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Ralph G. Steinhardt

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The Role of International Law As a Canon of Domestic Statutory Construction

*Ralph G. Steinhardt**

* Associate Professor of Law and Associate Director of the International and Comparative Law Program, The National Law Center, George Washington University. B.A., Bowdoin College, 1976; J.D., Harvard Law School, 1980. This work was supported by a grant made possible by Dean Jack Friedenthal of the National Law Center, George Washington University. I am grateful to several people who criticized an early draft of this Article or who discussed with me the issues raised here, including Donna Scarboro, Tom Buergenthal, Joshua Schwartz, Hal Maier, Richard Bilder, Steven Schneebaum, Andy Spanogle, Paul Hoffman, Ed Gordon, Joan Fitzpatrick, John Murphy, Brad Glosserman, Steve Troy, and especially Joni Charme, who provided valuable and spirited research assistance.

I. INTRODUCTION

From the beginning of our constitutional life, the Supreme Court has articulated principles that structure the juridical relationship between international law and domestic law. These principles purportedly offer rules of decision for resolving in domestic courts the potential inconsistencies between external and internal sources of law, and they do so with the surface simplicity of axioms. Treaties, for example, cannot trump constitutional norms.[1] Customary international law can provide a rule of decision at least in the absence of controlling legislative or

1. *See* Boos v. Barry, 485 U.S. 312 (1988) (holding unconstitutional a statute protecting foreign diplomats in conformity with international treaties); Reid v. Covert, 354 U.S. 1, 16 (1957) (plurality opinion) (stating that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution").

executive acts.[2] In the case of an irreconcilable conflict between a treaty and a statute, the latter-in-time prevails.[3] When Congress incorporates conventional or customary norms into a statute, those norms become directly enforceable[4] and in the absence of any other applicable principle, United States statutes should be read "where fairly possible" so as not to violate international law.[5]

These principles have been criticized variously as innocuous, anomalous, and asymmetrical.[6] But they also reflect the Court's insistence

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2. *See, e.g.*, The Paquete Habana, 175 U.S. 677, 700 (1900); Hilton v. Guyot, 159 U.S. 113, 163 (1895); Talbot v. Janson, 3 U.S. (3 Dall.) 133 (1795).

Customary international law bas been defined as law "made over time by widespread practice of governments acting from a sense of legal obligation." L. HENKIN, HOW NATIONS BEHAVE 33 (2d ed. 1979).

3. Chae Chan Ping v. United States, 130 U.S. 581, 599-602 (1889) (The Chinese Exclusion Cases); Edye v. Robertson, 112 U.S. 580, 597-99 (1884) (The Head Money Cases); South Afr. Airways v. Dole, 817 F.2d 119, 121, 125-26 (D.C. Cir.), *cert. denied*, 484 U.S. 896 (1987); *cf.* Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (finding no clear intent to abrogate treaty); Cook v. United States, 288 U.S. 102, 119-20 (1933) (same).

No algorithm for resolving confiicts between statutes and customary international law has been "authoritatively determined," according to the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 comment d (1986) [hereinafter RESTATEMENT (THIRD)]. There is no latter-in-time rule for customary international law and statutes, as there plainly is for treaties and statutes. Lower court decisions strongly suggest that customary international law bends to the will of Congress. *See, e.g.*, Schroeder v. Bissell, 5 F.2d 838 (D. Conn. 1925); United States *ex rel* Pfefer v. Bell, 248 F. 992, 995 (E.D.N.Y. 1918). Other cases, almost exclusively in the law of the sea area, suggest that subsequent custom can modify a preexisting statute. As Professor Jules Lobel has shown, the idea that statutes could derogate from international law was probably not the original understanding. Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1084-87, 1093-95 (1985).

4. Bilder, *Integrating International Human Rights Law into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L L. 1, 2 (1981).

5. Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (quoting Murray v. The Schooner Charming Betsy, 6. U.S. (2 Cranch) 64, 118 (1804)); *see also* RESTATEMENT (THIRD), *supra* note 3, § 114 (stating that "[w]here fairly possible, a United States statute is to be construed so as not to confiict with international law or with an international agreement of the United States"). The Restatement (Second) adopted a similar principle, including both customary and treaty law within "international law" generally. *See* RESTATEMENT (SECOND) OF UNITED STATES FOREIGN RELATIONS LAW § 3(3) (1965) [hereinafter RESTATEMENT (SECOND)] (stating "[i]f 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 confiict with international law, a court in the United States will interpret it in a manner that is consistent with international law"); *see also id.* comment j. For a discussion of these and other authorities adopting the *Charming Betsy* principle, see *infra* Part III.

6. *See, e.g.*, Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 875-76 (1987); Lobel, *supra* note 3, at 1130-37 (asserting peremptory norms, *jus cogens*, as a limit on the latter-in-time rule); Oliver, *Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights In United States Courts*, 4 HOUS. J. INT'L L. 59 (1981) (criticizing the application of customary international law of human rights in United States courts); Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393 (1988) (criticizing the latter-in-time rule witb respect to customary international law); Potter, *Relative Authority of International Law and National Law in the United States*, 19 AM. J. INT'L L. 315 (1925); Trimble, *A Revisionist View of*

that domestic and international law be accommodated, not necessarily as equals, but as two legitimate sources of norms binding on the United States and enforceable in its courts. Doctrinal purity may have been sacrificed, but the Court's accommodationist imperative has had the advantage of avoiding both dualist and monist extremes.[7]

As a result of the Supreme Court's approach, the debate persists about the proper way to characterize the relationship between international and domestic law in the United States. The drafting and completion of the Restatement (Third) of the Foreign Relations Law of the United States[8] provided the occasion and the ammunition for renewing this old controversy. Those deliberations show that, in the modern era, the specific focus of the debate has moved from the Bricker Amendment[9] and the *Sei Fujii* litigation[10] to the proper interpretation of the

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Customary International Law, 33 UCLA L. REV. 665 (1986) (stressing the asymmetry of custom and treaties as law of the United States).

7. Monism and dualism refer to contrasting perspectives on the relationship hetween international and domestic law. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 140 (2d ed. 1988) [hereinafter CASES AND MATERIALS]. In the monist paradigm, the international and municipal legal systems comprise a single universal order, with international law as the normative superior. Under a monist view, therefore, international law is not subject even to the constitutional limitations of municipal law. *Id.* at 41; *see also* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 553-88 (2d ed. 1966); Kunz, *The "Vienna School" and International Law*, 11 N.Y.U. L.Q. 370, 399-402 (1934). In the dualist perspective, the two systems are radically separate, and the effect of a rule of law in one system is unrelated to its effects in the other. Rather, international law becomes relevant domestically only to the extent that it is recognized or incorporated in a state's constitutional order. The doctrinal consequences of the dualist perspective include the orthodoxy within the United States that treaties do not necessarily create rights that are enforceable in domestic courts, *see, e.g.*, Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976), and that treaties in violation of the Constitution are void, *see supra* note 1.

Critics have suggested the inadequacy of the traditional distinction between monism and dualism. *See, e.g.*, J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 68-90 (6th ed. 1967); Borchard, *The Relation Between International Law and Municipal Law*, 27 VA. L. REV. 137 (1940); McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S.D.L. REV. 25 (1959). The distinction seems especially vulnerable to the deviationist hermeneutics of the new critical school. *See, e.g.*, D. KENNEDY, INTERNATIONAL LEGAL STRUCTURES 14 n.6 (1987) (criticizing Kearney, *Internal Limitations on External Commitments: Article 46 of the Treaties Convention*, 4 INT'L LAW. 1 (1969)).

8. RESTATEMENT (THIRD), *supra* note 3. For the dominant debate surrounding the Restatement (Third), see *infra* note 13.

9. Between 1952 and 1957, in an era of carefully circumscribed federal power, a conservative Senate viewed with some alarm the evolution of international human rights treaties. In order to assure that these covenants were not used as a pretext for federal interference in states' prerogatives, Senator John Bricker of Ohio introduced a series of constitutional amendments limiting the treaty power generally and the domestic effects of international agreements. The proposals sparked a heated debate. *See* Buergenthal, *International Human Rights: U.S. Policy and Priorities*, 14 VA. J. INT'L L. 611, 612-14 (1974); MacChesney, *The Bricker Amendment: Treaty Law vs. Domestic Constitutional Law*, 29 NOTRE DAME LAW. 529 (1954).

As Professor Henkin has pointed out, the Brickerites lost the constitutional battle when the amendment failed to pass, but they seem to have won the political war, in that the human rights treaties, with the exception of the Genocide Convention, still have not been approved by the Sen-

Alien Tort Claims Act,[11] the extent to which the political branches can violate international law,[12] and the propriety and consequences of classifying international law as federal common law.[13] But the essential and common issue remains unchanged: Under what circumstances and according to which rationale[14] will international law provide the rule of decision in domestic courts?[15]

This debate is about supremacy and politics: those who reject the determinative power of international law principles—or some substan-

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ate. The visceral resistance to the human rights covenants has outlived Senator Bricker's original agenda. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 147 n.71 (1972).

10. Sei Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952) (holding the human rights provisions of the United Nations Charter non-self-executing). For a description of the controversy that followed this decision, see L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 944 (1973).

11. 28 U.S.C. § 1350 (1982). This obscure provision of the First Judiciary Act has elicited extensive academic commentary since the Second Circuit's decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), but few cases have sustained jurisdiction under the Act. *See* Bilder, *supra* note 4; Blum & 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 (1981); Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 HOUS. J. INT'L L. 13 (1981); Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985); Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47 (1988); Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981).

12. *See* Essays, *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986); Essays, *Agora: May the President Violate Customary International Law? (Cont'd)*, 81 AM. J. INT'L L. 371 (1987).

13. *See* Goldklang, *Back on Board* The Paquete Habana*: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1985); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985); Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349 (1988); Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOKLYN J. INT'L L. 289 (1982); Trimble, *supra* note 6.

The most pointed debate on this subject arose out of the evolution of the Restatement (Third). *See* Goldklang, *Customary International Law and U.S. Laws*, INT'L PRAC. NOTEBOOK, Apr. 1983, at 16; Murphy, *Customary International Law in U.S. Jurisprudence—A Comment on Draft Restatement II*, INT'L PRAC. NOTEBOOK, Oct. 1982, at 17; Paust, *When Customary International Law Clashes With a Domestic Statute*, INT'L PRAC. NOTEBOOK, July 1983, at 10; Paust, *Reply to John Murphy's Comment on Incorporating Customary International Law in U.S. Jurisprudence*, INT'L PRAC. NOTEBOOK, Jan. 1983, at 18.

14. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932).

15. The persistence of the scholarly debate in this century is evident from C. PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES 105 (1915); Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239, 260 (1932); Wright, *Conflicts of International Law with National Laws and Ordinances*, 11 AM. J. INT'L L. 1, 2 (1917).

tial subclass of them[16]—in domestic litigation argue that the coercive power of law can be justified only if it reflects the political will of those to whom it applies. By assertion, international law fails this test because it arises out of a relatively vague and varying diplomatic process among states, not the consent of the governed as expressed through constitutional politics.[17] This failure is especially true with respect to customary international law, which is created not by majority votes in a bicameral, representative legislature and presentment to the executive, but by a nondemocratic and subjective interpretation of state practice and *opinio juris*.[18] As a result, issues of both political legitimacy and practical application arise. Treaties, being written and having an explicit constitutional pedigree,[19] are somewhat less suspect as a source of dispositive rules. But the interpretation of treaties, not to mention less formal international agreements, raises analogous problems of legitimacy. The courts' very act of interpretation "gives rise to law," a quasi-legislative function not expressed in article III of the Constitution and potentially in derogation of the political branches' foreign affairs powers. Those who advocate the broader application of international law in United States courts reject these positivist and majoritarian positions, note the adequate participation of the political branches in the creation of both treaty and customary law, and attribute the variousness of the lawmaking processes to the genius of the Framers.[20]

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16. Lane, *Mass Killing by Governments: Lawful in the World Legal Order?*, 12 N.Y.U. J. INT'L L. & POL. 239 (1979); Trimble, *supra* note 6; Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609 (1979); Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988).

17. International law scholars have invoked the Lockean ideal that legitimacy is a function of accountability. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 134-142, at 75-82 (T. Peardon ed. 1952); *see also* Trimble, *supra* note 6, at 718-23.

18. Customary international law comprises two elements: a reasonably consistent state practice combined with *opinio juris sive necessitatis* or "a sense of legal obligation." RESTATEMENT (THIRD), *supra* note 3, § 102(2); *see* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14; North Sea Continental Shelf Cases (FRG v. Den.; FRG v. Neth.), 1969 I.C.J. 4. For what has become a standard account of the process by which customary international law is made and proved, see generally A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 47-166 (1971).

19. U.S. CONST. art. II, § 2, cl. 2 (the treaty-making power); *id.* art. VI, § 2 (the supremacy clause).

20. Article I of the Constitution refers to "the legislative Powers *herein granted*." *Id.* art. I, § 1 (emphasis added). As noted repeatedly, there is no similar limitation on either "the executive Power," *id.* art. II, § 1, cl. 1, or "the judicial Power of the United States," *id.* art. III, § 1; *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 224 (1978). This textual difference might support an expansive conception of executive power. But the distinction also might be used to support the notion of multiple legitimate "legislative powers," only some of which are "herein granted." Examples would include the common-law powers of the courts and the ability of the executive branch to contribute to the creation of customary international law. These legislative powers exercised by the other branches obviously are not plenary because each is subject to congressional override through the mechanics of article I. But in the absence of such an override, the lawmaking inherent in the

All sides of this debate exhibit what might be called a "rule-of-decision purism," referring to the shared fixation on the supremacy *vel non* of international principles in classes of domestic cases. The debate is driven by the attempt to define respective spheres for the dominant operation of international and domestic law. It is, therefore, strongly reminiscent of the constitutional controversy over the separation of powers within our own government:[21] in both cases, law is invoked to resolve claims to power by competing sovereignties. Not surprisingly, these two controversies merge when "rule-of-decision purism" escalates into a debate about executive or congressional supremacy in matters of international law[22] or the power of one branch or the other to make or violate international law.[23]

Useful as that theoretical debate may be, it is a pathology.[24] Outright repudiation of international law by legislation or by executive act is the exceptional case, both because the political branches are generally unwilling to be perceived as violating international law[25] and because the courts are reluctant to find a confiict that triggers the supremacy axioms.[26] Domestic courts typically are not asked to resolve the separation-of-powers and supremacy concerns implicit in rule-of-decision purism, and the extensive commentary on this issue fixes necessarily on a

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judicial and executive functions would be authoritative.

21. *See, e.g.*, Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109 (1984); Lobel, *supra* note 3, at 1115-30.

22. *See, e.g.*, C. CRABB & P. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT, AND FOREIGN POLICY (1984); L. HENKIN, *supra* note 9, at 39-66, 77-79; Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L L. 605 (1977); Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988); Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986); Sparkman, *Checks and Balances in American Foreign Policy*, 52 IND. L.J. 433 (1977).

23. *Compare* Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L.Q. 719 (1982) (arguing that international law applies to the executive branch) *with* Goldklang, *supra* note 13 (arguing that the president and Congress can override customary obligations).

24. In this setting, "pathological" refers to legal analysis that fixates on the relatively rare case, or abnormality, in which the court must choose between international and domestic rules. The image suggests that the more probable concern ought to be those normal but difficult cases that attempt to harmonize international and domestic norms.

25. The eagerness to avoid such a perception may be greater than the eagerness to avoid violating international law. *See, e.g.*, Malawer, *Reagan's Law and Foreign Policy 1981-1987: The "Reagan Corollary" of International Law*, 29 HARV. INT'L L.J. 85 (1988).

26. *See, e.g.*, Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Washington v. Washington State Commercial Passenger Fishing Vessel, 443 U.S. 658, 690, *modified*, 444 U.S. 816 (1979).

Judicial reluctance to find a sufficient conflict can take ingenious, even tortured, form. *See* United States v. Palestine Liberation Org., 695 F. Supp. 1456 (S.D.N.Y. 1988); *see also infra* note 275 and accompanying text.

handful of relevant cases and their opaque dicta.[27]

By contrast, the courts frequently are requested to fulfill the traditional common-law function of accommodating international standards in interpreting domestic statutes. In these cases, the more characteristic judicial concern is the seemingly residual rule, the interpretive guideline captured in Chief Justice John Marshall's classic statement in *Murray v. The Schooner Charming Betsy*: the statutes enacted by Congress "ought never to be construed to violate the law of nations if any other possible construction remains."[28] The *Charming Betsy* principle has been reaffirmed without much reflection or analysis by the federal courts since it was announced in 1804[29] and, like other canons of construction, is dismissed easily by some critics as innocuous[30] or meaningless.[31] It is plain, however, that the interpretive role of international law is more common than its controlling role. Indeed, in cases arising under federal statutes that implicitly or explicitly incorporate international law,[32] courts rarely suggest that international law alone provides a controlling rule of decision. Rather, the fact of incorporation itself makes the international standard controlling. Even in cases in which there is no such incorporation, the *Charming Betsy* principle nonetheless appears frequently, if not specifically by name.[33]

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27. The dominant Supreme Court texts for scholarly controversy have been The Paquete Habana, 175 U.S. 677 (1900), The Nereide, 13 U.S. (9 Cranch) 388 (1815), and Brown v. United States, 12 U.S. (8 Cranch) 110 (1814). *Compare* Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987) *with* Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913 (1986).

28. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). In *Charming Betsy* the Court held that the Nonintercourse Act of February 27, 1800, 2 Stat. 7, did not apply to a former resident of the United States who had moved to St. Thomas and sworn allegiance to the king of Denmark. The Court concluded that the Nonintercourse Act, which by its terms applied to persons under the protection of the United States, did not include the former resident, declaring that any other construction would depart from the customary international standards of diplomatic protection. The Court would not infer that Congress intended such a result. *Charming Betsy*, 6 U.S. (2 Cranch) at 8. For a more complete discussion of this case, see *infra* Part III(A).

29. *See, e.g.*, *Weinberger*, 456 U.S. at 32-33 (construing a statute prohibiting employment discrimination against United States citizens by the military so as not to abrogate preexisting executive agreements); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (construing a labor relations statute so as not to violate customary rules of maritime jurisdiction); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953) (noting that the applicability of one statute is determined by customary maritime law in the absence of clearly expressed congressional intent to the contrary).

30. Lobel, *supra* note 3, at 1102 n.159.

31. *See infra* Part II.

32. *See, e.g.*, Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 5, 13, and 19 U.S.C.); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.); Neutrality Act, 18 U.S.C. § 960 (1982); Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (codified as amended at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982)).

33. *See infra* Part III(B).

The consequences of a meaningful requirement that statutes be construed consistently with international law largely are unrecognized,[34] but they are far from trivial: it would be significant enough if the norms of customary law determined only the extraterritorial applicability of domestic statutes. In the era when international law was concerned primarily with jurisdiction and state responsibility, that is precisely what *Charming Betsy* stood for.[35] The apparent consequences of that principle become even more significant as the international legal system addresses substantive matters of our political and economic life traditionally reserved to exclusive domestic jurisdiction.[36] As international law has moved in this century "from an essentially negative code of rules of abstention to positive rules of cooperation,"[37] its potential overlap with domestic statutory regimes has become pronounced. Even a partial list of recent international concerns—gender and race discrimination, restrictive business practices, environmental protection, and labor rights[38]—suggests the extent to which the international community may attempt to regulate matters that historically have been the exclusive subject of domestic legislation.

At the same time but for different reasons, domestic jurisprudence has undergone a dramatic transformation with the gradual "statutorifi-

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34. Since the nineteenth century, the standard treatises on statutory construction have given scant attention to the *Charming Betsy* principle. The discussion almost invariably is limited to a restatement of the holding in the case, followed by examples of cases either stressing the power of Congress to override international law (especially treaty obligations) or limiting the extraterritorial application of United States statutes. *See, e.g.*, H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 90-91 (1896); G. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES 239-43 (1888); *see also* 1 J. BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 10-13 (1883); T. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 18 n.2 (1890); T. SEDGWICK, RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 448-51 (1857). Some modern established works do not mention the *Charming Betsy* principle at all. *See* E. CRAWFORD, THE CONSTRUCTION OF STATUTES (1940); R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975); J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (Sands 4th ed. 1973).

International law scholars similarly tend to restate the canon, when they do not ignore it altogether, but no one has attempted a sustained analysis of *Charming Betsy* and its progeny. *See, e.g.*, CASES AND MATERIALS, *supra* note 7, at 209; J. SWEENEY, C. OLIVER & N. LEECH, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM (3d ed. 1988).

35. *See infra* Part III(B).

36. *See infra* Part IV(B).

37. W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 62 (1964). The transformation in substantive international law has accompanied the addition of new, authoritative processes by which international law may be made. Blum & Steinhardt, *supra* note 11, at 72-75.

38. The move from norms of abstention to more substantive standards of international law was identified at least as early as 1931. *See* Garner, *Le Développement et les Tendences Récentes du Droit International*, 35 RECUEIL DES COURS 605, 641 (1931) (referring to an emerging international law in labor, economics, communications, intellectual property, air transportation, and other fields of cooperation).

cation"[39] of United States law. In an historic shift, legislation, rather than the common law, has become the dominant expression of legal norms in United States society. The "orgy of statute making"[40] has justified a renewed examination of the discipline of statutory construction by courts and commentators.[41] This examination in turn has spawned new approaches in legal scholarship, as theories of literature, economics, linguistics, and politics assume roles in legal interpretation.

At the intersection of these otherwise unrelated developments lies the *Charming Betsy* principle. Taken at face value, it suggests that the transformation in substantive international law may penetrate domestic law through the presumption that Congress intends to conform its statutes to international standards. This Article suggests 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. In addition, if international law does provide authoritative guidance in the interpretation of controlling domestic statutory rules, the *Charming Betsy* principle has a profound theoretical aspect as well: it raises for international lawyers the issues of hermeneutics and judicial legitimacy that contemporary jurisprudence addresses in a more general and largely domestic context. Indeed, the *Charming Betsy* principle provides a useful test case for assessing some of the competing theories of interpretation that have come to dominate legal theory.

Of course, there are alternative analyses of the *Charming Betsy* principle. One of these would deny the asserted demise of exclusive domestic jurisdiction, which gives the *Charming Betsy* principle its sudden apparent relevance. Another account would view skeptically any claim that a mere canon of construction actually affects the substantive interpretation of domestic legislation. A third would doubt the practical workability of such an interpretive principle or its legitimacy if applied in controversial cases. A fourth alternative might distinguish between requirements and prohibitions, and stress that the *Charming Betsy* principle requires only that violations of international law be avoided, not that substantive international norms be incorporated. Each of these perspectives has its own jurisprudential costs and may not be persuasive on its own terms, as shown below.[42]

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39. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982); *see also* Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U.L. REV. 401, 401-02 (1968).

40. G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977).

41. *See infra* Part II.

42. *See infra* Parts IV & V.

In sum, the apparent simplicity of *Charming Betsy*'s canon of statutory construction 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. Rule-of-decision purism also focuses on this problem but seeks as answers only those principles that are determinative and hierarchical when international law conflicts with domestic law. *Charming Betsy*, by contrast, seeks principles of accommodation and interpretation, with the implicit acknowledgment that an irreducible or unavoidable conflict between international and domestic norms will be resolved by a "purist" rule. Its power lies in the requirement that such a conflict be avoided in the first place.

Part II addresses an overarching objection that has nothing to do with *Charming Betsy* or international law specifically. It arises out of the deep suspicion that canons of construction are no more than rhetorical tropes used to rationalize rather than to inform a decision. This objection presumes that judges simply "do not seriously believe themselves bound or even guided by general principles of interpretation beyond the vaguest adages about respect for legislative intent."[43] By the postrealist scholarly standards implicit in this objection, canons of construction do not qualify for serious doctrinal treatment because principles of construction, at best guidelines of law in the interpretation, resist meaningful generalization, assessment, or criticism. Part II, drawing on a pattern of contemporary responses to this skepticism, suggests that the so-called "public values" approach to interpreting statutes is also useful in understanding canons of construction like the *Charming Betsy* principle.

Part III outlines the history of the *Charming Betsy* principle and demonstrates that international norms inform the substantive interpretation of United States statutes and not just their territorial reach as courts and commentators usually assume.[44] The point is to show the range of federal statutory subjects[45] potentially affected by such an in-

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43. Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 214 (1983). *See generally* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

44. *See infra* Part III.

45. This Article does not address the potential impact of the *Charming Betsy* principle on the courts' interpretation of nonstatutory forms of federal law. *See, e.g.*, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986) (executive orders); Dames & Moore v. Regan, 453 U.S. 654 (1981) (congressional acquiescence to executive practices); Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983) (constitutional provisions); Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986); Hartman, *The "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983) (constitutional provisions); Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740 (1939) (federal common law); Schachter, *The Charter and the Consti-*

terpretive principle.

Part IV identifies three types of exemplary difficulties that arise in applying the *Charming Betsy* principle: (i) the problem of inferring when Congress intends to exercise its power to override international law and when the *Charming Betsy* principle should operate instead, (ii) the problem of determining which domestic statutes are appropriate for interpretation under international norms, and (iii) the problem of defining a state's international obligations in a given case when international law rests on what commentators have described as a gradient of relative or varying normativity. In other words, courts attempting to apply *Charming Betsy* will encounter the difficulty that meaningful international norms are not always either entirely binding or utterly irrelevant. Part IV suggests that the values served by the *Charming Betsy* principle offer preliminary guidance in the resolution of these problems and that none of these difficulties erects a prophylactic barrier to the reappreciation and revitalization of this long-standing doctrine of federal common law.

Part V addresses a class of objections to the legitimacy of any approach that takes the *Charming Betsy* principle too seriously.[46] This task requires a sustained defense of the rebuttable presumption of congressional compliance with international law against the objection that interpreting statutes in light of international norms is countermajoritarian and inherently political, and thus inappropriate for adjudication. The opposing ideological standpoint of critical legal theory raises a related objection: the *Charming Betsy* principle potentially

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tution: The Human Rights Provisions in American Law, 4 VAND. L. REV. 643 (1951) (constitutional provisions).

Nor does this Article address the interpretation of state or municipal statutes in light of international law, except to observe 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. *See* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) (construing treaty to avoid conflict with state statute); Nielsen v. Johnson, 279 U.S. 47 (1929) (finding the latter-in-time rule inapplicable in conflict between state statute and treaty); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 220 (1796); *cf.* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 641-42 (1981) (recognizing that the unique federal interest in admiralty displaces state law); United States v. Little Lake Misere Land Co., 412 U.S. 580, 590-93 (1973) (same with respect to federal regulatory program); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943) (same with respect to commercial obligations of the United States). Professor Thomas Merrill's insistence that principles of federalism limit the common-law powers of the federal courts would seem for that reason inapplicable in the foreign affairs context. *See* Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 16-27 (1985); *cf.* Maier, *Cooperative Federalism in International Trade: Its Constitutional Parameters*, 27 MERCER L. REV. 391 (1976). *See generally* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967).

46. Professor Ronald Dworkin has addressed the analogous argument that nontextual legal principles have significant meaning in the judicial process. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

shares the illegitimacy of any hermeneutical technique that views a particular interpretation of legal text as a function of proof rather than power. Part VI concludes, however, that none of these arguments displaces the mandate that statutes be construed in light of international law whenever possible.

II. The Recovery of Meaning: Perspectives on Statutory Construction

This Part first reviews a contemporary account of legal interpretation that offers a plausible and constructive alternative to the orthodoxy[47] that canons of statutory construction are largely meaningless in legal analysis and decision-making. Grounded in legal realism, that skeptical view has been sharpened by critical legal scholarship, which has applied deconstructive literary theory to the texts of law. Subpart A concludes, however, that the "public values" approach to statutory interpretation offers an attractive middle ground between skepticism and formalism.

Subpart B argues that public values analysis can be extended usefully from particular statutes to particular interpretive canons, especially those few canons that attempt to accommodate multiple sources of law, such as the maxim that a statute should be construed to preserve its constitutionality whenever possible. The *Charming Betsy* principle requiring statutes to be construed consistently with international law has a similar function. These and other canons of accommodation can be distinguished from the more numerous and more controversial canons that try to reconstruct statutory meaning or legislative intent, precisely because of the recurrent, concrete, and generalizable public values served by accommodation.

Addressing the public values of the *Charming Betsy* principle, Subpart C shows that two separate but largely reinforcing rationales exist for disapproving implicit repudiations of international law by statute: the value of compliance with the law of nations, which only exceptionally bases state liability on inadvertence; and the judiciary's respect for coordinate branches of government, to avoid the embarrassment of declaring a statute in violation of international law in the absence of a clear statement of repudiation by Congress. As shown below, these twin rationales, drawing on values implicit in monist and dualist paradigms, both shape and legitimize the application of the *Charming Betsy* principle, but neither rationale is adequate alone to capture the full impact of the canon.

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47. *See infra* note 48 and accompanying text.

A. *Public Values Discourse As a Response to Skepticism*

Scholarly disregard for the discipline of interpretation was perhaps inevitable after Karl Llewellyn's corrosive demonstration that for every principle of statutory construction there is an equal and opposite counter-principle.[48] Deconstruction theory has added a self-consciousness about ambiguity in the law and the intrinsically political act of interpreting texts. It has reemphasized the open texture of language, the impossibility of pretextual communication, and the contingency of doctrine.[49] The deconstructionists have exposed the fiction that distinguishes between "making" and "finding" the law,[50] on which the legitimacy of adjudication traditionally has rested.[51]

Within the field of statutory construction, the new critical school has contributed a rhetoric or a methodology for exploring legisprudential riddles. How can legislatures phrase statutes to make them simultaneously comprehensive, well-tailored, and comprehensible?[52] Is it

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48. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). Professor T. Alexander Aleinikoff has shown that Llewellyn's dialectic reveals a tension between intentionalist and textualist tendencies in the law of statutory interpretation. Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 24 n.22 (1988); *see also* K. LLEWELLYN, THE COMMON LAW TRADITION 521-35 (1960). The vulnerability of interpretation as a discipline was suggested long before Llewellyn's critique. *See, e.g.*, Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). Like any systematic skepticism about language, it can be traced ultimately to the Greeks. *See, e.g.*, P. DE MAN, THE RESISTANCE TO THEORY 12 (1986); Schmitt, *The Rediscovery of Ancient Skepticism in Modern Times*, in THE SKEPTICAL TRADITION 225 (M. Burnyeat ed. 1983); Tompkins, *The Reader in History: The Changing Shape of Literary Response*, in READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM 201, 226 (J. Tompkins ed. 1980).

49. *See, e.g.*, Hoy, *Interpreting the Law: Hermeneutical and Post-Structural Perspectives*, 58 S. CAL. L. REV. 136 (1985); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821-24 (1983).

50. *See* Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 535 (1977); *see also* T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY vii (1922). Plucknett states that

> [t]he more one examines the historical processes by which the judicature interprets the written and the unwritten laws, the laws that are enacted and the laws that are unenacted, the more clearly one sees that the office *ius dicere*, to interpret law, involves also the office *ius dare*, to make law.

Id. (emphasis in original).

51. *See* R. DWORKIN, LAW'S EMPIRE 314 (1986); Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Hazard, *Rising Above Principle*, 135 U. PA. L. REV. 153 (1986); Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957 (1940); Kennedy, *supra* note 49.

52. Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414 (1961); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947); *see also* 1 W. BLACKSTONE, COMMENTARIES 61. Blackstone observes:

> [S]ince in laws all cases cannot be foreseen or exposed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances which (had they been foreseen) the legislator himself

plausible to construct a unified theory of statutory interpretation when statutes assume a variety of forms and address a bewildering range of issues?[53] How can a court weigh legislative intent in the interpretation of a statute, when that intent is or must be utterly inaccessible except as a retroactive construct of the court itself?[54] How can one account for the common practice of applying a statute analogically to transactions or persons beyond its explicit scope?[55] What weight should a court give the generalizations about human and legislative experience that have emerged as canons of construction?[56] Certainly if text is vulnerable to

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would have excepted.

Id.

53. J. HURST, DEALING WITH STATUTES 2 (1982) (referring to the "open-door jurisdiction of the legislature").

54. Puhlic choice theorists have been especially critical of intentionalist interpretation to the extent that it relies on the legislative history of a statute. *See, e.g.*, Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 774 (1987). Professors Daniel Farber and Philip Frickey have demonstrated that skepticism is not necessarily the most balanced response to public choice theory as applied to statutory interpretation. Farher & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 435 (1988) (offering "strong reasons, both empirical and theoretical, for believing that actual legislatures do not suffer from the instability and incoherence some public choice theories have predicted").

But the skepticism has a long history behind it. *See* Radin, *supra* note 48, at 870 (noting that "[a] legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and heliefs"); *accord* R. DWORKIN, *supra* note 51, at 313; Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 246-70 (1981); *see also* DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 405 (1986) (observing that "[t]he 'congressional purpose' that lawyers and judges so solemnly analyze is always a tricky beast and frequently a mythical one").

Of course, the power of this academic insight has not stopped the courts from viewing legislative intent or statutory purpose as the touchstone in statutory interpretation cases. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984); Monell v. Department of Social Servs., 436 U.S. 658, 664-89 (1978); United States v. United Continental Tuna Corp., 425 U.S. 164, 169-81 (1976).

55. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 823-26 (1985) (discussing the history of analogical interpretation); Landis, *Statutes and the Sources of Law*, in HARV. LEGAL ESSAYS 213 (1934) (discussing the equity-of-the-statute doctrine); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-86 (1908) (discussing analogical interpretation).

56. Judge Richard A. Posner believes that canons of statutory construction cannot be defended as mere flexible guidelines which constrain judges or limit the courts' legislative powers, though his critique has little in common with critical hermeneutics. Posner's one exception is that statutes should be construed to avoid conflict with the Constitution. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806-07 (1983). In his view, the most common canons—the "plain meaning" rule, the use of postenactment materials, and the deference generally given the interpretation offered by the "expert" administrative agency—are the most vulnerable. These canons share a common weakness: they impute omniscience to Con-

the new critique, then such texts about texts should be especially suspect.

As a result of these difficulties, scholars who have attempted a modern reconstruction of the interpretive discipline in law have been forced to confront the suspicion that there is no doctrine to criticize or resurrect; that the "rules [of statutory interpretation] have weakened into quaint and naive homilies";[57] and that the attempt to deduce a general theory of legislation would be considered "otiose, impractical, and pretentious."[58] Perhaps in response to the contemporary dispute within the Supreme Court over approaches to statutory construction,[59] competing theories of legislation have proliferated in spite of the Realists' orthodoxy. Professor Anthony D'Amato, for example, has offered a distinctly nonskeptical account of the discipline based on the distinctly skeptical premise that there logically cannot be a definitive theory or set of rules governing the interpretation of statutes.[60] Professor Guido Calabresi is more complex; he has abandoned the narrow notion of judicial interpretation and has supported a broad judicial warrant for the reimagination of obsolete statutes.[61] This approach simply may trade the rhetoric of statutory interpretation for the rhetoric of common lawmaking, but it responds to the skeptical account of the canons and tries to contain the more corrosive elements of the Realists' theory. Professor Ronald Dworkin would make the sow's ear of subjectivism into the silk purse of integrity, positing a community of principle from which judges derive public values for the interpretation of statutes,[62] a theme sounded by other commentators as well.[63]

Two interwoven strategies unify these otherwise disparate defenses of statutory interpretation as a meaningful enterprise. One common front against the critical or skeptical attack is the notion that no proof,

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gress, especially with respect to the presumption against implicit repeals. *See id.* at 812.

57. Weisberg, *supra* note 43, at 213.

58. Posner, *supra* note 56, at 800.

59. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988). The Supreme Court's internal debate on statutory construction may be viewed as a controversy about the relevance of public values in the interpretation of statutes and especially in the determination that a statute is ambiguous in some relevant regard. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

60. D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561 (1989).

61. G. CALABRESI, *supra* note 39.

62. R. DWORKIN, *supra* note 51, at 313-54.

63. Eskridge, *supra* note 59; Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178 (1984); Macey, *supra* note 54, at 227 (observing that "the very act of statutory construction often transforms statutes designed to benefit narrow interest groups into statutes that in fact further the public interest"); Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200 (1984).

however rigorous, that demonstrates the impossibility of common experience is plausible. The second strategy denies the positivist premise that the law consists exclusively of rules-plus-discretion and shows that the law responds in more or less predictable patterns to nondeterminative but authoritative principles. The argument is that both positivism and the radical critique underestimate the descriptive and normative power of these principles.

These two strategies require brief elaboration. First, elegant argumentation showing that Congress cannot really pass meaningful legislation or that courts cannot really know congressional intent resembles other forms of skepticism in the history of philosophy.[64] Not surprisingly, similar skepticism has provoked similar responses, primarily in the form of ordinary-knowledge or common sense defenses of conventional understanding.[65] David Hume's philosophy, for example, seemed to demonstrate the impossibility of common experience: knowledge of cause and effect may be in some sense impossible as he argued, but no one walks in front of an oncoming train musing, "We never really know." Immanuel Kant accepted Hume's premise that cause and time and other "unknowables" were beyond direct experience but Kant rejected the skeptical conclusion that "unknowables" were beyond analysis. To the contrary, these "unknowables" were essential to make sense of experience. The mind must be structured by these concepts to give structure to the experiential world: objects in the world conform to our understanding or our intuition.[66] As a result, cause and time are con-

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64. *See generally* THE SKEPTICAL TRADITION (M. Burnyeat ed. 1983). Skepticism about the meaning of statutes or about the interpretive enterprise itself is in the tradition of David Hume's epistemological conclusion that "all the rules of logic require a continual diminution, and at last a total extinction of belief and evidence." D. HUME, A TREATISE OF HUMAN NATURE 183 (L. Selby-Bigge ed. 1978). In part, Hume's argument was that all knowledge degenerates into probabilities because the very basis of knowledge, cause-and-effect, is a relation beyond experience. Nothing in the experiential or phenomenal world could demonstrate causal relations. The entire superstructure of knowledge, therefore, must collapse into custom and belief, rather than reason. *Id.* Analogically, the canons of interpretation are textual reductions of customary inferences in multiple and conflicting situations.

For the history of interpreting Hume as a naturalist instead of as a skeptic, see T. PENELHUM, GOD AND SKEPTICISM: A STUDY OF SKEPTICISM AND FIDEISM 120-45 (1983).

65. G.E. Moore, in particular, advanced a self-styled "common sense" response to the skepticism of Hume, Descartes, and modern adherents. *See* G. MOORE, PHILOSOPHICAL STUDIES 228 (1959); G. MOORE, SOME MAIN PROBLEMS OF PHILOSOPHY 119-20 (1953); Moore, *A Defense of Common Sense*, in CONTEMPORARY BRITISH PHILOSOPHY (J. Muirhead ed. 1925). Other common sense responses to skepticism are analyzed in M. FERREIRA, SCEPTICISM AND REASONABLE DOUBT (1986).

66. I. KANT, CRITIQUE OF PURE REASON 3 (W. Schwarz trans. 1st ed. 1982).

> If the object of the senses must conform to qualities of our faculty of intuiting, and if the concepts by which intuitions are determined conform to rules of the understanding expressed in concepts a priori, the possibility of cognition a priori is conceivable. . . . [W]e cognize a priori of things only what we have put into them ourselves.

Id. Professor Barry Stroud summarizes the "Copernican revolution" worked by Kant in these

ceived not as something "out there" that all persons experience but as something presupposed and analyzable as a necessary element of experience.

The power of the skeptical insight, when applied to statutory construction, is likely to be dismissed as merely technical and outweighed by its imputed impracticability. If the courts actually invoke the plain-meaning rule in interpreting statutes,[67] for example, neither courts nor advocates likely will adopt the skeptical perspective. The Realists' skepticism may be valuable to the extent that it forces otherwise inert legal analysis onto a rhetorical, psychological, political, or even metaphysical plane, but it is not likely to be taken as some final or useful truth.

Mainstream responses to the deep skepticism about canons of construction follow this ordinary-knowledge paradigm, though not necessarily by name. These responses stress the dialogic quality of interpretation, and they suggest that the legitimacy of the canons of construction lies not in their authority as doctrine—not, by analogy, in the Humean world of the "unknowable"—but in their necessity. They are necessary to make sense of judicial and legislative experience, even if they deconstruct into indeterminacy and incoherence when analyzed in isolation. The canons of construction, in other words, are common presuppositions that make communication possible (or meaningful) in the first place.[68]

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terms:

> What we perceive must be in some way dependent on our own sensibility and understanding. . . . We can never explain how our knowledge of the world is possible on the assumption that our perception and knowledge of things simply conform to the constitution of the objects known, so we must adopt the revolutionary idea that "objects conform to our knowledge" or to "the constitution of our faculty of intuition."

Stroud, *Kant and Skepticism*, in THE SKEPTICAL TRADITION, *supra* note 64, at 413, 419 (citations omitted).

67. *Compare, e.g.*, United States v. Locke, 471 U.S. 84 (1985) (following the plain-meaning rule) *with* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) (departing from the plain-meaning rule). *See generally* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

68. D'Amato, *supra* note 60, at 565. Professor D'Amato states that

> [b]ecause each person (judges, attorneys, the public) who reads or hears the legislative message necessarily interprets it, the legislator may conclude that the more she knows about the interpretive processes of her audience, the more she can tailor the words of the statute so that the audience will interpret it the way she wants it to be interpreted.

Id.

Judge Posner presumably would object to such a suppositional technique on the ground that the imputation of knowledge to Congress is not justified empirically:

> I do not think that any of the canons of statutory construction can be defended on the theory that they are keys to deciphering a code. 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. . . . We should demand evidence that statutory draftsmen follow the code

This metaphor of communication or dialogue,[69] which recurs throughout the modern reconstruction of interpretation as a discipline, portrays the maxims of interpretation as ground rules for meaning. The metaphor typically comprehends a "conversation" between the legislature and the judiciary, in which the courts are empowered variously to remand statutes to the legislature for clarification,[70] or to "develop" the statutory scheme envisioned by their legislative coauthors,[71] or to "discuss" with the legislature the "state of legal principle" in the context of a particular statute,[72] or to "give meaning to our public values" or "community consensus" in the process of interpretation.[73] The conversation may be one in which the legislature is aware of the courts' interpretive rules[74] or one in which both the legislature and the judiciary are constrained by the "professional grammar" of the broader "interpretive

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before we erect a method of interpreting statutes on the improhable assumption that they do. Posner, *supra* note 56, at 806.

69. The metaphor is indehted philosophically to Bakhtin and Gadamer. *See* M. BAKHTIN, ESSAYS AND DIALOGUES ON HIS WORK (G. Morson ed. 1986); H. GADAMER, TRUTH AND METHOD 330-31 (2d ed. 1986).

70. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1 (1957) (urging the courts to adopt jurisdictional practices that would force the legislature to acknowledge and correct the discrepancy between the language of its statute and the legal principles).

71. R. DWORKIN, *supra* note 51, at 313.

72. G. CALABRESI, *supra* note 39, at 166; Weisberg, *supra* note 43, at 245.

73. Several commentators have urged the use of public values in this process, though there is little agreement about the content of those values or the relationship between these putative values and specific canons of statutory construction. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1315-16 (1976); Easterbrook, *supra* note 54 (recognizing the public value of private compromise); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17 (1979); Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 585-87 (1988). The evidence that judges would embrace such a view of their own power is mixed at best. *See* Eskridge, *supra* noto 59, at 1079-82.

74. *See* D'Amato, *supra* note 60, at 595 (expressing the author's position that "if an audience believes a given jurisprudential theory, that audience has forfeited a few of its degrees of interpretive freedom, and . . . if the legislature knows this fact about its audience, it may be able to use jurisprudence to its advantage"). Professor D'Amato does not address canons of construction, only "a jurisprudence;" he might not attribute the same dialectical power to the comparatively vague adages of interpretation. His point would seem equally applicable, however, to canons of construction: if a legislature is aware of the courts' interpretive rules, "it may be able to use [them] to its advantage." *Id.* Plainly, the Supreme Court is willing on occasion to attribute such knowledge to Congress. *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571 (1953), when, with respect to a provision of the Jones Act, 46 U.S.C § 688, the Court stated:

> Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law.

Lauritzen, 345 U.S. at 581; *see also* Eskridge, *supra* note 59, at 1065-66 (arguing that Congress is on notice that statutes will be interpreted by the courts in light of public values).

communities."[75] Each of these versions offers a new and refined formalism, informed by the legal realists' attack on the distinction between making and finding law, but committed to the perspective that the language used by courts and legislatures is neither meaningless nor infinitely manipulable.[76]

This view necessarily entails an abandonment of the flat distinction between binding and nonbinding sources of law, a distinction traceable in positivist terms to the notion that the legal system consists exclusively of rules plus unbounded discretion. Since *Brown v. Board of Education*[77] and the heyday of Legal Process jurisprudence,[78] it has been a mainstream though controversial proposition that extra-textual limits on governmental power exist, and that these limits take the form of public values or principles. Although no unifying definition of these cultural constructs has emerged, Professor William Eskridge has suggested that "public values . . . are legal norms and principles that form fundamental underlying precepts for our polity—background norms that contribute to and result from the moral development of our political community."[79] Although it is apparent that these public values or principles are not themselves rules and do not operate as rules,[80] they can channel the interpretation of constitutional[81] or statutory[82] rules. When Congress has directed a fairly determinate or unambiguous result, the courts follow the legislative will, and public values play no important

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75. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745-47 (1982); *cf.* Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982).

76. Judge Easterbrook has suggested the affinity of this perspective with the analytics of Wittgenstein, who

> showed that no system of language can be self-contained and that meaning thus must depend in part on logical structure and understandings supplied by a community of readers, but this does not establish that words contain no meaning or that judges may disregard such meaning as most readers would find. There is no 'private language'; meaning lies in *shared* reactions to text. If readers have a common understanding of structure they may decipher meaning accurately.

Easterbrook, *supra* note 54, at 533 n.2 (emphasis in original). The theory of intersubjectivity and its impact on recent jurisprudence are explored in 1 J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1981); Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985).

77. 347 U.S. 483 (1954).

78. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1148-79 (tent. ed. 1958).

79. Eskridge, *supra* note 59, at 1007-08.

80. H. HART & A. SACKS, *supra* note 78; Kennedy, *supra* note 49, at 395-98 (discussing a "Third Way").

81. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 34-41 (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 118 (1982); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365 (1929); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

82. *See, e.g.*, R. DWORKIN, *supra* note 51, at 313-54; Eskridge, *supra* note 59; Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1581-89 (1988).

interpretive role. But in close or ambiguous cases, these public values influence and rationalize the court's construction of statutory text. The claim is that public values discourse offers an account of the Supreme Court's legisprudence that is more pragmatic and more attractive than any competing paradigm—critical, natural, or positivistic.[83]

Public values discourse is an ambitious program, articulating values potentially as varied as the body of statutory law itself. For each statute, it is plausible to articulate multiple, potentially inconsistent values, which can by assertion guide the interpretation of ambiguous statutory text.

Professor Dworkin has argued, however, that it is meaningful to identify fewer and more inclusive principles at work in the legal culture.[84] Dworkin's legal principles also are not "binding" or rule-like in any positivist sense; they are standards to be observed because "justice or fairness or some other dimension of morality"[85] requires it, and they may "incline a decision one way, though not conclusively."[86] Even the test of a principle's validity has nothing to do with the positivists' pedigree of a rule: when the latter may depend on its conformity with a rule of recognition[87] or a *grundnorm*,[88] the validity of a principle is a cultural and historical determination based on the "sense of appropriateness developed in the [legal] profession and the public over time."[89] Professor Dworkin has argued that the inevitable controversy over the content of such principles does not render them beyond criticism; indeed, the fact that decisions based upon those principles are controversial implies the existence of some higher order perspective that gives meaning to the dispute. These principles set the standard against which a decision may be criticized, not on the ground that it violated obligatory principles of law, but on the ground that it gave those principles inadequate weight or respect. Whether or not these principles are sim-

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83. The proponents of this perspective acknowledge that it is flawed: there is at least a superficial tension between public values interpretation and the ideal of legislative supremacy, individual members of the Court seem deeply ambivalent about the legitimacy of public values discourse, and the indeterminacy of the method allows the ascription of public values to almost any decision, a fact that undermines the explanatory power of the insight. *See* Eskridge, *supra* note 59, at 1061-91; *cf.* Hazard, *supra* note 51, at 187. The defense is that principles discourse by judges in hard cases better serves the public than nominalist nonsense about legislative intent.

84. Professor Dworkin's notion of principle operates at both the level of specific legislation, *see* Dworkin, *How to Read the Civil Rights Act*, in A MATTER OF PRINCIPLE 316 (1985), and at the level of societal commitments to a public morality, *see* R. DWORKIN, *supra* note 51, at 313-54.

85. R. DWORKIN, *supra* note 46, at 22.

86. *Id.* at 35.

87. H. HART, THE CONCEPT OF LAW 92-99 (1961).

88. H. KELSEN, GENERAL THEORY OF LAW AND STATE 111 (1945). Kelsen posited the notion of a *grundnorm*, or basic norm for determining the validity of all other norms in a legal system.

89. R. DWORKIN, *supra* note 46, at 40.

ply fictions in the service of a judicial activism or contemporary manifestations of natural law theory,[90] Professor Dworkin's position on the power of principle in statutory interpretation now "probably represents . . . a conventional consensus on the problem."[91]

B. *Canons of Construction As Expressions of Public Values*

The reliance on principles and public values should not be limited to the interpretation of particular statutes and constitutional rules: Canons of construction can be understood and defended as expressions of public values as well. The validity and the power of the canons are directly proportional to the consistency and weight of the public values that they serve. Canons of statutory construction, to the extent that they give voice to Dworkin's principles or to some other form of public value, cannot be dismissed as easily as Llewellyn and Radin and their modern counterparts might have thought.[92]

Of course not every canon of statutory construction can be viewed usefully or plausibly as an instance of principle or public value, and the public values approach will not justify or clarify the reach of every maxim of interpretation. To the contrary, only those canons that presume the consistency of statutes with some other form or source of law rest on the kind of broad normative commitment which Dworkin and others have emphasized. In particular, those canons which presume the consistence of statutes with some form or source of law: that statutes are to be construed to preserve their constitutionality;[93] that federal statutes are to be construed not to preempt customary state functions;[94]

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90. Some commentators have criticized Professor Dworkin's jurisprudence on the ground that it provides virtually unlimited license for idiosyncratic interpretations by courts. Others find in this account an essentially naturalist, even evangelical perspective. *See* Steinhardt, *Believers Inside the Tent: Ronald Dworkin's Evangelism and Law's Empire*, 56 GEO. WASH. L. REV. 431 (1988).

91. Weisberg, *supra* note 43, at 234.

92. In Legal Process terms, the *Charming Betsy* canon, like a rule, presumably has purposes and values that courts and advocates use when applying it in any given case. H. HART & A. SACKS, *supra* note 78, at 166-67. As shown below, the opinion in *Charming Betsy* itself offers little or no guidance in the effort to articulate these values. *See infra* Part III(A).

93. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 62 (1932).

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Id.; *accord* New York v. Ferber, 458 U.S. 747 (1982); United States v. Thirty-Seven Photographs, 402 U.S. 363, 368-70 (1971); Schneider v. Smith, 390 U.S. 17, 26-27 (1968); Machinists v. Street, 367 U.S. 740, 749-50 (1961); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

94. The courts " 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978) (quoting Rice v. Santa Fe Elevator

that statutes in derogation of the common law are to be construed narrowly;[95] and, most important for current purposes, that statutes are to be construed consistently with international law.

Each of these canons of accommodation maximizes the scope of operation for sources of law in potential friction with one another, or is necessary to reconcile a norm in one legal order with norms of another legal order. Each reflects the legitimacy of pluralism in the law-giving institutions in our society and attempts to coordinate their interaction in a pragmatic way, even though the level of apparent political commitment to these sources of law varies generally and from time to time.[96]

As a class of guidelines for selecting, interpreting, and enforcing rules, the canons of accommodation should be distinguished from semantic canons of construction, which attempt to preserve meaning on the basis of linguistic rules or practices,[97] and from historical canons, which attempt to reconstruct congressional intent.[98] Both semantic and

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Corp., 331 U.S. 218, 230 (1947)). The Supreme Court's recent use of this canon of interpretation indicates that federalism constrains the national government's power to preempt state functions beyond the narrow conception of states' police powers recognized in *Rice*. *See, e.g.*, Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 183-85 (1988) (addressing state workers' compensation laws); Kelly v. Robinson, 479 U.S. 36, 47-49 (1986) (upholding state conditions on probation); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256-58 (1984) (refusing to preempt state remedies for victims of nuclear accidents); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 220-23 (1983) (upholding state safety regulations for nuclear power plants).

95. *See, e.g.*, Atchison, T. & S. Fe Ry. Co. v. Buell, 480 U.S. 557, 568 (1986); Urie v. Thompson, 337 U.S. 163, 174 (1949); Shaw v. Railroad Co., 101 U.S. 557, 565 (1879). *See generally* 2A J. SUTHERLAND, *supra* note 34, § 53.02, at 344. The contemporary dominance of statutory law has undermined the original force of this canon. *See* Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). But Professor Eskridge correctly states:

> An updated version of the old meta-rule is that the common law can be used to fill in statutory gaps, unless it is inconsistent with the overall statutory policy. Additionally, the common law is the source for a number of presumptions and clear statement rules that remain important to statutory interpretation, and in some cases common law background exerts a decisive influence on statutory developments.

Eskridge, *supra* note 59, at 1051.

96. Professor Calabresi, for example, demonstrates the displacement of the common law by statutes over time. *See* Calabresi, *supra* note 39. Similarly, scholars have traced the rise, fall, and rise again of international concerns in domestic law. *See supra* note 27. Among these various sources of rules, the Constitution is obviously supreme, *see* THE FEDERALIST NO. 78, at 468 (A. Hamilton) (C. Rossiter ed. 1961) (stating that "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former"), but the consequences of this axiom are disputed, *see* Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988) (criticizing the ideal of legislative supremacy under the Constitution).

97. Examples of these semantic canons would include the ordinary language rule, Nix v. Hedden, 149 U.S. 304 (1893), and the presumption against absurdity, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869); *see also* J. HURST, *supra* note 53, at 57-59.

98. It is not uncommon for some canons to be used as indexes to legislative intent even when there is no explicit reference to intent in the canon itself, as for example in the rebuttable presumption against implicit repeals. *See, e.g.*, Kremer v. Chemical Constr. Corp., 456 U.S. 461, 468 (1982); Regional Rail Reorganization Cases, 419 U.S. 102, 133-34 (1974); Posadas v. National City

historical canons may seem especially vulnerable to the criticism that they are radically indeterminate and incoherent because they presume that statutes are static texts, invested with determinate meaning at the canonical moment of passage.[99] A court that attempts to resurrect a past understanding, therefore, encounters all the interpretive problems associated with intentionalist interpretation.[100] In addition, the historical canons impute to Congress a level of knowledge or consciousness that is unrealistic and *post hoc*.[101]

The accommodation canons seem less vulnerable to these objections. They do not attempt to reconstruct an understanding or intention from the history of a statute, and they do not involve the counterintuitive imputation of omniscience to Congress. Rather they offer only a general and rebuttable presumption of a commitment to plural sources of law, and the values they serve are relatively easy to articulate. For example, the canon requiring the courts to construe statutes to preserve their constitutionality reduces the frictions inevitably associated with judicial review.[102] It preserves the appearance of legislative supremacy without allowing a statute to rise above its constitutional source. It avoids separation-of-powers disputes that ultimately could undermine the courts' institutional power, and it maximizes flexibility

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Bank, 296 U.S. 497, 503 (1936). The principle of *expressio unius est exclusio alterius*, (the expression of one is the exclusion of another), is similar. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 571-72 (1979); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 188 (1978). The obligation to construe remedial statutes broadly also may reflect assumptions about congressional intent. *See, e.g.*, Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976). A final example is the deference owed to the construction adopted by the expert administrative agency, on the grounds either that the legislature, being presumptively aware of the agency's interpretation, did nothing to alter it, *e.g.* Haig v. Agee, 453 U.S. 280 (1981), or that the agency's intimate involvement with the drafting of the legislation gave the agency an accurate perspective on congressional intent, *e.g.* Hart & Miller Islands Area Envt'l Group, Inc. v. Corps of Engineers, 621 F.2d 1281 (4th Cir.), *cert. denied*, 449 U.S. 1003 (1980).

At a sufficiently high level of abstraction, of course, virtually every canon of construction can be portrayed as an index to intent. *See* 1 J. KENT, COMMENTARIES ON AMERICAN LAW 468 (13th ed. 1884) (stating that "the great object of the maxims of interpretation is to discover the true intention of the law"); *see also* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943); Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982). This trait is also true of the *Charming Betsy* principle. *See* Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 593-94 (1983). The question addressed in the text is whether the *Charming Betsy* canon serves some more defined and characteristic function tban the vague supremacy of legislative intent.

99. R. DWORKIN, *supra* note 51, at 348.

100. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

101. Posner, *supra* note 56. Posner argues that the canon of construction under which courts avoid ruling a statute unconstitutional does not presume legislative omniscience and therefore may have greater validity. Although Posner does not mention *Charming Betsy*, the principle of that case presumes congressional omniscience no more than does the constitutional canon. *See infra* Part IV(C).

102. A. BICKEL, THE LEAST DANGEROUS BRANCH 181 (1962).

within broad and widely-shared notions of legitimacy. This set of values and the canon built upon it are hardly determinative,[103] but if the principles and values approaches are persuasive, the legal culture is not limited to the choice between "determinative" and "irrelevant."

A similar justification applies to the maxim that federal statutes should be interpreted to preserve state powers whenever possible. The public value of federalism requires that the courts limit the preclusive or preemptive effect of national legislation on traditional state functions. The fact that this canon can be overridden by a clear constitutional or statutory statement hardly undermines its significance. To the contrary, that the courts should impose on Congress such a requirement of explicit consciousness in an overall scheme of legislative supremacy is plain evidence that the canon expresses values which act as a meaningful constraint on interpretation.

C. *Articulating the Public Values of the* Charming Betsy *Canon*

It is considerably more complex to articulate the consensus values served by a canon of construction that directs the court to interpret statutes consistently with international law whenever possible. In part, the difficulty of defining a "public values" rationale for the *Charming Betsy* principle is attributable to the perception that the principle has played only a marginal and inconsistent role in the interpretation of statutes. No orthodox justification has had the opportunity to evolve. Even a fresh effort to define these public values encounters characteristic difficulty: the formulation of the values "inside" the *Charming Betsy* principle seems to vary with the perceived role of domestic courts in the international and constitutional orders. In particular, the public values approach to *Charming Betsy* replicates the classical tension between the monist and the dualist paradigms of international law.

In a simple monist model, the values served by the *Charming Betsy* canon of domestic statutory construction coincide with those served by international law itself. In this view, domestic courts may be conceptualized as "agents of the international order as well as constituent institutions of the national order."[104] They apply international law, like domestic law, whenever it is relevant. The monist model views the *Charming Betsy* principle as an obligation to respect international norms for their own sake and minimizes the role of the Congress or the

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103. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978). It seems tendentious to presume the values and the canons rigorous in order to denounce their "delusive rigor." Posner, *supra* note 56, at 817.

104. R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 72 (1964) (footnote omitted).

executive as a necessary incorporator of international norms. In other words, the monistic supremacy of international law implies that the norms operate without the mediation of a political branch. Moreover, monism, because it recognizes a gradient of norms rather than the pass-fail system of dualism, arguably takes an expansive view of what constitutes relevant international law in the first place.

Monism offers a plausible if partial perspective on *Charming Betsy*'s disapproval of sub silentio violations of international law by Congress. It is an established principle in both United States[105] and international[106] jurisprudence that domestic statutes, even domestic constitutional provisions, cannot be a defense to a violation of international law. A state's domestic law that breaches an international obligation exposes that nation to international liability. 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. Congress and the executive branch have a similar power, but the courts are not excluded from the process. The courts scrutinize statutes to assure that violations of international law by legislation are not merely implied or reckless.[107] The presumption of compliance reinforces the general reluctance of the international legal system to impose liability or responsibility for state acts that are unintended.[108]

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105. RESTATEMENT (SECOND), *supra* note 5, § 3. As summarized by Secretary of State Bayard: "It has been consistently maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties." 3 F. WHARTON, DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 969 (2d ed. 1887).

106. *See, e.g.*, Advisory Opinion on Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932 P.C.I.J. (ser. A/B) No. 44, at 23-25; Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, U.N. Doc. A/CONF.39/27, art. 27 (1969), *reprinted in* 8 INT'L LEGAL MATERIALS 679 (1969) [hereinafter Vienna Convention]; The Greco-Bulgarian Communities Case, 1930 P.C.I.J. (ser. B) No. 17, at 4, 32; *cf.* Vienna Convention, *supra*, art. 46 (limiting the circumstances under which a state may invalidate a treaty on the ground that its consent was expressed in violation of its internal law); J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 653, 655 (1898) (discussing The Alabama Claims Arbitration).

107. The potential consequences of construing a statute to allow a violation of international law have led other states to adopt an interpretive preference strongly reminiscent of the *Charming Betsy* principle. *See, e.g.*, Capital Cities Communications Inc. v. Canadian Radio-Television Comm'n, 81 D.L.R.3d 609, 30-31 (Can. 1977). *See generally* Morganstern, *Judicial Practice and the Supremacy of International Law*, 27 BRIT. Y.B. INT'L L. 42, 91 (1950) (recognizing that "[i]n order to prevent violations of international law . . . courts have strained their powers to the utmost in refusing to recognize that a violation of international law was intended [by legislative organs] unless such intention was expressed in the most unequivocal terms").

108. The purest statement of this traditional position is 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 343 (H. Lauterpacht ed. 1954) (stating that "[a]n act of a State injurious to another State is . . . not an international delinquency if committed neither willfully and maliciously nor with culpable negligence"); *see also* B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 231 (1953) (noting that "the principle of fault and its corollary,

The monist account of international law also fits well with the public values approach to statutory interpretation generally. As noted above, that approach presupposes a variety of sources to which courts can turn in search of principles to guide the interpretation of statutes. It necessarily downplays the requirement that Congress explicitly recognize or incorporate those principles into statutory form: a principle need not have received the explicit approval of Congress to be relevant in the values-based interpretation of federal statutes. The monist view of international law in domestic courts similarly denies that international conduct or emerging norms of law can be relevant only if recognized and adopted by Congress. As a result, in the monist view "[i]nternational law, in particular, is a rich source of public values in statutory interpretation, because its precepts are formulated slowly, through a process of academic consensus and transnational debate."[109]

Is the *Charming Betsy* principle then a monist doctrine? By its terms, that principle operates only "wherever *possible*," implying that irreconcilable conflicts between statutes and international law are to be resolved according to some other formula. This implication leaves the irony that the strictly hierarchical notion of monism operates only interstitially and that in case of conflict the domestic law can prevail, a result hardly consistent with monist tenets. Indeed, the *Charming Betsy* principle is often twinned with doctrines that resist the monist gloss altogether, such as the discretion of Congress to override preexisting treaties and customary law.[110] Although, as shown below, it is inaccurate to reduce *Charming Betsy* to a restatement of this congressional power of repudiation, monism standing alone cannot offer a complete account of the values behind that interpretive principle or guide its application.

In the dualist model, by contrast, the *Charming Betsy* principle is

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the concept of *vis major*, are general principles of law governing the notion of responsibility in the 'very nature of law'[and that] their application in the international legal order is abundantly confirmed by international judicial practice"). *Contra* J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 260 (1963).

The rhetoric of "fault" and "negligence" and "intent" may be obsolete in those pockets of liability arising out of acts not prohibited by international law. *See* Akehurst, *International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, 16 NETH. Y.B. INT'L L. 3 (1985); Handl, *Liability as an Obligation Established by a Primary Rule of International Law: Some Basic Reflections on the International Law Commission's Work*, 16 NETH. Y.B. INT'L L. 49 (1985).

109. Eskridge, *supra* note 59, at 1027. Of course from the dualist perspective, the transnational origin of the law of nations is precisely what undermines its legitimacy even for the limited purpose of statutory construction. Trimble, *supra* note 6 (arguing *inter alia* that customary international law is antimajoritarian and therefore has diminished constitutional status as law of the United States).

110. *See infra* Part IV(A).

not an expansive warrant for the application of international norms by domestic courts, but a restrictive and prophylactic doctrine protecting the separation of powers. In this view, the admonition to read statutes conformably with international law assures that the United States is not compromised or embarrassed in its foreign relations. Dualism views narrowly the process by which international norms become authoritative in the United States,[111] and the impact of the *Charming Betsy* principle is accordingly more modest. In essence, the public value of dualism is respect for Congress rather than for international law.

The Supreme Court articulated the dualist rationale late in the history of that principle, and even then, the Court's reference to *Charming Betsy* appears on its face to be a miscitation. In *NLRB v. Catholic Bishop of Chicago*,[112] a case utterly without international dimension, the Court faced the issue whether Congress intended the National Labor Relations Board to have jurisdiction over teachers in church-operated schools. A narrow majority concluded that it did not, in part on the ground that the opposite conclusion would raise serious constitutional problems under the free exercise clause of the first amendment. Writing for the majority, Chief Justice Warren Burger noted: "In a number of cases the Court has heeded the *essence* of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, by holding that an Act of Congress ought not to be construed to violate the *Constitution* if any other possible construction remains available."[113] The *Charming Betsy* principle was thus viewed in "essence" as a constitutional matter, rather than as an injunction to reconcile two non- or quasi-constitutional orders of law: statutes and the law of nations. This use of the *Charming Betsy* principle is seriously flawed,[114] not least be-

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111. *See supra* note 7.

112. 440 U.S. 490 (1979).

113. *Id.* at 500 (emphases added) (citation omitted).

114. As an example of the revisionist gloss of constitutionalism, Chief Justice Warren Burger offered McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963), a modern incarnation of the *Charming Betsy* principle. In *McCulloch*, the Court held that the National Labor Relations Board did not have jurisdiction over the maritime operations of foreign vessels owned by foreign subsidiaries of a United States corporation. *Id.* According to the majority in *Catholic Bishop*:

> [T]be Court [in *McCulloch*] 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. The international implications of the case led the Court to describe it as involving "public questions particularly high in the scale of our national interest." Because of those questions the Court held that before sanctioning the Board's exercise of jurisdiction "there must be present the affirmative intention of the Congress clearly expressed."

Catholic Bishop, 440 U.S. at 500 (quoting *McCulloch*, 372 U.S. at 17, 21-22).

Contrary to the majority's suggestion in *Catholic Bishop*, *McCulloch* is doubtful support for the revisionist view of *Charming Betsy* as a constitutional case. *McCulloch* involved the applica-

cause *Charming Betsy* itself is silent on such issues as constitutional rights, federalism, justiciability, the separation of powers, and any other explicitly constitutional matter. Nevertheless, in the aftermath of *Catholic Bishop*, academicians[115] and courts[116] commonly have cited *Charming Betsy* as a directive to avoid constitutional issues.

Flawed as that use may be, it is possible to construct a *post hoc* rationale for *Charming Betsy* as a prophylactic protection of the separation of powers in foreign affairs, a view that has received fresh support from the Supreme Court. In *Weinberger v. Rossi*,[117] in the course of describing its work in *McCulloch v. Sociedad Nacional de Marineros de Honduras*,[118] the Court noted that the *Charming Betsy* principle

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tion of a statutory regime in a transnational setting, and the Court found international principles of maritime comity controlling in the absence of a clearly expressed intent by Congress to override them. The issue was the narrow one of intent, not power; all parties conceded the ability of Congress to depart expressly from international norms. Finding no evidence of an intent to apply the statute to disputes between foreign shipowners and foreign crews, the Court followed the international principle. It does not follow that courts are to avoid first amendment issues arising under the same statute in a wholly domestic setting as in *Catholic Bishop*. The legislative history recited in *McCulloch* is irrelevant to the intent of Congress to extend the National Labor Relations Act to teachers, who are not aliens, in domestic, religiously-affiliated schools. Even if such an intent were discerned, the power of Congress to preclude the adjudication of all claims under the free exercise clause in all federal courts is doubtful. *See* P. BATOR, P. MISHKIN, D. SHAPRIO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 379-87 (3d ed. 1988); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). *Compare* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) *and* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948) *with Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) *and* Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). The Court's analogy between constitutional and international norms of comity must fail as a result.

115. *See, e.g.*, Eskridge, *supra* note 59, at 1021 n.42; Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 760 n.357 (1989); Goldstein, *The Failure of Constitutional Controls over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543, 1554 n.60 (1988); Note, *Church-Affiliated Universities and Labor Board Jurisdiction: An Unholy Union Between Church and State?*, 56 GEO. WASH. L. REV. 558, 570 n.62 (1988); Comment, *Constitutional Law*—Universidad Central de Bayamon v. National Labor Relations Board, 62 NOTRE DAME L. REV. 255, 256 n.11 (1987).

116. *See, e.g.*, DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988); Alexander v. Trustees of Boston Univ., 766 F.2d 630, 643 (1st Cir. 1985); United States v. Pappas, 613 F.2d 324, 329 (1st Cir. 1979); United States v. Standefer, 610 F.2d 1076, 1083 (3d Cir. 1979) (*en banc*), *aff'd*, 447 U.S. 10 (1980); Federal Election Comm'n v. Sailors' Union of the Pac. Political Fund, 624 F. Supp. 492, 496 (N.D. Cal. 1986), *aff'd*, 828 F.2d 502 (9th Cir. 1987).

During the same term in which the Court decided *Catholic Bishop*, Justice John Paul Stevens cited *Charming Betsy* and *McCulloch* as evidence of a "tradition of interpreting statutes to avoid *constitutional* issues." Dalia v. United States, 441 U.S. 238, 265 (1979) (Stevens, J., dissenting) (emphasis added).

Even if *Charming Betsy* were reconceived as a separation of powers case in foreign affairs, this result is not what most courts have in mind when they cite that case as authority for avoiding unconstitutional constructions of statutes. None of the decisions that avoid a statute's unconstitutionality on the strength of the *Charming Betsy* principle involves the separation of powers in international affairs.

117. 456 U.S. 25 (1982).

118. 372 U.S. 10 (1963). For a detailed discussion of the *McCulloch* case, see *infra* notes 171-

"was applied to avoid construing the National Labor Relations Act in a manner contrary to State Department regulations, for such a construction would have had foreign policy implications."[119] In other words, a contrary interpretation of the statute in *McCulloch* would have violated the maxim that the United States must "speak with one voice" in matters of foreign relations. Under the one voice maxim, the courts will not presume to revisit political decisions taken by the executive branch or articulate principles of international law that might place the United States in breach of its international obligations or embarrass the conduct of its diplomacy. Under the dualist gloss, the *Charming Betsy* principle presumptively tilts every question of statutory interpretation away from any such possibility: courts presume that Congress and the executive branch do not violate international law sub silentio because any other presumption might usurp a nonjudicial function.[120]

Does this presumption mean that the *Charming Betsy* principle is a dualist doctrine? The *Weinberger* decision suggests that it is not, for the Court did not rest the analysis of *McCulloch* solely on considerations of the separation of powers. Instead it declared: "The *McCulloch* court also relied on the fact that the proposed construction would have been contrary to a 'well-established rule of international law.' "[121] The Court did not explain the significance of this observation, but it clearly distinguished two separate, reinforcing rationales for the result in *McCulloch*: the prospect of embarrassing the executive branch and the independent prospect of giving inadequate respect to international norms. Under *Weinberger*, the weight to be given international law in the interpretation of domestic statutes is not a simple function of the separation of powers.

It could hardly be otherwise. Although the embarrassment rationale is a strong theme in the domestic resolution of many issues arising

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74 and accompanying text.

119. *Weinberger*, 456 U.S. at 32.

120. *See* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which bas long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 111; *see also* Regan v. Wald, 468 U.S. 222, 242 (1984) (referring to the "classical deference [owed by the judiciary] to the political branches in matters of foreign policy"). For a critique of the one-voice maxim, see Steinhardt, *Human Rights Litigation and the "One-Voice" Orthodoxy in Foreign Affairs*, in INTERNATIONAL HUMAN RIGHTS AND DOMESTIC COURTS (Gibney ed. forthcoming 1990).

121. *Weinberger*, 456 U.S. at 32 (emphasis added) (quoting *McCulloch*, 372 U.S. at 17).

under international law,[122] it is far from determinative in all of them. Especially outside the disputed range of the president's war powers,[123] the courts never have relinquished the authority to interpret and apply international law, in spite of the potential chaos that their pronouncements might cause. Recent judicial decisions on the merits have overridden the deference urged by the executive branch and its academic apologists[124] in such sensitive matters as the protection of diplomats,[125] bilateral aviation relations,[126] asylum determinations,[127] and commercial-strategic relationships with a NATO ally.[128] With respect to justiciability, the separation of powers in foreign affairs plainly does not require a blanket rule of abstention.[129]

These decisions deny that the interpretation of international law is so inherently political as to require deference to the executive's most recent pronouncement on an issue. In a clear display of the courts' common-law powers,[130] these decisions distinguish between "the application

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122. Cases challenging foreign policy, for example, are generally nonjusticiable. *See, e.g.*, Chaser Shipping Corp. v. United States, 649 F. Supp. 736 (S.D.N.Y. 1986) (holding nonjusticiable claims against the United States for property damage caused by its mining of Nicaraguan harbors), *aff'd mem.*, 819 F.2d 1129 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *cf.* Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (holding justiciable claims for damages and injunctive relief against the United States for the expropriation of land in Honduras for the training of Nicaraguan resistance figbters), *vacated*, 471 U.S. 1113 (1985). In matters of treaty interpretation, the executive's submissions also are entitled to great weight. *See* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982). And in recognition and boundary cases, the courts generally do not depart from the executive's position. *See* United States v. Pink, 315 U.S. 203 (1942); Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852); *cf.* Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380 (1948) (noting that the recognition "that the determination of sovereignty over an area is for the legislative and executive departments does not debar courts from examining the status resulting from prior action").

123. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988); Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright?, 13 YALE J. INT'L L. 5 (1988) (outlining contrasting models of executive and congressional powers in foreign relations).

124. *See, e.g.*, Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988).

125. Boos v. Barry, 485 U.S. 312 (1988) (holding unconstitutional the statute implementing convention for the protection of diplomats).

126. Wardair Can. v. Florida Dep't of Revenue, 477 U.S. 1 (1986) (upholding state tax on aviation fuel bought in-state by foreign-based carrier in spite of United States government's representation that foreign relations would be compromised).

127. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (rejecting the government's interpretation of an asylum applicant's burden of proof under refugee convention).

128. Rainbow Navigation Inc. v. Dep't of Navy, 699 F. Supp. 339 (D.D.C. 1988) (rejecting government procurement practices and interpretation of governing treaty).

129. Baker v. Carr, 369 U.S. 186, 211 (1961). *Compare* Dames & Moore v. Regan, 453 U.S. 996 (1979) *and* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) *with* Goldwater v. Carter, 444 U.S. 996 (1979).

130. *See infra* Part IV(C).

of law" and "the exercise of judgment" in international affairs,[131] requiring abstention or deference only when the latter is at issue. The embarrassment rationale of the *Charming Betsy* principle, therefore, must be broad enough to favor the adjudication of those cases in which not applying or recognizing international law would be an embarrassing violation of the separation of powers. A simple-minded dualism then is also unlikely to provide an adequate guide for the application of the *Charming Betsy* principle.

In summary, the public values approach to legislative interpretation generally applies well to certain types of interpretive canons, in particular those canons that preserve scope for multiple sources of law. Second, the monist and dualist paradigms separately offer powerful but partial rationales for the *Charming Betsy* principle. In other words, that principle is essentially bivalent: international law must be observed, and the United States must not be embarrassed in its foreign affairs, suggesting the application of international law when that is tenable and the repudiation of such norms when that is inescapable. This formulation offers some preliminary guidance to a court faced with a claim that an international norm is relevant to the interpretation of a domestic statute. First, the court should assess the meaning and status of the putative norm using the traditional evidentiary standards for determining custom and the scope of an agreement. Strict dualism downplays this inquiry to the extent that it focuses on the freedom of Congress to ignore international law and the impropriety of judicial interference with that power. Second, if 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. Third, if the conflict between the norm and the statute is unavoidable and irreducible, the court should refer to the supremacy axioms, such as the latter-in-time rule, and the doctrines of justiciability to resolve the conflict. Strict monism downplays this possibility, because it conceives international law as normatively superior to domestic law. This Article next will show the historical interrelationship between these two rationales and suggest how they may work as international law changes shape.

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131. The distinction between these terms is expressed in Smith v. Reagan, 844 F.2d 195, 200 (4th Cir. 1988). The distinction is of more pragmatic than academic value. *See* Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (D. Kairys ed. 1982) (criticizing the distinction between law and politics).

III. *Charming Betsy*: Toward the Substantive Use of International Law in Domestic Statutory Interpretation

Cases about interpretation are subject to interpretation themselves, and it is possible to discern distinct phases in the domestic courts' understanding of *Charming Betsy*. As shown below, courts commonly cite the case in disputes about the extraterritorial reach of domestic statutes, invoking the international norms of abstention or comity. The recent treatment of *Charming Betsy*, however, suggests a more expansive concept of relevant international standards. The substantive use of international, nonjurisdictional norms in the interpretation of statutes, though rediscovered by the Supreme Court in the last decade, is inherent in Chief Justice Marshall's original disposition of *Charming Betsy* in 1804. The case rewards a careful reading.

A. Origins and Evolution

Though now perceived as a fountainhead, the opinion in *Murray v. The Schooner Charming Betsy*[132] is surprisingly silent about the origin of the principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[133] Arguably, such a demonstration would not have been necessary,[134] but the Supreme Court's discussion of the applicable international standards in *Charming Betsy* remains only rudimentary and implicit. The Court does not explain why international law should be given weight in the first place.[135]

The case arose under a federal nonintercourse statute, enacted in 1800, that prohibited all commercial transactions "between any person or persons resident within the United States or under their protection, and any person or persons resident within the territories of the French

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132. 6 U.S. (2 Cranch) 64 (1804).

133. *Id.* at 118.

134. *See* Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26 (1952).

> [T]he Constitution was framed in firm reliance upon the premise, frequently articulated, that . . . the Law of Nations in all its aspects familiar to men of learning in the eighteenth century was accepted by the framers, expressly or implicitly, as a constituent part of the national law of the United States.

Id. at 55-56. Professor Lobel has outlined the intellectual origins of the Framers' placement of international law within the constitutional framework, but the evidence is general and does not address directly the interpretive setting of the *Charming Betsy* principle. Lobel, *supra* note 3, at 1088.

135. Such a discussion would have required the Court to address what Professor Maier has called the "authoritative" as distinct from the "substantive" sources of customary law. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 Mich. J. Int'l L. 450 (1989). Such a discussion might have seemed unnecessary, however, to eighteenth-century jurists. *See supra* note 134.

Republic, or any of the dependencies thereof."[136] Vessels used in trade between the United States and France were subject to forfeiture, seizure, and condemnation under the statute.[137] These provisions were supplemented by presidential instruction that directed United States naval commanders to take a broad view of the statute.[138]

In July 1800 Captain Alexander Murray of the United States frigate *Constellation* seized a ship in the Caribbean that appeared to violate the statute. His investigation revealed that the vessel had been owned by citizens of the United States and, in April 1800, had sailed with a cargo of flour from Baltimore. After the cargo had been discharged in St. Bartholomews, the vessel had sailed to St. Thomas, where it was sold to one Jared Shattuck, who cleared the ship out as a Danish vessel bound for Guadaloupe, a French dependency.[139] En route, the *Charming Betsy* was seized as prize by French privateers, and soon thereafter, Captain Murray recaptured the vessel on the ground either that it was being operated by a United States citizen within the scope of the Nonintercourse Acts or that its sale had been a ruse to evade the law. Murray sold the cargo in Martinique and brought the vessel into Philadelphia, where it was libelled by the Danish consul as the property of a Danish subject.

The judge for the district of Pennsylvania declared the seizure illegal and directed that the vessel be restored to its owners with compensation for damages sustained. On appeal the circuit court sustained only so much of the decree as directed the "restitution of the vessel, and payment to the claimant, of the *net proceeds of the sale of the cargo* in

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136. Act of February 27th, 1800, 2 Stat. 7, 8. This legislation was one of a series of war measures designed to fight a limited war against France on the high seas. 6 ANNALS OF CONG. 50-62, 524-25, 527-32, 557-58 (1800).

137. The act provided in part that "[a]ny ship or vessel, owned, hired, or employed wholly or in part by any person or persons resident within the United States, or any citizen or citizens thereof resident elsewhere . . . shall be wholly forfeited, and may be seized and condemned." 2 Stat. 7-8.

138. The presidential instruction read as follows:

> "[Y]ou are not only to do all that in you lies, to prevent all intercourse *whether direct or circuitous*, between the ports of the *United States*, and those of France and her dependencies, in cases where the vessels or cargoes are *apparently*, as well as *really American*, and protected by American papers only, but you are to be vigilant that vessels or cargoes really *American*, but covered by *Danish* or other foreign papers, and bound to *or from French* ports, do not escape you."

Charming Betsy, 6 U.S. (2 Cranch) at 78-79 (emphasis in original). In a remark with startling contemporary relevance to the debate over executive prerogative in the litigation of private rights, Justice Samuel Chase opposed the reading of these executive instructions "because if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted." *Id.* at 78; *see also* Presser & Hurley, *Saving God's Republic: The Jurisprudence of Samuel Chase*, 1984 U. ILL. L. REV. 771, 796 (1984).

139. *Charming Betsy*, 6 U.S. (2 Cranch) at 69.

Martinique, deducting the costs and charges there, according to the account exhibited by captain *Murray's* agent."[140] Both parties appealed to the Supreme Court. There, Murray argued that the vessel and its cargo were fully confiscable under the laws of the United States. In the course of addressing this argument, the Court articulated the principle of construction quoted above, noting in addition that an act of Congress "consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."[141]

With this general canon in mind, the Court turned to the Nonintercourse Act, noting that it covered both persons resident within the United States or under its protection, and vessels owned, hired, or employed by United States residents or United States citizens residing elsewhere. The applicability of the Nonintercourse Act thus turned on the residence and citizenship of Shattuck, the owner of the vessel at the time of the seizure, and on whether he was "under [the] protection [of the United States]."[142] Shattuck had been born in the United States but had moved to St. Thomas in 1789 or 1790, suggesting the possibility that he never had been a United States citizen under the Constitution. Shattuck maintained his domicile at St. Thomas for a decade, had become a Danish burgher, and had sworn allegiance to the King of Denmark.[143] On this basis, and applying international standards, the Supreme Court reasoned:

> He is not a person under the protection of the *United States*. The *American* citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the *American* government in his favor would be considered as a justifiable interposition.[144]

The Court then contrasted these circumstances, in which diplomatic protection was proper, with Shattuck's position:

> But his situation is completely changed, where by his own act he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the *United States*, a point not intended to be decided, yet . . . [his own act] certainly places him out of the protection of the *United States* while within the territory of the sovereign to whom he has sworn allegiance, and consequently takes him out of the description of the act.[145]

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140. *Id.* at 70 (emphasis in original).
141. *Id.* at 118.
142. *See supra* note 136.
143. *Charming Betsy*, 6 U.S. (2 Cranch) at 65.
144. *Id.* at 120-21 (emphasis in original).
145. *Id.* (emphasis in original).

Finally after this minimalist discussion, the Court stated its holding:

> It is therefore the opinion of the court, that the *Charming Betsy*, with her cargo, being at the time of her recapture the *bona fide* property of a *Danish* burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a *French* island.[146]

The submissions and argumentation in the case demonstrate that the parties viewed the relevance of the law of nations more expansively than is suggested by this conclusory reference of the Court.[147] The opinion reveals no explicit consideration or assessment of the law of nations standards governing admiralty, neutrality, or nationality, each of which had been argued in some detail.[148] Nor does it resolve the issue of construction by reference to the principles collected today under the rubric of comity[149] or jurisdiction to prescribe.[150] Although avoiding a diplomatic controversy with Denmark and other neutral states may have influenced the Court's disposition, the reasoning on its face is instead an early statement of general principles governing state responsibility for the treatment of aliens as a guideline for interpreting the statutory formula of a person "under [the] protection [of the United States]." Only if the person as a matter of international law were within the diplomatic protection of the United States, would he or she be subject to the Nonintercourse Act.

Thus, international law was not invoked in the opinion to resolve a conflict of laws among sovereign states, nor was it used generally to delimit the United States' jurisdiction to prescribe on the basis of nationality, nor even to incorporate international notions of comity into federal common law. Other contemporary opinions of the Court did these things explicitly.[151] The unique aspect of *Charming Betsy* is its

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146. *Id.* (emphasis in original)

147. The parties clearly had argued several international issues. *See id.* at 71, 93 (the right of individuals to expatriate themselves); *id.* at 70-72, 80 (the limits on the right to search and seize neutral shipping under the laws of war); *id.* at 73-75, 76-77 (the authority to recapture prize from an enemy); *id.* at 85-86, 97 (the sufficiency of "purchased" nationality); *id.* at 87, 95 (the applicability of the norms governing salvage). Counsel for Murray argued in part that "Captain Murray's authority . . . was derived not only from our municipal law, and his instructions [from the president]; but from the law of nations." *Id.* at 80.

148. The Supreme Court was familiar with these topics, as its contemporaneous decisions make clear. *See, e.g.*, The Nereide, 13 U.S. (9 Cranch) 388 (1815); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 229 (1796).

149. Hilton v. Guyot, 159 U.S. 113 (1895).

150. RESTATEMENT (THIRD), *supra* note 3, §§ 401-404. Nothing in the Restatement addresses which jurisdiction to prescribe on the basis of international standards of diplomatic protection or the rights of neutrals.

151. United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818), is a clearer contemporary example of the Court's interpretation of a statute in light of international *jurisdictional* principles. The Court addressed a 1790 law, 1 Stat. 115, that punished certain acts committed on the high seas by

reference to an international doctrine—diplomatic protection—to determine the application of a statute, the object of which—a selective embargo—was unrelated to the doctrine itself.[152] That Congress would not have violated the norms of diplomatic protection sub silentio was sufficient to justify the Court's determination of the intended scope of the regulation.

Subsequent citations to *Charming Betsy* do not invariably clarify the role of international law in construing domestic statutes; indeed, most references focus on features of the decision other than the interpretive principle.[153] The case is cited variously for the proposition that citizens have a natural right to expatriate themselves;[154] that admiralty courts of the United States have in personam as well as in rem jurisdiction over maritime torts;[155] that the Nonintercourse Act was not intended to prohibit the sale of United States vessels to neutral foreigners or to apply to such vessels after a bona fide sale and transfer to a foreigner.[156] Other decisions refer to *Charming Betsy* as establishing a rule of damages in maritime cases,[157] and scattered cases follow *Charming*

"any person or persons." Chief Justice John Marshall observed that this phrase was "broad enough to comprehend every human being" but concluded that the statutory language "must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." *Palmer*, 16 U.S. (3 Wheat.) at 631. The statute, therefore, could not apply to a person committing the proscribed acts on a foreign ship while on the high seas.

152. That is, the applicability of the Nonintercourse Act was determined by reference to the standards under international law for state-to-state claims, and these norms were quite distinct from the embargo that was the point of the statute.

153. *See, e.g.*, The Mary and Susan, 14 U.S. (1 Wheat.) 25, 54-55 (1816) (holding that "shipments made by merchants, actually domiciled in the enemy's country at the breaking out of a war, partake of the nature of enemy trade, and, as such, are subject to belligerent capture"). *Charming Betsy* was distinguished because it discussed the application of the Nonintercourse Acts and not the capture of a belligerent vessel. *Id.* at 55 n.2; *accord* The Frances, 9 F. Cas. 673 (D.R.I. 1813) (No. 5034), *aff'd*, 12 U.S. (8 Cranch) 363 (1814); *cf.* Rogers v. The Amado, 20 F. Cas. 1107, 1110 (E.D. La. 1847) (No. 12,005) (citing *Charming Betsy* for the proposition that "a citizen residing in a foreign country might acquire the commercial privileges attached to his domicile, and thus be exempt from the operation of a law of his original country restraining commerce with another foreign country").

154. *See* Savorgnan v. United States, 338 U.S. 491, 497 (1950) (stating that "[t]raditionally the United States has supported the right of expatriation as a natural and inherent right of all people"); *see also* Comitis v. Parkerson, 56 F. 556, 558-59 (E.D. La. 1893); Right of Expatriation, 8 Op. Att'y Gen. 139, 153-55, 167-69 (1856). The *Charming Betsy* court specifically had reserved opinion on this issue. *Charming Betsy*, 6 U.S. (2 Cranch) at 120; *cf.* United States v. Wong Kim Ark, 169 U.S. 649, 658 (1898) (declaring that *Charming Betsy* reflects the assumption prior to the fourteenth amendment "that all persons born in the United States were citizens of the United States").

155. Mauro v. Almeida, 23 U.S. (10 Wheat.) 473, 486 (1825).

156. Sands v. Knox, 7 U.S. (3 Cranch) 499, 502 (1806); Maley v. Shattuck, 7 U.S. (3 Cranch) 458, 483-85 (1806).

157. The Scotland, 105 U.S. 24 (1881); Conard v. The Pac. Ins. Co., 31 U.S. (6 Pet.) 110, 262, 274 (1832); The Mary J. Vaughn, 16 F. Cas. 991, 992 (S.D.N.Y. 1867) (No. 9217), *aff'd*, 81 U.S. (14 Wall.) 258 (1871); The Lively, 15 F. Cas. 631, 633-34 (D. Mass. 1812) (No. 8403); *see also* 3 Op.

Betsy in consulting treaties and the practice of states in determining the law of prize.[158]

The significance of *Charming Betsy* and its interpretive mandate became clearer, however, as the international clash of statutes increased and the international choice of law became a more pressing concern. In a critical line of Supreme Court decisions, especially after World War II, *Charming Betsy* assumed a largely jurisdictional cast. In these cases, the legitimate reach of a domestic statute was determined at least partially by reference to international notions of comity or jurisdiction, a reference made legitimate by citation to *Charming Betsy* itself.[159] Justice George Sutherland, for example, cited the case when he opposed the Court's conclusion that the prohibition laws applied to foreign steamship companies operating between foreign and United States ports.[160] In his dissenting opinion, Justice Sutherland noted:

> The general rule of international law is that a foreign ship is so far identified with the country to which it belongs that its internal affairs, whose effect is confined to the ship, ordinarily are not subjected to interference at the hands of another state

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Att'y Gen. 216, 220 (1837).

The case also was cited as establishing the proper *procedure* for determining damages. The amount of damages was determined by the clerk of the court with the assistance of "two intelligent merchants." *See* The Galatea, 9 F. Cas. 1073, 1075 (S.D.N.Y. 1872) (No. 5185) (citing *Charming Betsy*, 6 U.S. (2 Cranch) at 69).

158. *See, e.g.*, The Panama, 176 U.S. 535 (1900) (finding no general exemption for mail ships under the international law of prize); The Pizarro, 15 U.S. (2 Wheat.) 227 (1817) (recognizing that neither treaty nor state practice erects a per se rule of condemnation for the spoliation of papers); Burke v. Trevitt, 4 F. Cas. 746, 748 n.4 (D. Mass. 1816) (No. 2163) (noting that the effect of probable cause as a protection from damages depends on whether the seizure is on land or the high seas).

159. *See, e.g.*, United States v. Hensel, 699 F.2d 18 (1st Cir.) (upholding the legitimacy, under statute, of searches by United States officials of foreign-flag vessels on the high seas), *cert. denied*, 461 U.S. 958 (1983); FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300 (D.C. Cir. 1980) (upholding the enforceability of investigatory subpoena served by registered mail upon alien corporation); Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc., 404 F.2d 804, 814 n.32 (D.C. Cir. 1968) (recognizing the extraterritorial applicability of United States antitrust law), *cert. denied*, 393 U.S. 1093 (1969); National Maritime Union of Am. v. NLRB, 267 F. Supp. 117 (S.D.N.Y. 1967) (recognizing the extraterritorial applicability of United States labor law).

The principle that statutes should be construed consistently with international law has not automatically triggered a citation to *Charming Betsy*. *See, e.g.*, MacLeod v. United States, 229 U.S. 416 (1913).

> 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.

Id. at 434. References to the *Charming Betsy* principle, therefore, are not equivalent to references to *Charming Betsy*.

160. Cunard S.S. Co. v. Mellon, 262 U.S. 100, 132 (1923) (Sutherland, J., dissenting).

> in whose ports it is temporarily present.[161]

Charming Betsy in his view obliged the Court to interpret the reach of the act in light of this international principle.

That approach ultimately prevailed in a series of cases denying the applicability of various domestic statutes to foreign seamen. In *Lauritzen v. Larsen*,[162] for example, the Court addressed the issue whether the Jones Act,[163] which provided a cause of action in United States courts for "any seaman who shall suffer personal injury in the course of his employment,"[164] applied to a Danish seaman who had been hired in the United States and negligently injured on a Danish vessel in Cuban waters. The Court viewed the issue as a "simpl[e] . . . problem of statutory construction rather commonplace in a federal system by which courts often have to decide whether 'any' or 'every' reaches to the limits of the enacting authority's usual scope or is to be applied to foreign events or transactions."[165] Reversing the decisions of the lower courts, the Supreme Court held the Jones Act inapplicable, resting its result on traditional criteria for resolving conflicts of jurisdiction among sovereigns: "By usage as old as the Nation, [shipping laws of the United States written in all-inclusive general terms] have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."[166] In giving content to these "prevalent doctrines," the Court recognized the existence of

> a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.[167]

The Court went on to articulate the factors that inform the decision to

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161. *Id.* (citations omitted).

162. 345 U.S. 571 (1953).

163. Jones Act, ch. 250, § 20, 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 688 (1982)). Enacted in 1920, the Jones Act provides a cause of action for any seaman who suffers personal injury during the course of his or her employment. The cause of action sounds in negligence and may be maintained against the seaman's employer. In the event of death, the seaman's personal representative has a statutory cause of action for wrongful death, including survival damages. In addition to suit for personal injury, the plaintiff may sue and recover damages for unseaworthiness and for maintenance and cure under general maritime law. The Jones Act also preserves the option for the plaintiff to sue in federal admiralty jurisdiction or at law with the right of trial by jury in either state or federal court. *See* N. HEALY & D. SHARPE, CASES AND MATERIALS ON ADMIRALTY 456 (2d ed. 1986); T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-6 (1987).

164. Jones Act, *supra* note 163, § 20, 46 U.S.C. § 688(a) (1982).

165. *Lauritzen*, 345 U.S. at 578-79 (footnote omitted).

166. *Id.* at 577.

167. *Id.* at 581-82 (footnote omitted).

apply domestic statutes in these circumstances, ever mindful "of the necessity for mutual forbearance if retaliations are to be avoided."[168] The Court subsequently described these factors governing the choice of law in maritime torts as " 'the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community.' "[169] In *Lauritzen* these "interests" weigh against the application of the Jones Act on the facts presented; if the facts of the case changed, that result would change.[170]

In *Lauritzen*, as in *Charming Betsy*, the Court's interpretation of international norms essentially truncated the applicability of domestic statutes that had been couched in broad terms. In this respect, *Lauritzen* represents a now common approach, as shown by *McCulloch v. Sociedad Nacional de Marineros de Honduras*.[171] In *McCulloch* the Court similarly held that the jurisdictional provisions of the National Labor Relations Act do not extend to the maritime operations of foreign-flag ships, legally owned by foreign subsidiaries of a United States corporation, which employ alien seamen, who are represented by a foreign union. Here, too, the Court noted the "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship"[172] and concluded that the National Labor Relations Board was without jurisdiction to order an election under the circumstances. Explicitly recognizing the gravitational force[173] of the *Charming Betsy* principle, the Court declared that any other result would "arouse[] vigorous protests from foreign governments and create[] international problems for our government."[174]

Lower federal courts frequently have followed this doctrinal path. On the strength of *Charming Betsy*, courts have assumed that Con-

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168. *Id.* at 582. These factors were articulated as: the place of the wrongful act; the law of the flag; allegiance or domicile of the injured; allegiance of the defendant shipowner; place of contract; inaccessibility of foreign forum; and the law of the forum. *Id.* at 583-92.

169. Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 312 (1970) (Harlan, J., dissenting) (quoting Romero v. International Terminal Co., 358 U.S. 354, 383 (1959)).

170. In *Hellenic Lines*, for example, a Greek seamen employed on a Greek-owned and Greek-flag vessel was allowed to recover under the Jones Act, in light of the shipowner's "substantial and continuing" contacts with the United States. *Hellenic Lines*, 398 U.S. at 310. These contacts distinguished *Hellenic Lines* from *Lauritzen* and demonstrated the fact-dependence of the *Lauritzen* criteria. *Charming Betsy*, not surprisingly, appears only in the dissent. *Id.* at 313 (Harlan, J., dissenting).

171. 372 U.S. 10 (1963).

172. *Id.* at 21 (citations omitted).

173. The gravitational force metaphor appears in R. DWORKIN, *supra* note 46, at 112, and in G. CALABRESI, *supra* note 39, at 129.

174. *McCulloch*, 372 U.S. at 17; *accord* Windward Shipping v. American Radio Ass'n, 415 U.S. 104, 110 (1974) (stating the Court's "reluctance to intrude domestic labor law willy-nilly into the complex of considerations affecting foreign trade, absent a clear congressional mandate to do so").

gress, in enacting the Marijuana on the High Seas Act[175] and the smuggling statutes,[176] intended to limit its exercise of the power to define and punish felonies committed on the high seas in conformity with the international law of jurisdiction.[177] Other decisions have made it clear that, in the absence of congressional override, the executive's investigatory powers are limited by international norms governing jurisdiction to enforce.[178] Moreover, courts have held that subject matter jurisdiction under various regulatory statutes reflects the international principles of comity protected in *Charming Betsy*, subject again to explicit congressional expansion.[179] In these cases, comity generally though not invariably[180] has required that domestic legislation not apply.

B. Charming Betsy *As a Jurisdictional Imperative*

Taken together, the results in these cases suggest that the *Charming Betsy* principle operates as a doctrine of diffidence in conflicts cases. In operation, it simply limits the application of domestic statutes in extraterritorial concerns. Both *Lauritzen* and *McCulloch*, for example, followed a principle of accommodation as a rationale for not apply-

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175. Pub. L. No. 96-350, 94 Stat. 1159 (1980) (current version at 46 U.S.C. appendix § 1903(a) (Supp. IV 1986)).

176. *Id.* at 1159-60, 46 U.S.C. appendix § 1903(a)(d).

177. *See, e.g.*, United States v. Robinson, 843 F.2d 1 (1st Cir. 1988) (smuggling statutes); United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982) (smuggling statutes), *cert. denied sub nom.* Pauth-Arzusa v. United States, 459 U.S. 1114 (1983); United States v. James-Robinson, 515 F. Supp. 1340 (S.D. Fla. 1981) (Marijuana on the High Seas Act).

178. *See, e.g.*, Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493-94 (D.C. Cir. 1984) (holding that federal courts do not have jurisdiction under the Commodity Exchange Act, 7 U.S.C. § 15 (1982), to enforce an investigatory subpoena served by the Commodity Futures Trading Commission upon a foreign citizen in a foreign nation); FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1304, 1323 n.130 (D.C. Cir. 1980) (finding the FTC to be without jurisdiction to enforce an investigatory subpoena served upon a French corporation by registered mail).

179. *See, e.g.*, Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc., 404 F.2d 804, 814 n.32 (D.C. Cir. 1968) (evaluating the extraterritorial application of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988)), *cert. denied*, 393 U.S. 1093 (1969); United States v. Firestone Tire & Rubber Co., 518 F. Supp. 1021, 1032 n.9 (N.D. Ohio 1981) (assessing the extraterritorial effect of regulations pursuant to the Gold Reserve Act of 1934, 48 Stat. 337); National Maritime Union of Am. v. NLRB, 267 F. Supp. 117, 120 (S.D.N.Y. 1967) (discussing the extraterritorial reach of the National Labor Relations Act, 29 U.S.C. §§ 141-187 (1982 & Supp. V 1987)).

180. *See, e.g., Pacific Seafarers*, 404 F.2d at 804 (considering comity to support the applicability of the Sherman Act). The comity respecting treaty obligations also may be insufficient to override domestic law. *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 484 U.S. 694 (1988) (holding the Hague Service Convention inapplicable when a domestic subsidiary of a foreign parent is served as its agent); Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522 (1987) (limiting the Hague Evidence Convention to define the optional, but not exclusive, means of obtaining foreign evidence from litigant within the United States court's jurisdiction).

ing the forum's substantive rule of decision or statutory provision.[181] In this application of essentially jurisdictional norms, *Charming Betsy* and its progeny might be viewed as providing a specialized rationale for the rebuttable presumption that all legislation is territorial,[182] and not as offering an affirmative warrant for applying more substantive international standards in the construction of domestic statutes. So conceived, *Charming Betsy* would amount only to an innocuous endorsement of international comity in all its breadth and apparent indeterminacy.[183]

In this interpretation, however, there are layers of irony. First, the Court's analysis in *Charming Betsy* actually had little to do with comity, if that term is given its modern connotation as a prudential or voluntary restraint on a power that is established at law. Second, comity, far from being an expression of international legal principle, has been characterized repeatedly in the twentieth century as distinctly not law and therefore presumably not a proper application of the *Charming Betsy* principle. Finally, the Supreme Court's most recent application of that principle demonstrates that it need not operate as a consideration in the choice of law at all, much less as a counterweight to the textually-defensible application of a domestic statute beyond the territory of the United States.[184] For these reasons, it is fundamentally misleading to reduce *Charming Betsy* to a restatement of abstention-based rules of comity.

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181. Similarly, in MacLeod v. United States, 229 U.S. 416 (1913), the Court declined to interpret a congressional statute to apply in areas beyond the territory or control of the United States. The statute could not be interpreted as a ratification of presidential action that would be at odds with customary norms governing the rights of occupying forces. *Id.* at 433-35.

182. *See, e.g.*, Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (The Eight Hour Law); Sandberg v. McDonald, 248 U.S. 185, 195 (1918) (Seaman's Act of 1915); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (Sherman Antitrust Act). *But see* Laker Airways v. Sahena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) (antitrust laws); United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945) (antitrust laws); *see* Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT'L L. 395 (1983).

183. *See* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

> Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. . . . [I]t is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.

Id. at 440; *see also* Macalister-Smith, *Comity*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 41 (1984) (acknowledging that "[b]y definition, the rules of comity lack a legal nature").

184. *See infra* notes 226-48 and accompanying text.

1. An Anachronism in the Interpretation of *Charming Betsy*

Comity is an idea with its own intellectual history.[185] Unlike the recent courts that apply comity in the apparent spirit of *Charming Betsy*, however, the Supreme Court in that case did not find jurisdiction proper first and then offer reasons based in prudence for declining to exercise it.[186] The Court pursued none of the interest-balancing or reasonableness inquiries that characterize the modern comity jurisprudence.[187] Moreover, because there seems to have been no doubt that the Nonintercourse Act would have applied to a United States national operating in Caribbean waters, even on a foreign vessel, there was no issue of extraterritoriality—the issue which, above all others since World War II, has framed the comity analysis.[188] Rather, in *Charming Betsy*, the Supreme Court invoked international standards to determine whether

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185. Distinct phases in the evolution of the comity doctrine may be discerned. *See* Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189 (1942). Professor Maier, in particular, has described the modern emergence of a politicized notion of comity that departs significantly from its ancient conceptualization as a legal principle, especially in the works of Joseph Story. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281-85 (1982). *See generally* Lorenzen, *Huber's de Conflictu Legum*, 13 ILL. L. REV. 199 (1918); Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966).

186. *See, e.g.*, Westinghouse Elec. Corp. v. Rio Algom, Ltd., 617 F.2d 1248 (7th Cir. 1980) (Uranium Antitrust Litigation); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 611-12 (9th Cir. 1976).

187. *See, e.g., In re* Grand Jury Proceedings (Bank of Nova Scotia I), 691 F.2d 1384, 1389 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); United States v. Vetco, Inc., 644 F.2d 1324, 1331 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *In re* Grand Jury Proceedings (Field), 532 F.2d 404, 408-09 (5th Cir. 1976); United States v. First Nat'l City Bank, 396 F.2d 897, 901-04 (2d Cir. 1968). Section 40 of the Restatement (Second) of Foreign Relations Law, which framed the analysis in these cases, erected a multifactor test for the resolution of international conflicts of jurisdiction through reciprocal accommodation. That provision states:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescrihe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement hy action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

RESTATEMENT (SECOND), *supra* note 5, § 40.

The Restatement (Third) of Foreign Relations Law, articulating similar and additional factors, indicates that the essential comity analysis consists in a fiexible and comprehensive test of reasonableness under all the circumstances. No longer obliging states simply to "consider" these moderating factors, the Restatement (Third) declares that "a state may not exercise jurisdiction to prescrihe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." RESTATEMENT (THIRD), *supra* note 3, § 403(1).

188. Comity analysis does appear in cases raising issues other than the extraterritoriality of regulatory statutes, traditionally including the act of state doctrine, foreign sovereign immunity, and the foreign sovereign compulsion defense. *See* Maier, *supra* note 185.

Shattuck was under the diplomatic protection of the United States and, therefore, within the explicit and intended reach of the statute. Even if subject matter jurisdiction and comity converge today at some level of abstraction, the original analysis in *Charming Betsy* is not an example of that phenomenon.

2. The Inadequate Conception of Comity As Law

Treating *Charming Betsy* as a case determining the jurisdictional reach of statutes in light of international comity raises a more significant problem. The meaning and status of comity has been the subject of recurrent theoretical and diplomatic dispute, and it is ironic that *Charming Betsy*, with its injunction to construe statutes in conformity with international *law*, is used to vindicate what is in fact a highly contested proposition in international discourse.

In the typical modern case in which comity is an issue, a foreign national has challenged the extraterritorial reach of United States trade or commercial regulation, especially antitrust law[189] or securities regulation[190] or export controls.[191] Most scholarly commentary on the meaning of comity has responded to the resulting body of decisions in these regulatory areas,[192] but it is plain that jurisdictional reach is a potential

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189. *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988). For judicial construction of the extraterritorial application of the antitrust statutes, see Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) (stating that "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"); Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc., 404 F.2d 804, 817 (D.C. Cir. 1968) (stating that "[i]t is plain that where American foreign commerce is affected foreigners may be held under our antitrust laws for restraints thereon"). *But see* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) (stating that "[r]espondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies"). *See generally* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976); Leasco Data Processing Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); RESTATEMENT (THIRD), *supra* note 3, § 415.

190. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1988); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78jj (1988). For judicial construction of the extraterritorial application of the securities laws, see Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987); Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied sub nom.* Manley v. Schoenbaum, 395 U.S. 906 (1969).

191. *See, e.g.*, Dresser Indus. v. Baldridge, 549 F. Supp. 108 (D.D.C. 1982).

192. With respect to securities regulation, see Ryan, *International Enforcement of Insider Trading: The Grand Jury Process, Court Compulsion and the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters*, 26 AM. CRIM. L. REV. 247 (1988); Symposium, *Can the International Securities Markets be Regulated?*, 14 BROOKLYN J. INT'L L. 251 (1988). With respect to trade controls, see Atwood, *The Export Administration Act and the* Dresser Industries *Case*, 15 LAW & POL'Y INT'L BUS. 1157 (1983); Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439 (1981);

issue with respect to any legislative scheme phrased in broad terms and not geographically limited in its application. Even a partial addendum would include tax,[193] government investigations,[194] environmental protection,[195] civil discovery,[196] and antidiscrimination and labor law.[197]

History offers little hope that these extraterritoriality issues will be resolved according to generally applicable principles or a fortiori according to norms recognized as binding international obligations. The analysis of extraterritoriality varies with the regulatory interest asserted, obliging courts in case of conflict to assess the reasonableness of exercising jurisdiction in light of the respective governmental interests of the United States and the foreign state. Not surprisingly, the extraterritorial application of the antitrust laws differs from that of the securities laws or the rules of federal procedure,[198] though in all such cases the court assertedly acts as a passive referee in balancing competing sovereign policies. The mark of its apparent passivity is the emergence of a powerful but vacuous rhetorical habit: phrasing the dispositive issue as jurisdictional lays the predicate for applying United States law in a transnational context.[199] Viewing a case as raising essen-

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Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1316-18 (1985). With respect to antitrust laws, see Hood, *The Extraterritorial Application of United States Antitrust Laws: A Selective Bibliography*, 15 VAND. J. TRANSNAT'L L. 765 (1982).

193. *See, e.g.*, Palmer, *Toward Unilateral Coherence in Determining Jurisdiction to Tax Income*, 30 HARV. INT'L L.J. 1 (1989).

194. *See, e.g.*, *In re* Grand Jury Proceedings (Bank of Nova Scotia I), 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

195. *See, e.g.*, United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977); J. BRUNNÉE, ACID RAIN AND OZONE LAYER DEPLETION: INTERNATIONAL LAW AND REGULATION 124-32 (1988); Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT'L L. 525 (1980); Note, *The United States Environmental Protection Agency's Proposal for At-Sea Incineration of Hazardous Wastes—A Transnational Perspective*, 21 VAND. J. TRANSNAT'L L. 157 (1988).

196. *See, e.g.*, Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522 (1987); Societe Internationelle v. Rogers, 357 U.S. 197 (1958); Minpeco S.A. v. Commodity Servs., Inc., 116 F.R.D. 517 (S.D.N.Y. 1987).

197. *Compare, e.g.*, Boureslan v. Aramco, 857 F.2d 1014 (5th Cir.), *on reh'g en banc*, 58 U.S.L.W. 2468 (5th Cir. Feb. 20, 1990) (No. 87-2206) *with* Bryant v. International School Servs., Inc., 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982). *See generally* McNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989). In response to the courts' conclusion that Congress did not intend for the Age Discrimination in Employment Act of 1986, 29 U.S.C. §§ 621-634 (Supp. V 1987), to apply extraterritorially, Congress amended the act to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." *Id.* § 630(f); *cf., e.g.*, Cleary v. United States Lines, Inc., 728 F.2d 607 (3d Cir. 1984). Other federal labor statutes explicitly or apparently are limited in their territorial application. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 213(f) (1982); Occupational Safety and Health Act, 29 U.S.C. §§ 652(7), 653(a) (1982); Davis-Bacon Act, 40 U.S.C. 276a(a) (1982 & Supp. V 1987).

198. *See* Note, *supra* note 192, at 1312-16.

199. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608 n.12 (9th Cir. 1976).

tially issues of comity seems to tilt the analysis in favor of the foreign state interest.[200]

The question remains whether comity and the values it represents are in *any* meaningful sense either "law" or an authoritative algorithm for formulating "law." The two Restatements of Foreign Relations Law have contributed to the tenacity of this question. The Restatement (Second) of 1965, for example, declared that each state that faces an international conflict of jurisdiction is "required by international law to consider, in good faith, moderating the exercise" of its jurisdiction in the light of multiple factors including nationality, territoriality, and the vital national interests of each state.[201] The Restatement (Third) of 1986 transforms the good faith obligation to "consider moderat[ion]" into an apparent prohibition on any exercise of jurisdiction that would be "unreasonable" under all the relevant circumstances, which include but are not limited to the earlier factors.[202]

Both Restatements purport to restate international law,[203] but this common claim, controversial at the time the Restatement (Third) was adopted formally,[204] has provoked criticism. In application, the Restatement (Second) failed to offer a "global frame of reference" and, therefore, inadequately respected the systemic, international interests in predictable and stable standards for the resolution of jurisdictional disputes.[205] It tended to favor parochialism[206] and did not reflect the prac-

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200. *See, e.g., Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 522. In this respect, the jurisdiction/comity polarity in determining the extraterritorial applicability of United States law corresponds with the tension between fairness and power in assessing personal jurisdiction within the states of the union. *See, e.g.*, Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987); Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849 (1989).

201. RESTATEMENT (SECOND), *supra* note 5, § 40.

202. RESTATEMENT (THIRD), *supra* note 3, § 403(1). Arguably the Restatement (Third) obliges states in conflict only to "evaluate" their respective interests: "[A] state should defer to the other state if that state's interest is clearly greater." *Id.* § 403(3). By its terms, however, this obligation in paragraph 3 only arises "[w]hen it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity," and therefore does not vitiate the prohibition in paragraph 1 against unreasonable exercises of jurisdiction. *Id.*

203. The Restatement (Second) "represent[ed] the opinion of the American Law Institute as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law." RESTATEMENT (SECOND), *supra* note 5, at xii. The Restatement (Third) changed this reference from an "international" tribunal to an "impartial" tribunal. RESTATEMENT (THIRD), *supra* note 3, at 3. The commentary to § 403 declares that reasonableness "has emerged as a principle of international law." *Id.* § 403 comment a.

204. *See* AM. LAW INST., PROCEEDINGS OF THE 63RD ANNUAL MEETING 94-108 (1986); Maier, *supra* note 135, at 467-69.

205. Maier, *supra* note 185, at 295.

206. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 205-06 (1984).

tice of states.[207] The modern reasonableness test, to the extent that it is different, has been hailed as progress of a sort,[208] but not necessarily as an accurate statement of international jurisdictional obligations. To the contrary, the Restatement (Third) has been criticized precisely because it seems to exceed precedent and practice both in the United States and abroad.[209]

Of course, this failure of the Restatements does not by itself imply that international law imposes no limits on a state's jurisdiction,[210] and there have been efforts to bring established and obligatory norms, like noninterference or the sovereign equality of states, into the jurisdictional analysis.[211] Some commentators have suggested principles to

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207. Mann, *The Doctrine of International Jurisdiction Revisited*, 186 RECUEIL DES COURS 9, 20 (1984) [hereinafter Mann, *Jurisdiction Revisited*]; *see also* Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1 (1964) [hereinafter Mann, *Jurisdiction*].

208. *See, e.g.*, Maier, *supra* note 185.

209. The principal domestic authority on which the Restatement (Third) rests its approach is Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), but the *Timberlane* court explicitly noted that its approach was not defined or required by international law. Nor does state practice unequivocally support the result or the analysis in *Timberlane*, not least because it seems to reserve a unilateral power for domestic courts to assess the public policy interests of foreign sovereign states. *See* Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 AM. J. INT'L L. 783, 784-86, 802 (1984); Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487, 488-89, 502-03 (1985). Nor have the domestic courts invariably endorsed a reasonableness test as a part of international law. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 952 (D.C. Cir. 1984) (stating that "[t]here is . . . no rule of international law holding that a 'more reasonable' assertion of jurisdiction mandatorily displaces a 'less reasonable' assertion" (footnote omitted)); *accord* AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148 (2d Cir. 1984).

210. Many commentators have argued that international law imposes some limitations on a state's jurisdiction to prescribe. *See, e.g.*, 3 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1965 (1935); Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 315, 329 (1979); Meessen, *International Law Limitations on State Jurisdiction*, in EXTRATERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO (C. Olmstead ed. 1984); Nussbaum, *Rise and Decline of the Law of Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189, 199 (1942).

211. *See, e.g.*, E. NEREP, EXTRATERRITORIAL CONTROL OF COMPETITION UNDER INTERNATIONAL LAW 551-55 (1983); L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 643-44 (1973); Gerber, *supra* note 206; Mann, *Jurisdiction Revisited*, *supra* note 207, at 47; Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 AM. J. INT'L L. 783, 784 (1984). Professor Gerber, for example, argues that the Supreme Court's comity analysis in Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522 (1987), "is implicitly based on concepts of customary international law. . . . To assess whether particular action is intrusive, . . . one must determine the sphere of protection to which the state is entitled, and this sphere of protection is established by international law." Gerber, *International Discovery After Aerospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521, 530-31 (1988).

Not all commentators are convinced that the norm of noninterference is meaningful in this context. *See, e.g.*, Abbott, *Collective Goods, Mobile Resources, and Extraterritorial Trade Controls*, 50 LAW & CONTEMP. PROBS. 117, 141 (Summer 1987). For an analysis of the suggestion that the norm against intervention has not survived the Cold War intact, see Schwenninger, *The 1980's: New Doctrines of Intervention or New Norms of Nonintervention?*, 33 RUTGERS L. REV. 423 (1981).

guide the jurisdictional inquiry, which might pass muster as customary obligations.[212] Even constitutional principles have been offered to resolve international conflicts of jurisdiction.[213] Each of these perspectives, however, encounters an overarching ambiguity in the international law of jurisdiction, namely, whether the rights implicit in the recognized categories of prescriptive jurisdiction[214] can be transformed into limitations on the exercise of such power. On one hand, it might be said that the right of each state to exercise prescriptive jurisdiction is limited necessarily by the equal correlative rights of all other states. This argument provides a plausible account for the pattern of protest engendered by aggressive exercises of jurisdiction by the United States,[215] the promulgation of foreign blocking statutes and antisuit injunctions,[216] the general eschewing of similar policies by other states,[217] and the pattern of treaty arrangements to resolve jurisdictional disputes.[218]

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212. The best analysis along these lines is Maier, *supra* note 185.

213. Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11 (Summer 1987).

214. RESTATEMENT (THIRD), *supra* note 3, § 402(1) (territorial jurisdiction); *id.* § 402(2) (nationality jurisdiction); *id.* § 402(3) (protective jurisdiction); *id.* § 404 (universal jurisdiction). The increasing applicability of the passive personality principle in United States law is noted in *id.* § 402 reporter's note 3.

215. *See, e.g.*, 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 101 (1981); *European Communities, Comments on the U.S. Regulations Concerning Trade with U.S.S.R.*, 21 INT'L LEGAL MATERIALS 891 (1982); Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980).

216. Gerber, *supra* note 206, at 188, 219-20.

217. *See, e.g.*, Vitta, *The Impact in Europe of the American "Conflicts Revolution,"* 30 AM. J. COMP. L. 1, 2-3 (1982).

218. *See, e.g.*, Memorandum of Understanding between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, *reprinted in* 23 INT'L LEGAL MATERIALS 275 (1984); *see also* The United States-Switzerland Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302. Similar bilateral treaties have been concluded between the United States and Italy, the Netherlands, and Turkey. Multilateral efforts to define principles and procedures to resolve jurisdictional disputes also have been undertaken. *See, e.g.*, The Hague Convention on The Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, *construed* in Societe Nationale Industrielle Aerospatialle v. United States Dist. Ct., 482 U.S. 522 (1987).

On the relevance of treaties in the creation of customary norms, see Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicar. v. U. S.), 1986 I.C.J. 4, 97, 98-100 (Merits Phase, June 27, 1986); Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, 29-30 (Merits Phase, June 3, 1985); North Sea Continental Shelf Cases (FRG v. Den., FRG v. Neth.), 1969 I.C.J. 4, 37-46.

The scholarly debate continues on the circumstances under which treaties can generate customary law. *See* M. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 183-98 (1985); Akehurst, *Custom as a Source of International Law*, [1974-1975] BRIT. Y.B. INT'L L. 1, 42-52; Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25-102 (1970); D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L L. 459 (1988); Weisburd, *supra* note 16.

On the other hand, a traditional strand of international legal theory undermines the inference from these data that comity operates as an *obligatory* prohibition on the extraterritorial application of statutes or on all other offensive forms of prescriptive jurisdiction. A standard reading of the seminal *Lotus* case[219] requires the party asserting the limitation on the independence of states to show that states forego a form of jurisdiction, or protest its exercise, out of a sense of legal obligation.[220] In one famously opaque passage, the Permanent Court of International Justice stated:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[221]

Given the arguably mixed pattern of responses to United States jurisdictional claims,[222] Professor Richard Falk's judgment of twenty-five years ago—that "the prohibitive impact of international law upon the discretion of a state to limit its legal competence is marginal"[223]—may remain valid. Comity, in this view, would remain a characteristic of a process by which international legal norms might emerge but not be a rule of law or even a source of rules of law. Indeed, in this perspective it is possible to reject the customary legal status of a practice precisely on the ground that it reflects comity, and not *opinio juris* or legal

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219. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A.) No. 9.

220. *Id.* at 28. The court stated:

> Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . . it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on [states'] being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty;

Id. For contrasting assessments of the contemporary relevance of the *Lotus* decision, compare Mann, *Jurisdiction*, *supra* note 207, at 33-35, with Kuyper, *European Community Law and Extraterritoriality: Some Trends and New Developments*, 33 INT'L & COMP. L.Q. 1013, 1014 (1984), and Weil, *International Law Limitations on State Jurisdiction*, in EXTRATERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 32-33 (C. Olmstead ed. 1984).

221. *S.S. Lotus*, 1927 P.C.I.J. at 19.

222. Some states have adopted United States jurisdictional policies, even after objecting to them. *See* Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983); Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, 50 LAW. & CONTEMP. PROBS. 39, 40-1 (Summer 1987).

223. R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 39 (1964). Even those who argue that the reasonableness test in the Restatement (Third) expresses international law have difficulty articulating the substance of the putative norm and may reduce it to a wholly procedural or remedial status. *See* Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 LAW. & CONTEMP. PROBS. 47, 59-60, 68-69 (Summer 1987).

obligation.[224]

But these controversies about the legal status of the comity doctrine, and more generally about the limits imposed by international law on a nation's jurisdiction, should not obscure a simple and significant truth. Despite the conceptual difficulties, courts typically have viewed *Charming Betsy*, with its injunction to interpret acts of Congress consistently with international *law*, as a rebuttable directive to limit the extraterritorial application of domestic statutes. Comity is treated as though it were law. This treatment is remarkable if for no other reason than its departure from the traditional standard of proving the existence and content of customary norms.[225] But it also suggests that the more defensible application of the *Charming Betsy* principle lies in more settled matters, outside the disputed context of comity, choice-of-law, jurisdiction, and extraterritoriality.

3. The Courts' Endorsement of Nonjurisdictional Interpretive Uses of International Law

Perhaps the most important irony in the modern treatment of this ancient case is that although courts generally may view the *Charming Betsy* principle as the exemplar of comity analysis, recent decisions of the Supreme Court establish that such an interpretation radically un-

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224. *See* A. D'AMATO, *supra* note 18, at 84. Ultimately, the ambiguous status of comity may simply reflect the power of formulation: comity as an obligation to "think twice" or to consult before acting or to weigh the community's interests in an effective legal system may enjoy a different legal status from comity as an obligation not to exercise jurisdiction in well-defined circumstances. Judge Fitzmaurice recognized this difference in dicta appearing in his separate opinion in Barcelona Traction, Light & Power Company (Belg. v. Spain), 1970 I.C.J. Rep. 3.

> It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction. . . . It does however . . . involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.

Id. at 105 (Fitzmaurice, J., dissenting). A similar distinction appears in 2 E. NEREP, EXTRATERRITORIAL CONTROL OF COMPETITION UNDER INTERNATIONAL LAW 558 (1983) (distinguishing the "weighing of state interests" as a process "compelled by international customary law," from the "weighing of state interests standard in and of itself" as a substantive rule of international law). The ambiguity also may substantiate the imprudence of relying on judicial resolutions of disputes that ultimately reflect the self-conception and self-interest of the United States, foreign states, and possibly the community of nations as well. It is tempting to leave such issues to diplomatic adjustment rather than to expect courts, operating in the realm of law and principle, to assess conflicting sovereign interests. Durack, *Australia, Conflicts and Comity*, in ACT OF STATE AND EXTRATERRITORIAL REACH: PROBLEMS OF LAW AND POLICY 41, 48 (J. Lacey ed. 1983); Juenger, *supra* note 222, at 46 (preferring "soft," nonjudicial approaches to resolving jurisdictional conflicts); Maier, *supra* note 98, at 581-82.

225. *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-63 (1820); Filartiga v. Pena-Irala, 630 F.2d 876, 880-85 (2d Cir. 1980). The unsettled customary environment for comity-based jurisdictional issues has been regulated to some extent by treaties. *See supra* note 218.

derstates the potential impact of that case. In particular, *Weinberger v. Rossi*[226] and *INS v. Cardoza-Fonseca*[227] suggest a broad endorsement of international principle in the interpretation of statutes.

In *Weinberger* the Court addressed an apparent conflict between an executive agreement, which gave local nationals preference in employment on United States military bases in the Philippines, and a subsequent statute, which prohibited employment discrimination against United States citizens by the military unless permitted by "treaty." The narrow interpretive issue was whether the word "treaty" as used in the statute included only those agreements within the constitutional treaty power[228] or if it extended to executive agreements as well. The narrowest articulation of the Court's holding is that the word "treaty" does include such agreements, a conclusion as to which international law itself is virtually silent.[229] The statute was construed to preserve the obligation expressed in the executive agreement.

This result is superficially congruent with that in *Lauritzen* and *McCulloch*: some international consideration limited the applicability of a domestic statutory regime. But as a reaffirmation of the relevance of international law in the construction of statutes, *Weinberger v. Rossi* is considerably more significant. The Court noted that thirteen executive agreements, each providing for preferential hiring of local nationals, were in effect at the time the statute was enacted, and it was unwilling to infer that Congress would repudiate those agreements sub silentio: "We think that some affirmative expression of congressional intent to abrogate the United States' international obligations is required in order to construe the word 'treaty' in [the statute] as meaning only Art. II treaties."[230] The Court did not think that Congress was powerless to repudiate these agreements as a constitutional matter had it chosen to do so. Rather, the Court recognized that the statute, read restrictively to mean only formal treaties, might compromise the foreign relations of the United States by repudiating existing agreements through implication. The Court considered itself unauthorized to declare the abrogation of those agreements in the absence of a clear legislative statement to that effect.

Plainly, the international norms preserved in *Weinberger* were neither jurisdictional in content nor maritime in context. Unlike the law-of-the-flag principle in *Lauritzen* and *McCulloch*, the respect for

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226. 456 U.S. 25 (1982).
227. 480 U.S. 421 (1987).
228. U.S. CONST. art. II, § 2, cl. 2.
229. J. BRIERLY, THE LAW OF NATIONS 317 (6th ed. 1963); 1 L. OPPENHEIM, INTERNATIONAL LAW 898 (H. Lanterpacht ed. 1955).
230. *Weinberger*, 456 U.S. at 32.

international norms in *Weinberger* did not allocate prescriptive authority among sovereigns along territorial lines. Rather, the case announced a principle of employment law that accommodated both a statute and a limited number of international agreements, maximizing the respective scope of operation for each body of law. At its most abstract, the case implemented a flexible version of the international standard that states are bound by their promises, *pacta sunt servanda*, in the form of a clear statement requirement: international agreements will be honored in the construction of statutes, unless Congress provides a clear statement of its repudiatory intent.

It is critical to observe that the international standard respected in *Weinberger* was not the territorial comity at work in *Lauritzen* and *McCulloch*. The statute involved did not implement the international agreements, and the agreements themselves, though obviously the product of accommodation, did not announce legal principles of interstate accommodation for the courts to apply in resolving conflicts of jurisdiction. *Weinberger* suggests instead that international obligations are inertial; they subsist until expressly contradicted by legislation,[231] and that these obligations exert a "gravitational force"[232] that is neither merely territorial nor limited to the statutes which implement them.

Standing alone, *Weinberger* might be a weak authority for an interpretive mandate requiring substantive as well as jurisdictional reference to international principles. But *Weinberger* seems representative of the Supreme Court's modern conception of the *Charming Betsy* principle. *INS v. Cardoza-Fonseca*[233] reaffirms the propriety of consulting nonjurisdictional, international standards in the interpretation of domestic statutes.

In *Cardoza-Fonseca* the Court addressed the Refugee Act of 1980,[234] which established a statutory basis for the granting of asylum in the United States in accordance with international refugee law. For the definition of "refugee" Congress had turned explicitly to the 1951 Convention relating to the Status of Refugees[235] and its 1967 Proto-

231. *See* Clark v. Allen, 331 U.S. 503, 512 (1947) (emphasizing that the court will "not readily assume" that Congress "had a purpose to abrogate" treaty obligations).

232. *See supra* note 173.

233. 480 U.S. 421 (1987).

234. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.). Before the Act, the only provision of United States law that specifically addressed asylum for refugees appeared in the Attorney General's administrative regulations. 8 C.F.R. § 108.1 (1976).

235. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The United States became a party to the Convention in 1967 by acceding to the United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

col,[236] to which the United States was a party. At issue in *Cardoza-Fonseca* was the meaning of the term "well-founded fear of persecution," which is used to define "refugee" in the 1951 Convention.[237] The specific question in *Cardoza-Fonseca* was what burden of proof this international definition implied: what must the asylum applicant prove to acquire refugee status under United States law?

The government interpreted the "well-founded fear" criterion to require a showing by each individual applicant that persecution was more likely than not. Under this clear probability standard, an individual's fear could be "well-founded" only if the chances for persecution were better than even or amounted to a "realistic likelihood." The Court rejected the government's strict standard, concluding that the international term of art, "well-founded fear of persecution," excuses an asylum applicant from proving that the chances of persecution are more likely than not. The Court evidently concluded that a fear can be well-founded long before the feared event becomes likely.[238]

The Court resolved the issue in *Cardoza-Fonseca* in part by reference to the plain language of the statute: Congress deliberately used the international term of art in defining the appropriate asylum standard. A consistent refrain in the legislative history of the Refugee Act is Congress's understanding that it finally was bringing United States law into conformity with the internationally accepted definition of the term "refugee."[239]

The Court even went beyond this observation, relying on international evidence, and especially the *travaux preparatoires* of the 1951 Convention and its subsequent interpretation by the Office of the United Nations High Commissioner for Refugees (UNHCR).[240] Consistently with the *travaux*, the UNHCR's *Handbook* emphasized that the subjective fear of the applicant, not the hypothetical likelihood of future events, is the central element of the refugee standard. Although the UNHCR's *Handbook* does not purport to state binding principles of

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236. 1967 Protocol, *supra* note 235.

237. The Convention, liberalized to some extent by the 1967 Protocol, defines a "refugee" as a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." Refugee Convention, *supra* note 235, art. 1. In the Refugee Act, Congress tracked this international language and made clear that the Attorney General in his or her discretion could grant asylum to any individual satisfying these criteria. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102 (codified as amended at 8 U.S.C. § 1101(a)(42) (1988)).

238. *Cardoza-Fonseca*, 480 U.S. at 431 (quoting A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).

239. *Id.* at 436-41.

240. UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979).

asylum law, it is the most authoritative and articulated interpretation of the Convention and Protocol at the international plane.[241]

The Court thus resolved an issue not addressed in the Convention itself, and its resolution was guided by the common understanding and practice of states as interpreted by the UNHCR.[242] In other words, the statute was interpreted not in accordance with jurisdictional norms but under substantive principles of international refugee law. Although *Charming Betsy* was not cited in the opinion, its directive that international and domestic law be reconciled when "fairly possible" was plainly in operation, and *Cardoza-Fonseca* therefore cannot be squared with any view of the *Charming Betsy* principle that limits its application to cases in which United States jurisdiction to prescribe overlaps that of another state. It accommodates no competing jurisdictional claim of another state. *Cardoza-Fonseca*, therefore, cannot be considered an application of comity, unless that term is freed of its contemporary connotation and equated with international law generally.[243]

Of course, *Cardoza-Fonseca* and *Weinberger* might be interpreted as justifying the substantive, nonjurisdictional use of international law in the construction of statutes only when a treaty provides the relevant standard or when the statute in question implements or incorporates a treaty obligation of the United States. The substantive use of the *Charming Betsy* principle would be limited in this view to statutes linked by congressional action to international norms. The "law of nations" that guides the interpretation of statutes under *Charming Betsy* would refer only to that narrow portion of customary law which estab-

241. United States courts and the Board of Immigration Appeals periodically have turned to the *Handbook* for guidance. *See, e.g.*, Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985); Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984); McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); Ellis v. Ferro, 549 F. Supp. 428 (W.D.N.Y. 1982); *In re* Vigil, Interim Dec. 3050 (B.I.A. Mar. 17, 1988) (No. A26787128). *Cardoza-Fonseca* marks the first time that the United States Supreme Court has placed its approval on the *Handbook*, significantly enhancing the relevance of those guidelines to future asylum adjudications.

242. In particular, the Court traced the international definition of "refugee" to the 1946 Constitution of the International Refugee Organization (IRO). Whether a refugee or displaced person was included under that Constitution depended on an evaluation of the validity of that person's objections to returning to his or her country of origin. One of the valid objections included "fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinion." *Cardoza-Fonseca*, 480 U.S. at 437. The *travaux* of the subsequent 1951 Convention made clear that its framers intended to adopt the prior IRO standard, a point of near-dispositive significance in *Cardoza-Fonseca*, because the IRO merely required that an applicant for refugee status show a "plausible and coherent account of why he fears persecution." *Id.* at 438 n.20. Certainly nothing in the Convention or its history required an applicant for refugee status to show that persecution is more likely than not. *See* Cox, *"Well-Founded Fear of Being Persecuted:" The Sources and Application of a Criterion of Refugee Status*, 10 BROOKLYN J. INT'L L. 333, 338-40, & n.29 (1984).

243. In his general analysis of the "public values" approach to statutory interpretation, Professor Eskridge makes this mistake. *See* Eskridge, *supra* note 54, at 1073 n.303.

lishes jurisdictional competence.[244]

But these limitations, though initially plausible, are not persuasive. *Cardoza-Fonseca* undermines the interpretive relevance of the distinction between treaty and customary norms. Despite the disparate constitutional settings in which treaty and custom operate in the United States,[245] the Court's analysis in *Cardoza-Fonseca* cannot be confined usefully in one category or the other. A treaty provided the dominant framework for the Court's reasoning and for Congress's prior political act of conforming domestic law to international law. But equally plainly, the congressional commitment to international standards appeared only in legislative history and not in any provision expressly implementing the Protocol,[246] and the Court was not confined to the "plain language" of the treaty or its semantic penumbra. To the contrary, the Court consciously consulted materials that are not included in the treaty, including predecessor conventions and an interpretation by the UNHCR that followed the Refugee Convention by almost thirty years and that described itself as nonbinding. Thus, in interpreting the statute, the Court consulted authoritative forms of evidence that were neither conventional nor customary. The principles that prevailed in *Cardoza-Fonseca* arose out of a *customary* interpretation of treaty obligations: the decision suggests that a common understanding of the treaty language had arisen as to the burden of proof, which a party can be expected to honor[247] in the absence of a limiting prior understanding or an explicit repudiation as allowed by the treaty itself.[248]

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244. *See* Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 836-37 (1989).

245. *See* Friedlander, *Should the United States Constitution's Treaty-Making Power Be Used as the Basis for Enactment of Domestic Legislation?*, 18 CASE W. RES. J. INT'L L. 267 (1986); Trimble, *supra* note 6.

246. Even the legislative history of the Refugee Act is ambiguous. *See infra* Part IV(B)(1). Before the Refugee Act, tbe Refugee Protocol constrained the interpretation of the Attorney General's discretion to withhold deportation. *See* Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977) (suggesting that the interpretive significance of the treaty was not dependent upon the existence of implementing legislation); Kasbani v. INS, 547 F.2d 376 (7th Cir. 1977). *Contra* Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982) (recognizing that provisions of the Protocol are not a source of individually enforceable rights until implemented by Congress); *but see* INS v. Stevic, 467 U.S. 407, n.22 (1984) (explaining and resolving the difference between domestic statutory law and the Protocol).

247. Whether nonparties also would be bound by that common understanding was not before the Court in *Cardoza-Fonseca*. The impact of the Court's analytical approach on other questions of asylum law is explored below. *See infra* Part IV(B)(1).

248. This notion that the distinction between customary and conventional international law is of limited value in the interpretation of statutes bas a tolerable analogy in the history of federal common law. As Professor Martha Field has demonstrated, at a time when United States courts were convinced that "[t]he common law could be made a part of our federal system only by legislative adoption," Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834), the process of statutory interpretation frequently allowed the incorporation of common-law standards even without express

This evidentiary practice is not surprising: a conventional or customary norm may be relevant in statutory interpretation even when there is no claim that the statute in question implements or executes that obligation. That is, even when there is no indication that Congress intends to harmonize domestic law with international standards, the statute will be so construed. In *Rodriguez-Fernandez v. Wilkinson*,[249] for example, the Tenth Circuit interpreted the statutory detention and exclusion powers of the Attorney General in light of the customary norm prohibiting prolonged and arbitrary detention, declaring that "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."[250] The evidence for the court's conclusion was the Universal Declaration of Human Rights,[251] a declaration of the United Nations General Assembly and the American Convention on Human Rights,[252] which had

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"legislative adoption." Field, *supra* note 45, at 885 n.5, 894 n.50. The line between statutory construction and common lawmaking gradually weakened, in spite of the mutually exclusive ideals of legislative supremacy on one hand and the overriding power of the common law on the other. As noted by the Supreme Court, "The code of constitutional and statutory construction which . . . is gradually formed by the judgments of this court . . . has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority." Smith v. Alabama, 124 U.S. 465, 478-79 (1888); *see also* P. BATOR, P. MISKHIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 770 (2d ed. 1973). The analytical costs are high if statutes and the common law are kept hermetically separate. Even when their very different political origins and degrees of textuality are acknowledged, these two modes of law shade into one another in the act of statutory interpretation. *See* J. GRAY, THE NATURE AND SOURCES OF THE LAW § 366, at 162 (1909) (stating that "statutes do not interpret themselves; their meaning is declared by the courts, and it is with the meaning declared by the courts, and no other meaning, that they are imposed on the community as Law" (emphasis omitted)). For a postrealist and positivistic assessment of Gray, see J. HURST, DEALING WITH STATUTES 32-33 (1982).

Without venturing further than necessary into the controversy surrounding international law as federal common law, it seems equally clear that customary and conventional law exhibit a similar interpenetration: a treaty's meaning can be constrained by uniform state practice under the treaty so long as that practice is combined with *opinio juris*.

249. 654 F.2d 1382 (10th Cir. 1981).

250. *Id.* at 1388. The Tenth Circuit noted that principles of international law had been used historically to solidify the plenary power of Congress over the exclusion and deportation of aliens, and suggested that symmetry required similar resort to international principles to define fairness. *Id.* (citing Fong Yue Ting v. United States, 149 U.S. 698 (1893)). The role of international law in the interpretation of constitutional norms like fairness is beyond the scope of this Article, except to note that a similar role in the interpretation of statutes would seem proper.

251. Universal Declaration of Human Rights, 3 U.N. GAOR, c. 3 Annexes (Agenda Item 58) at 535, 536-41, U.N. Doc. A/177 (1948). Though not binding at its inception, the Universal Declaration of Human Rights is regarded generally as an authoritative declaration of states' human rights obligations under the United Nations Charter and customary international law. *See* Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 16-17 (1982) (asserting that "[t]he Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations").

252. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, OEA/Ser.

been signed but not ratified by the United States. It must be emphasized that nothing in the immigration statutes implemented those obligations.[253] In the court's view, however, and consistent with *Charming Betsy*, statutes and substantive customary norms will not be treated as mutually exclusive unless no other construction is fairly possible.

This inclusive approach to international materials contrasts with the "pathological" view[254] in this way: The latter would note conclusively that United Nations declarations do not create rights enforceable by individuals and that this rule is true a fortiori of signed, unratified treaties of the United States, which might not be self-executing in any event. Even if these instruments were normatively significant, in this pathological view the rights which they create could be trumped by executive and congressional power over aliens. The failure of Congress to implement a non-self-executing treaty would be fatal to a domestic claim under that treaty, and United Nations declarations and unratified treaties would have no evidentiary weight. Consistent with this approach, the holding in *Rodriguez-Fernandez* has been rejected specifically by other courts that frame the issue in the stark terms of a contest between international law and congressional or executive supremacy.[255]

But framing the issue as a contest inverts the proper order of analysis. Under *Charming Betsy*, courts should first attempt to read the statute conformably with international law, as in *Rodriguez-Fernandez*,

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K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, OAS T. S. No. 36 (1970). The American Convention on Human Rights was adopted by the Organization of American States in 1969 and entered into force in 1978.

253. By 1986, Congress had "explicitly rejected a provision for indefinite detention in the Immigration Act on at least four occasions." Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 379 n.176 (1986). There was no explicit incorporation of the norm against indefinite detention in the statutes at issue in *Rodriguez-Fernandez*.

254. *See supra* note 24.

255. *See, e.g.*, Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986) (finding that the detention decision of Cabinet official constitutes a controlling act that displaces putative norms of international law); *accord* Singh v. Nelson, 623 F. Supp. 545 (S.D.N.Y. 1985); Ishtyaq v. Nelson, 627 F. Supp. 13 (E.D.N.Y. 1983). The Supreme Court's remand in Jean v. Nelson, 472 U.S. 846 (1985), provided no authoritative resolution of the issue.

Professor Lobel has demonstrated that this view of executive power is an unprincipled departure from precedent, which generally has viewed the executive foreign affairs power as inherent in, and therefore limited by, international law. *See* Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1070-74 (1986). *Contra* Weisburd, *supra* note 124. This debate appears to be an intramural one in the pathological mode: the courts in *Garcia-Mir*, *Ishtyaq*, and *Singh* approached the issue as one of congressional or executive power to trump international law. The admitted power to do so preempted the effort to read statutes, executive actions, and international law as harmoniously as possible. Insisting on a clear congressional repudiation of the norm, or holding that executive power to violate the implied will of Congress was at its lowest ebb, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring), would have been more consistent with *Charming Betsy*.

and give international undertakings such as signed, unratified treaties and United Nations declarations whatever evidentiary weight they deserve in the overall assessment of state practice and *opinio juris*. If after this assessment the norm is sufficiently obligatory and defined so as to be in irreducible conflict with the statute at issue, only then is it proper to apply the supremacy axioms, including *inter alia* the latter-in-time rule and the techniques of nonjusticiability. Though the applicability and meaning of the norm against indefinite detention or any other putative norm may be disputed, foregoing such an analysis altogether takes a particularly narrow and ahistorical view of the public values at work in the *Charming Betsy* principle. That is, the inverted order, to the extent that it assumes a world in which international law is either controlling or irrelevant, gives intermediate forms of state expression, such as the act of the executive in signing a treaty or voting for a United Nations resolution and the congressional action of affirming even abstract international standards, inadequate weight. The inverted order, therefore, serves neither the monist value of respect for international norms nor the dualist value of respect for the diplomatic actions of the political branches.[256]

Clearly, recent decisions do not view the *Charming Betsy* principle as a vehicle only for the domestic application of international considerations of comity. And these examples, in which substantive norms of international law have channelled, if not determined, the interpretation of federal legislation, can be multiplied to include interpretations of federal legislation such as the Communications Act of 1934,[257] the Federal Tort Claims Act,[258] and to some extent Title VII of the Civil Rights

256. *See infra* Part IV(C).

257. In Reston v. FCC, 492 F. Supp. 697 (D.D.C. 1980), plaintiff brought an action under the Freedom of Information Act, 5 U.S.C. § 552 1982), to compel the disclosure of tapes of certain radio transmissions made from Guyana to the United States. The FCC refused to make the tapes public, citing § 605 of the Communications Act of 1934, as amended, 5 U.S.C. § 605 (1982), which barred the disclosure of amateur broadcasts not intended for use by the general public. Finding an ambiguity in § 605, the court consulted the legislative history of the Act, and concluded tbat disclosure on the facts presented was prohibited. *Reston*, 492 F. Supp. at 703-07. Citing *Charming Betsy*, the court then reinforced its conclusion, noting the treaty obligation of the United States not to divulge, "without authorization, . . . information obtained by the interception of radio communications." *Id.* at 707; *see* International Telecommunications Convention of Malaga-Torremolinos, Oct. 25, 1973, 28 U.S.T. 2495, T.I.A.S. 8572, art. 82. The importance of confidentiality was reinforced in the International Radio Regulations, Dec. 21, 1959, 12 U.S.T. 2377, T.I.A.S. No. 4893, art. 17. The government's interpretation of the Communications Act conformed to this international obligation.

258. 28 U.S.C. §§ 1346(b), 2671-2680 (1982). The Federal Tort Claims Act constitutes a waiver of sovereign immunity by the United States to specific categories of claims but does not apply to "any claim arising in a foreign country." *Id.* § 2680(k). In Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984), the court was required to determine whether Antarctica qualified as a "foreign country." The district court, noting that the position of the United States government was

Act of 1964.[259] As in *Rodriguez-Fernandez*, none of the statutes in these cases "implemented" the treaty or the customary norm that was invoked by the court in the act of interpretation, and extraterritorial jurisdiction was not the dispositive issue. Plainly, though conflicts and comity remain a primary field of operation for the *Charming Betsy* principle, its impact cannot be limited to those concerns.

In summary then, the *Charming Betsy* principle, under which United States courts are directed to interpret statutes consistently with international law, has come to include both customary law and treaties in its reference to "international law."[260] The relevance of a treaty in the interpretation of a statute is not limited necessarily to those cases in which the statute implements the treaty. Even when an apparently implementing statute is before the court, as in *Cardoza-Fonseca*, there may be a customary understanding of the conventional norm that channels the interpretation of text. In this narrow but significant connection, the *Charming Betsy* principle undermines the traditional distinction between customary and conventional law. Finally, the principle is not limited to jurisdictional considerations or to accommodating overlaps in nations' respective spheres of legislative competence. In-

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"somewhat equivocal," Beattie v. United States, 592 F. Supp. 780, 781 n.3 (D.D.C.), *aff'd*, 756 F.2d 91 (D.C. Cir. 1984), consulted the Antarctica Treaty, *signed on* Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. Under article IV of that treaty, according to the court, the contracting parties agreed not to assert any territorial claim in Antarctica or to establish rights of sovereignty there, but their existing claims were not extinguished. On that and other evidence, the district court concluded that Antarctica was not a "foreign country" within the meaning of the Federal Tort Claims Act. *Beattie*, 592 F. Supp. at 781. That conclusion was affirmed on appeal, *Beattie*, 756 F. 2d at 106, over the dissent of Judge Scalia who interpreted the treaty and United States claims on the continent differently. *Id.* (Scalia, J., dissenting).

259. 42 U.S.C. §§ 1981-2000e(17) (1982 & Supp. V 1987). In Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982), the Supreme Court held that American subsidiaries of Japanese corporations were subject to United States statutes prohibiting discrimination on the basis of national origin. Such companies were not entitled to invoke article VIII(1) of the Treaty of Friendship, Commerce, and Navigation between the United States and Japan, Apr. 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, under which "companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." *Id.*; *see Sumitomo Shoji*, 457 U.S. at 181. The remand of the case makes it clear that American branches of Japanese companies do come within article VIII, requiring additional interpretation of the statute and the treaty. *See* MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989). *See generally* Lewis & Ottley, *Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based upon* Sumitomo Shoji, 44 OHIO ST. L. REV. 45 (1983); Note, *Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 MICH. L. REV. 237 (1984).

260. The Restatement (Third) affirms this conclusion and explicitly combines customary and conventional international law into a unified statement of *Charming Betsy* and its progeny: "Where fairly possible, a United States statute is to he construed so as not to confiict with international law or with an international agreement of the United States." RESTATEMENT (THIRD), *supra* note 3, § 114, at 62.

stead, it operates to inform the substantive interpretation of federal statutes.

IV. Exemplary Approaches to Three Recurring Problems in the Application of the *Charming Betsy* Principle

A. Introduction: Two Easy Cases, Three Riddles

In assessing the substantive impact and utility of the *Charming Betsy* principle, the ground of controversy is bounded by two categories of cases in which the application of that principle has become relatively simple. In one category are those statutes that Congress explicitly crafts to conform to international standards by implementing a treaty obligation of the United States[261] or incorporating a customary norm.[262] These statutes address the full range of substantive matters within the common concern of states, and they obviously can have a considerable commercial and political impact. But they also have an interpretive consequence: the pedigree of the statute, combined with the explicit consent of Congress to be bound by international standards, empowers a court to consult materials outside the four corners of the statute itself. The courts have construed such statutory terms in light of the language of the treaty,[263] or its *travaux preparatoires*, or the subsequent practice of states under the treaty,[264] as well as the traditional indicia of customary international law.[265] Courts and commentators may disagree

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261. The examples of such implementation are too numerous to catalogue here though the range of examples can be suggested. *See, e.g.*, The Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1988) (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3); The Endangered Species Act, 16 U.S.C. §§ 1537a, 1538(c) (1988) (implementing the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 56 Stat. 1354, T.I.A.S. No. 981); The Diplomatic Relations Act, 22 U.S.C. § 254a-e (1988) (implementing the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; The Federal Aviation Act, 49 U.S.C. § 1472(n)(1) (1982 & Supp. V 1987) (referring to crime as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192).

262. For example, the Secretary of State may act to protect a United States flag vessel and its crew, if it is seized by a foreign country on the basis of jurisdictional claims not recognized by the United States or "*exercised in a manner inconsistent with international law* as recognized by the United States." 22 U.S.C. § 1972(1) (1988) (emphasis added). Similarly, the Neutrality Act of 1794, 18 U.S.C. § 960 (1988), specifically was enacted to assure that the United States met its ohligations under the law of nations. *See* United States v. The Three Friends, 166 U.S. 1, 51-53 (1897); *see also* 10 U.S.C. §§ 818, 821 (1988) (incorporating aspects of customary humanitarian law); *id.* § 1651 (criminalizing piracy as defined by the law of nations); 28 U.S.C. § 1350 (1982) (providing jurisdiction over an alien's actions for torts committed in violation of the law of nations).

263. Reed v. Wiser, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

264. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984).

265. Customary law is not necessarily evidenced by anything in a treaty or by subsequent state practice under a treaty. Subsequent state practice may be evidence of a customary under-

about the particular underlying obligation or the scope of the parties' agreement, but few criticize the interpretive license itself. Indeed, as a canon of construction, it has its own line of authority, running through *Charming Betsy*.[266]

Equally simple though doctrinally opposed is that category of statutes in which Congress explicitly and consciously repudiates preexisting international norms. As noted, the courts of the United States generally have accepted the power of Congress to override the requirements of international law and have sustained the domestic validity of such statutes when Congress expresses its intent to do so.[267] Strictly speaking, these cases fall within only a small and relatively settled part of the *Charming Betsy* principle: by hypothesis in each such case it is not "fairly possible" to reconcile the legislation with the law of nations. The more complex directive to accommodate statutes with international norms is not implicated because there is little doubt about how a United States court will rule when Congress by statute deliberately and expressly overrides some aspect of international law.

These opposite abstract categories comprise relatively easy cases in a system of legislative supremacy like that of the United States because they presume congressional consciousness and a clear statutory choice. These cases, however, hardly begin to test the full impact of the *Charming Betsy* principle as a canon of statutory interpretation. That requires an assessment of the hard intermediate cases, including those instances in which Congress's understanding or intent is implicit or inferred. This assessment may happen in a variety of circumstances. For example, the incorporation or the repudiation of international norms

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standing, but it is not included in the traditional indicia catalogued by Justice Horace Gray in The Paquete Habana, 175 U.S. 677 (1900).

266. *See, e.g.*, Moser v. United States, 341 U.S. 41, 45 (1951); Clark v. Allen, 331 U.S. 503 (1947) (construing Trading with the Enemy Act not to impair the right of German national, under preexisting treaty, to inherit property in the United States); United States v. Gue Lim, 176 U.S. 459 (1900); Chew Heong v. United States, 112 U.S. 536, 539-40 (1884) (holding the subsequent immigration statute not to affect the right of a resident alien, under a preexisting treaty, to reenter the United States).

267. South Afr. Airways v. Dole, 817 F.2d 119 (D.C. Cir. 1987) (sustaining and enforcing provision in the Comprehensive Anti-Apartheid Act of 1986 that required the revocation of the treaty-based right of any designee of the South African government to provide air service to the United States); *cf.* Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1989). In its acknowledgement that Congress may not trump international obligations in all instances, the court stated:

> Such basic norms of international law as the proscription against murder and slavery may well . . . restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law.

Id. at 941.

may appear only in the legislative history and not in the statute itself. The admitted inconsistency between the statute and a treaty or a customary norm may appear to be inadvertent or uninformed. Congress may provide that the statute is to be interpreted in light of "laws and treaties" but may not expressly include customary international law. The question will then arise whether this specification of "laws and treaties" should be interpreted as an exercise of Congress's power to override and thereby exclude custom. As shown below, the *Charming Betsy* presumption that statutes comport with international law offers a preliminary approach to these issues.

Other variables complicate the substantive interpretation of domestic statutes in light of international standards. The subject matter of certain statutes naturally may appear to involve international persons or transactions, such as the trade, extradition, or immigration statutes. In contrast, other legislation may appear to be wholly unrelated to international law, such as the bulk of the criminal code, wealth transfer and grant programs, or the bankruptcy law. Courts could limit the applicability of *Charming Betsy* to only statutes with an international dimension, but no categorical rule of "subject matter appropriateness" can be simultaneously helpful and plausible.

Equally important, the *Charming Betsy* principle does not clarify what the law of nations is at a given moment. Apart from the evidentiary problem of proving what international law requires, a putative obligation may have a normative status that is neither entirely binding nor utterly irrelevant. The court may be requested to consider norms that do not fit comfortably into the classical dichotomy of treaties and custom. The United States may have signed but not ratified a particular treaty, and the court will be uncertain what weight, if any, should be given to that agreement in the interpretation of related statutes. The parties may raise issues about which there is theoretical or diplomatic dispute, such as the persistent objector doctrine[268] or the domestic impact of *jus cogens*, the set of peremptory international norms.[269] Even a court committed to giving international law its due under *Charming Betsy* may encounter considerable difficulty determining what "international law" requires in these circumstances.

In summary, three types of exemplary difficulties arise in the application of the *Charming Betsy* principle: the problem of inferred intent, the problem of statutory appropriateness, and the problem of relative

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268. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 459 (1985).

269. *See* Christenson, Jus Cogens: *Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 623-30 (1988).

normativity in international law. As shown below, these problems pose limits but not fatal obstacles for the operation of the canon.

B. The Problem of Inferred Intent

1. Silence, Inconsistency, and Preemption

The essential problem in applying the *Charming Betsy* principle is not determining whether it can operate in the face of congressional silence. That principle has been portrayed as "[t]he plainest evidence that international law has an existence in the federal courts *independent* of acts of Congress."[270] The claim that a statutory ambiguity should be resolved in conformity with international principles is not foreclosed by the failure of Congress to incorporate those principles in the statute itself. A common-law presumption does not require implementation by Congress before it can operate in the courts, and United States jurisprudence is replete with examples of statutory interpretation in light of principles that are not incorporated either implicitly or explicitly by Congress.[271] The essential difficulty is determining when Congress is "silent" in the first place: what inferences can be drawn from an ambiguous legislative history? How explicit must repudiation be?

Charming Betsy is relevant to these inquiries. The presumption of congressional compliance with international law is sufficiently powerful to affect not only the interpretation of ambiguous statutes but the interpretation of ambiguous legislative history as well. In *Cardoza-Fonseca*, for example, the Court found a clear congressional intent in the Refugee Act, but the Court's assurance obscures the fact that Congress actually described its action in different ways at different times. On one hand, as emphasized by the Court, Congress plainly intended finally to bring United States refugee law into conformity with the internationally-accepted definition of the term "refugee" set forth in the 1967 United Nations Refugee Convention and Protocol.[272] Elsewhere in the

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270. Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (emphasis added); *see also* RESTATEMENT (SECOND), *supra* note 5, § 3 comment j (establishing that the relevance of an international norm is not dependent upon its affirmative incorporation by Congress into statutory form).

271. Thus, in The Nereide, 13 U.S. (9 Cranch) 388 (1815), Chief Justice John Marshall stated that, in the absence of legislation, customary international standards would govern the ownership of a vessel seized as prize. *Id.* at 422. Other examples are cited in Eskridge, *supra* note 59, at 1051-55.

272. INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987). The report of the conference committee, for example, stated that the Act incorporated the definition of "refugee" "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." S. REP. No. 590, 96th Cong., 2d Sess. 20 (1980); *see also* H.R. REP. No. 781, 96th Cong., 2d Sess. 19 (1980); S. REP. No. 256, 96th Cong., 1st Sess. 4 (1979); H.R. REP. No. 608, 96th Cong., 1st Sess. 9 (1979).

legislative record, however, Congress expressed its belief that the Refugee Act would not alter the existing standard for asylum.[273] The executive branch, when testifying on the proposal that eventually became the Refugee Act, similarly had noted that "[f]or purposes of asylum, the provisions in this bill do not really change the standards."[274] If the Court had interpreted this history to mean that the pre-1980 practice of the United States was substantively in compliance with the Refugee Convention and the 1967 Protocol, the Court's reliance on the *travaux preparatoires* and the UNHCR *Handbook* would have been irrelevant, and the dissent would have prevailed. The actual result reflects a predisposition to interpret a mixed legislative history to maximize respect for international norms.[275]

Cardoza-Fonseca makes it clear that the intent of Congress to conform domestic law to international standards will justify the courts' resort to treaty-based standards even if nothing in the "plain language" of a statute implements or incorporates that treaty by name. *Cardoza-Fonseca*, 480 U.S. at 436-37. Subsequent decisions under the Refugee Act have used precisely that interpretive technique to articulate rights for asylum applicants well beyond the burden of proof. *See, e.g.*, M.A. A26851062 v. INS, 858 F.2d 210 (4th Cir. 1988) (consulting international understandings, especially the UNHCR *Handbook*, to determine if conscientious objectors in El Salvador may qualify for asylum in the United States), *reh'g granted en banc*, 866 F.2d 660 (1989) ; Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988) (consulting international law to identify rights of asylum applicants, including the right to receive notice of the procedures for applying for asylum).

273. S. REP. No. 256, *supra* note 272, at 9 (stating that "[t]he substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees").

274. *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (statement of David Martin, Department of State). Similarly, in its argument to the Supreme Court in *Cardoza-Fonseca*, the government stressed the administrative continuity in the standards governing the withholding of deportation and asylum, *see, e.g.*, *In re* Dunar, 14 I. & N. Dec. 310 (B.I.A. 1973), an administrative practice of which Congress was presumptively aware when it passed the Refugee Act.

275. Indeed, the *Charming Betsy* principle so favors the perpetuation of international obligations that congressional intent to override them, even when it is crystalline, may be insufficient in the absence of express provisions of repudiation. In United States v. Palestine Liberation Org., 695 F. Supp. 1456 (S.D.N.Y. 1988), for example, Congress undoubtedly was aware that the Antiterrorism Act, 22 U.S.C. §§ 5201-5203 (1988), would place the United States in breach of its prior obligations under the Agreement Between the United States and the United Nations regarding the Headquarters of the United Nations, June 26, 1947, G.A. Res. 169 (II), 61 Stat. 756, T.I.A.S. No. 1676, 11 U.N.T.S. 11. The legislative history was replete with discussions of the potential conflict. *See Palestine Liberation Org.*, 695 F. Supp. at 1460, 1466-71. Ironically, the very constancy of these references created an ambiguity for the court: in the face of such explicit expressions of concern and intent, the legislation itself never made the override explicit. *Id.* at 1469. Therefore the statute did not accomplish what Congress and the parties to the litigation thought was its sole purpose.

The *Palestine Liberation* court's reasoning, though seemingly extreme, is consistent with a line of authority disapproving implicit repeals of conventional obligations. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (acknowledging that "[t]here is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action"); Washington v. Washington State Commercial Passenger Fishing Vessel

Cardoza-Fonseca thus illustrates an important interplay between the interpretive mandate of *Charming Betsy* and the power of Congress to override international law. The presumption of compliance affects the courts' determination of when it is "fairly possible" to reconcile a statutory and an international norm in the first place, and therefore, when the supremacy axioms come into play. The *Charming Betsy* principle is designed to prevent inadvertent violations of international law, and before accepting apparent violations as congressional policy, the court should assure itself that apparent violations were intended. If the violations were inadvertent, the court should interpret the statute sufficiently narrowly to avoid the violation. Thus, a court fully respecting both congressional supremacy and the *Charming Betsy* principle may insist that an attempted legislative override be explicit, comprehensive, and conscious. This approach is not purely textual: a court may recognize a statutory override of international law only when there is both evidence of an intent to override the norm and a text that is irreconcilable with the norm.

In contrast, a court that stresses only the power to repudiate will frame the burden of proof quite differently, giving controlling weight to the fact of textual inconsistency between international law and the statute in question. The court will tend to downplay the *Charming Betsy* principle and stress instead the famous dicta in *The Paquete Habana*:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and *no controlling executive or legislative act* or judicial decision, resort must be had to the customs and usages of civilized nations. . . .[276]

The notion of a "controlling legislative act," when combined with the power of Congress consciously to legislate in violation of international law, has been interpreted to mean that even a superficial inconsistency must be resolved in favor of the statute. This pattern of resolving a

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Ass'n, 443 U.S. 658, 690 (1979) (stating that "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights"). No other court, however, similarly has required a statutory provision to identify and expressly override a particular treaty or customary norm. *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"); Diggs v. Shultz, 470 F.2d 461, 466 (D.C. Cir. 1972) (stating that "no amount of statutory interpretation now can make the Byrd Amendment other than what it was as presented to the Congress, namely, a measure which would make—and was intended to make—the United States a certain treaty violator"), *cert. denied*, 411 U.S. 931 (1973); Farr Man & Co. v. United States, 544 F. Supp. 908, 915 (Ct. Int'l Trade 1982) (interpreting amendment to the Agricultural Adjustment Act as "a demonstrative effort on the part of Congress to continue to provide preferential treatment for certain imports, despite the recognition of the most-favored-nation provisions included in our international treaties").

276. 175 U.S. 677, 700 (emphasis added).

possible conflict implies that courts need not try to reconcile international and statutory norms in the same subject area: the international standards are either superfluous because they are congruent with the domestic statute or they are irrelevant because they are superceded by the domestic statute. This view has led some courts prematurely to reject or suspend international argumentation.

In *American Baptist Churches v. Meese*,[277] for example, the court faced the claim that Salvadoran and Guatemalan aliens in the United States enjoy the right to temporary refuge, a customary[278] right not to be deported until the cessation of armed hostilities and human rights abuses in their homelands. The court opened its analysis with a correct but pathological premise: "Congress is not constitutionally bound to abide by precepts of international law, and may therefore promulgate valid legislation that conflicts with or preempts customary international law."[279] The court then concluded that Congress actually had exercised that preemptive power with respect to the norm of temporary refuge in passing the Refugee Act of 1980.[280] In the court's view, that statute oc-

277. 712 F. Supp. 756 (N.D. Cal. 1989).

278. *See* Helton, *Ecumenical, Municipal, and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 493, 514-17 (1986); Perluss & Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551 (1986) (demonstrating that the norm of temporary refuge satisfies both the state practice and the *opinio juris* criteria of customary international law).

The plaintiffs in *American Baptist Churches* also argued that the norm of temporary refuge was a conventional obligation as well, citing articles 1, 3, and 45 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; *see American Baptist Churches*, 712 F. Supp. at 769. The court concluded that the convention was not self-executing and therefore could not be the source of rights in domestic courts. *Id.* at 770. The court appears not to have considered the possibility that the conventional obligations may have become customary norms. On the issue of the extent to which that has occurred, see Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 357-58 (1987).

279. *American Baptist Churches*, 712 F. Supp. at 771; *see also* United States v. Merkt, 794 F.2d 950, 964 n.16 (5th Cir. 1986) (asserting that "[i]n enacting our refugee statute, . . . Congress was not bound by international law"), *cert. denied*, 480 U.S. 946 (1987). The Board of Immigration Appeals reached a similar conclusion in *In re* Medina, Interim Dec. 3078, at 17 (B.I.A. Oct. 7, 1988) (No. A26949415).

280. *American Baptist Churches*, 712 F. Supp. at 771. The *American Baptist Churches* court concluded: "In this case, Congress has specifically rejected the asserted norm of temporary refuge. Congress clearly intended that implementation of the new standards set forth in the statute would itself bring the United States into full compliance with its obligations under international law." *Id.* The evidence for this conclusion was the legislative history of the act, which according to the court showed tbat "[t]he Refugee Act of 1980 was enacted by Congress in order to 'bring United States law into conformity with our international treaty obligations.' Specifically, the Act 'incorporated the internationally accepted definition of refugee contained in the U.N. Convention and Protocol Relating to the Status of Refugees.' " *Id.* at 767 (quoting S. REP. No. 256, *supra* note 272, at 4). "Yet, Congress did not include within the 1980 Act any reference to a right of temporary refuge for aliens fieeing general conditions of violence or internal armed confiict. We thus conclude that Congress rejected the norm of temporary refugee asserted here." *Id.* at 771.

cupied the field of refugee rights in the United States. The failure of Congress to include the norm of temporary refuge in the legislation was held to preclude the plaintiffs' claim. In response to the argument that *Charming Betsy* obliged the court to construe domestic statutes in light of international standards wherever possible, the court declared that "the only 'possible construction' of the Refugee Act of 1980 is that it was intended to provide the exclusive means for obtaining refugee status in this country."[281]

In collapsing the notion of temporary refuge into the refugee doctrine, the court led itself into fundamental error. Even without defending the customary legal status of the norm, it is clear that the norm cannot be equated with, or defined by reference to, international standards governing "refugees," as that term of art is understood. "Conventional refugee law parallels, but is incongruent with, the norm of temporary refuge."[282] The norm of *nonrefoulement*,[283] the cornerstone of international refugee law, is triggered by individualized persecution, or the well-founded fear of persecution, on such grounds as religion, political opinion, or race. By contrast, the obligation of temporary refuge arises out of generalized conditions of violence and human rights violations in the country of origin: "The applicability of the norm does not, therefore, depend upon the presence of a subjective individualized fear or upon an objective membership in a particular social group."[284] Similarly distinct is the scope of relief under the two norms; asylum brings with it affirmative obligations of assistance and assimilation that are considerably more structured than the simple, temporary grant of physical refuge.[285] Moreover, the doctrinal origins of the two norms are

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281. *Id.*

282. Perluss & Hartman, *supra* note 278, at 597. Perluss and Hartman continue:

> Seekers of temporary refuge flee not from individualized persecution but in fear of their lives: they seek protection and security from conditions of generalized violence. Unlike a refugee, a person fleeing internal armed conflict generally does not seek to disestablish his ties of nationality or allegiance to his country on a temporary or permanent basis. Nor does such a person seek ordinarily to obtain durable asylum in or to acquire the nationality of the country of temporary refuge. . . . His need for relief, and therefore for temporary refuge, lasts only until his government can ensure him *de facto* protection.

Id. at 597-98 (footnotes omitted).

283. Nonrefoulement is the obligation of a state not to return a refugee to any territory where he or she has a well-founded fear of persecution.

284. Perluss & Hartman, *supra* note 278, at 583-84 (footnote omitted).

285. *See, e.g.*, Report on the Resettlement of Refugees, Exec. Comm. of the High Commissioner's Programme, U.N. Doc. A/AC.96/609, at 6 (1982) (stating that protection for those who do not qualify as refugees under the convention "may be correspondingly limited in time, pending a change of circumstances in their country of origin"); Report of the United Nations High Commissioner for Refugees, U.N. Doc. E/1985/62, at ¶ 22 (1985) (noting that persons escaping "serious danger resulting from unsettled conditions or civil strife" are protected by the principle of *nonrefoulment*, even though they are not "refugees").

not equivalent: judging from the practice of states in applying the norm, and its exposition by international organizations, agencies, and scholars, the norm of temporary refuge arises out of humanitarian law and international human rights law, rather than the refugee doctrine.

These distinctions, which were ignored in *American Baptist Churches*, undermine the court's interpretation of the Refugee Act; they transform the stated intention of Congress to conform domestic law with international refugee standards into a silence with respect to customary norms arising out of other doctrinal sources. Congress had no reason to address in the Refugee Act, obligations that do not arise out of the 1967 Protocol; therefore, that Act cannot be regarded as preclusive or inconsistent legislation with respect to international norms grounded in some other source. In this light, the Refugee Act left the norm of temporary refuge alone, free to emerge as it has through state practice and expressions of *opinio juris* since 1980.[286]

Thus, far from an explicit repudiation of the norm of temporary refuge, the Refugee Act is, by definition of the norm itself, silent on its status. There is no necessary inconsistency between the Act's comprehensive coverage in refugee matters and the plaintiffs' claims to temporary refuge. Under the *Charming Betsy* principle, the court was obliged to engage in a careful assessment of the evidence that such a norm exists and applies to Salvadorans and Guatemalans in the United States, and that no other controlling executive or legislative act displaced that norm.[287] The court's view of the Refugee Act as inconsistent, rather than silent, provides a thin rationale for the decision and potentially

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286. The *American Baptist Churches* court's assessment of congressional action after 1980 is equally flawed. The court stressed the fact that a conference committee abandoned a provision that would have suspended temporarily the deportation of Salvadorans and Guatemalans. *American Baptist Churches*, 712 F. Supp. at 771 (citing H.R. REP. No. 1000, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5854). The court also noted that Congress had rejected proposals for extended voluntary departure status for specific Central Americans. *Id.* (citing S. 377, 99th Cong., 1st Sess. (1985) and H.R. 822, 99th Cong., 1st Sess. (1985)). But the inference that failure to pass a law is tantamount to enacting its opposite is absurd. Especially in a context in which international standards apply, that inference inverts *Charming Betsy* to suggest that Congress by *not* acting repudiates an asserted norm of international law. "Legislative acts"—controlling or otherwise—can be passed only by both houses of Congress and presented to the president for signature. INS v. Chadha, 462 U.S. 919 (1983) (citing U.S. CONST. art. I, § 7, cl. 2).

287. The Paquete Habana, 175 U.S. 677 (1900), forecloses the argument that the government's action or its position in the litigation is a sufficiently controlling executive act to override the asserted customary norm. In that case, the executive branch had stated its willingness to conduct the war against Spain in conformity with the law of nations. But its interpretation of these obligations, based on its action in the war and its stance in the litigation, was not considered persuasive, let alone determinative on the issue of whether fishing vessels could be seized as prize. If, as is assertedly the case with respect to the norm of temporary refuge, the United States had acted in conformity with the norm up to the litigation in question, the court's disposition should uphold the norm. Any other result allows sub silentio violations of international law by the executive branch, a power presumptively denied to Congress by *Charming Betsy*.

constrains the ability of the United States to assist in the development and recognition of the norm.[288]

The Supreme Court's disposition of *Argentine Republic v. Amerada Hess Shipping Corp.*[289] provides a useful contrast. During the Malvinas/Falklands Island war, Argentina attacked a neutral vessel carrying oil in the domestic trade of the United States. The alien plaintiffs, owner and timecharterer of the vessel, alleged that the attack on the high seas violated international law, and the Second Circuit held that the Alien Tort Claims Act provided subject matter jurisdiction.[290] The Second Circuit also decided that nothing in the Foreign Sovereign Immunities Act (FSIA) displaced the prima facie propriety of jurisdiction under the Alien Tort Claims Act, because sovereign immunity could not attach to claims for violations of international law: "If sovereign acts were immunized today from scrutiny under international law, the exception would nearly swallow the rule. For example, the emerging international law prohibition of genocide . . . would make little sense, even in theory, if sovereign states were not covered by the prohibition."[291] According to the Second Circuit, nothing in the FSIA altered this analysis because that statute was intended to restrict sovereign immunity for the commercial acts of a sovereign and did not create an immunity for noncommercial violations of international law. To the contrary, the Second Circuit stated that it "would consider it odd to hold that, by enacting a statute designed to narrow the scope of sovereign immunity in the commercial context, Congress, though silent on the subject, intended to broaden the scope of sovereign immunity for violations of international law."[292] The Second Circuit apparently reasoned that the

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288. Some evidence suggests that the United States applies the norm of temporary refuge in its interactions with foreign states. *See, e.g., Foreign Assistance Legislation for Fiscal Year 1982, Part 5: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 315 (1981) (warning that forced repatriation by Thailand and Pakistan would prejudice relations with the United States); U.S. DEP'T OF STATE, COUNTRY REPORTS ON THE WORLD REFUGEE SITUATION, REPORT TO CONGRESS FOR FISCAL YEAR 1984, at 95-96 (Aug. 1983) (noting that forced repatriation by Costa Rica of Central American nationals displaced by war would not be appropriate, even though these individuals were not conventional or statutory refugees and were instead in "temporary asylum status"). In 1987, the United States declared that the forced repatriation of Hmong tribesmen by Thailand constituted "a serious breach of human rights." *Thai Officials Deny Violating the Rights of Laos Tribesman*, N.Y. Times, Mar. 20, 1987, at 13, col. 1; *see also Britain Demands Return to Vietnam of Boat People*, N.Y. Times, June 14, 1989, at 1, col. 5 (reporting that the Deputy Secretary of State declares that the United States "will not consider forced repatriation as falling within the rubric of 'acceptable under international practices' ").

289. 109 S. Ct. 683 (1989).

290. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 426 (2d Cir. 1987), *rev'd*, 109 S. Ct. 683 (1989).

291. *Id.* at 426 (citation omitted).

292. *Id.* at 427.

Alien Tort Claims Act provided a jurisdiction not displaced by the FSIA, because Congress knew that jurisdiction on these facts would be sustained and did nothing about it.

Both halves of the argument were flawed: it seems doubtful that Congress was aware in 1976 that jurisdiction over foreign acts of war would be sustained under an obscure provision of the First Judiciary Act. Even if Congress were aware of that fact, it is not "fairly possible" to construe as silence the facially comprehensive and preemptive language of the FSIA[293] and its legislative history.[294] As noted by the Supreme Court in reversing the Second Circuit's decision, "[T]he text and structure of the FSIA demonstrate Congress'[s] intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."[295] When Congress intended to vitiate immunity for violations of international law, it did so explicitly,[296] a fact which bars the judicial construction of a more universal exception for international wrongs generally.

In its treatment of the *Charming Betsy* principle, the Second Circuit decision in *Amerada Hess* is the opposite of that in *American Baptist Churches*, but it is equally implausible. On its surface, the appellate result in *Amerada Hess* vindicated an established norm of customary law, the protection of neutral shipping on the high seas, by interpreting the FSIA to preserve the courts' jurisdiction over such claims. *Charming Betsy* and its progeny support the form of this analysis although the Second Circuit ironically may have approved an exercise of jurisdiction in violation of international law.[297] The critical failing was that it accomplished this result by construing as silence text and legislative history that could not logically bear such a construction.

The *Charming Betsy* principle thus offers grounds for rejecting the spurious finding of either preemption, as in *American Baptist Churches*, or silence, as in the Second Circuit's disposition of *Amerada Hess*. The former displays a flippancy towards putative customary

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293. *See* 28 U.S.C. §§ 1330, 1604 (1982); *see also* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 493 (1983).

294. *See, e.g.*, H.R. REP. No. 1487, 94th Cong., 2d Sess. 12 (1976); S. REP. No. 1310, 94th Cong., 2d Sess. 12 (1976) (stating that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States" and "prescribes . . . the jurisdiction of U.S. district courts in cases involving foreign states").

295. *Amerada Hess*, 109 S. Ct. at 688.

296. *See, e.g.*, 28 U.S.C. § 1605(a)(3) (1982).

297. The Second Circuit should have considered state practice before it embraced its cramped notion of sovereign immunity. It would have discovered that virtually no doctrine of foreign sovereign immunity in foreign states, in the International Law Commission deliberations, or in the evolution of the Restatement (Third) supported the general exception for violations of international law.

norms that risks a violation of international law, and the latter shows inadequate respect for the language and the intent of Congress. *Charming Betsy* prohibits the inference of repudiation from congressional silence, but it is clear that a preemptive intent, combined with unavoidable inconsistency, does not qualify as silence.

2. Statutory Directives to Consider "Other Laws and Treaties"

A narrower version of the inferred intent problem arises when Congress directs that statutory provisions be construed in conformity with other, designated types of law.[298] For example, the courts occasionally have endorsed the inference that the explicit specification of "laws and treaties" implicitly excludes customary international law from consideration.[299] The specification of "laws" in this view refers only to statutes, and possibly court decisions, and the specification of "treaties" exhausts other relevant international sources of norms. According to this line of analysis, one of the *intent* canons of construction, "the expression of one implies the intent to exclude others,"[300] trumps the *Charming Betsy accommodation* canon directing that statutes be construed in light of international law wherever possible.

But these two canons operate in mutually exclusive circumstances. The *exclusio* canon has been considered reliable only when there is evidence of comprehensive legislative attention to alternatives, including the specific alternative urged before the court.[301] It is, therefore, espe-

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298. The Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1988), provides that each fishery management plan approved by the Secretary of Commerce shall be "consistent with the national standards, the other provisions of this chapter, and any other applicable law." *Id.* § 1853(a)(1)(C). This language was construed to include treaties in Washington State Charterboat Assoc. v. Baldrige, 702 F.2d 820, 823 (9th Cir. 1983), *cert. denied*, 464 U.S. 1053 (1984). *Compare id. with* Section 22 of the Agricultural Adjustment Act, ch. 25, tit. I, § 22 (1933) (codified as amended at 7 U.S.C. § 624(f) (1988)) (stating that "[n]o trade agreement or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this section").

299. *See, e.g.*, United States v. Aguilar, 871 F.2d 1436 (9th Cir.), *modified*, 883 F.2d 662 (9th Cir. 1989). In determining the deportability of an alien, the Attorney General is directed by statute to consider "the provisions of this Chapter [the Immigration and Nationality Act], or of any other law or treaty." Immigration and Nationality Act, ch. 477, tit. II, § 242(b), 66 Stat. 163, 209 (1952) (codified as amended at 8 U.S.C. § 1252(b) (1988)). The phrase "immigration laws" is defined elsewhere in the statute as "all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens." 8 U.S.C. § 1101(a)(17) (1988). Without discussion, the Ninth Circuit in *Aguilar* concluded that "laws and treaties" did not include customary norms. *Aguilar*, 871 F.2d at 1454.

300. The maxim *expressio unius est exclusio alterius* is "closely related to literalism and the plain meaning rule," 2A J. SUTHERLAND, *supra* note 34, § 47.25, at 209, and is subject to related criticisms.

301. *See, e.g.*, National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973) (stating that the *exclusio* canon "stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen"), *cert.*

cially unreliable as a counterweight to the *Charming Betsy* principle, which presumes compliance in the *absence* of such evidence. If Congress were aware of a customary norm and nonetheless enacted contrary legislation, the *exclusio* canon properly could operate, but the *Charming Betsy* principle would not: as noted, the *Charming Betsy* interpretive mandate can be overcome by an express intent to repudiate existing international standards. On the other hand, in the absence of extrinsic evidence of such an intent, the preconditions for the application of the *exclusio* principle would not be satisfied, and the inference of exclusion would violate the presumption against implied repeals.

Treating the specification of "laws and treaties" as an exclusion of customary law also contradicts the substantial case law and commentary that portrays custom as a pocket of federal common law.[302] That designation is significant because federal common law has been held to be "law" within the meaning of the federal question jurisdictional statute[303] and for other purposes,[304] including the interpretation of federal statutes.[305] To the extent that the congressional preservation of "laws and treaties" does not exclude federal common law generally, it should not qualify as an affirmative repudiation of relevant norms of customary international law.

On the other hand, the force of the syllogism—federal common law is "law," customary international law is federal common law, therefore,

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denied, 415 U.S. 951 (1974); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 282 (1985). In the absence of such evidence, the *exclusio* maxim attributes an implausible omniscience to the legislature.

302. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964); Henkin, *supra* note 13, at 1559. The British origins of this rule date to the eighteenth century. *See, e.g.*, Triquet v. Bath, 3 Burr. 1478, 97 Eng. Rep. 936 (1764); 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1st ed. 1769) (recognizing that "the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land"). *See generally* Jay, *supra* note 244, at 819.

303. 28 U.S.C. § 1331(a) (1982); *see* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Republic of the Philippines v. Marcos, 806 F.2d 344, 354 (2d Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987) (upholding jurisdiction under § 1331 of conversion claim on the ground that it raised "as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state"). Professor Charles Alan Wright concludes that " 'federal common law,' when it exists, is among the 'laws of the United States' referred to in the jurisdictional statute, and that, except in the admiralty field [Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)], there is federal question jurisdiction of claims based on federal common law." C. WRIGHT, THE LAW OF FEDERAL COURTS § 17, at 97 (4th ed. 1983) (footnotes omitted).

304. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (recognizing that federal common law creates right of action).

305. Professor Eskridge, in particular, has demonstrated the considerable penetration of common-law principles into such statutory regimes as the Civil Rights Act, the Taft-Hartley Act of 1947, the Sherman Act of 1890, the antifraud provisions of the securities laws, and a variety of jurisdictional or procedural statutes. Eskridge, *supra* note 59, at 1051-55.

customary international law is "law"—may be more apparent than real in the context of statutory interpretation. Most of the decisions establishing that federal common law is "law" assess that branch of federal common law consisting of court decisions, not customary international law, and it is not self-evident that all forms of federal common law should be treated identically. Custom may be federal law in that it is distinct from state law, but custom is not federal law in origin, because it arises out of international practice and not the constitutional politics of article I. It is, therefore, one thing to suggest that a federal court, in filling federal statutory gaps, should consult common-law rules developed by domestic judges over generations. It is quite another to suggest that the work of international organizations, the practice of states, and evidence of *opinio juris* are proper referents for the interpretation of statutes the drafters of which may have been entirely unfamiliar with international developments.

In part, the propriety of consulting international sources when interpreting domestic statutes is suggested by the original understanding among the Framers of the Constitution that the law of nations and the common law were "laws" of the United States. Neither the law of nations nor the common law is mentioned in the supremacy clause of the Constitution[306] or the jurisdictional provisions of article III.[307] Nevertheless, impressive evidence suggests that the founding generation understood that the law of nations was supreme over state law and that the specific provisions of article III subsumed the categories of jurisdiction under that branch of law.[308] By contrast, the status of federal law generated under the Constitution, including congressional statutes and treaties, required explicit protection through the supremacy clause and by a federal judiciary. Given the national experience with such federal law under the Articles of Confederation,[309] express treatment of "laws and treaties," unlike the law of nations or the common law, was essential. Though this analysis has generated some controversy,[310] it clearly undermines the inference that modern statutory references to "laws

306. U.S. CONST. art. VI (providing that laws "made in Pursuance" of the Constitution "shall be the supreme Law of the Land").

307. U.S. CONST. art. III.

308. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239, 253 (1932); Jay, *supra* note 244, at 819; Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985).

309. *See* F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 155-56 (1985); THE FEDERALIST No. 22, at 191-93 (A. Hamilton) (J. Hamilton ed. 1866); *id.* No. 33, at 257-58.

310. Recent scholarsbip has suggested the pitfalls of injecting eighteenth-century precepts into twentieth-century analysis. *See* Jay, *supra* note 244, at 820-21; Weisburd, *supra* note 124, at 1210-12.

and treaties" implicitly exclude customary international law. The internal values of the *Charming Betsy* principle do not favor inferences of repudiation from silence or congressional unawareness and thus require a more articulate repudiation of international law than the court's inference that "laws and treaties" excludes customary international law.

In summary, the *Charming Betsy* presumption treats as a kind of "silence" those statutory provisions that do not reflect either some explicit consideration of customary norms or a clear intent to preempt or preclude consideration of all other sources of legal standards. If the textual and historical evidence establishes either of these preconditions, the court need not apply the *Charming Betsy* presumption that the statute conforms to international law. In the absence of such evidence, however, there is no reason based in legislative supremacy to preclude consideration of such international norms as may exist and be relevant.

C. *The Problem of Statutory Appropriateness*

The hypothesis that customary and conventional international law is relevant in the substantive interpretation of domestic statutes cannot be tested directly: it is not possible to explore every hypothetical intersection between international law and the fifty titles in the United States Code. But it is possible to demonstrate the implausibility of a blanket rule defining categories of inherently domestic statutes that are beyond the reach of the international system and, therefore, exempt from the *Charming Betsy* principle. In any given case, no threshold test of subject matter appropriateness should displace a careful assessment of the status and meaning of the international norms invoked by the parties or discovered by the court.

First, as a theoretical matter, a blanket rule would presume a category of defined subjects that are within states' exclusive domestic jurisdiction. The existence of such a category in the abstract is impossible to deny, appearing by name in the Charter of the United Nations[311] and multilateral pronouncements on the rights and duties of states.[312] Our hypothetical blanket rule of inappropriateness would reflect the perpet-

311. U.N. CHARTER art. 2, para. 7 (stating that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter").

312. *See, e.g., United Nations Draft Declaration of the Rights and Duties of States*, June 9, 1949, 4 U.N. GAOR Supp. (No. 10) at 8, U.N. Doc. A/925, art. 1 (1949) (stating that "[e]very State has the right . . . to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government"); *see also* Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.I.A.S. No. 881, 165 L.N.T.S. 19; Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

uation of territorial sovereignty as the foundation of international law and would exclude from international scrutiny certain types of decisions including those in legislative form.

But the history of international law in the twentieth century has been the steady if incremental exclusion of issues and behaviors from the protective ambit of exclusive domestic jurisdiction and the demonstration that such jurisdiction does not comprehend an inert and unchanging set of state competences.[313] As demonstrated by the rise of universal organizations and of regional integration as well as the emergence of international human rights law, exclusive domestic jurisdiction does not mean today what it meant at the turn of the century or even at the end of World War II. And the move "from an essentially negative code of rules of abstention to positive rules of cooperation"[314] leaves little confidence in a stable notion of exclusive domestic jurisdiction for the future.

In essence, the distinction between domestic and international concern is a function of diplomatic history rather than principle. In the *Tunis-Morocco Nationality Cases*[315] the Permanent Court of International Justice recognized that "[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."[316] By their behavior, states determine what is and what is not within a state's exclusive domestic jurisdiction. A blanket rule of appropriateness would be necessarily provisional, constantly subject to dis-

313. Higgins, *Intervention and International Law*, in INTERVENTION IN WORLD POLITICS 29, 31-32 (H. Bull ed. 1984) (recognizing that nineteenth-century notions of domestic jurisdiction are antiquated by contemporary developments).

The transformation from domestic to international concern can be rapid. *See, e.g.*, 15 DEP'T ST. BULL. 452 (1946) (Connally Amendment to the United States' acceptance of the compulsory jurisdiction of the International Court of Justice under article 36(2) of the ICJ Statute). The amendment withheld consent to jurisdiction over matters "essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." *Id.* at 453. A contemporary account suggests that the amendment was necessary because, without it, "the Court might invade such fields as immigration, the tariff and the control of the Panama Canal." O. LISSITZYN, INTERNATIONAL COURT OF JUSTICE 64 (1951). Although these "fields" were then thought to be within the exclusive domestic jurisdiction of the United States, each has become the subject of international concern since 1946 and to that extent can no longer lie within the exclusive category.

This observation does not deny the continuing relevance, indeed the dominance, of exclusive domestic jurisdiction in modern international law discourse. *See* Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1 (1989). The argument, however, is that in giving content to such a concept one cannot define a priori types of statutes that are immune from the *Charming Betsy* principle on the grounds of exclusive domestic jurisdiction.

314. W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 62 (1964).

315. Nationality Decrees Issued in Tunis and Morocco (Fr. v. Gr. Brit.), 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7).

316. *Id.* at 24.

placement by the conduct and agreement of states. Moreover, such a rule, reflecting judicially-imposed constraints on legitimate international discourse, would limit unduly the political branches in their dealings with foreign nations, especially in the attempt to develop new law.[317] The more traditional and intrinsically judicial course is to assess the evidence that an international norm exists and the scope of such a norm, rather than to erect some per se barrier to such an analysis in interpreting certain types of domestic statutes.

The implausibility of an appropriateness test also may be inferred if one posits a gradient of statutory types, distinguished by the degree to which customary or conventional international law may be relevant in the act of interpretation. At one end of the gradient would be all statutes in which international standards are expressly or implicitly incorporated, as to which the *Charming Betsy* principle plainly would apply.[318] At the other extreme would be the putative category of statutes within a state's exclusive jurisdiction as to which *Charming Betsy* would be irrelevant by hypothesis. Between these extremes would be statutes that affect international persons or foreign affairs but that do not refer explicitly to customary or conventional international law (including international criminal offenses, international trade statutes, and the arbitration acts) and statutes that overlap international concerns.

In determining where on this gradient a particular statute or a particular statutory issue belonged, a court would consider evidence of international concern in the form of treaties, custom, declarations, guidelines, and the like. Though the court may conclude that there is no international law for it to apply, that conclusion should follow its assessment of international practice, not its predisposition to ignore international developments on the ground that they are ultra vires. The

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317. Justice Joseph Story recognized the importance of such normative evolution. In United States v. La Jeune Eugenie, 26 F. Cas. 832 (D. Mass. 1822) (No. 15,551), he stated:

> It does not follow, . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recogni[z]ed, as such, by all civilized communities, or even by those constituting, what may be called, the Christian states of Europe. Some doctrines, which we, as well as Great Britain, admit to belong to the law of nations, are of but recent origin and application, and have not, as yet, received any public or general sanction in other nations. . . .

Id. at 846.

318. Thus, for example, the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982), gives federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Section 894 of the Internal Revenue Code, states that "[t]he provisions of this title shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer." I.R.C. § 894(a)(1) (West Supp. 1990).

court must recognize that a different issue under the same statute, or even the same issue later in time, will be assessed differently. For example, a question of statutory construction under the federal procurement statutes may implicate issues arising under the Convention on Contracts for the International Sale of Goods,[319] and the interpretive task of the court will be to assess the relevance and status of the norm, rather than to respect some threshold abstract test of domestic jurisdiction. Again, the dominant factor is not a per se test of appropriateness but the evidence that relevant international norms exist. The very facts that would determine that there were standards to apply under the *Charming Betsy* principle would override the barrier of exclusive domestic jurisdiction. A test of statutory appropriateness, therefore, would be superfluous, even if it were plausible.

D. The Problem of Relative Normativity in International Law

The application of the *Charming Betsy* principle may be complicated by the fact that international legal standards emerge and have varying normative status over time. This difficulty is not new: the pure ideal of international law as consisting exclusively of binding legal norms governing international relations always has been an oversimplification.[320] Especially since World War II, and increasingly since the Vienna Convention on the Law of Treaties,[321] normative types in international discourse have proliferated. Sometimes designated "soft law," these putative norms go beyond the traditional rhetoric dominated by the distinction between rights and obligations that are either binding or nonbinding.

There are multiple examples of this phenomenon. The resolutions of international organizations and guidelines articulated by international conferences, even when confessedly neither constitutive nor declaratory of law, nonetheless are given weight in the decisions of international courts and arbitral tribunals.[322] The doctrine of *jus cogens*

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319. 1980 U.N. Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18 (1980), *reprinted in* 19 INT'L LEGAL MATERIALS 668 (1980). The United States deposited its instrument of ratification on Dec. 11, 1986. The Convention entered into force for the United States on Dec. 11, 1987.

320. 1 P. GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 1 (2d ed. 1967) ("le droit international public . . . est l'ensemble des norms juridique qui régissent les relations internationales") (translated as "public international law is the set of legal norms that regulate international relations" (translation by Author)). The long-standing difficulty of distinguishing between *lex lata*, the established law, and *lex ferenda*, the emerging law, undermines any simple dichotomy between relevant binding law and irrelevant aspiration.

321. Vienna Convention, *supra* note 106.

322. *See, e.g.*, Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389, 483-95 (Arb. 1977), *reprinted in* 17 INT'L LEGAL MATERIALS 1, 27-31 (1978).

erects a hierarchy of norms, distinguishing peremptory from merely customary obligations.[323] The International Court of Justice has defined circumstances under which a treaty provision can come to bind nonsignatories.[324] Intergovernmental institutions such as the General Agreement on Tariffs and Trade[325] or the Helsinki Commission[326] rest on legal foundations that are neither strictly conventional nor strictly customary. States that have signed but not ratified a treaty nevertheless may be under an obligation "to refrain from acts which would defeat the object and purpose of [that] treaty."[327] States commonly frame their conventional obligations as exhortations to commit "best efforts" or "to cooperate" to some specified end. Each of these examples suggests a range of normativity in international law, which vastly complicates the basic task of defining a state's entitlements and obligations; indeed the "blurring of the normativity threshold"[328] has been criticized as expanding claims for international law beyond its consensualist base and making it incomprehensible and illegitimate in the process.[329]

Does the *Charming Betsy* principle transfer this theoretical dispute

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323. Vienna Convention, *supra* note 106, arts. 53, 64; RESTATEMENT (THIRD), *supra* note 3, § 102 comment k. Referring to *jus cogens* norms, the Restatement (Third) recognizes that "[s]ome rules of international law are recognized by the international community of states as peremptory, permitting no derogation. . . . Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character." *Id. See generally* Suy, *The Concept of* Jus Cogens *in Public International Law* in CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, 2 PAPERS & PROC. 17 (1967); Virally, *Réflexions sur le "jus cogens,"* 1966 ANNUAIRE FRANÇAID DROIT INT'L 5; Whiteman, Jus Cogens *in International Law, With a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977).

324. The North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 4, 28, 37-46.

325. *See* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 59-60 (1969).

326. Conference of Security and Cooperation in Europe: Final Act, 73 DEP'T ST. BULL. 323 (1975), *reprinted in* R. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 470.1 (1986). The Helsinki Accords do not have the force of a treaty and often are equated to declarations of the United Nations. Nevertheless, in 1976, Congress created a joint executive-congressional commission to further the objectives of the Accords. Act of June 3, 1976, Pub. L. No. 94-304, 90 Stat. 661 (codified as amended at 22 U.S.C. §§ 3001-3009 (1988)).

327. Vienna Convention, *supra* note 106, at art. 18.

328. Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 415 (1983). Professor Prosper Weil argues:

> While prenormative acts do not create rights or obligations on which reliance may be placed before an international court of justice or of arbitration, and failure to live up to them does not give rise to international responsibility, they do create expectations and exert on the conduct of states an influence that in certain cases may be greater than that of rules of treaty or customary law. Conversely, the sanction visited upon the breach of a legal obligation is sometimes less real than that imposed for failure to honor a purely moral or political obligation.

Id.

329. *See, e.g.*, Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L.Q. 549 (1980); Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?*, 11 NETH. Y.B. INT'L L. 65 (1980); Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 AM. J. INT'L L. 296 (1977); Weil, *supra* note 328, at 441.

into the courts of the United States? Must a domestic court consider this "soft" international law in the interpretation of domestic statutes? Can it do so without usurping a political function? In approaching these questions, the starting point should be the recognition that *Charming Betsy* and its progeny offer no internal criteria for determining the content of the law of nations. No burden of proof is defined, and the presumption on its face seems to require statutory conformity only with norms that qualify as "law." It would be no apparent violation of that principle if a court chose to ignore standards that had not achieved international legal status.[330]

It is perhaps surprising, therefore, that some courts have consulted standards that do not readily qualify as the law of nations and have done so in apparent accord with the values implicit in the *Charming Betsy* principle. This practice has been especially true in cases raising human rights issues, as well as cases determining the extraterritorial reach of statutes on the basis of international comity.[331] In human rights cases, for example, when the content of customary international law was at issue, some courts have given evidentiary weight to declarations and guidelines as well as treaties that had been signed by the United States but never ratified.[332]

The court's eagerness to find help wherever it can in difficult issues of interpretation may explain and justify these uses of soft law. Equally plausible, the use of soft law may illustrate the monist and dualist values jointly at work in the *Charming Betsy* principle. In the dualist paradigm, for example, the courts take seriously the prospect of embarrassing the political branches of government caused by giving inadequate recognition to emerging principles of law. Embarrassment may follow even if these standards are intended as precatory guidelines with no pretense that they express law or may yet become law. The

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330. *See, e.g.*, Wardair Can., Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 10 (1986) (distinguishing law from aspiration).

331. *See supra* Part III(B).

332. *See, e.g.*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (citing the American Convention on Human Rights and the Universal Declaration of Human Rights as support for customary principle prohibiting prolonged arbitrary detention); Filartiga v. Pena-Irala, 630 F.2d 876, 883-85 (2d Cir. 1980) (consulting the American Convention on Human Rights and the International Covenant on Civil and Political Rights, *inter alia*, to determine the customary prohibition on torture); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (recognizing the Universal Declaration, American Convention, and the Civil and Political Covenant as evidence of a customary norm against summary execution), *reh'g granted in part and denied in part*, 694 F. Supp. 707 (N.D. Cal. 1988); Lareau v. Manson, 507 F. Supp. 1177, 1187-89 n.9 (D. Conn. 1980) (discussing the United Nations Minimum Standard Rules Governing the Treatment of Prisoners), *modified*, 651 F.2d 96 (2d Cir. 1981), *aff'd in part and modified in part*, 651 F.2d 96 (2d Cir. 1981). *See generally* R. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 440.6-.7 (1986) (collecting federal and state court cases discussing the principal human rights instruments).

courts of the United States are in no position to deny the significance of United States positions taken on international matters, even if these matters do not yet approximate law. The courts should acknowledge that embarrassment is not limited to violations of law, but can include departures from formal principles achieved by consensus in international settings. Unless compelled by statutory directive to override these principles, there is no reason to ignore them altogether on account of their "softness." Indeed, the decision to consult such principles at all reflects a greater sensitivity to the separation of powers than a per se rule that allows potential norms to be only dispositive or irrelevant. Thus the embarrassment rationale opens the door to the consideration of norms that have not yet achieved the status of law.

The evidentiary value to be given those standards should reflect the monist rationale. That is, in determining how much weight to give informal declarations or principles, it is relevant for the court to assess how the international community as a whole regards the standards. International courts and arbitral tribunals proceed in this way, either dismissing principles as aspirations of a limited group or relying on them as expressions of widespread understandings. Domestic courts applying the *Charming Betsy* principle should take a similar role in determining where on the normativity gradient a putative standard rests.

There may be no international standards, hard or soft, to apply in a given case, and the interpretive light cast by the international standard may be lost in the glare of statutory detail. Inevitably the weight to be given international pronouncements will reflect the common-law powers of the court. As noted by Justice Benjamin Cardozo, "[I]nternational law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality."[333] The *Charming Betsy* principle allows the courts to assess both the meaning and the status of international standards that do not achieve the status of international law. The variety of legal experience in the international legal system provides no prophylactic grounds for ignoring principles that are not yet binding.

V. Objections to the Legitimacy of the Enterprise

This part of the Article responds to the objection that it is illegitimate—and not merely difficult—for a court to give the law of nations a significant role in the interpretation of domestic statutes. Illegitimacy in this context is a class of three separate objections. First, it may be

333. New Jersey v. Delaware, 291 U.S. 361, 383 (1934).

argued that the *Charming Betsy* principle is inherently counter-majoritarian: it involves a quasi-legislative function rather than the interpretation of domestic, judge-made common law. Second, it arguably violates the constitutionally-grounded principle that the judiciary is not competent to adjudicate issues of foreign affairs, including international law. In this respect, it raises the prospect of an intolerable interference with the prerogatives of the political branches. A final objection arises out of critical legal scholarship: the interpretive or hermeneutic technique at work in *Charming Betsy* amounts to an intellectual *deus ex machina*, a contrived solution to an insolvable puzzle, a facile but unsatisfying escape from the embarrassment of radical indeterminacy.

A. Illegitimacy Round I: The Counter-Majoritarian Difficulty

A court's turn to international standards may be challenged as an illegitimate exercise of judicial power. Like any public values approach to statutory construction, the affirmative obligation expressed in the *Charming Betsy* principle raises the "counter-majoritarian difficulty."[334] It is arguably illegitimate for unelected and unaccountable judges to substitute their subjective judgment for the law, which reflects the will of the majority. Though generally raised in the context of constitutional adjudication, this counter-majoritarian objection has a distinct analogue in disputes over statutory construction: judicial subjectivism undoes the deal implicit in every legislative enactment[335] and, therefore, cannot be reconciled with the dominant ideal of legislative supremacy expressed in the Constitution and protected by the separation of powers. Specifically, as Justice Antonin Scalia has argued, the court cannot enforce some unenacted legislative intent, a premise that leads him to ignore extratextual legislative materials found useful, if not dispositive, by other members of the Court.[336]

This objection arguably should apply a fortiori in the *Charming Betsy* context, where, without even the dubious support of legislative history, a congressional understanding is presumed as a prophylactic measure against both international discord and encroachments on the political branches' prerogatives. In this view the *Charming Betsy* principle should not oblige the courts of the United States to apply foreign norms. The Second Circuit in *United States v. Aluminum Corp. of*

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334. A. BICKEL, *supra* note 102, at 16.

335. Easterbrook, *supra* note 54, at 540 (observing that "[a]lmost all statutes are compromises"); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 894 (1975) (arguing that judges should enforce only the deal negotiated in the process of legislation).

336. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring).

America[337] noted with respect to United States antitrust laws that "the only question open is whether Congress intended to impose the liability and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law."[338] Even if the court acknowledged "the limitations customarily observed by nations upon the exercise of their powers,"[339] the opinion does not suggest that the supremacy of Congress could be displaced by foreign or international law.

In this form, the counter-majoritarian objection is inapposite, even if it were sound in its premise.[340] A proper appreciation of *Charming Betsy* does not require the courts of the United States to reconcile domestic statutes with the laws of foreign nations. Certainly nothing in that case undermines the territorial sovereignty of nations, including the United States, and foreign laws standing alone do not give rise to the kind of international norms embraced by the *Charming Betsy* principle. For example, "general principles of law recognized by civilized nations" may be cognizable as international law,[341] but the details of a foreign statutory regime, even if consistent in form from nation to nation, generally are not thought to qualify as "principles" in this sense. Nor could foreign laws give rise to customary law except to the extent that they constituted a "general practice accepted as law,"[342] and then it could apply in the United States not as the law of a foreign state but as the law of nations that is "part of our law."[343] Furthermore, when a statute is interpreted in light of conventional practices, as in *Cardoza-Fonseca*, it is not some foreign law that constrains the interpretation of the statute, but a congressionally-acceptable reference to an international standard.

In this context, the counter-majoritarian objection is undermined

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337. 148 F.2d 416 (2d Cir. 1945).

338. *Id.* at 443.

339. *Id.*

340. The "counter-majoritarian" objection itself has been criticized for equating legislative supremacy with majority will, *see* Popkin, *supra* note 73, at 566, and as perverting the real locus of sovereignty in United States political culture, *see* Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 388-409 (1942). In addition, it would seem that the counter-majoritarian difficulty proves too much in the context of statutory interpretation: even assuming an adequately representative legislature, only a court that actually consists of the legislature itself could both interpret a statute's inevitable gaps and do so in conformity with the majority will. Although there is nothing self-contradictory about such an arrangement, it is plainly not our system.

341. I.C.J. STAT. art. 38(1)(c). *See generally* W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 188-210 (1964); McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. (1957).

342. I.C.J. STAT. art. 38(1)(b). Mere parallelism among foreign statutes would not ipso facto qualify as custom. J. KUNZ, THE CHANGING LAW OF NATIONS 342 (1968).

343. *See* The Paquete Hahana, 175 U.S. 677, 700 (1900).

by the fact that the Congress always can correct the courts' "mistakes" in articulating international law under the *Charming Betsy* principle. The judicial interpretation of statutes, unlike the interpretation of the Constitution, is always "subject to overrule or alteration by ordinary statute."[344] Thus, Congress enjoys a majoritarian corrective for the antimajoritarian exercise of judicial power. This response is only partial, however, because it rests on a counter-factual assumption, namely that Congress has sufficient information, time, and political will to oversee and modify the courts' statutory work product in its totality. The economic theory of legislation suggests that this assumption is naive[345] and that the oversight power of the legislature is of more theoretical than practical comfort.

It is significant then, that a court applying the *Charming Betsy* principle is constrained by factors that are not necessarily present in other modes of common lawmaking. For example, the *Charming Betsy* principle obviously operates only in the interpretation of a statute and is constrained by the limits of fair reconcilability. Contrary to the troubling view that international law is ipso facto incorporated into domestic law, the interpretive model presupposes some prior, relevant political act by Congress. If the majority wishes by legislation to violate international law, nothing in the *Charming Betsy* principle thwarts that will except to require that it be expressed clearly. The court's articulation of a "clear statement" rule sets a condition for *expressing* majority will: it puts Congress on notice that the judiciary will interpret unclear statutes to preserve international law. But the clear statement rule does nothing to frustrate the *effectuation* of a majority will that is expressed plainly; indeed, clear statement rules can violate majoritarianism only if the court is powerless to define the terms of its discourse with the legislature. The judiciary would be obliged to follow the legislature's understanding of a rule that is in the court's view unclearly expressed, and that result is absurd.

In addition, the *Charming Betsy* principle protects majoritarian values better than any competing interpretive presumption about domestic statutes and international law. An opposite presumption, that acts of Congress are presumably in violation of international law, is plainly unworkable and empirically wrong. The nonpresumption, that

344. J. ELY, *supra* note 81, at 4.

345. Macey, *supra* note 54, at 227 (arguing that "[i]nterest group theory treats statutes as commodities that are purchased by particular interest groups or coalitions of interest groups that outbid and outmaneuver competing interest groups" (footnote omitted)). *See generally* M. OLSON, THE RISE AND DECLINE OF NATIONS (1982); R. POSNER, *supra* note 301, at 271 (describing the importance of interest groups in affecting the legislative process); Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984).

norms of international law are presumably irrelevant to acts of Congress unless a contrary intent appears, has a superficial plausibility. It reflects a profoundly dualist perspective. But it sacrifices the presumption of respect for both the political branches and the international community in exchange for a dubious simplicity: it provides guidance in only the easy cases. In a case like *Lauritzen*, in which the issue is whether the statute will be construed to violate international standards, a presumption of irrelevance either offers no answer at all or collapses into the discredited presumption of violation. If the court attempts, through Judge Posner's technique of "imaginative reconstruction,"[346] to determine how the Congress would have resolved an interpretive issue like *Lauritzen*, it seems unlikely in the abstract that a majority would intend to override international norms if a saving construction can be sustained.

The counter-majoritarian objection fails for a final reason. The inquiry and analysis required by the *Charming Betsy* principle are constrained by the essential fact-dependency of international law, especially customary international law. Although the evidence that a court will consult in determining the law of nations is not majoritarian in any legislative sense, the court is not free to follow utterly subjective expressions of principle or values located somewhere in the international system. Norms of international law properly are deemed legislative facts,[347] constrained by historical and diplomatic reality.[348] The

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346. *See* R. POSNER, *supra* note 301, at 286-93; Posner, *supra* note 56, at 817-22.

347. The distinction between legislative and adjudicative facts was developed in Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942). It was articulated by the Advisory Committee on Proposed Rules as follows:

> Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

FED. R. EVID. 201 advisory committee's note (a).

348. International law traditionally has been distinguished from domestic laws of foreign states in this regard: prior to the promulgation of FED. R. CIV. P. 44.1, foreigu law was treated as a question of fact, with significant consequences for both the standard of review on appeal, *see* Anderson v. City of Bessemer City, 470 U.S. 564 (1985); United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); FED. R. CIV. P. 52(a) (establisbing "clearly erroneous" standard of review of findings of fact); and the acceptable forms of evidence, *see* Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 615, 649-56 (1967).

International law was treated differently. Thus in The Scotia, 81 U.S. (14 Wall.) 170 (1871), having declared that the Court would take judicial notice of a particular rule of international law, Justice William Strong stated that "[f]oreign municipal laws must indeed be proved as facts, but it is not so with the law of nations." *Id.* at 188; *see also* The New York, 175 U.S. 187 (1899). The British courts adopt a similar position, as expressed by Stephenson, L.J., in Trendtex Trading Corp. v. Central Bank of Nig., [1977] 2 W.L.R. 356, 1 All E.R. 881 (C.A.).

> But rules of international law, whether they be part of our law or a source of our law, must be

court must buttress its articulation of the law of nations with the general practice of states and evidence of *opinio juris*, requirements that are sufficiently demanding to erase the prospect of complete judicial creativity in principle. The *Charming Betsy* canon, in other words, does not alter the structured inquiry into whether an international norm exists. Illegitimacy is accordingly a less trenchant problem in the interpretive context of *Charming Betsy* than it is in the incorporationist context, in which it has proven a constant theme of positivist scholarship.[349]

B. Illegitimacy Round II: Prudence and the Political Question Doctrine

A separate version of the legitimacy objection suggests that the *Charming Betsy* principle, if taken seriously, allows the courts to usurp a political function. To the extent that it invites judicial consideration of international issues, the canon politicizes the courts, raising the prospect of a premature or embarrassing statement of international principles and potentially undermining the important power of the national government to alter customary international law by violating it.[350]

This argument rests on the theory that the nation must speak with one voice in foreign affairs. International law in this view is a subspecies of foreign affairs, collapsing inevitably into international politics: when the political branches determine or articulate the United States' international obligations under either customary or conventional law, they inherently are making decisions about the conduct of United States foreign policy. The court in *Finzer v. Barry*[351] made this equivalence ex-

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in some sense "proved", and they are not proved in English courts by expert evidence like foreign law: they are "proved" by taking judicial notice of "international treaties and conventions, authoritative textbooks, practice and judicial decisions" of other courts in other countries which show that they have "attained the position of general acceptance by civilised nations. . . ."

Id. at 379, 1 All E.R. at 902 (quoting The Cristina, [1938] A.C. 485, 497).

Rule 44.1 of the Federal Rules of Civil Procedure altered the conception and treatment of foreign law and did not address international law: "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." FED. R. CIV. P. 44.1. It now appears that international law and foreign law are to he proved and treated similarly: as legislative facts conceptually, but as matters of law with respect to the methods of proof and the standard on review. *See* Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619 (1978).

349. *See, e.g.*, Trimhle, *supra* note 6.

350. Henkin, *supra* note 13, at 1568. In Brown v. United States, 12 U.S. (8 Cranch) 110 (1814), Chief Justice John Marshall noted in dictum that the President and the Congress, acting together, can violate customary international law. *Id.*; *see also* The Nereide, 13 U.S. (9 Cranch) 388 (1815).

351. 798 F.2d 1450 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom.* Boos v. Barry,

plicit: "Defining and enforcing the United States' obligations under international law require the making of extremely sensitive policy decisions, decisions which will inevitably color our relationships with other nations."[352] Judicial resolution of international issues, whether or not deemed to be matters of law, is thought here to undermine an essential coherence in the United States' dealings with foreign countries. In this view, the political question doctrine[353] should bar the importation of broad conceptions of international law into the interpretation of domestic statutes. The *Charming Betsy* principle can be criticized as adding no justiciable standards to those approved under the stricter, incorporationist paradigm.

But the Supreme Court also has established that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[354] Lower courts have eschewed broad applications of the political question doctrine in cases raising issues of international law.[355] These decisions establish that it is not the mere possibility or likelihood of controversy that renders a question "political." Instead, under *Baker v. Carr*,[356] the mark of nonjusticiable political questions is that they "[i] turn on standards that defy judicial application, or [ii] involve the exercise of a discretion demonstrably committed to the executive or legislature . . . [or] [iii] uniquely de-

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485 U.S. 312 (1988).

352. *Id.* at 1458; *accord* Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34, 37 (2d Cir. 1985); Occidental of Umm Al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1204-05 (5th Cir. 1978), *cert. denied sub nom.* Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co., 442 U.S. 928 (1979); *In re* Korean Air Lines Disaster, 597 F. Supp. 613, 616-17 (D.D.C. 1984).

353. The classic list of circumstances in which the political question doctrine may come into play appears in Baker v. Carr, 369 U.S. 186 (1962):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

354. *Id.* at 211.

355. McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 256 (1981) (arguing that "the recent history of the doctrine has been one of judicial indifference and scathing scholarly attack"). Academics have attacked the theoretical underpinnings of the doctrine in the international context. *See, e.g.*, Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law after the* Chadha *Case*, 79 AM. J. INT'L L. 912 (1985); Gordon, *American Courts, International Law and "Political Questions" Which Touch Foreign Relations*, 14 INT'L LAW. 297, 312 (1980); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

356. *Baker*, 369 U.S. at 186.

mand single-voiced statement of the Government's views."[357] These three categories of nonjusticiability suggest limits on the *Charming Betsy* principle but pose no per se obstacle to its reappreciation and application.

1. Judicially Manageable Standards

At base, the reluctance to exercise a broad power of abstention reflects the courts' capacity and willingness to distinguish between law, which is justiciable in spite of the admitted consequences for United States foreign relations, and politics, which are nonjusticiable altogether. Consistent with *Baker*, the courts may decline to abstain when there are judicially manageable standards to apply, even when those standards originate in international law or implicate issues of diplomacy: "[W]hereas attacks on foreign policymaking are nonjusticiable, claims alleging noncompliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs."[358] The contemporary critique of the broad distinction between law and politics argues that the courts cannot in principle apply the distinction with consistency but this potential inconsistency has not erected some blanket rule of abstention in cases raising issues of international law.[359] To the contrary, the courts seem to employ a distinction between law and politics that is evident[360] though elusive.[361]

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357. *Id.* at 211.

358. DKT Memorial Fund, Ltd. v. Agency for Int'l Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987), *on remand*, 691 F. Supp. 394 (D.D.C. 1988), *aff'd in part and rev'd in part*, 887 F.2d 275 (D.C. Cir. 1989).

359. *Compare* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding disputed issue justiciable despite potential international repercussions) *with* Goldwater v. Carter, 444 U.S. 996 (1979) (holding disputed issue nonjusticiable).

360. The case of Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) is instructive. In that case, the plaintiffs challenged the continued funding of anti-Sandinista forces by the United States in spite of the decision by the International Court of Justice (ICJ) declaring such action to be in violation of international law. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (Judgment of June 27, 1986). The district court dismissed the case on the ground that it raised a nonjusticiable political question, namely the conditions under which the executive branch would choose to comply with a decision of the ICJ. *See* Committee of United States Citizens Living in Nicar. v. Reagan, No. Civ. A. 86-2620, slip op. (D.D.C. Mar. 24, 1987), *aff'd on other grounds*, 859 F.2d 929 (D.C. Cir. 1988).

But the court of appeals rejected this approach, noting that the political question doctrine, with its "shifting contours and uncertain underpinnings" and its "susceptib[ility] to indiscriminate and overbroad application," could not trump rights grounded in law:

> Such basic norms of international law as the proscription against murder and slavery may well . . . restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic courts under international law. . . .

Applying that distinction in the *Charming Betsy* context need not be the occasion for jurisprudential speculation about the nature of law or language. There is instead an empirical basis for the distinction in the very fact of disagreement among nations as to the existence and meaning of an international norm. The Supreme Court has established that the rationale for abstention is particularly powerful when there is dissension among states, progressively weakening with the evidence of agreement:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[362]

Thus, the inevitable linguistic difficulty of determining whether there are judicially manageable standards to apply becomes, in the *Charming Betsy* context, a largely historical inquiry into state conduct, rather than a legislative inquiry into the meaning of statutory or constitutional terms.

This result hardly renders all *Charming Betsy* cases per se justicia-

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Reagan, 859 F.2d at 941. The court of appeals ultimately dismissed the complaint, holding that the violation of an ICJ judgment was fundamentally different from the violation of basic human rights:

> There is no question that, in the second half of the twentieth century, the protections afforded individuals under international law have greatly expanded. . . . Notwithstanding these changes, however, the expanded law of nations does not encompass the principles that appellants advance in this lawsuit. No principle of *jus cogens* protects citizens from harm that may result from their own government's contravention of an ICJ decision.

Id. at 953. In doing so, the court held in essence that there was no law for it to apply to allegations based on a nation's disregard of an ICJ judgment, noting that "the harm that results when a government disregards or contravenes an ICJ judgment does not generate the level of universal disapprobation aroused by torture, slavery, summary execution, or genocide." *Id.* at 942.

Irrespective of whether the court properly assessed the United States' obligation to adhere to an ICJ judgment as a matter of international law, it distinguished between what it perceived as law and what it perceived as politics. As a result, the customary standards of human rights were preserved as limits on deference and nonjusticiability. *See* Wardair Can., Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 10 (1986) (making the same distinction in international context); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (distinguishing law from politics in domestic setting).

361. *Compare* Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (holding justiciable a claim for damages and injunctive relief against the United States for the expropriation of land in Honduras for the training of the Nicaraguan resistance), *vacated on other grounds*, 471 U.S. 1113 (1985) *with* Chaser Shipping Corp. v. United States, 649 F. Supp. 736 (S.D.N.Y. 1986) (holding a claim against the United States for the destruction of private property caused by the mining of Nicaraguan resistance to be a nonjusticiable political question), *aff'd mem.*, 819 F.2d 1129 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

362. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); *see also* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984) (citing cases), *on remand*, 616 F. Supp. 660 (W.D. Mich. 1985); RESTATEMENT (THIRD), *supra* note 3, § 443 comment c.

ble, but it does suggest a partial identity between the justiciability of an issue and the applicability of the *Charming Betsy* principle. That is, the *Charming Betsy* canon applies when there is a customary or conventional standard that is relevant to the interpretation of a statute or that is potentially violated by a proffered interpretation of a statute. The canon need not apply when there is no international norm, and the political question doctrine need not apply when there is. The *Charming Betsy* principle and the "judicially manageable standards" prong of the political question doctrine therefore apply in mutually exclusive settings.

2. Textual Commitment

At the same time, it is clear that the *Charming Betsy* principle will not convert a question "textually committed" to a coordinate branch of government into a justiciable case or controversy. An otherwise nonjusticiable controversy about the political branches' war powers,[363] for example, will not be rendered justiciable solely because a statute exists to which some international standard may be relevant.[364] The same is true of other textually committed constitutional powers, such as impeachment,[365] and obligations, such as the guarantee of republican government.[366] There is, of course, no textual commitment of international

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363. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980) (asserting the "[t]he federal judiciary should not decide constitutional questions concerning . . . whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President"); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 39-66, 77-79 (1972); Franck, *supra* note 22, at 640; Koh, *supra* note 22; *cf.* Goldwater v. Carter, 444 U.S. 997, 1007 (1979) (Brennan, J., dissenting) (disapproving abstention when the issue is whether the constitution delegates a power to the executive or not, as distinct from the legality of a particular exercise of an exclusive and political power).

364. In Commercial Trust Co. v. Miller, 262 U.S. 51 (1923), for example, the Court rejected the argument that the statutory authority of the Alien Property Custodian lapsed with the end of hostilities after World War I. Although a proclamation of peace had issued, arguably incorporating international obligations governing peaceful relations among states, the Supreme Court concluded that "the power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative." *Id.* at 57. Professor Wright views the case as an example of textual commitment, noting that "the Court will not review the determination of the political departments as to when the exigencies produced by war have ended." C. WRIGHT, *supra* note 303, § 14, at 80.

365. Under the Constitution, the House of Representatives has "the sole Power of Impeachment," U.S. CONST. art. I, § 2, cl. 5, and the Senate has "the sole Power to try all Impeachments," *id.* art. I, § 3, cl. 6. There is some controversy whether these sole powers render all impeachment questions nonjusticiable. *Compare* Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 UCLA L. Rev. 30 (1974) (excluding judiciary from impeachment issues) *with* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEM (1973) (empowering judiciary to address some impeachment-related issues).

366. Under the Constitution, "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4, cl. 1. Challenges under the guarantee clause to both state action, *see* Luther v. Borden, 48 U.S. (7 How.) 1 (1849), and congressional

legal issues to a coordinate political branch, and it seems unlikely after *Powell v. McCormack*[367] that such a commitment will be inferred from the narrowly-defined foreign affairs powers that are conferred expressly. Here too, the political question doctrine is unlikely to erect a prophylactic bar to the application of the *Charming Betsy* principle, though a textual commitment argument may be plausible in any particular case.

3. The "One-Voice" Orthodoxy

The prospect of multiple voices is similarly an inadequate rationale for abstention. To summarize the criticism of the orthodoxy as a limitation on adjudication of international legal issues,[368] the one-voice ideal presumes a rigid and unified model of executive power that has not been sustained in other separation-of-powers contexts.[369] It provides no guidance in the common circumstances in which Congress and the executive branch "speak" at odds;[370] or when private initiatives add to the implausibility of a univocal foreign policy;[371] or when there are multiple executive voices over time—some incoherent, some contradictory, some

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action, *see* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867), have been held nonjusticiable. Professor Louis Henkin articulates and criticizes the view that the guarantee clause is a textual commitment of an issue to a coordinate political department. Henkin, *supra* note 355, at 609.

367. 395 U.S. 486 (1969). In *Powell*, the Supreme Court addressed U.S. CONST. art. I, § 5, providing that "Each House shall be the Judge of the . . . Qualifications of its own Members." The Court declared that this language was "at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution." *Powell*, 395 U.S. at 548. Because the House of Representatives refused to seat Adam Clayton Powell on grounds *other* than these constitutional qualifications, the Court held the issue justiciable. The result in *Powell* and other cases has suggested to at least one commentator that the textual-commitment prong of the political question doctrine is "virtually meaningless." Lobel, *supra* note 3, at 1156 n.425.

368. *See* Steinhardt, *supra* note 120.

369. Morrison v. Olson, 487 U.S. 654 (1988), suggests that the Supreme Court has chosen the balancing methodology of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and CFTC v. Schor, 478 U.S. 833 (1986), over the formalism of Bowsher v. Synar, 478 U.S. 714 (1986), and INS v. Chadha, 462 U.S. 919 (1983). In *Morrison*, the Court rejected the argument that a statute authorizing court-appointed independent prosecutors violated the President's constitutional authority to exercise the executive power of the United States, especially the prosecutorial function. The court's willingness to allow an intrusion into the executive preserve of criminal enforcement undermines the model of a coherent and unified executive branch. A similar intrusion into foreign affairs when there is no comparable textual allocation of exclusively presidential power, therefore, also should be allowed. *See* U.S. CONST. art. II, § 2, cl. 2 (providing for presidential appointment of inferior executive officers).

370. *See* Forsythe, *Congress and Human Rights in U.S. Foreign Policy: The Fate of General Legislation*, 9 HUMAN RIGHTS Q. 382 (1987); *see also* South Afr. Airways v. Dole, 817 F.2d 119, 121, 125-26 (D.C. Cir.) (referring to congressional directive to the executive branch to "terminate the Agreement Between the United States of America and the Government of the Union of South Africa"), *cert. denied*, 484 U.S. 896 (1987).

371. This tendency has been most notably true in the Iran-Contra scandal. *See* Koh, *supra* note 22.

less than authoritative.[372] To the extent that the one-voice orthodoxy translates into a simple-minded form of executive domination, it also posits a legislative power without accountability,[373] an anomaly under constitutional principles that cannot be resolved on the simple assertion that the conducting of foreign affairs is different.[374] Nor is this perspective consistent with the cases as a whole.[375]

That is not to say that the one-voice orthodoxy has no explanatory power in foreign affairs cases. To the contrary, it faithfully captures one aspect, but only one aspect, of our juridical history. One-voice concerns are especially powerful in the purist debate about when international law trumps domestic law and vice versa. The conflict between the two orders of law raises the prospect of multiple voices. In cases of conflict, the supremacy axioms identify the one voice that counts in a particular

372. The one-voice orthodoxy offers no criteria for determining the legal status of an executive position that changes over time: which conduct contributes to the creation of a norm, which merely violates, and which "unmakes" the norm, which, being essentially political, may be juridically irrelevant? If the orthodoxy erects a "later-in-time" rule of executive domination, it actually undermines long term executive power and allows violations of international law sub silentio. Steinhardt, *supra* note 120.

373. In contributing to the emergence of customary law, the executive plainly is engaged in a legislative act, though it is by comparison with other legislative acts somewhat attenuated and ill-defined. But in the United States political system, legislative acts of any stripe are subject presumptively to some form of effective oversight. Court decisions "creating" common law can be overturned by statute. Congressional enactments can be either vetoed or judicially reviewed. Administrative regulations can be overturned by either the legislature or, generally, the judiciary. Exceptions to this rule, for example when Congress precludes judicial review of a statute or certain administrative rules, are subject, nonetheless, to a measure of oversight in the form of the President's veto or, in theory, the popular vote. It is anomalous to posit an exercise of power that is hoth legislative and immune from effective review, but this step is precisely what the "one-voice" orthodoxy in foreign affairs does. Whether expressed as a doctrine of nonjusticiability or as a conclusive presumption on the merits, the one-voice orthodoxy prevents Congress and the people from "overturning" the executive practices that contribute to the law in question. If an attempt were made to do so, the one-voice orthodoxy would provide grounds for criticizing the interference rather than recognizing its oversight function.

374. Courts have rejected the full implications of Justice George Sutherland's theory in United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936), of investing the executive with extensive and exclusive power in foreign affairs, radically unconstrained by the structural limitations that are applicahle in domestic matters. *See, e.g.*, American Int'l Group, Inc. v. Islamic Repuhlic of Iran, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981) (rejecting the characterization that "denominating the President as the 'sole organ' of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country").

375. Among the cases in the last decade to reject the executive's exclusive legislative or interpretive power in foreign affairs are Boos v. Barry, 485 U.S. 312 (1988) (rejecting executive interpretation of international treaty governing diplomatic relations); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (rejecting executive interpretation of refugee convention); Wardair Can., Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986) (rejecting executive interpretation of bilateral treaty). In The Paquete Habana, 175 U.S. 677 (1900), the Court rejected the executive's interpretation of the customary law governing the seizure of prize. If the one-voice orthodoxy genuinely reflected United States jurisprudence, these cases—and the authority on which they rest—would be inexplicable.

setting and amplify it.

By contrast, the one-voice orthodoxy is unlikely to undermine the interpretation of statutes in light of international law. The *Charming Betsy* principle offers no authority for a court to contradict a clear legislative statement. It only insists that congressional departures from international law be express, so that they will not be misunderstood or contradicted. The one-voice orthodoxy might be implicated by the *Charming Betsy* principle in the narrow circumstance in which a statute incorporates or is silent with respect to a particular norm, and the executive branch explicitly has disapproved of the norm. In considering the silent statute, the court might give evidentiary value to the executive position in determining what the law of nations requires and conclude that the putative norm is irrelevant in interpreting the statute. But the canon of construction cannot resolve a clear conflict between the executive and the congressional understandings of international law. It operates in principle to construe the statute consistently with international law. But the case—perhaps erroneously[376]—may be considered nonjusticiable or controlled on the merits by executive suggestion, and we are left with the irony that the hypothetical conflict assumes what the one-voice orthodoxy denies. In the end, this narrow potential conflict offers no broad-gauged obstacle to a renewed appreciation and invocation of the *Charming Betsy* principle by courts and advocates.

C. *Illegitimacy Round III: The Critical Criticism of Hermeneutical Technique*

Not all of the plausible attacks on the legitimacy of the renewed vision of *Charming Betsy* reflect the liberal ideals of this Nation's politics. Those attacks dominate to the extent that the renaissance of interpretive theory, the rise of hermeneutical technique, seems to elevate the judiciary into a position of creative dominance. A very different objection suggests that it is simply too facile for a court to rely on an interpretive guideline to understand a concrete statute and a relevant international norm. It is not enough to say "go forth and interpret."

The argument rests on the observation that the turn to interpretation has been one strategy for confronting the "formalist fallacy": the erroneous reduction of legal analysis to deductive and neutral methods capable of producing determinate results in any legal contest.[377] Herme-

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376. Glennon, *Raising* The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321, 363 (1985).

377. In an attempt to show the continuum hetween law and politics, Professor Roberto Unger distinguishes this usual meaning of formalism from his more general definition of formalism as

neutics, by admitting a "looser and more contestable rationality,"[378] avoids the pretense that law is deterministic and acknowledges that there may be multiple defensible answers to any legal question. Its proponents argue that the application of hermeneutics improves legal analysis by forcing judges and advocates to pitch legal controversy as matters of principle, justifying interpretations of precedent or statute on gradients of "fit" and "honor,"[379] rather than as "either/or" clashes among doctrines portrayed as compelling and necessary. The skeptic who first provoked hermeneutics might dismiss it as advice to think too softly—and too arrogantly[380]—about law.

From the critical perspective, hermeneutics simply may hide a particularly insidious version of formalism. A judge's adoption of a particular interpretation is inevitably "a function of power and not of proof."[381] Moreover, the more conscious of alternatives the courts may be, the more the choice of one interpretation over another may be viewed, fallaciously, as immune from a broader political critique.[382] This realization brings us full circle: Part II addressed the legal realist objection that canons of construction are meaningless. This second version of the objection suggests that it is too simple to rely on hermeneutics to resolve any of the recurring tensions in law, including the relationship between international and domestic law. Even sophisticated legal reasoning is hegemonic.

It seems appropriate, perhaps inevitable, that our assessment of the plausibility of the critical criticism is a function of axioms rather than reasons. A paradigm that admits only the extremes of formalism

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"a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary." Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564 (1983).

378. *Id.* at 582.

379. R. DWORKIN, *supra* note 51, at 57, 77. Professor John Denvir phrases these criteria as "complexity" and "sense." Denvir, *Justice Brennan, Justice Rehnquist, and Free Speech*, 80 NW. U.L. REV. 285, 313-14 (1985).

380. *Cf.* Chevigny, *Why the Continental Disputes Are Important: A Comment on Hoy and Garet*, 58 S. CAL. L. REV. 199, 207-08 (1985) (urging modesty in the re-vision of legal controversy).

381. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 823 n.6 (1985).

382. *See* Kennedy, *supra* note 76. In this respect, the formalist objection collapses into the objectivist fallacy, under which law is criticized for presuming the existence of a natural and necessary order of social arrangement and right. Unger, *supra* note 377, at 578. Hermeneutics is thought to offer a response to this objection in that

> [t]he social order is no longer a pre-existing given, but a social creation of which law is an important constituent; the judge no longer studies the text to discover meaning, but helps give it meaning. . . . Nor is there one possible meaning as the result of a judicial reading; hermeneutics admits to the existence of a multiplicity of possible interpretations.

Denvir, *supra* note 379, at 290.

and indeterminacy leaves the apparent choice between dueling implausibilities: mechanical law and no law. Begin instead with "rich theories of adjudication,"[383] in which judges seek guidance from a variety of sources, and absolute determinacy is exchanged for a dialectical technique that by hypothesis cannot be universally acceptable. In this respect, the decision to take the *Charming Betsy* principle seriously is a mode of inclusive analysis, admitting multiple sources of potentially relevant considerations into a process of practical reasoning.

VI. CONCLUSION

The *Charming Betsy* principle stands at the intersection of three unrelated but highly significant developments in law and legal scholarship. As a principle of statutory construction, its importance has risen naturally with the increasingly statutory aspect of United States law. Simultaneously, international law has come to comprehend more substantive matters of social and political life, suggesting that there is an increasingly complex and detailed body of international norms that may be relevant to a given statutory problem. Finally, legal scholarship has focused increasingly on the deconstruction and reconstruction of interpretive theory. The *Charming Betsy* principle combines elements of textualist and intentionalist paradigms, but it also, unlike most canons of construction, turns on generalizable public values that give it shape and legitimacy. In exploring the potential effect of the *Charming Betsy* principle, this Article demonstrates that the public values approach to statutory construction is a fruitful technique for the interpretation and application of canons of construction and not just particular statutes.

What has here been called "the *Charming Betsy* principle" refers of course to a constellation of principles at work in the legisprudence of United States courts. In its simplest form, the presumption affects most directly the interpretation of ambiguous text: ambiguity will not support the repeal of a treaty or the delegation of a power to violate international law. Jurisdiction and substantive violations of customary law and treaties may not be inferred from a text that fairly supports any other interpretation. In these respects, the *Charming Betsy* principle is but a special example of the clear statement rules familiar in other branches of law.

But the canon as applied imposes a test that is not merely textual;

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383. Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989). Professor Ken Kress states:

> Critical scholars demand that for something to be law it must meet an impossibly high standard. The consequence of critical scholars' unrealistic requirement for law is that there can be no law. But this is too high a price to pay. For the most part, critical legal scholars themselves refuse to accept this consequence of their deductive standard for legal truth.

Id. at 329 (citations omitted).

it requires some congressional awareness or intent as well. That is, the essential finding of inconsistency necessary to override an otherwise relevant international norm must take the form of consideration and repudiation. That consideration may be expressed as an intent to preempt all competing standards, and if the resulting statute cannot be reconciled with an asserted norm of international law, the presumption of conformity may be overcome. But in any case, whether reconciliation is fairly possible or not is a function of both congressional intent and the logical or normative incompatibility between the statute and the putative international norm.

That the *Charming Betsy* test is not strictly textual is shown by *Lauritzen* and *McCulloch*, in which the court interpreted facially unambiguous language, which, if given its literal application, would threaten the interests of the United States by placing the Nation in violation of international standards or embarrassing the political branches in their conduct of foreign relations. The twin rationales for the principle, respecting both international law and the separation of powers, can operate even in the absence of ambiguous text and guide its judicial transformation away from naive literalism.

The principle also offers a touchstone for interpreting intent as it may be revealed in a statute's legislative history. When congressional intent can be interpreted in at least two ways, one preserving international standards and the other not, *Cardoza-Fonseca* suggests that the court should adopt the former view. Thus, in determining whether a reconciliation is fairly possible, the *Charming Betsy* principle offers guidance in cases when Congress acts with mixed or obscure motives.

The potential impact of this interpretive guideline has been lost in the purist debate about the hierarchical relationship between domestic law and international law. Especially when phrased narrowly as a controversy over the effective immunity of domestic officers from international standards, this debate has proven to be a largely intramural one, somewhat removed from the broad day-to-day task of interpreting statutes and committed to the "either/or" logic of supremacy. As the international legal system addresses more substantive aspects of economic and political life, however, the *Charming Betsy* principle should take on a heightened practical and theoretical significance.

Although the challenge falls in part to Congress, this Article is not a plea for more legislative consciousness or "better" statutes. It is instead an alert to courts, advocates, and scholars that a potentially powerful idea has been under-appreciated and should be reconsidered in light of contemporary international legal developments and the rise of statutes in the law of the United States.