Charming Betsy and the Constitution

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One of the main disputes in regard to how courts should interpret the federal Constitution pertains to the legitimacy of relying on international law in constitutional interpretation. This Article examines the interpretative status of international law, in general, and the controversy over the use of international law in constitutional interpretation, in particular. The Article offers an innovative approach to the controversy based on the significant difference between customary international law and treaty law; namely, that constitutional interpretation with reference to international law should be limited to customary international law, as opposed to treaty law.

Introduction

Constitutional interpretation is "the process of extracting meaning

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from the text of the [C]onstitution."[1] The issue of how courts should interpret the federal Constitution has sparked much debate and controversy.[2] One of the main disputes pertains to the legitimacy of relying on international law in constitutional interpretation. This Article examines the interpretative status of international law, in general, and the controversy over the use of international law in constitutional interpretation, in particular. The Article offers an innovative, nuanced approach to said controversy, based on the significant difference between treaty law and customary international law.

The *Charming Betsy* canon provides that courts must interpret United States (U.S.) laws in a manner consistent with international law.[3] However, the scope of the canon is limited, as it only applies to national statutes and general acts of Congress, and not to the Constitution, since "Congress has the authority to breach treaty obligations through express action, just as any party to a contract can breach their obligations and suffer the consequences."[4] While some authorities have supported the idea of a constitutional *Charming Betsy*,[5] the idea remains unaccepted and therefore theoretic. The notion of a constitutional *Charming Betsy* has been described as radical,[6] and criticized for aiming to please the international community at the expense of the U.S. Constitution's superiority.[7] Some have warned that "[t]he constitutional *Charming Betsy* canon, thus broadly defined and strictly applied, could effectively result in the subordination of all domestic law to international human rights law."[8]

Scholarly discussion regarding international law as a source of constitutional interpretation has thus far considered international law as a homo-

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1. Aharon Barak, *Hermeneutics and Constitutional Interpretation*, 14 CARDOZO L. REV. 767, 767 (1992).

2. *See, e.g.*, Peter J. Smith, *How Different Are Originalism and Non-Originalism?* 62 HASTINGS L.J. 707, 709 (2011) ("The academic debate about originalism remains vibrant and dynamic, and the theoretical case for originalism is more nuanced now than ever before."); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1944) (noting that "the debates over interpretivism and noninterpretivism, originalism and nonoriginalism . . . have dominated scholarly discussion during roughly the past twenty years . . . .").

3. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

4. Laura A. Young, *Setting Sail with* The Charming Betsy*: Enforcing the International Court of Justice's Avena Judgment in Federal Habeas Corpus Proceedings*, 89 MINN. L. REV. 890, 906 (2005); *see also* Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that "Congress may modify [treaty] provisions, so far as [those provisions] bind the United States, or supersede them altogether.").

5. *See* Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 48 (1994) (arguing that "interpretation of the Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind.").

6. *See* Melissa A. Waters, *Getting Beyond the Crossfire Phenomenon: A Militant Moderate's Take on the Role of Foreign Authority in Constitutional Interpretation*, 77 FORDHAM L. REV. 635, 645 (2008).

7. *See* Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of* Charming Betsy, 67 OHIO ST. L.J. 1339, 1343, 1389 (2006) (arguing against the adoption of a constitutional Charming Betsy doctrine).

8. Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 686 (2007).

geneous unit.[9] The discussion is therefore binary, focused on whether to include or exclude international law as a legitimate source of constitutional interpretation.[10]

In our view, both existing approaches fail to capture the significant difference between treaty law and customary international law (CIL), which shall be treated separately when examining the justification for a constitutional *Charming Betsy*. This Article proposes a nuanced approach to the role of international law in constitutional interpretation, which considers the legal order within international law and its effects on use of international law as a source for constitutional interpretation. We suggest that the criticism of constitutional interpretation with reference to international law is compelling with regards to treaty law; however, it is difficult to accept the same criticism with regards to CIL. We claim that CIL, unlike treaty law, should serve as a legitimate source for constitutional interpretation. Applying a constitutional *Charming Betsy* solely to CIL would resolve many of the concerns that arise with regards to international law as a source of constitutional interpretation.

The remainder of this Article proceeds as follows. Part I discusses different theories with regards to the relationship between domestic and international law. Part II presents the *Charming Betsy* canon and its application. Part III analyzes the concept of a constitutional *Charming Betsy* canon, while focusing on the case of *Roper v. Simmons*[11] and its respective criticism. In Part IV, we suggest that a constitutional *Charming Betsy* should be considered legitimate, but only as applied to the constitutional interpretation in accordance with CIL.

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9. *See* Paul B. Stephan, *Rethinking the International Rule of Law: The Homogeneity Fallacy and International Law's Threat to Itself*, 4 JERUSALEM REV. LEGAL STUD. 19, 21, 25–30 (2012) (noting that "homogeneity fallacy permeates international law scholarship . . ." and "[t]he fallacy lies in positing that all international law has the same basic significance and functional role").

10. *See, e.g.*, Alford, *supra* note 7, at 1385.

> A constitutional *Charming Betsy* presumes that the courts will attempt to interpret constitutional liberties consistent with international law so as to liberate the executive branch in the conduct of foreign affairs; but instead, constitutional interpretation frequently requires courts to interpret constitutional liberties in light of asserted executive foreign affairs demands that may conflict (or perhaps coincide) with the demands of international law.
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> . . . .
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> [Consequently,] [t]he burdens on the executive branch are decidedly greater when a statute is applied abroad so as to unlawfully encroach on the sovereignty of other nations.

Id. at 1385, 1389; *see also* DAVID L. SLOSS ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT 526–28 (2011) (assuming that international law obligations are rooted in treaty law and ignoring the difference between treaty law and CIL).

11. *See* Roper v. Simmons, 543 U.S. 551, 551 (2005).

I. The Relationship Between U.S. Law and International Law

A. Monism, Dualism, and Pluralism

Traditionally, the domestic incorporation of international law in domestic law has been explained by the "monist" and "dualist" approaches, defined as two opposing theorizations of the relationship between international law and domestic law.[12]

Monism is the perception of "international law and domestic law as part of a single universal legal system."[13] According to the monist approach, there is a hierarchy under which international law is superior to domestic law, and thus prevails in any conflict between the two laws.[14] The monist model situates countries in a community of nations, and emphasizes the responsibility of states' agencies for securing compliance with international law.[15] The monist approach has been described as restricting the sovereignty of a country, and accordingly as "limit[ing] the capacity of the internal political process to oversee the extent of the state's international obligations and domestic powers."[16]

Dualism, on the contrary, perceives the international and domestic legal systems as separate and independent.[17] In a dualist domestic system, the domestic legislature may decide to authorize the applicability of international law norms.[18] The dualist approach allows limited compliance with international law.[19]

At present, there is growing criticism regarding the dichotomy between

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12. *See, e.g.*, Madelaine Chiam, *Monism and Dualism in International Law*, OXFORD BIBLIOGRAPHIES (June 27, 2018), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml#:~:text=monism%20and%20dualism%20were%20originally,international%20law%20and%20domestic%20law.&text=A%20dualist%20system%20treats%20the,law%20as%20separate%20and%20independent [https://perma.cc/4CJW-8M5S].

13. *Id.*

14. *See id.*; *see also* Francois Rigaux, *Hans Kelsen on International Law*, 9 EUR. J. INT'L L. 325, 331–33 (1998) (discussing the dilemma between the concept of sovereignty and unity of the rule of law).

15. *See* David Feldman, *Monism, Dualism and Constitutional Legitimacy*, 20 AUSTL. Y.B. INT'L L. 105, 105 (1999) ("This monist model, in which municipal and international law form part of a single system, or at least directly related systems, situates the state in the community of nations. It makes clear the responsibility of state agencies for securing compliance with international law, including respect for human rights. It recogni[z]es the role of international law in defining the scope of a state's authority, and entails constitutional rules establishing the status of rules of international law relative to other rules of the legal system.").

16. *Id.* at 105.

17. *See, e.g.*, SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 29 (2010) ("For dualists . . . international law and national law are two entirely distinct legal orders existing independently of one another.").

18. *Id.* at 30.

19. *See id.* at 35–36 (suggesting that the duty to ensure conformity between national and international laws might be non-existent in a dualist system).

monism and dualism.[20] The theories of monism and dualism are seemingly limited by explanatory powers.[21] Both theories have been criticized as posing hermetic arguments with poorly developed core assertions, while disconnected from the contemporary theoretical debate.[22] One of the main critiques is that domestic legal systems are neither strictly monist nor strictly dualist, as international law may be treated in a variety of forms by the different institutions of a single state.[23] Armin von Bogdandy described these theories as "intellectual zombies of another time that should be laid to rest, or 'deconstructed.'"[24] Other scholars have referred to the dichotomy between monism and dualism as "passé,"[25] "fruitless and anachronistic,"[26] and "a false dichotomy."[27] Indeed, the common position among prominent legal scholars is that such traditional definitions are outdated,[28] and that the "monism [versus] dualism dichotomy is giving way in the international law literature to a more nuanced approach."[29]

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20. *See* PAUL GRAGL, LEGAL MONISM: LAW, PHILOSOPHY, AND POLITICS 42–44 (2018) ("Strong criticism has been voiced that theorizing the relationship . . . merely based on either monism or dualism constitutes a false dichotomy . . . .").

21. *See, e.g.*, *id.*; Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 397, 400 (2008); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 929 (2004); Ramses A. Wessel, *Reconsidering the Relationship Between International and EU Law: Towards a Content-Based Approach?*, *in* 5 INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION 7, 8–9 (Enzo Cannizaro et al. eds., 2011); MARIO MENDEZ, THE LEGAL EFFECTS OF EU AGREEMENTS 47 (Paul Craig & Graínne de Búrca eds., 2013).

22. Armin von Bogdandy asserts that:

> As theories, monism and dualism are today unsatisfactory. Their arguments are rather hermetic, the core assertions are little developed, opposing views are simply dismissed as "illogical," and they are not linked with the contemporary theoretical debate. As doctrines, they are likewise unsatisfactory since they do not help in solving legal issues.

von Bogdandy, *supra* note 21, at 400.

23. Louis Henkin points out that:

> Few if any nations are either strictly monist or strictly dualist. In Great Britain, for example, although international law has long been accepted as part of the law of England and applied as such by the courts, Parliament is supreme: the courts give effect to an act of Parliament even if it is inconsistent with Britain's obligations under international law. Treaties are made under the authority of the Crown and are international acts rather than laws of the realm, and treaty obligations are enforced in court only as they are enacted or implemented by Parliament.

Louis Henkin, *The Constitution and United States Sovereignty: A Century of "Chinese Exclusion" and Its Progeny*, 100 HARV. L. REV. 853, 865 (1987).

24. von Bogdandy, *supra* note 21, at 397.

25. Pierre Pescatore, *Treaty-Making by the European Communities*, *in* THE EFFECTS OF TREATIES IN DOMESTIC LAW 191 (Francis G. Jacobs & Shelley Roberts eds., 1987).

26. BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 26 (René Provost trans., 1993).

27. GRAGL, *supra* note 20, at 42.

28. MENDEZ, *supra* note 21, at 39–40.

29. Henry H. Perritt, Jr., *The Internet Is Changing International Law*, 73 CHI-KENT L. REV. 997, 1005 (1998); *see also* Jan-Peter Hix, *Indirect Effect of International Agreements: Consistent Interpretation and Other Forms of Judicial Accommodation of WTO Law by the EU Courts and the U.S. Courts* 4 (N.Y.U. Sch. L., Jean Monnet Working Paper Series No. 3/13, 2013) ("The legal status of international law in domestic legal orders, which has

However, while monism has been neglected and is now considered irrelevant, the theory of dualism has developed into the new theory of legal pluralism, which accounts "descriptively and normatively, for the diversity within the legal realm, in general, and the links between domestic constitutions and international legal phenomena, in particular."[30] Legal pluralism promotes the insight that there is interaction among the different legal orders, rather than a strict separation between legal regimes.[31] According to the legal pluralism approach, "any given constitution does not set up a normative *universum* anymore but is, rather, an element in a normative *pluriversum*."[32] In such normative pluriversum, there is no legal hierarchy between domestic and international law, rather, there is a relationship between distinct legal orders that may overlap and interact with one another—accommodating and contesting, converging and diverging—in accordance with competing values, interests, and priorities, while taking the other into account.[33] Despite the contestation on legal orders, pluralism, in its conservative version, does not undermine constitutionalism because it includes "limits on the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles."[34]

In practice, conflicting norms of domestic and international law are mediated by political, administrative, and judicial institutions.[35] In the case of judicial mediation, the domestic effect of international norms is dependent on two mediating doctrines: the doctrine of direct effect, and the doctrine of consistent interpretation.[36] According to the direct effect doctrine, international law can be invoked and enforced in national courts.[37] A country may allow for the direct effect of international law by the power of its domestic legislation or by international law's supposedly superior status. Therefore, even through the lens of the traditional dualism versus monism separation, any direct effect is detached from the

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traditionally been described by resort to the alternative concepts of monism and dualism, is increasingly understood to require a more nuanced analysis of the interaction between multiple legal orders and legal instruments, which are interlinked and which interact.").

30. von Bogdandy, *supra* note 21, at 398.

31. *Id.* at 401.

32. *Id.*

33. *See* NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 28 (2010) (positioning the world in a "postnational" phase). *But see* Gregory Shaffer, *A Transnational Take on Krisch's Pluralist Structure of Postnational Law*, 23 EUR. J. INT'L L. 565 (2012) (claiming that Krisch's argument is too radical for the world outside Europe).

34. *See* von Bogdandy, *supra* note 21, at 398.

35. *Id.* at 397–98.

36. *Id.* at 398.

37. *See* Paul Daly et al., *Brexit and EU Nationals: Options for Implementation in UK Law* 2 (Cambridge Univ. Working Papers Series No. 1, 2017) (noting that directly effective, substantive provisions may be enforced nationally without incorporation by the national legislature).

dichotomy.[38]

Countries that do not wish to grant international law direct effect, may still apply international law in accordance with the doctrine of consistent interpretation, which requires domestic courts to interpret national law in conformity with international law.[39] Some domestic courts apply the doctrine often with regard to all types of legislation, including the states' constitution. The Netherlands is a prominent example of such a country, in line with its "open [c]onstitution and liberal judicial practice."[40] The U.S. also has adopted the doctrine of consistent interpretation through the *Charming Betsy* canon, but the doctrine traditionally applies to federal legislation and not to the Constitution.[41]

While constitutional interpretation according to international law would be assumed under a monist regime—and utterly unacceptable under a dualist regime—the nuanced approach of legal pluralism allows the U.S. to consider such interpretation without absolute constraints. The contestation between legal orders is welcomed from the perspective of legal pluralism, and distinct constraints on the applicability of international law may vary in accordance with different justifications and considerations, as discussed later in this Article.

B. International Law in the United States

While modern constitutions often enumerate the relationship between international law and domestic law, the U.S. Constitution is silent on this matter.[42] Article VI, Section 2 of the Constitution provides that treaties are part of the superior law of land:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[43]

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38. *See id.* at 3; Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT'L L. 514, 516 (2015) ("[N]ational systems do not adopt a monolithic approach to international law; most of them combine aspects of the monist and dualist approaches. For example, in the United Kingdom treaties do not become part of domestic law unless implemented by Parliament, while courts may directly apply international custom.").

39. *See* Gerrit Betlam & André Nollkaemper, *Giving Effect to Public International Law and European Community Law Before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EUR. J. INT'L L. 569, 571 (2003).

40. *Id.*

41. Young, *supra* note 4, at 906.

42. *See, e.g.*, Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMPAR. L. 455, 458 (2010) ("Unlike many modern constitutions, the American one does not spell out in detail the relationship of international law to the many forms of domestic law."); Henkin, *supra* note 23, at 866 (asserting that "[w]hen the Constitution was adopted, this country clearly constituted one state for international purposes and as such had status, rights, and obligations under international law. The Constitution neither notes that fact nor addresses all of its implications; it assumes them.").

43. U.S. CONST. art. VI, § 2.

However, the Constitution does not refer to many of the relevant issues with regard to the relationship between U.S. domestic law and international law:[44]

> [The Constitution] does not specify the relationship between state law and non-treaty forms of international law, such as customary international law. Nor does the Constitution address the relationship between international law and federal statutes; both are said to be part of the supreme law of the land, but neither is given express primacy in the event of a conflict between the two.[45]

Furthermore, the Constitution does not articulate whether the U.S. legal system is monistic or dualistic, nor does it define the relationship between the international law and the Constitution itself:

> No provision squarely addresses whether the U.S. legal system is monist or dualist. The document addresses the jurisdiction of federal courts to adjudicate disputes potentially involving international law but says nothing about the role of state courts. And nowhere does the document speak to perhaps the most fundamental question: What is the relationship between international law and the Constitution itself?[46]

Constitutional silence with regard to the relationship between domestic and international law did not prove troubling in the U.S.' early days because "[i]nternational law had been part of the law of the colonies; [therefore,] it was [then] part of the law of the United States."[47] Louis Henkin points out that "[a]lthough the Constitution did not indicate a predominantly monist disposition, early United States courts and legislators regarded customary international law and treaty obligations as part of the domestic legal system."[48] In the Restatement (Third) of the Foreign Relations Law of the United States, it was recognized that "[m]atters arising under customary international law also arise under 'the laws of the United States,' since international law is 'part of our law' . . . and is federal law."[49]

However, in the 1880s, three Supreme Court decisions established that courts must give effect to acts of Congress that are inconsistent with prior treaty obligations.[50] This was as a tipping point for the American

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44. In states such as Peru, Argentina, Brazil, Ecuador, Venezuela, and the Dominican Republic, the obligation to interpret each states' respective constitution according to international human rights law is set in the constitutions themselves, making it clear that international law is a legitimate source of constitutional interpretation. *See* REPORT OF THE VENICE COMMISSION ON THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES IN DOMESTIC LAW AND THE ROLE OF COURTS, COUNCIL OF EUROPE 11–12 (Dec. 8, 2014), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)036-e.

45. Dubinsky, *supra* note 42, at 458.

46. *Id.* at 458–59.

47. Henkin, *supra* note 23, at 868.

48. *Id.*

49. RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 111, rep. note 4 (AM. L. INST. 1987).

50. *See* Edye v. Robertson, 112 U.S. 580, 599 (1884) ("The Constitution gives [a treaty] no superiority over an Act of Congress . . . ."); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a Treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . [B]ut if the two are inconsistent, the one

legal system, which switched from a monist approach to a dualist one.[51]

Only in 1957 was the superiority of the Constitution over treaty law clearly formulated, when Justice Hugo Black established, in *Reid v. Covert*, 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."[52]

Discussion on whether the modern U.S. legal system is monistic or dualistic echoes criticisms over the dichotomy between these two doctrines, offering that states are never completely monistic nor completely dualistic.[53] Thus, unsurprisingly, Henkin described the U.S. legal system as a hybrid between monism and dualism.[54] It is true that the U.S. legal system has some monistic characteristics; for example, the Constitution dictates that treaties are part of the supreme law of the land,[55] and the Supreme Court[56] established that CIL is to be considered "part of our law."[57] Nevertheless, the U.S. has displayed stronger preference towards a dualist direction, due to the fact that "United States courts, for their part, have been virtually unanimous in the view that human rights treaty provisions are unenforceable absent implementing legislation."[58] This dualistic tilt in the U.S. legal system is further explained by the notion that the U.S. views itself as a "city upon a hill," and fears that international law might interfere with its enshrined values.[59]

If one looks at the U.S. legal system through the lens of legal pluralism, the question is not about the hierarchical superiority of a given legal system, but rather, about how the U.S. gives effect to international law. The U.S. legal system conducts the contestation between legal orders through the mediating instrument of consistent interpretation—a doctrine adopted through the *Charming Betsy* canon. This canon is critical to understanding the relationship between U.S. domestic law and international law and may

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last in date will control the other . . . ."); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (reaffirming the *Robertson* doctrine).

51. *See* Henkin, *supra* note 23, at 871.

52. Reid v. Covert, 354 U.S. 1, 16 (1957).

53. *See* Henkin, *supra* note 23, at 865; Chiam, *supra* note 12.

54. Louis Henkin, Professor, Colum. Sch. of L., Remarks at the American Society of International Law Plenary Session: The U.S. Constitution in Its Third Century: Foreign Affairs (Apr. 18, 1991), 85 AM. SOC'Y INT'L L. 1991, at 191, 191.

55. U.S. CONST. art. VI, § 2.

56. *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM xii (2013).

57. The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice . . . .").

58. Waters, *supra* note 8, at 639. For a detailed assessment of U.S. courts' dualist approach to human rights treaties, see David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 197–203 (1999) (listing cases in which litigants raised claims under human rights treaties, and concluding that "both advocates and judges have failed to appreciate the possibilities for judicial application of human rights treaties to which the United States is a party").

59. BRADLEY, *supra* note 56, at xiii (describing the U.S.'s dualistic orientation as rooted in its aspirations of setting the path to other nations by adopting unique values rather than following the values and rules other nations operate by).

also shape the relationship between the Constitution and international law, as is analyzed in the next Part of this Article.

II. The *Charming Betsy* Canon

A. *Murray v. The Schooner Charming Betsy*

As part of the 1797–1800 "quasi-war" between the U.S. and France, the U.S. Congress passed the Non-Intercourse Act, prohibiting commerce between persons residing in the U.S., or those who were under such persons' protection, and residents of French territories.[60] The act further applied to captured or forfeited U.S. ships sailing to French territories, U.S. ships sold for the purpose of sailing to French territories, and ships engaged in commerce by or for residents of French territories.[61] In July 1800, the "Charming Betsy," a schooner owned by American-born Danish subject Jared Shattuck, was taken as a prize by a French privateer.[62] Even though Denmark was neutral in the conflict between the U.S. and France, the French captain claimed the ship as American and justified its seizure.[63] Shortly after, the Charming Betsy was recaptured from the French by the American frigate "Constellation," commanded by Captain Murray.[64] Although the text of the Supreme Court's *Charming Betsy* decision does not specify what triggered the capture of the Charming Betsy, it is possible that Murray considered the Charming Betsy to be an American vessel, captured by the French because the schooner was built in an American style.[65] Thus, Murray assumed that Shattuck was an American citizen, violating the Non-Intercourse Act, explaining why he confiscated and sold the vessel's cargo.[66] Murray further sent the Charming Betsy to Philadelphia, and there asked the district court to condemn the ship for violating the Non-Intercourse Act.[67]

The Court rejected Murray's claim that the Charming Betsy was a lawful prize, as the schooner was not American but Danish, and thus neutral, and assessed damages against him for wrongfully seizing the vessel and selling its cargo.[68] Murray appealed the decision.[69] The Circuit Court affirmed that the ship was not lawfully captured but set that Murray would

60. *See* An Act Further to Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 10, § 1, 2 Stat. 7, 8 (1800); William S. Dodge, *The Charming Betsy and the Paquete Habana (1804 and 1900)*, *in* LANDMARK CASES IN PUBLIC INTERNATIONAL LAW 11, 12 (Eirik Bjorge & Cameron A. Miles eds., 2017).

61. An Act Further to Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, §§ 1–2.

62. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 115–16 (1804).

63. *See* Dodge, *supra* note 60, at 13.

64. *The Schooner Charming Betsy*, 6 U.S. at 116.

65. *See* Dodge, *supra* note 60, at 13 ("[S]he looked to be an American-built ship. . . .").

66. *The Schooner Charming Betsy*, 6 U.S. at 116.

67. *Id.*

68. *Id.*

69. *Id.* at 69.

not be liable for damages.[70]

Upon certiorari, the Supreme Court reaffirmed the decrees of the lower courts, establishing that a neutral vessel had nothing to do with the American and French "quasi-war," since "neutrals are not bound to take notice of hostilities between two nations, unless war has been declared."[71] Thus, protections under international law should have been respected despite the Non-Intercourse Act:

> It being then a neutral unarmed vessel, captain Murray had no right to seize and send her in. A right to search a neutral arises only from a state of public known war, and not from a municipal regulation. In time of peace the flag is to be respected. Until war is declared, neutrals are not bound to take notice of it.[72]

The Supreme Court then examined whether Murray had followed the Non-Intercourse Act, in order to review whether he should be excused from damages.[73] The Court construed that the purpose of the Non-Intercourse Act in prohibiting "*all* commercial intercourse" was to also prohibit the sale of vessels to neutrals.[74] Specifically, the Court opined:

> It has been very properly observed, in argument, that the building of vessels in the United States for sale to neutrals, in the islands, is, during war, a profitable business, which Congress cannot be intended to have prohibited, unless that intent be manifested by express words or a very plain and necessary implication.
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> It has also been observed that *an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains*, and 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.[75]

Historian Frederick Leiner suggests that the Supreme Court did not anticipate such judgment to develop into a canon, but rather, hoped to offer a solution for the case at hand:

> To the Marshall court, the importance of the *Charming Betsy* case was not the rule of construction generations of lawyers have come to cite . . . but the reinforcement of international law norms at a time when a militarily weak neutral nation with extensive mercantile interests at stake desperately wanted the law respected.[76]

Be that as it may, Chief Justice John Marshall's decision, which held that an act of Congress should not be interpreted to conflict with interna-

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70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 118 (emphasis added).
75. *Id.* (emphasis added).
76. Frederick C. Leiner, *The* Charming Betsy *and the Marshall Court*, 45 AM. J. LEGAL HIST. 1, 18 (2001).

tional law if a non-conflicting interpretation exists, became known as the *Charming Betsy* canon.

B. The Application of the *Charming Betsy* Canon

Curtis Bradley observed that the *Charming Betsy* canon is misleading in the sense that it may seem "simple and uninteresting," as it "does not require that courts use international law to override domestic law, only that they try to harmonize the two."[77] Ralph Steinhardt similarly observed that "the apparent simplicity of the *Charming Betsy* canon . . . hides a deep and characteristic complexity that goes to the heart of how international law should be applied in the courts of the United States."[78]

The *Charming Betsy* canon is a canon of construction. Canons of construction "are a set of background norms and conventions that are widely used by courts when interpreting statutes. For interpreters, the canons serve as rules of thumb or presumptions that help extract substantive meaning from, among other things, the language, context, structure, and subject matter of a statute."[79] Such canons are "prominent feature[s] of American" statutory interpretation and are consistently used by U.S. courts.[80]

The *Charming Betsy* canon is best described as a rebuttable presumption; as such, "the canon is neither too weak nor too strong: it provides valuable weight to interpretations in accordance with international law, but it can easily be rebutted by other evidence commonly used in statutory interpretation."[81] It has been clarified that "[t]he *Charming Betsy* canon comes into play only where Congress's intent is ambiguous."[82] If Congress intends to violate international law, "there must be present the affirmative intention of the Congress clearly expressed."[83] In cases where there is no such affirmative intention, the Court may advise Congress to amend the law in order to "calibrate its provisions" to provide such affirmative intention.[84] It has been further established that even when the statutory text is unclear, the Judiciary is to give "substantial weight to the views of the political branches, especially the Executive, regarding the content of international law."[85] Therefore, it seems that the manner in which the Executive

77. Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1998).

78. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1113 (1990).

79. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344 (2010).

80. Bradley, *supra* note 77, at 505.

81. Rebecca Crootof, *Judicious Influence: Non-Self-Executing Treaties and the* Charming Betsy *Canon*, 120 YALE L.J. 1784, 1811 (2011).

82. United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003).

83. McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 21–22 (1963) (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

84. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991) ("Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot.").

85. Crootof, *supra* note 81, at 1813.

understands international law may also carry import for the canon. While the U.S. has a great deal of influence over the development of international law,[86] sometimes the formal U.S. position on international law rules differs from the general understanding of the international community.[87] Such understanding of the canon guarantees that the U.S. position is considered the correct one for matters of consistent interpretation. Further, endorsement of U.S. interpretations of international law by U.S. courts may promote such interpretations in the international community, as it "encourages and facilitates thoughtful participation in the transnational judicial dialogue."[88]

Until the 1980s, the *Charming Betsy* canon was applied exclusively in disputes regarding jurisdictional or maritime matters.[89] However, the canon's scope has dramatically expanded over time, gradually applying to employment law, immigration, diplomatic relations, and treaties with Native American tribes.[90]

The first significant use of the *Charming Betsy* canon in the twentieth century was in the 1953 case of *Lauritzen v. Larsen*.[91] There, the Supreme Court relied on the canon to construe a vague statute as not applying to foreign actors in order to comply with international maritime law.[92] Roger Alford argues that "the overarching concern [in *Lauritzen v. Larsen*] was to avoid international discord through statutory interpretations that might

86. *See id.* at 1814 (explaining that the U.S. "actively influences the development of treaties," and "often plays a pivotal role in drafting international treaties . . . .").

87. A good example of such differences of positions is manifested in the 2005 CIL Study of the International Committee of the Red Cross (ICRC), and the U.S. response criticizing the ICRC's take on the specially affected states doctrine as well as its assessment of state practice. *See* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 153, 267 (2005); John B. Bellinger, III & William J. Haynes, II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, INT'L REV. RED CROSS, June 2007, at 443, 443–46 (2007) (summarizing the basis for U.S. skepticism); *see also* Shelly Aviv Yeini, *The Specially-Affecting States Doctrine*, 112 AM. J. INT'L L. 244, 246 (2018). Another example is the endorsement of the "unwilling or unable" doctrine by the U.S., which has not been thus far universally accepted. *See* Olivier Corten, *The 'Unwilling or Unable' Test: Has It Been, and Could It Be, Accepted?* 29 LEIDEN J. INT'L L. 777, 799 (2016) ("Undoubtedly, as the 'unwilling and unable' test is at least equivalent to a reinterpretation of Article 51 of the [U.N.] Charter, it is not surprizing [sic] that it has not been accepted by a large majority of U[.N.] members.").

88. Crootof, *supra* note 81, at 1815.

89. *Id.* at 1794.

90. *See, e.g.*, *id.* at 1794–95; Bradley, *supra* note 77, at 489 (citing United States v. Dion, 476 U.S. 734, 738–39 (1986); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979); Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968); Mojica v. Reno, 970 F. Supp. 130, 147–52 (E.D.N.Y. 1997); and United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1464–65 (S.D.N.Y. 1988)).

91. Lauritzen v. Larsen, 345 U.S. 571, 571 (1953); *see also* Alford, *supra* note 7, at 1353 (referring to *Lauritzen* as the first important citation of the *Charming Betsy* doctrine in the twentieth century).

92. *Lauritzen*, 345 U.S. at 578 (quoting Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)).

otherwise create a multiplicity of overlapping and conflicting burdens."[93]

In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, the Supreme Court was asked to interpret the National Labor Relations Act. Citing the *Charming Betsy* canon,[94] the Court held: "[W]e find no basis for a construction which would . . . apply its laws to the internal management and affairs of the vessels here flying the Honduran flag, contrary to the recognition long afforded them . . . by our State Department . . . ."[95]

While the *McCulloch* decision does not indicate considerations other than those relating to harmony between international law and domestic law, the decision was later construed by the Supreme Court as having separation of powers justifications. Thus, in *N.L.R.B. v. Catholic Bishop of Chicago*, the Court explained that in *McCulloch* the Court "declined to read [the statute] 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."[96] Similarly, in *EEOC v. Arabian American Oil Co.* the Court recognized that the *Charming Betsy* canon was applied in *McCulloch* "to avoid, if possible, the separation-of-powers and international-comity questions associated with construing a statute to displace the domestic law of another nation."[97]

As the cases above indicate, new justifications for the *Charming Betsy* canon have emerged over the years. Bradley explains that, traditionally, the *Charming Betsy* canon had two conceptions: (1) the legislative intent conception, which "rests on the assumption that Congress generally does not wish to violate international law because, among other things, such violations might offend other nations and create foreign relations difficulties for the United States";[98] and (2) the internationalist conception, which provides that "courts should use the canon not primarily to implement legislative intent, but rather to make it harder for Congress to violate international law, and to facilitate U.S. implementation of international law."[99] However, Bradley argues that the most convincing justification for the *Charming Betsy* canon in modern times is to serve the constitutional principle of separation of powers because it prevents unintended and unde-

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93. Alford, *supra* note 7, at 1353.

94. The Court stated:

> The presence of such highly charged international circumstances brings to mind the admonition of Mr. Chief Justice Marshall in *The Charming Betsy* . . . that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." We therefore conclude . . . that for U.S. to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."

McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 21–22 (1963) (quoting *The Schooner Charming Betsy*, 6 U.S. at 118; and Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

95. *Id.* at 20.

96. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979).

97. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 265 (1991) (Marshall, J., dissenting).

98. Bradley, *supra* note 77, at 495.

99. *Id.* at 498.

sirable breaches of international obligations by the Court or by Congress, which were determined by the Executive:

> [T]he separation of powers conception views the *Charming Betsy* canon as a means of both respecting the formal constitutional roles of Congress and the President and preserving a proper balance and harmonious working relationship among the three branches of the federal government. The canon arguably does this in several ways. First, it is a means by which the courts can seek guidance from the political branches concerning whether and, if so, how they intend to violate the international legal obligations of the United States. Second, the canon reduces the number of occasions in which the courts, in their interpretation of federal enactments, place the United States in violation of international law contrary to the wishes of the political branches. Third, by requiring Congress to decide expressly whether and how to violate international law, the canon reduces the number of occasions in which Congress unintentionally interferes with the diplomatic prerogatives of the President.[100]

Indeed, a vague law legislated by Congress, and interpreted by the Court to contradict international law, may undermine the intentions of the Executive, the branch responsible for U.S. foreign relations.[101] The *Charming Betsy* canon attempts to minimize such interference via power separation. It does so by pushing statutory constructions to be consistent with international law, to reduce the cases "in which the United States violates international law against the wishes of the political branches" and to encourage the judiciary "to consult the political branches about their wishes regarding [such] violations."[102] The *Charming Betsy* canon further encourages Congress to be clear when writing statutes, thus reducing its unintentional interference with the Executive's diplomatic obligations.[103]

However, alongside its separation of powers motives, the *Charming Betsy* canon has some separation of powers costs because "[b]y interpreting international sources and defining 'conflicts' between municipal and international laws, the court is actively engaged in a transnational dispute regardless of its ultimate decision under the canon."[104] Therefore, some claim that the canon interferes with separation of powers because it empowers judges, to some extent, to make foreign policy judgments.[105]

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100. *Id.* at 525–26.

101. *See* 1 LAURENCE E. TRIBE, AMERICAN CONSTITUTIONAL LAW 643–56 (3d. ed. 2000). *But see* Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 309 (2006) (arguing that "the [U.S.] Constitution does not vest in the president a general, discretionary lawmaking power in foreign affairs, even to enforce formal rights recognized in or formal obligations owed under international law . . . and . . . that the Constitution itself delegates to the president certain powers in foreign affairs, but the domestic incidents of these powers are both few and limited, and must yield to congressional power in any event.").

102. *See* HARV. L. REV., Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1219 (2008).

103. *Id.*

104. Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 238 (1993).

105. Bradley, *supra* note 77, at 531.

The *Charming Betsy* canon, with its 200 years of jurisprudence, is viewed as an integral part of the U.S. legal toolkit and was described by the Supreme Court as "beyond debate."[106] However, it is worth noting Justice Brett Kavanaugh's criticism of the canon,[107] which he considers as contradicting *Erie R.R. Co. v. Tompkins*.[108] In *Erie*, the Supreme Court established that "there is no federal general common law" prohibiting judicially made law.[109] Justice (then-Judge) Kavanaugh's concurring opinion in *Al-Bihani v. Obama* in the D.C. Circuit described the use of international law in statutory interpretation as conflicting with *Erie* and stated that "in our constitutional system of separated powers, federal courts may not enforce law that lacks a domestic sovereign source."[110]

Nevertheless, *Erie* was issued in 1938, and, as is evident, the Supreme Court did not consider the *Charming Betsy* canon to conflict with *Erie* given that the Court applied and used the canon to an even greater extent after *Erie*.[111] If anything, the *Charming Betsy* canon "came into its own" after the 1950s.[112]

Despite that isolated criticism, the controversy with regards to the *Charming Betsy* canon does not refer to its traditional application in interpretation of ordinary acts of Congress, but rather to its use in constitutional interpretation. The notion of a constitutional *Charming Betsy*, and criticism thereof, are presented in the next Part of this Article.

III. Constitutional *Charming Betsy*

A. *Roper v. Simmons*

Although originally applied solely to acts of Congress, the notion of a constitutional *Charming Betsy* has been the subject of vibrant discussions recently, especially in the context of the Eighth Amendment.

The idea of interpreting the Eighth Amendment so as not to conflict with international law was raised in 1994 by Justice Harry Blackmun, who famously argued that the "interpretation of the Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind."[113]

In *Atkins v. Virginia*,[114] in which international law was not the focus

106. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in [the *Charming Betsy*] . . . and has for so long been applied by this Court that it is beyond debate.").

107. *See* Al-Bihani v. Obama, 619 F.3d 1, 10, 17 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

108. *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

109. *Id*. at 64.

110. *Al-Bihani*, 619 F.3d at 10, 17–18.

111. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 265 (1991).

112. Alford, *supra* note 7, at 1352.

113. Blackmun, *supra* note 5, at 48; *see also* Alford, *supra* note 7, at 1339 n.2 (pointing out that Justice Blackmun's quote has been referenced over 200 times in scholarly literature).

114. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

but "simply tacked on as a sort of afterthought to a detailed discussion of domestic law,"[115] the Supreme Court held that execution of mentally retarded persons violates the Eighth Amendment's prohibition on cruel and unusual punishment.[116] International law was mentioned in a footnote, noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[117]

The very brief reference to international law in *Atkins* with regards to the interpretation of the Eighth Amendment was further highlighted seven years later in *Roper v. Simmons*.[118] The case of *Roper v. Simmons* required the Supreme Court to determine whether it is permissible under the Eighth and Fourteenth Amendments to execute a juvenile offender (older than fifteen but younger than eighteen) who has committed a capital crime.[119] Although the Supreme Court had already rejected this proposition in *Stanford v. Kentucky*,[120] the Court reconsidered the issue in *Roper*.[121] Therefore, to determine whether execution of a juvenile over fifteen years old constitutes "cruel and unusual punishment" in accordance with the Constitution, the Court in *Roper* was required to interpret the meaning of that phrase.[122]

Seventeen Nobel peace laureates, who submitted an amicus brief in *Roper*, cited the *Charming Betsy* decision and requested the Supreme Court to interpret the Eighth Amendment in line with international law, arguing that the "Court always has maintained that United States courts must construe domestic law so as to avoid violating principles of international law."[123] The brief further provided that the execution of child offenders endangers children outside the U.S. as well because the international community "looks up" to the U.S.:

> By continuing to execute child offenders in violation of international norms, the United States is not just leaving itself open to charges of hypocrisy, but

115. Waters, *supra* note 8, at 654.
116. *Atkins*, 536 U.S. at 321.
117. *Id.* at 316–17 n.21.
118. *See* Alford, *supra* note 7, at 1376.
119. Roper v. Simmons, 543 U.S. 551, 556 (2005).
120. *See* Stanford v. Kentucky, 492 U. S. 361, 378–79 (1989). Notably, the Eighth Amendment applies to the states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV.
121. *Roper*, 543 U.S. at 569–70.
122. *Id.* at 560–61.
123. Brief for President James Earl Carter, Jr., et al. as Amici Curiae Supporting Respondents, at 5, Roper v. Simmons, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636446 [hereinafter Amici Curiae Brief]. The brief was filed on behalf of Nobel Peace laureates President James Earl Carter, President Frederik Willem De Klerk, President Mikhail Sergeyevich Gorbachev, President Oscar Arias Sanchez, President Lech Walesa, Shirin Ebadi, Adolfo Perez Esquivel, the Dalai Lama, Mairead Corrigan Maguire, Dr. Joseph Rotblat, Archbishop Desmond Tutu, Betty Williams, Jody Williams, American Friends Service Committee, Amnesty International, International Physicians for the Prevention of Nuclear War, and the Pugwash Conferences on Science and World Affairs. *Id.*; *see also* Alford, *supra* note 7, at 1376 (describing the submitters as "the most illustrious group of persons to ever submit an amicus brief before the Supreme Court").

> also is endangering the rights of many around the world. Countries whose human rights records are criticized by the United States have no incentive to improve their records when the United States fails to meet the most fundamental, base-line standards.[124]

Justice Anthony Kennedy, delivering the Court's opinion, viewed the execution of juvenile offenders as contrary to the constitutional prohibition on cruel and unusual punishments under the Eighth Amendment, and based his argument, inter alia, on international law:

> Our determination that the death penalty is disproportionate punishment for offenders under [eighteen] finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. . . . As respondent and a number of amici emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under [eighteen].[125]

In addition to the U.N. Convention on the Rights of the Child (UNCRC), Justice Kennedy further mentioned that the International Covenant on Civil and Political Rights (ICCPR),[126] the American Convention on Human Rights,[127] and the African Charter on the Rights and Welfare of the Child,[128] as well as foreign legislation,[129] all prohibit capital punishment for offenders under eighteen years old at the time of the offense.[130] Such international authorities, explained Justice Kennedy, confirm the Court's decision:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.[131]

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124. Amici Curiae Brief, *supra* note 123, at 29.

125. *Roper*, 543 U.S. at 575, 576.

126. International Covenant on Civil and Political Rights, art. 6(5), Dec. 16, 1966, 999 U.N.T.S. 171.

127. *See generally* INTER-AM. COMM'N ON HUM RTS., THE DEATH PENALTY IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: FROM RESTRICTIONS TO ABOLITION (2011), https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf [https://perma.cc/7VN9-YCKG]. One may also note that the Inter-American Commission on Human Rights has considered the norm against the execution of children "regional *jus cogens*," but did not go as far as explaining such term or providing to what ages it refers to. *See* Case 9647, 147, Report No. 9/71,172 Inter-Am. Comm'n H.R. 147, OEA/ser.L./V./II.71, doc. 9 rev. ¶ 1 (1987).

128. African Charter on the Rights and Welfare of the Child, art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990).

129. Criminal Justice Act 1948, 11 & 12 Geo. 6 c. 58, § 16 (Eng.).

130. *Roper*, 543 U.S. at 575.

131. *Id*. at 578.

Justice Antonin Scalia, in his dissenting opinion, firmly rejected the use of international law to interpret the Constitution. In particular, Justice Scalia objected to constitutional interpretation of treaties the U.S. is not a party to (i.e., the UNCRC),[132] or had made reservations to (i.e., the ICCPR).[133]

> Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage. . . . Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position.[134]

Justice Sandra Day O'Connor, in her dissenting opinion, rejected some of the majority's determinations, but did find it correct to use international law for the interpretation of the Eighth Amendment:

> Nevertheless, I disagree with Justice Scalia's contention . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. . . . [T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights.[135]

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132. For a call for ratification of the UNCRC by the United states, see generally Shulamit Almog & Ariel L. Bendor, *The UN Convention of the Rights of the Child Meets the American Constitution: Toward a Supreme Law of the World*, 11 INT'L J. CHILD. RTS. 273 (2003).

133. The U.S. ratified the ICCPR with the following reservation: "The United States reserves the right, subject to its Constitutional restraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crime committed by persons below eighteen years of age." CLAIBORNE PELL, U.S. SENATE REPORT ON RATIFICATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. REP. NO. 102–23, at 13 (2d Sess. 1992).

134. *Roper*, 543 U.S. at 622. Justice Scalia also rejected the use of United Kingdom legislation in constitutional interpretation because it had "a legal, political, and social culture quite different from" that of the U.S. *Id.* at 604–05. For the use of foreign law in constitutional interpretation, see, e.g., Paul Finkelman, *Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition*, 63 N.Y.U. ANN. SURV. AM. L. 31, 32 (2007); Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653, 657 (2009). In certain jurisprudence and scholarship, the legitimacy of American courts using non-U.S. laws is discussed as one question, with no distinction between the use of international law and the use of foreign laws. For the difficulties involved in this discourse, see generally Mark V. Tushnet, *When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006). Because this Article engages with international law for interpretation, in general, and for constitutional interpretation, in particular, and not for the role of foreign laws in the American jurisprudence, this point is not discussed further.

135. *Roper*, 543 U.S. at 604–05.

Justice O'Connor suggested that "the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus"[136] with regards to the abolishment of juvenile executions. However, she did not believe that, in the U.S., there was such consensus.[137]

The notion of a constitutional *Charming Betsy* has also been discussed in the context of due process. Russel Weintraub argues that the Due Process Clause should be interpreted to disallow for jurisdiction based merely on the transitory presence of the defendant because "the use of the defendant's temporary presence in the forum as grounds for personal jurisdiction is contrary to the consensus of civilized nations and, if used against foreigners, may violate international law."[138] Gordon Christenson also calls for the use of international law to interpret the Constitution in due process matters:

> External sources such as international law . . . form part of a universal context in which a right, because it is juridically shaped from these sources, assumes importance in interpreting a limitation in the Bill of Rights, or in other constitutional provisions designed to protect individual rights, in ways that avoid unnecessary conflict with a state's obligations to the international community.[139]

However, while notions of a constitutional *Charming Betsy* concerning the interpretation of the Fifth and Fourteenth Amendments have been promoted by legal scholars, they have not been brought before the Supreme Court for consideration.

B. Criticism of a Constitutional *Charming Betsy*

The U.N. Charter establishes that modern international law aspires to achieve international cooperation in promoting and encouraging respect for human rights and strives to harmonize the application of such rights globally.[140] While a constitutional *Charming Betsy* is the clearest path for (some) global rights harmonization, it also raises concerns regarding loss of constitutional superiority and subordination of domestic law to international law.[141]

The *Roper* decision[142] was perceived as revolutionist and upset many

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136. *Id.* at 605.
137. *See id.*
138. Russell Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 612 (1991).
139. Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 4–5 (1983).
140. *See* U.N. Charter art. 1, ¶¶ 3, 4 (describing the U.N.'s purpose as, inter alia, "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and [t]o be a center for harmonizing the actions of nations in the attainment of these common ends.").
141. Waters, *supra* note 8, at 686.
142. *See Roper*, 543 U.S. at 551.

in conservative circles, who derided Justice Kennedy as "ha[ving] been brainwashed on his summer trips to Europe."[143]

The legal community also voiced much criticism regarding the determinations made in *Roper*. Alford criticized the use of a constitutional *Charming Betsy* in *Roper*, arguing that it relies on poor grounds:

> While a traditional role for *Charming Betsy* has a firm structural justification, the novel suggestion of a constitutional *Charming Betsy* is far more troublesome.
>
> . . . .
>
> The difficulty with a constitutional *Charming Betsy* is that there is little textual, historical, decisional, or theoretical support for a position that takes international discord into account in interpreting the content of individual liberties so as to harmonize those liberties with international norms.[144]

Melissa Waters observed that the problem with the application of a constitutional *Charming Betsy* in *Roper* was that the Court referred to international treaties that do not apply to the U.S.

> This move [applying a constitutional *Charming Betsy* in *Roper*] was problematic, however, because the Court did not acknowledge that the international human rights treaties on which it relied either have not been ratified by the United States or are so-called "unincorporated" treaties (that is, non-self-executing treaties that have not been legislatively incorporated into U.S. law). In both instances, the treaties relied on in *Roper* do not constitute legally enforceable obligations in U.S. courts.[145]

Waters explains that the use of international law in *Roper* is part of a phenomenon she refers to as "creeping monism," in which "common law courts are abandoning their traditional dualist orientation and are beginning to utilize unincorporated human rights treaties in their work despite the absence of legislation giving domestic legal effect to the treaties."[146] Other examples of such phenomenon can be found in Australia, where Justice Michael Kirby, in particular, has advanced the notion that the Australian Constitution should be interpreted not to conflict with international law.[147]

Waters describes the interpretive technique used in *Roper* as "gilding

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143. *See* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 157 (2005) (citing to Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER (Sept. 12, 2005), at 42, 48).

144. Alford, *supra* note 7, at 1377.

145. Waters, *supra* note 8, at 633.

146. *Id.*

147. *Kartinyeri v Commonwealth* [1998] HCA 22, ¶¶ 166, 167 (Austl.) ("Where there is ambiguity in the common law or a statute, it is legitimate to have regard to international law. Likewise, the Australian Constitution, which is a special statute, does not operate in a vacuum. . . . If there is one subject upon which the international law of fundamental rights resonates with a single voice it is the prohibition of detrimental distinctions on the basis of race."); *Al-Kateb v Godwin* [2004] HCA 37, ¶ 190 (Austl.) ("[O]pinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail. They will be seen in the future . . . with a mixture of curiosity and embarrassment.").

the domestic lily."[148] She argues that the Court "points to international treaty provisions as a kind of value-added—that is, as additional support for its own interpretation (based on traditional canons of analysis) of a domestic legal text."[149] The use of such technique may indicate the Court's willingness "to participate in transnational judicial dialogue on human rights issues," converging human rights norms in the Constitution.[150] Further, courts use the "gilding the domestic lily" technique as "subtle means to give additional heft to an argument based on domestic legal sources."[151] Such use may either "emphasize the importance or fundamental character of a particular domestic norm—for example, a constitutional prohibition on double jeopardy. . . . [or] confirm the correctness of a legal conclusion drawn from analysis of domestic legal sources."[152]

However, scholars doubt whether the use of "gilding the domestic lily" is a mere cover for a more significant use of international law, and whether the Supreme Court in *Roper* has actually used international law as a peripheral "confirmatory" tool. For example, Waters points out that "if international law merely plays a confirmatory role, it is not clear why the Court would bother to discuss it at all."[153] She finds it doubtful that the Court would spend time and energy on international law research in return for such minimal use.[154] Moreover, Ernest Young claims that Justice Kennedy brought international law to the discussion in order to blur the absence of a real consensus regarding abolition of juvenile executions in the U.S., thus giving international practice a greater weight than U.S. practice:

> Justice Kennedy sought "evidence of national consensus against the death penalty for juveniles," but what he found was a nation deeply divided on the question. Twenty states retained the practice, while thirty had abolished it. . . . Such an even split hardly fits the common understanding of 'consensus' as "[g]eneral agreement or concord" or "the collective unanimous opinion of a number of persons." This substantial minority position on the domestic plane becomes an aberrational practice, however, when judged against the backdrop of world opinion. Used in this way, foreign legal rules become dispositive of domestic law; without them, after all, there would be insufficient "consensus" to void state practice.[155]

Thus, Young argues, international law did not have a confirmatory role in *Roper* in the sense of confirming a reasonable legal result, but rather, was used by the Supreme Court to confirm its own intuitions and beliefs, thus overriding the democratic process.[156]

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148. Waters, *supra* note 8, at 654.
149. *Id.*
150. *Id.* at 657.
151. *Id.*
152. *Id.*
153. *Id.* at 658.
154. *See id.*
155. Young, *supra* note 143, at 154.
156. *See id.* at 155 ("The most appealing account of the consensus test is that the Court looks to practice—both domestic and foreign—to confirm its own intuitions out of an appropriate sense of the limits of its own wisdom. The Court might feel strongly,

Zooming out from the specific circumstances of *Roper*, the concern in adopting a constitutional *Charming Betsy* is that it will subordinate the Constitution to international law:

> The constitutional *Charming Betsy* canon, thus broadly defined and strictly applied, could effectively result in the subordination of all domestic law to international human rights law. . . . [T]he adoption of a broad constitutional *Charming Betsy* canon would result in the triumph of monism, and the defeat of traditional dualism, in the common law legal tradition.[157]

The notion of a constitutional *Charming Betsy* has been further described as radical,[158] and faced criticisms for aiming to please the international community at the expense of the superiority of the Constitution.[159] The constitutional *Charming Betsy*, warns Alford, "timidly fears that a candid world is watching us, and therefore we should interpret constitutional guarantees in order to garner the respect and maintain the good graces of other nations."[160] The Constitution, in accordance with such criticisms, should be perceived as of a sufficient moral value to stand on its own, without the need to confirm with international sources.

A rather practical concern in regard to a constitutional *Charming Betsy* is the fear that the Executive, by entering into a treaty, would effectively influence the content of the Constitution. Granting such an influence to the Executive may threaten separation of powers, much against the very purpose of the *Charming Betsy* canon.[161] Indeed, a constitutional *Charming Betsy* would allow the political branches to manipulate the Constitution by entering into a treaty,[162] and may also allow foreign institutions to control domestic constitutional laws.[163]

Despite these criticisms, many in the legal community support the adoption of a constitutional *Charming Betsy*, and opine that it is not as radical as suggested by critical commentators. Bradley, for example, explains that the outcomes of a constitutional *Charming Betsy* are not as dramatic as portrayed, as the use of the canon does not forbid anything

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based on its own moral reasoning, that the juvenile death penalty is immoral but be unwilling to override democratic processes unless it finds its intuitions shared by a large majority of respected legislators and jurists.").

157. Waters, *supra* note 8, at 686.

158. *See* Waters, *supra* note 6, at 645.

159. *See* Alford, *supra* note 7, at 1343, 1389.

160. *Id.* at 1343.

161. *See* Bradley, *supra* note 77, at 524–29.

162. *See* Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 88 (2004) ("The treaty makers cannot override constitutional norms, and they cannot order the Supreme Court to alter its interpretation of a constitutional provision. . . . The political branches can[not] . . . require the Court to follow international or foreign law in interpreting the Constitution.").

163. *See, e.g.*, Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?* 1 CHI. J. INT'L L. 327, 335 (2000) (asserting that "[d]ecisions about the future course of civil and political rights on issues such as homosexuality, immigration, age, hate speech, family structure, and genetics will shape the character of our nation. In a flourishing constitutional democracy with a powerful tradition of domestic human rights protection, such issues should not be decided by international norms and institutions.").

that the Constitution requires and thus does not undermine the Constitution:

> Assuming that the canon is applicable to constitutional as well as statutory provisions, it is important to keep in mind that current constructions of the Constitution do not *require* any of the alleged violations of international law discussed by the commentators. The Eighth Amendment, for example, does not *require* the execution of juveniles. The Supreme Court has held simply that the Eighth Amendment does not *forbid* such executions. To the extent such executions occur, it is not because they are prescribed by the Eighth Amendment, but rather because they are prescribed by federal or state statutes (which presumably are unambiguous in authorizing such executions, and therefore not subject to the canon).[164]

Justice Ruth Bader Ginsburg argued that the opposition to the use of international sources in cases such as *Roper* fails to appreciate the ability of international law to inform and aid the Court in its work and to increase the pool of knowledge and experience the Court can draw on:

> Foreign opinions . . . can add to the store of knowledge relevant to the solution of trying questions. As to our ignorance of foreign legal systems, just as lawyers can learn from each other in multinational transactions and bar associations, judges, too, can profit from exchanges and associations with jurists elsewhere. Yes, we should approach foreign legal materials with sensitivity to our differences, deficiencies, and imperfect understanding, but imperfection, I believe, should not lead us to abandon the effort to learn what we can from the experience and good thinking foreign sources may convey.[165]

Justice Ginsburg further emphasized the importance of global cooperation manifested in harmonization of rights, stressing that modern challenges require the international community to work together: "Recognizing that forecasts are risky, I nonetheless believe we will continue to accord 'a decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility."[166]

Martin Flaherty remarked that consulting international sources for constitutional interpretation is not a dramatic shift of paradigm, as "[t]he law of nations exerted an enormous influence over the Founding generation."[167] Flaherty further explained that for the Founding generation, political sciences enjoyed direct correlations with international law: "Franklin, Hamilton, Jefferson, Jay and John Adams regularly cited the work of the era's great international jurists, and not only for international propositions."[168] In the early days of the U.S., constitutional law and international law were perceived as complementary.[169] Indeed, in the Declara-

164. Bradley, *supra* note 77, at 502–03 (emphasis in original).
165. Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 1 FIU L. Rev. 27, 32 (2006).
166. *Id.* at 42.
167. Martin S. Flaherty, Restoring the Global Judiciary 247 (2019).
168. *Id.*
169. *Id.*

tion of Independence, Thomas Jefferson provided that it is important to pay "decent respect to the opinions of mankind."[170] James Madison similarly argued in *The Federalist Papers* in favor of using international law in the U.S. legal system:

> An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?[171]

Regarding the criticism of the use of international law in the modern-era Supreme Court, one may note that the fear of a constitutional *Charming Betsy* leading to "creeping monism"[172] assumes the traditional dichotomy of monism versus dualism. Because such dichotomy has been abandoned in favor of legal pluralism,[173] it seems adequate that the domestic legal system would be able to rely on international law and be informed by it. Such use of international law actually aligns with Madison's sentiment, presented in *The Federalist Papers*, which viewed the U.S. as part of the global community.[174] The U.S., according to such view, should not subordinate itself to international law, but rather, be informed by it, and use it to improve its own jurisprudence.

IV. Interpreting Constitutional Ambiguities in Line with Customary International Law

A. Customary International Law

The two primary sources of international law are CIL and treaty law.[175] Treaty law is "a relatively straightforward source of law,"[176] comprised of countries' obligations under treaties signed and ratified by the competent authorities of the member countries. CIL, on the other hand, is

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170. The Declaration of Independence para. 1 (U.S. 1776).
171. The Federalist No. 63 (James Madison).
172. *See generally* Waters, *supra* note 8.
173. *See* von Bogdandy, *supra* note 21, at 397–98.
174. *See* The Federalist No. 63, *supra* note 171.
175. *See* Statute of the International Court of Justice art. 38, ¶ 1, Oct. 24, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute] (listing the various sources of international law); Antonio Cassese, International Law 198 (2d ed. 2005) ("In international law there is no hierarchy of sources or rules, at least as between the two primary law-creating processes, that is, custom and treaty.").
176. Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, *in* Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings 63, 67 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

a more complicated concept. CIL has existed since the beginning of the development of international law. According to legal historian Arthur Nussbaum, in the law of nations, CIL "has always held a position equal or superior to treaties."[177] Hans Kelsen considered CIL the basic norm of the international legal order, upon which all international legal rules and norms are built.[178] Brian Lepard, as an example of that hierarchy, writes about how the rules governing treaties, rules that relate to the entry into force and conclusion of treaties, and the interpretation and termination of those same rules originate in CIL.[179]

Article 38(1)(b) of the Statute of the ICJ defines CIL as "a general practice accepted as law"[180]—a formulation often described as a combination of state practice and *opinio juris*. State practice is an empirical element that evidences customary norms.[181] State practice, often referred to as the "material" or "objective" element of CIL,[182] must be general—sufficiently "widespread and representative."[183] *Opinio juris* requires that states act on such rule from a sense of legal obligation. Acts constituting state practice must "be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[184] *Opinio juris* is a subjective element, which requires the assessment of whether states "feel that they are conforming to what amounts to a legal obligation."[185]

Rules of CIL apply to all countries and do not require unanimous consent; however, two doctrines limit their applicability. First, the specially affected states doctrine sets that a practice leading to the emergence of a CIL rule must also include the practice of "[s]tates whose interests were

177. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 201 (revised ed. 1954).

178. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 369 (Anders Wedberg trans., 1945).

179. *See* BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 5 (2010); *see also* Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. 303, ¶¶ 263–64 (Oct. 10) (describing the customary character of the rules governing treaty entry); Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 46 (Sept. 25) (explaining that the provisions of the Vienna Convention of 1969 on the Law of Treaties setting termination and suspension of treaties are, in fact, codifications of pre-existing CIL norms); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 94 (July 9) ("The [c]ourt would recall that, according to customary international law . . . . [a] treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.").

180. ICJ Statute, *supra* note 175, at art. 38(1)(b).

181. J. Patrick Kelly, *Customary International Law in Historical Context: The Exercise of Power Without General Acceptance*, *in* REEXAMINING CUSTOMARY INTERNATIONAL LAW 47, 47 (Brian D. Lepard ed., 2017).

182. Michael Wood & Omri Sender, *State Practice*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶ 2 (2017), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1107?print=pdf [https://perma.cc/D4UK-X3DK].

183. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 73 (Feb. 20).

184. *Id.* ¶ 77.

185. *Id.*

specially affected."[186] Therefore, states that have a special interest in a rule of CIL may either contribute to its formation as CIL, or conversely, prevent the rule from emerging as CIL if they are opposed to such a rule.[187] Second, the persistent objector doctrine posits that "if a state persistently objects to the development of a customary international law, it cannot be held to that law when the custom ripens."[188] A country's persistent objection to a rule by a country would prevent the rule from applying to it, whereas, if the objecting country is specially affected by the rule to which it objects, that rule may possibly be prevented from emerging as CIL.[189] However, special norms of CIL, referred to as *jus cogens*, are peremptory norms constituting *obligatio erga omnes*, which are non-derogable.[190] Common examples of *jus cogens* norms are the prohibitions of genocide and slavery.[191] A persistent objection to such norms would not exempt the objector from their application.

The requirements of CIL do not target a specific governmental branch, but are instead comprised of a country's total and general behavior and beliefs, as reflected, inter alia, in their constitutions. As Ryan Scoville puts it: "CIL is derivative of foreign law insofar as the traditional doctrine holds that state practice can take the form of foreign judicial decisions, statutes, constitutions, regulations, and a wide range of other similar authorities."[192]

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186. *Id.* ¶ 73.

187. *See* Yeini, *supra* note 87, at 244 ("Acceptance by specially-affected states is . . . necessary but not sufficient for a rule of custom to emerge . . . . Conversely, the absence of rule-supporting practice by specially-affected states would have a negating effect on the emergence of a rule of customary international law, despite rule-affirming practice of states not specially affected. On this view, practice of only such states could not crystalize into a custom.").

188. Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495, 495 (2005).

189. *See* Yeini, *supra* note 87, at 244–55 ("While a 'normal' persistent objector would exclude the custom from applying to the objector alone, the absence of rule-affirming practice by specially-affected states (including those specially-affected states that may object to practice of other states affirming the rule) would prevent the putative rule from crystalizing into a custom at all, so that the putative rule would bind neither the objectors nor other states.").

190. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining *jus cogens* as a "peremptory norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

191. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 702 (AM. L. INST. 1987) (listing *jus cogens* norms including genocide; slavery or slave trade; murder or kidnapping; torture or other cruel, inhuman, or degrading, treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and consistent pattern of gross violations of internationally recognized human rights); *see also* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 68 (1996); Andrea Bianchi, *Human Rights and the Magic of* Jus Cogens, 19 EUR. J. INT'L L. 491, 495 (2008).

192. Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1947 (2016).

The International Committee of the Red Cross (ICRC), in its comprehensive 2005 study regarding CIL, similarly stated that the practice of all state branches can contribute to the formation of CIL, and therefore "can engage the international responsibility of the State and adopt positions that affect its international relations."[193] Constitutions, thus, can be invoked as evidence of CIL, and subsequently influence its development.[194]

The separation between CIL and treaty law is not absolute. Some treaty provisions have gained CIL status with time, and many CIL rules have been codified and incorporated into treaties.[195] In such cases, state practice of non-parties to a multilateral treaty may be particularly telling.[196] However, sometimes, treaties are so widely ratified that it is difficult to find such non-party practice. As the famous "Baxter Paradox" indicates, the development of multilateral treaty law might hinder the development of CIL, as it becomes unclear whether state practice stems from *opinion juris* or from a treaty provision:

> [T]he proof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases. The number of participants in the process of creating customary law may become so small that the evidence of their practice may be minimal or altogether lacking. Hence the paradox that as the number of parties to a treaty increases it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty.[197]

Theodor Meron argues that the Baxter Paradox gives too much consideration to the notion that practice by parties to a treaty lack evidentiary weight in CIL creation, and suggests that widespread ratification should, by itself, be evidence of CIL's emergence.[198]

Even with the existence of such ambiguities, most countries agree on most rules of CIL. For example, in response to an ICRC study, the U.S. government "recognize[d] that a significant number of the rules set forth in the Study are applicable in an international armed conflict because they have achieved universal status . . . ."[199]

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193. HENCKAERTS & DOSWALD-BECK, *supra* note 87, at xl.

194. *See, e.g.*, *id.* at 617 (explaining that the constitutional influence on the rule of CIL is known as "Rule 160," according to which statutes of limitation may not apply to war crimes).

195. *See generally* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1989).

196. *See* R.R. Baxter, *Multilateral Treaties as Constitutive of New Customary International Law*, 129 RECUEIL DES COURS 57, 64 (1970).

197. *Id.*

198. *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 50–52 (1989); *see also* Cedric M.J. Ryngaert & Duco W. Hora Siccama, *Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts*, 65 NETH. INT'L L. REV. 1, 6 (2018) (suggesting that domestic courts often view widespread ratification as evidence of CIL).

199. Bellinger & Haynes, *supra* note 87, at 443–44; *see also* Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, INT'L REV. RED CROSS, June 2007, at 473, 473.

Despite the solid roots of CIL in the history of international law, many argue that CIL may be perceived as less legitimate than treaty law because it lacks the element of consent.[200] Most such concerns apply to smaller, weaker countries, and to new countries in particular, which, conversely, do not enjoy the benefits of the persistent objector doctrine and the specially affected states doctrine. Moreover, some assert that CIL's formation process "violates fundamental procedural values, including democratic governance, and cannot function as an acceptable or effective process of norm formation in a decentralized community with widely different values and perceptions."[201] New countries are bound by existing rules of CIL, despite the fact they did not have a chance to object to these rules.[202] Further, the specially affected states doctrine arguably favors stronger countries, especially those in the Global North, as such countries tend to be more heavily involved in military operations and in the development of new weapons.[203] Such conception of the specially affected states doctrine "find[s] the very idea of custom developing over the objections of a powerful state like the United States nearly unthinkable."[204]

While such concerns regarding CIL's legitimacy should be given due consideration, they seem inconsequential in the context of CIL for interpretation of the U.S. Constitution. The U.S. has had considerable influence over the development of CIL; in fact, the Universal Declaration of Human Rights, one of the main human rights law documents treated as CIL,[205]

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200. *See* Allen Buchanan, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 79, 92 (Samantha Besson & John Tasioulas eds., 2010).

201. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 517 (2000).

202. *See id.* at 525 (pointing out that "[t]he actual effect of the persistent objector principle [or] new states dichotomy is to bind the new states emerging from colonialism to preexisting customary law"); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 199 (2010) (asserting that "[u]nder current doctrine, new states are bound by existing rules of CIL").

203. *See* Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AM. J. INT'L L. 191, 192 (2018) (challenging the north-centric conception of the specially affected states doctrine).

204. *Id.*

205. For further discussion of the CIL status of the specially affected states doctrine, see, e.g., John Peter Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, *in* HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 37 (B.G. Ramcharan ed., 1979); MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 262 (1980); ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 123–47 (1986); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMPAR. L. 287, 323 (1996); Hilary Charlesworth, *Universal Declaration of Human Rights (1948)*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW ¶ 14 (2008), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887?print=pdf [https://perma.cc/E3CY-FCU7]; Melissa Robbins, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT'L L.J. 275, 281 (2005); Anne Lowe, *Customary International Law and International Human Rights Law: A Proposal for the Expansion of the Alien Tort Statute*, 23 IND. INT'L & COMPAR. L. REV. 523, 537 (2013); Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977). While the majority of authors agree that the Universal Declaration of Human Rights (UDHR) forms part of CIL, some contest that notion and suggest that only some

was greatly inspired by the American Constitution and "its 200 years of interpretive jurisprudence."[206] Scholars further point out that there is "a remarkable correlation between the norms identified as customary rules, and the range of rights which has been incorporated into the U.S. Bill of Rights."[207] The common understanding of the specially affected states doctrine has also provided the U.S. with vast influence over the development of CIL.[208] Further, the U.S. is by no means a new state, and has persistently objected to rules of CIL it did not agree with.[209]

Although the domestic status of CIL has been contested in U.S. foreign relations law,[210] most complaints deal with CIL's binding powers as arguably enjoying equal status to that of a federal law, not with CIL's use as an interpretive tool.[211]

B. Is Customary International Law a Solution to the Problems of a Constitutional *Charming Betsy*?

The existing discussion regarding a constitutional *Charming Betsy* is based on the perception of international law as a uniform set of rules. This discussion casts aside the substantial differences between different types of sources within international law. In this section, we argue that, in the interpretation of constitutional ambiguities, U.S. courts should refer to CIL and not to treaty law. Our proposal rests on the conclusion that concerns

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of the UDHR rules are CIL, and others claim that human rights do not reflect CIL at all. *See* Simma & Alston, *supra* note 195, at 84.

206. *See* Louis Henkin, *The Universal Declaration and the U.S. Constitution*, 31 POL. SCI. & POL. 512, 512 (1998).

207. Simma & Alston, *supra* note 195, at 94.

208. *See* Heller, *supra* note 203, at 241 (arguing that "[t]he doctrine of specially affected states has . . . been *appropriated* by the United States and Northern scholars").

209. For example, the U.S. is a persistent objector to the prohibition of methods or means of warfare causing widespread, long-term, and severe damage to the environment, and the prohibition on the use of environmental destruction as a weapon. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 87, at 151 ("It appears that the United States is a 'persistent objector' to the first part of this rule. In addition, France, the United Kingdom and the United States are persistent objectors with regard to the application of the first part of this rule to the use of nuclear weapons."); *see also* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 11, 13 (1985) (noting that the U.S. has also persistently objected in the past to the possibility of territorial sea claims of more than three nautical miles, and to coastal states jurisdiction over highly migratory species of tuna beyond their territorial sea). The U.S. is possibly also a persistent objector with regards to the prohibition on the use of expanding bullets (dumdum bullets). *But see* David Glazier et al., *Failing Our Troops: A Critical Assessment of the Department of Defense Law of War Manual*, 42 YALE J. INT'L L. 216, 253 (2017) (considering the U.S. not to be a persistent objector in this area based solely on the U.S.' refusal to procure expanding bullets).

210. *See* Curtis A. Bradley et al., *SOSA, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 870 (2007) (pointing out that "[t]he most contested issue in U.S. foreign relations law during the last decade has been the domestic status of customary international law").

211. *See id.* at 934; *see also* Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 385 (2002) (arguing that "[the] use of international custom to inform interpretation of legislative enactments is perfectly consistent with the revisionist view that such custom is not itself federal law").

about a constitutional *Charming Betsy* mostly apply to treaty law rather than CIL.

There is merit to both arguments in the current controversy, which focuses on whether it is appropriate to interpret the Constitution in accordance with international law as a whole. On the one hand, there is much to learn from the wisdom of international law.[212] Further, there are benefits to harmonizing human rights worldwide in order to achieve greater human rights' protections. Finally, the U.S. does consider itself a moral lighthouse, and generally, does not wish to lag in compliance with international law.[213] Conversely, constitutional independence is crucial, and the Constitution should not be subordinated to international law.[214] In addition, separation-of-powers concerns require avoiding manipulation of the Constitution.[215]

Our proposal offers a pathway that both benefits from international law and maintains constitutional superiority. Arguably, post-*Roper*, a constitutional *Charming Betsy* is a fact.[216] However, it should be applied in a different manner than the traditional *Charming Betsy*, so as to avoid concerns about constitutional superiority. Therefore, our suggestion applies only to the constitutional *Charming Betsy*, and does not affect the common understanding of the federal *Charming Betsy* canon.

Our proposal is made up of three main arguments: First, limiting constitutional *Charming Betsy* to CIL avoids some separation-of-powers concerns that arise in a general constitutional *Charming Betsy*. Second, CIL's unique characteristics make it a better candidate for constitutional interpretation than treaty law. Third, the use of CIL as a source of constitutional interpretation impliedly requires the use of American understandings of CIL norms, and thus, does not constitute foreign influence over the U.S. Constitution.

1. Separation-of-Powers Concerns

The main criticism of *Roper* is that a constitutional *Charming Betsy* interferes with the separation of powers.[217] Separation-of-powers concerns flow in two directions. First, the Supreme Court gave effect in *Roper* to treaties that the U.S. has not signed or ratified, thus overriding the Execu-

212. *See* Ginsburg, *supra* note 165, at 32 (claiming that "differences, deficiencies, and imperfect understanding [of foreign law] . . . should not lead us to abandon the effort to learn what we can from the experience and good thinking foreign sources may convey").

213. *See* Amici Curiae Brief, *supra* note 123, at 29.

214. *See* Waters, *supra* note 8, at 686 ("The constitutional *Charming Betsy* . . . could effectively result in the subordination of all domestic law to international human rights law.").

215. *See* Neuman, *supra* note 162, at 88 ("The political branches can neither require the Court to follow international or foreign law in interpreting the Constitution nor prohibit the Court from considering international or foreign law.").

216. *See* Alford, *supra* note 7, at 1385 ("[F]oreign relations concerns play a traditional and central role in justifying government authority to curtail constitutional liberties.").

217. *Id.* at 1352.

tive's prerogative.[218] Second, a constitutional *Charming Betsy* would allow the Executive to interfere with the judicial prerogative to interpret the Constitution, as the Executive could potentially manipulate constitutional interpretation by signing treaties.[219]

Limiting a constitutional *Charming Betsy* to CIL may ease these concerns. Both unsigned and signed treaties would be considered legitimate sources for constitutional interpretation only if relevant treaty provisions are CIL rules that bind the U.S.; namely, CIL rules that the U.S. has not persistently objected to. The Judiciary would not override the prerogative of the Executive, as it would consider CIL rules that would have obliged the U.S. anyway, regardless of any action taken by the Executive.

Further, the Executive would not be able to manipulate the content of the Constitution by signing treaties, as CIL cannot be created by Executive decisions alone. While Article II of the Constitution requires the President to obtain the advice and consent of two-thirds of the Senate to ratify a treaty,[220] most modern international agreements are formed as "executive agreements," falling outside the scope of Article II, and not requiring Senate consent.[221] Therefore, it is much simpler to create international commitments through an executive agreement. Many U.S. executive agreements "have been . . . made with the ex ante or ex post approval of a majority of Congress. Nevertheless, there are a number of examples of what are called 'sole executive agreements,' which are international agreements created solely by the president."[222] While such process is arguably desirable for practical reasons,[223] it makes it fairly easy for the president to enter treaties and thus influence constitutional interpretation because such simplified process may be easily abused to tip the scales in favor of an interpretation that conforms with the Executive's ideologies.

Conversely, creating CIL is a relatively slow process,[224] which takes

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218. *But see* Roper v. Simmons, 543 U.S. 551, 622 (2005) (Scalia, J., dissenting) ("Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position."); Waters, *supra* note 8, at 633 (criticizing the use of unratified treaties in *Roper*).

219. *See* Neuman, *supra* note 162, at 88 ("But treaties, like legislation, can contribute to a shift in the factual, institutional, and normative environment within which the Court carries on its task of constitutional interpretation.").

220. U.S. CONST. art. II, § 2 (establishing that the President has the power to make treaties "by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur").

221. *See* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 320 (2007) (arguing that the practice of using executive agreements "has been especially prevalent in the period since World War II, during which time the vast majority of international agreements entered into by the United States have not gone through the two thirds senatorial consent process. Indeed, in the fifty-year period between 1939 and 1989, the United States entered into 11,698 'executive agreements' (agreements concluded outside of the Article II process) and only 702 Article II treaties.").

222. *Id.* at 321.

223. *See id.* (providing that "many sole executive agreements have concerned relatively minor or routine matters, [but] some of them have had significant effect").

224. J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 62 (6th ed. 1963). For further discussion, see discussion *infra* Section IV.B.2.

into account the practice of all branches.[225] A single branch of a single country cannot create a CIL rule. In fact, it is very difficult to imagine any manipulation that could create a new CIL rule. As Bradley explains:

> The president's role in triggering signing obligations is distinguishable from his role in the formation of general rules of customary international law. Although the president can take actions along with other nations that may affect the development of customary international law, he cannot unilaterally create customary international law obligations for the United States.[226]

Therefore, while a constitutional *Charming Betsy* that uses treaty law as a source of interpretation may raise separation-of-powers concerns, such concerns do not apply to the use of CIL as a source of constitutional interpretation. However, the concern regarding foreign influence on constitutional interpretation is not hermetically solved by that limitation. Nevertheless, because the U.S.' influence over the formation of CIL is substantial,[227] such concern is somewhat diluted.

2. The Special Nature of Customary International Law

CIL, unlike treaty law, reflects the minimal core protection of rights in international law.[228] The fact that CIL is universal and has a durable quality renders it a better source than treaty law for constitutional interpretation. As articulated by Henkin, "[c]ustomary international law is universal and lasting and has better claim to supremacy than do treaties, which govern only the parties and can be readily terminated or replaced by those parties."[229] Nations aspire to refrain from violating CIL norms, as CIL compliance is considered the minimal legal requirement:

> Conventional wisdom views CIL as a unitary phenomenon that pervades international relations. Governments take care to comply with CIL and incorporate its norms into domestic statutes. National courts apply CIL as a rule of decision, or a defense, or a canon of statutory construction. Nations argue about whether certain acts violate CIL. Violations of CIL are grounds for war or international claims. Legal commentators view CIL to be at the core of the study of international law.[230]

CIL may reflect a global consensus better than any other non-American legal source.[231] Consensual treaties are generally considered CIL, or

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225. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 87, at xl ("The practice of the executive, legislative and judicial organs of a State can contribute to the formation of customary international law.").

226. Bradley, *supra* note 221, at 320 n.58.

227. *See supra* text accompanying notes 205–09.

228. *See* KELSEN, *supra* note 178, at 369 ("Customary international law . . . is the first stage within the international legal order.").

229. Henkin, *supra* note 23, at 877.

230. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999).

231. *Cf.* Roper v. Simmons, 543 U.S. 551, 578 (2005).

manifest a codification of existing CIL norms.[232] Limiting a constitutional *Charming Betsy* interpretation to CIL means limiting it to rules of international law, which have gradually gained approval in the international community.[233] It seems that the criticism regarding CIL legitimacy is not relevant to the legitimacy interpretation of the U.S. Constitution according to CIL, but rather, to weaker countries' capability to effect CIL's development.[234] The impact and influence of the U.S. and American constitutional law on CIL[235] also detracts from the power of criticism of a constitutional *Charming Betsy* according to CIL.

It seems that some of Justice Scalia's criticism in his dissenting opinion in *Roper*,[236] regarding the application of treaty law in constitutional interpretation, actually corresponds to the differences between CIL and treaty law. Thus, Justice Scalia protested the fact that the majority considers what foreign states *say* rather than what they *do*:

> It is interesting that whereas the Court is not content to accept what the States of our Federal Union *say*, but insists on inquiring into what they *do* (specifically, whether they in fact apply the juvenile death penalty that their laws allow), the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact adheres to a rule of no death penalty for offenders under [eighteen].[237]

While treaty law comprises countries' obligations—namely, what countries say they will do—what makes a rule emerge as CIL is state practice and what states *actually* do.[238] Thus, it seems that the use of CIL, rather than treaty law, as a legitimate source for constitutional interpretation would also resolve Justice Scalia's concerns.

Further, Waters, in her criticism of a constitutional *Charming Betsy*, argued that "[t]he constitutional *Charming Betsy* canon, thus broadly defined and strictly applied, could effectively result in the subordination of all domestic law to international human rights law."[239] Waters does not reject the idea of a constitutional *Charming Betsy* altogether, but rather,

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232. *See* Ryngaert & Siccama, *supra* note 198 ("[T]hey may cite international treaties with a view to more strongly anchor an identified customary norm in the consent of states, and on that basis, preempt accusations that they favour one party over another.").

233. The Paquete Habana, 175 U.S. 677, 686 (1900) (referring to "usage among civilized nations . . . gradually ripening into a rule of international law . . . "); *see also* BRIERLY, *supra* note 224, at 62 (pointing out that "[t]he growth of a new custom is always a slow process"). It has been suggested that modern CIL rules develop quicker than in the past. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001) ("Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs.").

234. *See generally* Heller, *supra* note 203.

235. *See supra* text accompanying notes 205–09.

236. *See Roper*, 543 U.S. at 622–28 (Scalia, J., dissenting).

237. *Id.* at 623 (emphasis in original).

238. *See* BRIERLY, *supra* note 224, at 59 ("Evidence that a custom . . . exists in the international sphere can be found only by examining the practice of states . . . .").

239. Waters, *supra* note 8, at 686.

rejects its broadly defined form. Indeed, because not all international law rules have gained CIL status, limiting a constitutional *Charming Betsy* to CIL inherently hedges against the application of international law to constitutional interpretation. This makes sense due to CIL's unique nature (i.e., it represents both practice and conviction, and it provides core protections), and the fact that the drafters of the Constitution considered CIL an inseparable part of the American legal system.

3. Adopting an American Interpretation of Customary International Law

One of CIL's most notable characteristics is its ambiguity; indeed, CIL is less straightforward than treaty law.[240] While sometimes codified in treaties, CIL is traditionally unwritten,[241] and is inherently vague.[242] Although vagueness can be seen as a disadvantage of CIL, we suggest it is an advantage: it allows one to adopt an American perspective on CIL when interpreting the Constitution. Vagueness and ambiguity are not unique to CIL, and can be found in many legal fields. Timothy Endicott argues that vagueness in legal instruments is not trivial.[243] When lawmakers use vague language in framing standards, they typically use "extravagantly vague" terms, such as "reasonableness."[244] Such terminology may generate "serious and deep disputes over the principles of the standard in question. Because it may allow different, incompatible views as to the nature of the standard and the principles of its application (even among sincere and competent interpreters), it leads to the danger that its application will be incoherent."[245]

However, while one of the aims of law is to guide conduct, legal vagueness can serve certain valuable ends.[246] Some degree of vagueness with regards to the application of CIL can be used by U.S. courts to develop and promote an American CIL jurisprudence. This may seem to raise a rather circular problem: ambiguities of the Constitution would be interpreted in accordance with a vague CIL. However, the U.S.'s position regarding the interpretation of CIL rules is not vague. For example, while the international community might be divided on the understanding of the specially affected states doctrine, the U.S. has published its detailed position on the

240. *See* Mendelson, *supra* note 176, at 67 ("Treaties are a relatively straightforward source of law. . . . By contrast, custom is often much less clear.").

241. *See* Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 567 (2016) (asserting that "as an ideal-type, custom is non-negotiated, unwritten, and universal").

242. *See id.* at 577 (pointing out that "[s]ome treaties are intended to codify preexisting custom, thereby rendering it less vague by memorializing it").

243. *See* Timothy A.O. Endicott, *The Value of Vagueness*, *in* VAGUENESS IN NORMATIVE TEXTS 27, 32 (Vijay K. Bhatia et al. eds., 2005) ("Vagueness in legal instruments is generally far from trivial.").

244. *See id.*

245. *Id.*

246. *See* Hrafn Asgeirsson, *On the Instrumental Value of Vagueness in the Law*, 125 ETHICS 425, 425 (2015) ("[A] number of authors have recently argued that vagueness in the law is sometimes a good thing, because it is—in one way or another—a means to achieving certain valuable ends.").

proper understanding of this doctrine.[247] Thus, when a court refers to CIL as a source of constitutional interpretation, it shall give "substantial weight to the views of the political branches, especially the Executive, regarding the content of international law."[248] The courts may learn from international knowledge, but the reference to CIL will be made through an American lens. Under this interpretation, a constitutional *Charming Betsy* does not impose foreign norms on the Constitution, but rather, allows the court to be informed by CIL, as intended by the framers of the Constitution:

> The use of international law in constitutional interpretation does not "impose" anything on the United States, be they fundamental values or passing fads. It is, instead, a resource that judges—American judges—can draw upon in answering difficult questions of constitutional law. Its use reflects a humility that is becoming to a superpower. It reflects the kind of decent respect for the opinions of mankind that the Framers prized and that we should continue to value today.[249]

Another benefit of embracing an American interpretation of CIL is that it will encourage the U.S. to further articulate and develop its positions regarding CIL norms. As Jordan Paust asserts: "[I]t is realistic to note that we are merely participants in the creation and shaping of [CIL], but what glory and greatness participants can make!"[250]

Conclusion

For many years, it was debated whether the *Charming Betsy* canon should apply to the Constitution. In 2005, the case of *Roper v. Simmons* rendered a constitutional *Charming Betsy* a reality.[251] The Supreme Court's decision in *Roper* triggered much criticism, also expressed in the dissenting opinion of Justice Scalia. Critics asserted that the Supreme Court relied on treaties that do not apply to the U.S., thus interfering with the Executive's prerogative to sign treaties. It was further argued that the Court focused on what states *say* rather than on what they actually *do*.

This Article suggests that the discussion of a constitutional *Charming Betsy* should be nuanced to address the differences between CIL and treaty law. We offer that constitutional interpretation with reference to international law should be limited to CIL. CIL's characteristics are fit to serve as a source of constitutional interpretation since it is universal, lasting, and presents core obligations in international law. Further, CIL considers what countries actually do, rather than what they say. Referring to CIL in constitutional interpretation solves separation-of-powers concerns that arise from a constitutional *Charming Betsy* when it is applied to treaty law. As the creation of CIL is not conducted by the Executive, its application

247. *See* Bellinger & Haynes, *supra* note 87, at 455.
248. Bradley, *supra* note 77, at 532.
249. Daniel M. Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMPAR. L. 421, 428 (2004).
250. Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 91 (1990).
251. *See* Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

does not interfere with the Executive's prerogatives. Because a single branch does not create CIL norms, the Executive is not able to manipulate the interpretation of the Constitution by entering into international obligations. To perform constitutional interpretation with reference to CIL, U.S. courts would adopt the American understanding of CIL and promote U.S. positions in the international arena. In adopting the American understanding of CIL norms, the rules applied would not impose international law on the Constitution, but rather, reflect American views as informed by CIL. Such formulation would enable U.S. courts to be in dialogue with international law, while hedging against its application to the Constitution.

As John Donne famously wrote: "No man is an *Iland* [sic], intire [sic] of it selfe [sic]; every man is a peece [sic] of the *Continent*, a part of the *maine* [sic] . . . ."[252] The U.S. should not shutter itself from the vast knowledge CIL has to offer, as the U.S. is a part of a larger global community. However, the use of international sources in constitutional interpretation should be conducted carefully, considering the proper sources of interpretation. Limiting constitutional interpretation to CIL would offer a proper balance between international dialogue and constitutional independence.

252. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS 96, 98 (John Sparrow ed., 1923) (emphasis in original).