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Foreign Relations as a Matter of Interpretation: The Use and Abuse of *Charming Betsy*

ROGER P. ALFORD*

Charming Betsy is a canon of construction that construes legislative enactments consistent with the law of nations. This canon promotes the passive virtue of avoiding constitutional problems by eschewing potential international law violations through statutory interpretation, thereby enhancing the United States' performance in foreign affairs. As a rule of separation of powers, Charming Betsy helps explain how foreign relations concerns clarify the scope of legislative, executive, and judicial authority. But when advocates contend that the Constitution likewise should be read through the lens of Charming Betsy, they abuse the doctrine by ignoring its purpose. While structural guarantees that relate to foreign affairs may be animated by foreign relations concerns, there is little support for a position that takes foreign relations into account in interpreting the content of individual liberties so as to harmonize those liberties with international norms. The proper function of foreign relations in construing individual liberties is its traditional one, to justify government authority to curtail constitutional guarantees.

I. INTRODUCTION

“[I]nterpretation 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.”¹ This opinion, first voiced by Justice Harry Blackmun, has become a clarion call of the internationalist movement to interpret legislative and constitutional materials in light of foreign opinion.²

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¹ Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 48 (1994).

² Blackmun's quote has been referenced over 200 times in scholarly literature since its publication and has become a “staple of the internationalist argument . . . invoked by the nation's most respected and influential international law scholars.” Eugene Kontorovich, *Disrespecting the “Opinions of Mankind,”* 8 GREEN BAG 2D. 261, 262

It purports to echo the Jeffersonian ideal that “the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance.”³ As Justice Ruth Bader Ginsburg recently put it, “[f]ar from [exhibiting hostility] to foreign countries’ views and laws . . . the founding generation showed concern for how adjudication in our courts would affect other countries’ regard for the United States.”⁴ This perspective counsels that United States courts should not decide cases without paying a decent respect to the opinions of mankind.

A competing perspective suggests that, while ambiguous statutes may well be interpreted consistent with the law of nations to facilitate United States’ performance in foreign affairs, it is an altogether more radical proposition to suggest that foreign influences should inform the protections of our founding document.⁵ This perspective greets with grave caution the proposition that foreign opinions should inform the content of our Constitution, which seeks to preserve and protect our republican form of government and the liberties cherished thereby. This perspective echoes the Washingtonian fear of the “insidious wiles of foreign influence” whose intrigues should be resisted by all patriots and whose “tools and dupes usurp the applause and confidence of the people to surrender their own interests.”⁶ This perspective counsels that United States courts should decide cases by

(2005). Justices Ginsburg and Breyer have referenced it in judicial or extrajudicial writings. See *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari); Ruth Bader Ginsburg, Justice of the United States Supreme Court, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the Annual Meeting of the Am’ Soc’y of Int’l Law (Mar. 30–Apr. 2, 2005), in 99 AM. SOC’Y INT’L L. PROC. 351, 352 (2005).

³ Harold Hongu Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 43–44 (2004).

⁴ Ginsburg, *supra* note 2 (quoting Vicki Jackson, *Yes Please, I’d Love to Talk with You*, LEGAL AFFAIRS, July/Aug. 2004, at 43, 44).

⁵ See, e.g., ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES, 137 (2003); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69 (2004); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 116 (2003); *Atkins v. Virginia*, 536 U.S. 304, 348 (Scalia, J., dissenting); *id.* at 322 (Rehnquist, C.J., dissenting); see also *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., 2d Sess. 77 (2004) (statement of Rep. Chabot, Chairman of the House Judiciary) (designating the use of foreign material in constitutional interpretation as “disturbing”).

⁶ *Washington’s Farewell Address*, 1 COMP. MESSAGES & PAPERS PRES. 205, 214 (Sept. 17, 1796) (1897) (hereinafter *Washington’s Farewell Address*); see also Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1979 (2004).

paying a decent respect to the interest of our nation and its people, and that foreign influence on judicial authority should be greeted with a skeptical eye.

Thus far the debate over the role of foreign opinion as an interpretive device has focused almost exclusively on international and foreign law. All but ignored in this debate are the separate arguments that foreign relations concerns should also animate our understanding of United States laws. International diplomacy provides a distinct justification for an international gloss on judicial interpretation.⁷ As one noted scholar put it, “[f]or a country that aspires to be a world leader in human rights, the death penalty has become our Achilles’ Heel.”⁸ We cannot simply entrust to the legislature such questions of foreign policy and international relations.⁹ Courts are now admonished to display a decent respect for the opinions of mankind because of the impact that a failure to do so will have on United States foreign relations.

If there is a mascot for the proposition that foreign opinion should inform federal court decision-making, it is *Charming Betsy*. That doctrine in its simplest formulation provides that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”¹⁰ But it has been contorted and co-opted to now oblige an international gloss on all “existing U.S. legal texts, including the Constitution.”¹¹ In an effort to look “outward . . . to earn the respect of other nations,” we now are admonished by Supreme Court Justices to render decisions mindful of “the scrutiny of a ‘candid World’” in which whatever the “the United States does, for good or for ill, continues to be watched by the international community.”¹² We thus should “favor interpretive rules that assume a national preference to be in conformity with international human rights law, as . . . *Charming Betsy* presumes with respect to statutes.”¹³ Once

⁷ See *infra* text accompanying notes 178–87.

⁸ Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1108 (2002).

⁹ Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture: The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT’L L. 1, 10 (2004).

¹⁰ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

¹¹ Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 335 (2003). Although proponents do not cite it, the companion case of *Talbot v. Seeman* has language that parallels *Charming Betsy* but will admit of more universal coverage. See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (“[T]he laws of the United States ought not, if it be avoidable . . . be construed as to infract the common principles and usages of nations, or the general doctrines of national law.”).

¹² Ginsburg, *supra* note 2, at 352.

¹³ Jackson, *supra* note 11.

benignly embedded in the narrow confines of statutory discretion, it has now metastasized to such a degree that its proponents harbor hope that it soon will be deeply embedded throughout our corpus juris. As Justice Blackmun famously put it, he “look[s] forward to the day when the majority of the Supreme Court will inform almost all of its decisions almost all of the time with a decent respect to the opinions of mankind.”¹⁴

This Article seeks to re-examine the role of foreign relations in statutory and constitutional interpretation, and it will do so through the vessel of *Charming Betsy*. It will take *Charming Betsy* seriously as a rule of statutory construction that facilitates the United States’ performance in the foreign affairs arena. This requires a closer look at the original facts of *Charming Betsy* to underscore its origins as a case first and foremost about the relation among nations, not the law of nations. As a doctrine of separation of powers, the *Charming Betsy* canon seeks to eliminate international discord in furtherance of an executive prerogative to comply with international obligations without inadvertent congressional circumscription. The Article then examines the development of the doctrine and its potential impact on legislative, executive, and judicial authority. Legislative authority is limited in the doctrine of prescriptive jurisdiction, in which *Charming Betsy* overlaps with the presumption against extraterritoriality to the extent that the extraterritorial application of statutes may offend international jurisdictional norms. Executive authority is limited in the doctrine of implied congressional authority, with *Charming Betsy* clarifying the *Youngstown* demarcation of implied congressional authority or admonishment. Finally, judicial authority is limited by *Charming Betsy* impacting the scope of questions that are deemed political rather than legal. In short, a *Charming Betsy* presumption facilitates a foreign relations interpretation of legislative, executive, and judicial authority.

The Article will then focus on the so-called constitutional *Charming Betsy*, which is viewed with a jaundiced eye. Unlike statutory interpretation, the role of foreign relations as a gloss on constitutional interpretation is far more problematic, particularly when the focus turns to individual liberties. While foreign relations are of undoubted concern in constitutional provisions relating to international matters such as war powers or the treaty-making power, a concern for foreign affairs is far more problematic when one examines constitutional liberties. This section of the Article argues that there is little textual, historical, decisional, or theoretical support for a position that takes international discord into account in interpreting the content of

¹⁴ Blackmun, *supra* note 1, at 49.

individual liberties. With one or two exceptions,¹⁵ the text of constitutional liberties is not animated by a concern for foreign relations. Nor is there historical or precedential support for a constitutional *Charming Betsy*. As for a theoretical justification, this novel approach is premised on the false syllogism that foreign affairs should impact all constitutional interpretation, that international discord will flow from any asymmetry between international obligations and constitutional liberties, and therefore constitutional guarantees should be refashioned to conform to international norms. The constitutional *Charming Betsy* 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. This Article concludes by positing that the proper role of foreign relations is its traditional one—to justify a government's authority to curtail constitutional guarantees. Constitutional interpretation frequently requires courts to interpret constitutional liberties in light of asserted executive foreign affairs demands. These demands may or may not coincide with the demands of international law.

II. FOREIGN RELATIONS AND STATUTORY INTERPRETATION

The importance of foreign relations in statutory interpretation has been with us from our foundation.¹⁶ This concern finds its most potent expression in a presumption that the legislative branch will not unintentionally foment international discord through measures that violate the law of nations and thereby encroach upon sensitive issues of executive authority. This doctrine counsels that the courts will presume that the legislature will wish to avoid international discord absent a clear intent to the contrary. This presumption avoids international discord in furtherance of structural harmony consistent with constitutional demands.

The true purpose of the *Charming Betsy* doctrine has been the subject of intense debate. In particular, scholars have debated whether *Charming Betsy*

¹⁵ Particularly the Second Amendment right to bear arms. See *infra* text accompanying notes 190–92.

¹⁶ Even before the Constitution there were early cases that suggested such a doctrine. In *Rutgers v. Waddington*, a case involving a trespass action against a British citizen who had occupied Rutgers's property during the British occupation of New York, Alexander Hamilton successfully argued before the Mayor's Court of New York City that a 1783 New York statute should be read consistent with the law of nations. *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 392, 414–19 (Julius Goebel, Jr. et al. eds., Columbia Univ. Press 1964); see also *Talbot*, 5 U.S. (1 Cranch) at 1.

is essentially a norm of international comity or one of separation of powers.¹⁷ As Ralph Steinhart has elegantly argued, the “apparent simplicity of *Charming Betsy*’s canon of statutory construction hides a deep and characteristic complexity that goes to the heart of how international law should be applied in the courts of the United States.”¹⁸ As discussed below, close examination reveals that the case, and the doctrine which developed from it, is animated from a concern for separation of powers, not compliance with international law per se. *Charming Betsy* offers the passive virtue of avoiding foreign conflict through an interpretative device that reads around potential international violations, which redounds to the benefit of executive performance in foreign affairs. International law is but an ancillary, not intended, beneficiary in this structural compact.

A. *The Charming Betsy Case*

The facts of *Charming Betsy* amply illustrate the importance that foreign relations have played in statutory interpretation. A detailed portrait of the case is required to fully appreciate these foreign relations concerns. This portrait reveals an executive official loosely interpreting congressional authorization to violate international law, resulting in an international imbroglio that threatened the young republic’s relations with neutral European countries that were of critical importance to its future. Given that over one-fourth of all foreign affairs cases and almost one-half of all admiralty cases involved the question of prize and salvage, it was critical that the early Court get these cases right.¹⁹ It did so with great deference to the importance of executive performance in foreign affairs and with great sensitivity to the fledgling nation’s need and desire to comply with international maritime law.

In 1794, the United States and Great Britain signed the Jay Treaty, which resolved the outstanding disputes from the American Revolution and

¹⁷ Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 524–33 (1998); Jonathan Turley, *Dualistic Values in the Age of International Jurisprudence*, 44 HASTINGS L.J. 185, 262 (1993); Ralph G. Steinhart, *The Role of International Law as a Canon of Domestic Interpretation*, 43 VAND. L. REV. 1103, 1130–31 (1990).

¹⁸ Steinhart, *supra* note 17, at 1113.

¹⁹ Ariel N. Lavinbuk, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket*, 114 YALE L.J. 855, 882 (2005). Forty-five percent of all admiralty cases and twenty-eight percent of all foreign affairs cases from 1791 to 1835 (the Jay and Marshall Court) involved prize and salvage. *See id.*

formalized the peaceful relations between the two countries.²⁰ This treaty excited the jealousy of France,²¹ which at the time was at war with Britain. On the heels of President Washington's controversial Neutrality Proclamation of 1793, the Jay Treaty was received by revolutionary France as a further affront to Franco-American relations and a clear violation of the 1778 Franco-American treaties of alliance and commerce.²² Moreover, the Jay Treaty divided the country: Republicans such as Thomas Jefferson denounced Federalists such as Washington and Adams as "apostates who have gone over to [English] heresies, men who were Samsons in the field and Solomons in the council, but who have had their heads shorn by the harlot England."²³

Soon thereafter, French armed vessels began seizing American commercial vessels that traded with the British enemy, with French privateers capturing hundreds of American ships in 1798 and infesting American coastal waters, crippling foreign commerce.²⁴ This prompted Congress beginning in 1798 to pass retaliatory legislation authorizing American vessels to seize French vessels hovering off the American coast. Thus began the two-year undeclared "Quasi-War" with France.

In the furtherance of this undeclared war with France, Congress passed legislation that was "tantamount to a declaration of war."²⁵ From May 1798 to February 1800, Congress declared all treaties with France abrogated, provided for internment of enemy aliens in case of war, increased the regular army, appropriated funds for new war vessels, suspended commercial intercourse between the United States and France, and passed the Alien and Sedition Act.²⁶ The country was firmly placed on a war footing.

The specific legislation at issue in *Charming Betsy* was the Non-

²⁰ Treaty of Amity, Commerce, and Navigation, U.S.—Gr. Brit., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty].

²¹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 109 (1804).

²² See generally H.J.K. Jenkins, *The Quasi-War and American Fears of a French Invasion in 1798*, 89 MARINER'S MIRROR 462 (2003), for a discussion on the "Quasi-War" with France that led to the passage of this legislation; STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 643–90 (1993); SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 111–25 (5th ed. 1965); ALEXANDER DE CONDE, *THE QUASI-WAR* (1966); MICHAEL J. CRAWFORD & CHRISTINE F. HUGHES, *DEP'T OF THE NAVY, 4 THE REESTABLISHMENT OF THE NAVY, 1787–1801: HISTORICAL OVERVIEW AND SELECT BIBLIOGRAPHY* (1997), <http://www.history.navy.mil/biblio/biblio4/biblio4a.htm>.

²³ DAVID McCULLOUGH, *JOHN ADAMS* 483 (2001).

²⁴ ELKINS & MCKITRICK, *supra* note 22, at 645.

²⁵ *Charming Betsy*, 6 U.S. (2 Cranch) at 77.

²⁶ BEMIS, *supra* note 22, at 118.

Intercourse Act of February 27, 1800, one of the earliest precursors to our modern-day Trading With the Enemy Act.²⁷ In that Act, Congress prohibited United States vessels from engaging in commercial dealings with France. The legislation provided in relevant part:

[I]t shall be lawful for the President . . . to give instructions to the public armed vessels of the United States, to stop and examine any ship or vessel of the United States on the high sea, which there be reason to suspect to be engaged in any traffic or commerce contrary to this act, and if upon examination, it shall appear that such ship or vessel is bound or sailing to, or from any port or place, contrary to the true intent and meaning of this act, it shall be the duty of the commander of such public armed vessel, to seize every ship or vessel engaged in such illicit commerce, and send the same to the nearest convenient port of the United States, to be there prosecuted in due course of law, and held liable to the penalties and forfeitures provide by this act.²⁸

The statute defined a United States vessel to include “any vessel owned, hired, or employed wholly or in part by any person . . . resid[ing] within the United States, or [by] any citizen . . . thereof resid[ing] elsewhere.”²⁹

Based on such “French non-intercourse” legislation, the President instructed the commanding officers of armed vessels to “be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to, or from, French ports, do not escape you.” In so doing, the commanders nonetheless should be “*extremely careful not to harass, or injure the trade of foreign nations with whom we are at peace.*”³⁰

What followed from this legislation and its implementation was an international imbroglio between the United States and Denmark regarding the treatment of neutral vessels.³¹ Such litigation involving the Non-

²⁷ 50 U.S.C. app. §§ 1–44 (2000).

²⁸ Act of Feb. 27, 1800, ch. 10, 2 Stat. 7, 10 (1800).

²⁹ *Id.* at 8.

³⁰ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170–72 (1804) (omission of some emphasis).

³¹ Other Danish vessels were also being seized pursuant to such French nonintercourse legislation. See *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 458 (1806); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 173 (1804); *Sands v. Knox*, 7 U.S. 499, 499 (1806); *Stewart v. M’Intosh*, 4 H&J 233, 1816 WL 640 (Md. 1816).

In *Maley*, a Danish vessel was seized by a Lieutenant Maley, described by the Secretary of Navy as “a very ignorant illiterate man [who] has been dismissed [from] the Service principally for his conduct toward Neutral Vessels.” See Letter from the Secretary of Navy to the Secretary of State (Nov. 25, 1800), reprinted in 6 NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE:

Intercourse Act was among the first controversies in the history of the republic over the proper use of United States naval warships.

It should be emphasized that in the late 18th century:

[N]eutral shipping was always fair game for belligerents, all but irresistibly so, no matter how well or how badly the neutrals might behave in the area of diplomacy [E]ach belligerent [was] determined not only to secure the advantages of neutral trade . . . but also to deny them to his enemy This was nowhere more openly or extravagantly seen than in the French West Indies during the final years of the 1790s.³²

While the law of nations protected neutral vessels, the custom of nations was an altogether different matter. In essence, maritime law was entrusted to privateers whose love of money—not country—inspired implausible pretexts for the capture of neutral vessels. Thus it was that the *Charming Betsy* fell into the hands of French privateers in the summer of 1800.

In response to such capture, and in furtherance of congressional authorization, on July 3, 1800, Captain Alexander Murray of the American frigate *Constellation* recaptured the *Charming Betsy* from the French privateers, which was at that time headed for the French island of Guadeloupe.³³ The *Charming Betsy* was taken to Martinique and then Philadelphia, where it was later sold in forfeiture pursuant to the statute.³⁴

NAVAL OPERATIONS FROM JUNE 1800 TO NOV. 1800, at 548 (1938) [hereinafter 6 NAVAL DOCUMENTS]. Believing her to be a French vessel in disguise, Maley captured Schooner *Mercator*, flying under Danish colors and owned by *Charming Betsy*'s owner, Jared Shattuck. The Supreme Court held that Maley lacked probable cause for seizing the Danish vessel and was liable for damages. *See Maley*, 7 U.S. at 483.

³² ELKINS & MCKITRICK, *supra* note 22, at 649.

³³ For a detailed description of the recapture of *Charming Betsy* and subsequent trial, see Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 AM. J. LEGAL HIST. 1 (2001).

³⁴ "I have thought it proper to send the Danish, (or American) Schooner to Phi[adelphia] for tryal [as] she comes clearly under my Instructions in the 5 Sec[ti]on] of the Act preventing an intercourse with the French . . ." Letter from Captain Alexander Murray to Secretary of Navy (July 12, 1800), *reprinted in* 6 NAVAL DOCUMENTS, *supra* note 31, at 139; *see also* Letter from Secretary of Navy to Captain Alexander Murray (Nov. 25, 1800), *reprinted in* 6 NAVAL DOCUMENTS, *supra* note 31 at 549 ("You mention in your letter to me of the 12th July 1800—that this Vessel was under very doubtful circumstances—that you should send her to the U[nited] States for trial . . . and that she clearly came under your Instructions in the 5th Sect[.] of the Act of Congress, preventing an intercourse with the French—That act expired with the 3^d March 1800; but the 8th Section of the Act 'further to suspend the commercial intercourse between the U[nited] States and France', amounts substantially to the same, as the 5th Section of the former act.").

On what pretext did both the French privateers and Captain Murray justify the capture of this neutral Danish vessel? Originally, the *Charming Betsy* was an American vessel that had been sold on June 18, 1800 to one Jared Shattuck, a former United States citizen residing in St. Thomas who became a naturalized Danish citizen in 1796 and who, upon completion of the sale, documented the ship as a Danish vessel. According to Captain Murray, the French captured the vessel “upon strong grounds of her being an American” and that according to the French *process verbal* the ship “was under false papers” as a Danish rather than an American vessel.³⁵

Upon recapturing the “American” vessel from the French, Captain Murray thought—incorrectly as it turned out—that he “had no alternative but to take her to Martinique” for adjudication as an American vessel engaged in commercial intercourse with the French in violation of the statute.³⁶ Murray expressed “hope it will appear that I have been perfectly consistent in my conduct in this Business” for in truth “few Commanders have been as cautious as myself in molesting the trade of any Neutral Power.”³⁷

Captain Murray’s actions were taken at great personal risk, for as Chief Justice Marshall put it, “[a] commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution.”³⁸ This was precisely the fate of Captain Murray in unlawfully seizing the *Charming Betsy*.

On behalf of its Danish subject, the Danish consulate brought a case against Captain Murray for the seizure of the vessel.³⁹ Captain Murray lost the case in trial court on April 28, 1801, and was ordered to pay compensation of \$14,930.50—over ten times his annual salary.⁴⁰ Captain Murray appealed to the Secretary of the Navy to post the appeal bond.⁴¹ In deliberating on the matter, the Acting Secretary of Navy noted on May 12, 1801:

³⁵ Letter from Captain Alexander Murray to the Secretary of the Navy (Nov. 29, 1800), *reprinted in* 6 NAVAL DOCUMENTS, *supra* note 31, at 561–62.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, at 170 (1804) (emphasis omitted).

³⁹ Leiner, *supra* note 33, at 10.

⁴⁰ *Id.*

⁴¹ Letter from Captain Alexander Murray to the Secretary of the Navy (Sept. 1, 1801), *reprinted in* 7 NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE: NAVAL OPERATIONS FROM DECEMBER 1800 TO DECEMBER 1801, at 280 (1938) [hereinafter 7 NAVAL DOCUMENTS].

Captain Murray informs me that the . . . Consul, on the part of the claimants demand a compensation for damages alleged to have been sustained by the recapture of the Danish schooner Charming Betsy . . . Capt[ain] Murray conceived himself authorized by his instructions to make this recapture [and] send the Vessel into Port.⁴²

Captain Murray's timing could not have been worse. Two days later, on May 14, 1801, the Pasha of Tripoli declared war against the United States after Jefferson refused to pay the annual tribute to stave off state-sponsored pirates in the Mediterranean.⁴³ Thus, at the same time the Jefferson Administration was deciding whether to defend Captain Murray's mistreatment of the neutral vessel Charming Betsy, it was fighting a war in Northern Africa to defend the principle of safe passage of neutral vessels from Barbary pirates. In justifying the first overseas war for the young nation, it could hardly afford the perception that its own naval officers were insensitive to the principle of freedom for neutral commerce on the high seas.

Noting in September 23, 1801, that his "predecessors seem to have entertained a doubt with respect to the propriety of Executive interposition," the Secretary of Navy stated that "[o]pinions so respectful have created in my mind much hesitation and have induced me to take the more time to form my ultimate determination upon the Subject."⁴⁴ In the end, the Secretary of the Navy concluded:

Much however as my various Engagements have pressed upon me, I have been induced to give this case due Consideration, and my opinion is that the Executive can consistently and under the Circumstances of the Case ought in the Exercise of a reasonable discretionary power, to afford protection to the officer of the Government, & to endeavour to prevent an eventual Loss to the public.⁴⁵

Accordingly, the Secretary of the Navy posted the appeal bond on behalf of Captain Murray. On appeal to the Supreme Court, the question before the Court was whether the "Charming Betsy [was] subject to seizure and condemnation for having violated a law of the United States."⁴⁶ The holding depended on a finding that Jared Shattuck was an American citizen and

⁴² Letter from Samuel Smith for the Acting Secretary of the Navy to Alexander J. Dallas, (May 12, 1801), *reprinted in* 7 NAVAL DOCUMENTS, *supra* note 41, at 225–26.

⁴³ BEMIS, *supra* note 22, at 176.

⁴⁴ Letter from the Secretary of the Navy to George Harrison, Navy Agent, (Sept. 23, 1801), *reprinted in* 7 NAVAL DOCUMENTS, *supra* note 41, at 287.

⁴⁵ *Id.*

⁴⁶ Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

Charming Betsy was an American vessel within the meaning of the statute. Upon review, the Supreme Court found that Captain Murray's seizure was unwarranted, because the papers appeared perfectly in order and no substantial reason existed to support the suspicion that she was an American vessel within the meaning of the statute.⁴⁷ This was despite the fact Captain Murray had seized the vessel from the French, who likewise thought the vessel was an American one traveling under false Danish papers.

The most important aspect of the decision was the Court's use of the law of nations to interpret the congressional measure. The Court held:

[A]n 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.⁴⁸

Applying that standard, the Court concluded that the "correct construction" of the statute was that the vessel must be owned by a United States citizen "not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed."⁴⁹ In language reminiscent of modern international law jurisprudence on prescriptive jurisdiction, the Court stated that, "[i]f it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the *United States*, such extraordinary intent ought to have been plainly expressed."⁵⁰

Regarding whether Shattuck was an American national, the Court was faced with the "politically explosive issue of expatriation."⁵¹ Most Republicans believed that a person had a natural right to change citizenship, while most Federalists maintained that nationality was inalienable.⁵² The Court avoided addressing the question directly. Instead it found that Shattuck, as a foreign domicile who swore allegiance to the Danish crown, took himself "out of the description of the act" as a United States citizen. The Court found that the *Charming Betsy*, although it was regularly "employed in carrying on trade and commerce with a French island," the ship could not be

⁴⁷ *Id.* at 122.

⁴⁸ *Id.* at 118.

⁴⁹ *Id.* at 119.

⁵⁰ *Id.*

⁵¹ JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 338 (1996).

⁵² *Id.*; Leiner, *supra* note 33, at 12.

forfeited because “at the time of her recapture [it was] the bona fide property of a Danish burgher.”⁵³

The offense of French intercourse was committed by a Danish vessel owned by a Danish citizen, which under a proper interpretation of the law was no offense at all. What animated the Court’s reference to the law of nations was a concern about foreign relations. Congress passed a statute concerning the seizure of vessels engaged in commercial intercourse with France in a time of war. Absent such congressional action, it was, to quote Chief Justice Marshall in the companion case of *Little v. Barreme*, “by no means clear that the president of the *United States* . . . might not, without any special authority for that purpose . . . have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication.”⁵⁴ Anticipating *Youngstown*,⁵⁵ the Court concluded that it had no need to address the question of inherent executive authority. Congress had spoken on a matter pertaining to foreign commerce, prescribing the manner in which the law was to be carried into execution. This included stopping and examining any ship or vessel of the United States on the high sea “which there be reason to suspect to be engaged in any traffic or commerce contrary to the act.”⁵⁶ The executive branch, through commanding officers of the armed services, seized numerous neutral vessels under suspicion that they were American vessels engaged in French commercial intercourse. One Navy captain, “acting upon correct motive, from a sense of duty,”⁵⁷ believed himself authorized by congressional action to seize a Danish vessel on the suspicion that it actually might be an American vessel. Based on this and similar incidents,⁵⁸ a powerful foreign government protested the United States’ conduct and successfully sued the captain in United States court for the seizure of the vessel. With great hesitation, the executive branch agreed to post a bond and pursue the case on appeal on behalf of its Navy officer who took the dubious actions based on his perceived authority. To avoid future incidents, the Supreme Court relied

⁵³ *Charming Betsy*, 6 U.S. (2 Cranch) at 120–21.

⁵⁴ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804). The Court noted that the authority to seize vessels is “derived not only from our municipal law . . . but [also] from the law of nations.” *Charming Betsy*, 6 U.S. (2 Cranch) at 80.

⁵⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see *infra* notes 116–37 and accompanying text.

⁵⁶ Act of Feb. 27, 1800, ch. 10, 2 Stat. 7, 10 (1800).

⁵⁷ See J. Gregory Sidak, *The Quasi-War Cases—And Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL’Y 465 (2005); Kenneth W. Kemp & Charles Hudlin, *Civil Supremacy over the Military: Its Nature and Limits*, 19 ARMED FORCES & SOC’Y 7, 13–15 (1992).

⁵⁸ See *supra* note 31.

upon a doctrine that, whenever possible, congressional legislation should “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.”⁵⁹ Such an interpretation provides clear guidance to executive officers to avoid statutory constructions that create international friction of the kind encountered in *Charming Betsy*. Foreign relations concerns militate against a presumption that Congress would take action to create international tensions for the executive branch with measures inconsistent with the law of nations.

As historian Frederick Leiner has noted, “[t]he international situation confronting the United States best explains how the Court decided the *Charming Betsy* case.”⁶⁰ With the Barbary Coast War in full swing, the British and French at war again, and the United States having the second largest merchant marine in the world, American neutral vessels were unusually vulnerable to attack.

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.⁶¹

B. *The Charming Betsy Doctrine*

From this case, the *Charming Betsy* doctrine emerged. But it was not until the 1950s that it came into its own.⁶² The most recent pronouncements by the Supreme Court confirm that *Charming Betsy* is a constitutional avoidance doctrine premised on a concern for separation of powers. Whenever possible, courts will construe statutes to be consistent with international law so as to avoid interpretations that will give rise to international discord. That is, the substantive reach of an ambiguous statute must be construed in light of the implications that an international law violation would have for the executive branch. Consistent with separation of powers concerns, it reflects a desire to interpret statutes to avoid inter-branch usurpations of power and carefully husbands the complex relationship of the federal branches in the international context.

⁵⁹ *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

⁶⁰ Leiner, *supra* note 33, at 17.

⁶¹ *Id.* at 18.

⁶² *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

Although implicit in numerous cases, the Supreme Court has expressly relied upon the *Charming Betsy* doctrine in approximately a dozen cases in the past one hundred years.⁶³ The first important citation to the doctrine in the Twentieth century was in the 1953 case of *Lauritzen v. Larsen*, which presented a modern variation of the same issue addressed in *Charming Betsy*: whether an ambiguous statute should be construed to regulate the maritime operations of a foreign vessel.⁶⁴ “[B]y usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.”⁶⁵ Such an admonition, the Court found, is consistent with the “long-headed admonition of Mr. Chief Justice Marshall” in *Charming Betsy*.⁶⁶ The precise theoretical basis for the Court’s conclusion that the Jones Act should not reach foreign actors is unclear, but the overarching concern was to avoid international discord through statutory interpretations that might otherwise create a multiplicity of overlapping and conflicting burdens.⁶⁷ One should construe a statute consistent with international law because that law derives its force from common acceptance of rules designed to foster amicable international relations.⁶⁸

⁶³ See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *F. Hoffman–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988); *Weinberger v. Rossi*, 456 U.S. 25 (1982); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Benz*, 353 U.S. at 138; *Lauritzen*, 345 U.S. at 571.

⁶⁴ *Lauritzen*, 345 U.S. at 578–79 (“[W]e are simply dealing with a problem of statutory construction rather commonplace in a federal system by which courts have to decide whether ‘any’ or ‘every’ reaches to the limits of the enacting authority’s usual scope or is to be applied to foreign events or transactions.”).

⁶⁵ *Id.* at 577.

⁶⁶ *Id.* at 578 (“This doctrine of construction is in accord with the long-headed admonition of Mr. Chief Justice Marshall that ‘an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.’”) (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

⁶⁷ *Id.* at 581.

⁶⁸ *Id.* at 581–82. One of the most recent cases, *F. Hoffman–La Roche*, provides a virtually identical rationale for the *Charming Betsy* doctrine. See *F. Hoffman–La Roche*, 542 U.S. at 164 (“This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony . . .”).

Four years later in *Benz v. Compania Naviera Hidalgo, S.A.*, the question was whether United States labor laws “applie[d] to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel [was] temporarily in an American port.”⁶⁹ Declining the invitation to rule that the labor laws applied in such circumstances, the Court noted the diplomatic fallout that would result from such an application⁷⁰ and applied the *Charming Betsy* canon without citation to avoid such international discord:

[H]ere such a ‘sweeping provision’ as to foreign applicability was not specified in the Act For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts.⁷¹

The Court made a similar finding in *McCulloch*, a case involving the interpretation of the National Labor Relations Act. The Court held that “we find no basis for a construction which would . . . apply its laws to the internal management and affairs of the vessels here flying [a foreign] flag, contrary to the recognition long afforded them . . . by our State Department.”⁷² The Court reasoned that:

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 us 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.”⁷³

None of these early cases clearly articulated the basis of the decision as grounded in separation of powers. One might find the doctrine as a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own

⁶⁹ *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 138–39 (1957).

⁷⁰ *Id.* at 146.

⁷¹ *Id.* at 146–47.

⁷² *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–21 (1963) (citations omitted).

⁷³ *Id.* at 21–22 (citations omitted).

territory. But the Court has since clarified that the doctrine, in fact, has constitutional underpinnings, derived from domestic separation of powers concerns and reflecting the sense that the legislative branch, in passing statutes that inadvertently offend international obligations, will hinder the conduct of foreign relations.

This justification for the doctrine finally was made explicit in the case of *N.L.R.B. v. Catholic Bishop of Chicago*, where the Court construed *McCulloch* as a case in which 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.”⁷⁴ Consistent with *McCulloch*, the Court in *Catholic Bishop* extended this principle beyond structural concerns, first examining whether “serious constitutional questions”⁷⁵ were implicated by the statute in question⁷⁶ and, if so, whether those concerns could be alleviated through statutory interpretation that avoided First Amendment problems.⁷⁷ Finding no clear expression of Congress’ intent, the Court construed the ambiguous statute to avoid the constitutional issue.⁷⁸

The Court offered a similar construction of *McCulloch* in *Weinberger v. Rossi*, recognizing that *Charming Betsy* was applied in *McCulloch* to avoid an interpretation that was contrary to State Department regulations.⁷⁹ Following *McCulloch*, the Court in *Rossi* found that where a statute touches upon the United States’ foreign policy, a clear statutory intent to repudiate international obligations must be evident.⁸⁰ Recognizing that executive agreements represent a quid pro quo, the Court took into account the foreign policy implications that would flow from a statutory interpretation that would abrogate executive agreements regarding the preference for employment of local nationals over United States civilian dependents on United States

⁷⁴ *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979).

⁷⁵ *Id.* at 501.

⁷⁶ *Id.* at 501–04.

⁷⁷ *Id.* at 504–07.

⁷⁸ *Id.* at 507.

⁷⁹ *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); see also *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 265 (1991) (Marshall, J., dissenting) (“[T]he Court has . . . recognized that *Benz* and *McCulloch* are reserved for settings in which the extraterritorial application of a statute would ‘implicate sensitive issues of the authority of the Executive over relations with foreign nations.’ The strictness of the *McCulloch* and *Benz* presumption permits the Court 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.”).

⁸⁰ *Rossi*, 456 U.S. at 32.

military bases.⁸¹ The import of *Rossi* is that when the Executive makes promises in international agreements, the Court requires a clear congressional statement to effect a breach of those promises.

One can see then that the *Charming Betsy* doctrine is a rule premised on the avoidance of structural discord through avoidance of international discord. The canon thus admonishes courts to “not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”⁸² The narrow rule of construing statutes to avoid violations of the law of nations in fact supports what the Court in *DeBartolo* described as the much broader “cardinal principle” rooted in *Charming Betsy* that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”⁸³ This reading of *Charming Betsy* comports with the general purpose of statutory presumptions, for

when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice . . . [Such a canon] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.⁸⁴

In short, constitutional avoidance is the “essence” of the *Charming Betsy* doctrine.⁸⁵

As these later cases underscore, in one sense *Charming Betsy* enhances executive freedom in the foreign affairs arena, presuming that Congress has not inadvertently required the Executive to perform functions that would repudiate international obligations and generate international discord. However, as the original *Charming Betsy* case illustrates,⁸⁶ the doctrine also curtails executive freedom by presuming that Congress has not inadvertently authorized the Executive to perform functions that would violate

⁸¹ *Id.* at 29–35.

⁸² *INS v. St. Cyr*, 533 U.S. 289, 300 n.12 (2001).

⁸³ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575 (1988); see also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 629 (1993).

⁸⁴ *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

⁸⁵ *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979).

⁸⁶ See also *MacLeod v. United States*, 229 U.S. 416, 434–35 (1913); *Chew Heong v. United States*, 112 U.S. 536, 549 (1884); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 340–45 (2005) (discussing application of *Charming Betsy* in *MacLeod* and *Chew Heong*).

international law and thereby undermine foreign relations. In both cases, the purpose is to interpret ambiguous statutes to avoid foreign relations difficulties for the United States. The judicial role is to presume that, as a matter of course, Congress does not wish to foment international discord in the passage of ambiguous statutes that might be construed to authorize or require violations of international obligations.⁸⁷ It also serves to depoliticize the courts through plausible interpretations that avoid foreign tensions absent a clear political statement of intent to violate international law. *Charming Betsy's* clear-statement rule unburdens the courts from the foreign policy implications that might flow from interpretations that would work an international wrong. In this sense, *Charming Betsy* serves as a coordinating function among the three branches on matters that implicate foreign relations.

The separation of powers conception of *Charming Betsy* has been aptly summarized as one that

[e]mphasizes institutional relationships rather than legislative intent or respect for international law [It] acknowledges that the violation of international law can create foreign relations difficulties for the United States. But it takes no view as to whether particular violations of international law are desirable or undesirable from the U.S. perspective. Nor does it agree with the internationalist conception that courts should supplement U.S. positive law with international law. It simply rests on the belief that, for formal and functional reasons, the political branches should determine when and how the United States violates international law.⁸⁸

With the Court explicitly having construed the *Charming Betsy* doctrine as a constitutional rule of separation of powers, one can find its application in unexpected contexts. Although rarely discussed, *Charming Betsy* helps explain foreign relations' limitations on legislative, executive, and judicial authority.

⁸⁷ Wuerth, *supra* note 86, at 339 ("To the extent the canon is based on separation-of-powers concerns, it may be designed at least in part to prevent courts from construing statutes to create a violation of international law unintended by either Congress or the President.").

⁸⁸ Bradley, *supra* note 17, at 526; see also Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 714 (2001) ("[T]he *Charming Betsy* canon allows the courts to sound out the political branches as to whether and how they wish to violate international law, reduces judicial interpretations mistakenly placing the United States in conflict with customary international law, and reduces inadvertent interference by Congress with the President's diplomatic prerogatives.").

C. Charming Betsy and Legislative Authority

The impact of foreign relations finds one of its most common applications in discerning whether the legislative branch has prescriptive authority over foreign acts and actors. The presumption is that it does not, a statutory canon commonly described as the presumption against extraterritoriality. The exceptions to this presumption are narrow and few, limited to prescribing conduct that has a clear national nexus.⁸⁹ The rule has been invoked as an assumed application of congressional intent:

The vast run of statutes are enacted with only the intrastate situation in mind [T]his is so even if, as is frequently the case, the statute employs such sweeping terms as "every contract" or "every decedent." Unless it appears that the draftsmen so intended, language of this sort is not to be taken literally to mean that the statute is applicable to every transaction wherever occurring or to every case brought in the forum. Where, on the other hand, it is clear that the legislature has actually addressed itself to the choice of law problem, the courts, subject to the limitation of constitutionality, must give effect to its intentions.⁹⁰

Although formally delineated as a separate rule of statutory construction, the presumption against extraterritoriality is in fact commonly employed as a subsidiary rule of specific application of the *Charming Betsy* doctrine. With limited exceptions, prescribing foreign conduct of foreign actors is a violation of international law. Such violations engender international discord and undermine United States conduct in foreign relations. The presumption against extraterritoriality is a device used to construe ambiguous statutes to avoid such violations.

The facts of *Charming Betsy* represent a conflation of the two presumptions, addressing the question of whether the statute should be read to apply to a foreign vessel and foreign citizen, both of which previously had American allegiances.⁹¹ *Charming Betsy*'s progeny likewise incorporates

⁸⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); Edwin D. Dickinson, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 480-508 (Supp. 1935); Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 2-4 (1992).

⁹⁰ *Lauritzen v. Larsen*, 345 U.S. 571, 579 n.7 (1953) (quoting Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 961 (1952)).

⁹¹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 119 (1804) ("If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to

both presumptions, with many subsequent cases applying *Charming Betsy* to address the extraterritorial application of domestic laws.⁹² *Lauritzen* exemplifies the interplay of the two presumptions, with the literal universality of a prohibition limited to the objects for which the legislature intended them to apply, and *Charming Betsy* invoked in support of the general international rule that “if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting.”⁹³ Indeed, the Court has emphasized that the foreign policy concerns underlying *Charming Betsy* apply with special force to “the construction of statutes couched in general language which are sought to be applied in an extraterritorial way.”⁹⁴

Most recently, the foreign policy implications that animate the two presumptions were the focus of the Supreme Court’s landmark decision in *Sosa v. Alvarez-Machain*.⁹⁵ In *Sosa*, the Court stressed that a number of factors urge judicial caution in creating a private right of action for human rights abuses under the Alien Tort Statute. Among these factors was the following:

[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, *but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens*, and to hold that a foreign government or its agent has transgressed those limits Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.⁹⁶

Although *Sosa* never expressly warned of extraterritorial violations of prescriptive jurisdiction, its reference to the foreign relations concerns over lawsuits that claim to delimit the power of a government over its own people undeniably speaks to the issue. This concern is precisely that which the two

citizens of the *United States*, such extraordinary intent ought to have been plainly expressed.”).

⁹² *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244 (1991); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *Lauritzen*, 345 U.S. at 571.

⁹³ *Lauritzen*, 345 U.S. at 578.

⁹⁴ *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

⁹⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–28 (2004).

⁹⁶ *Id.* (emphasis added).

canons seek to avoid: the assertion of judicial authority beyond the confines circumscribed by international law. Put simply, the Court is saying that “great caution” is required under the Alien Tort Statute to show fidelity to international law norms on prescriptive jurisdiction, and failure to do so will exacerbate foreign relations concerns.⁹⁷ That is, adverse foreign policy consequences counsel against violating international jurisdictional norms in vindicating international human rights norms.

The significance of the interplay between the two presumptions is that both presumptions advance the same basic concern: to “protect against unintended clashes between our laws and those of other nations which could result in international discord.”⁹⁸ But like *Charming Betsy*, the presumption against extraterritoriality avoids international discord in order to protect against unintended violation of international law. Its function is broader than simply “the desire to avoid conflict with the laws of other nations.”⁹⁹ As the Court recently put it, “acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.”¹⁰⁰

Having said this, it cannot be denied that the two presumptions have often been treated as separate and distinct.¹⁰¹ The confusion over the two presumptions lies in the fact that not every extraterritorial application of our laws is a violation of international law. *Charming Betsy* and the presumption against extraterritoriality regularly overlap, but not inevitably so. “But if the presumption against extraterritoriality has been overcome,” the *Charming Betsy* canon “is relevant to determining the substantive reach of a statute because the ‘law of nations’ . . . includes limitations on a nation’s exercise of its jurisdiction to prescribe.”¹⁰² To the extent that Congress regulates conduct extraterritorially consistent with international norms of prescriptive jurisdiction, *Charming Betsy* is not at play, although the presumption against extraterritoriality may still be. Thus, in *Aramco*, a case involving the alleged prescription of foreign conduct of United States nationals, the dissent

⁹⁷ Jason Jarvis, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 699–722 (2003) (discussing international norms of prescriptive jurisdiction as applied to the Alien Tort Statute).

⁹⁸ *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (citing *McCulloch* in support of a presumption against extraterritoriality).

⁹⁹ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993).

¹⁰⁰ *Id.* at 188.

¹⁰¹ *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting); *Aramco*, 499 U.S. at 261–62 (Marshall, J., dissenting).

¹⁰² *Id.* at 814–15.

correctly notes that the majority liberally borrowed language from *Charming Betsy*'s progeny¹⁰³ without a full appreciation of the distinction between regulating persons of foreign versus American allegiance, the latter of which are clearly subject to regulation consistent with international law under the "nationality exception."¹⁰⁴ As Justice Marshall put it:

[t]he strictness of the *McCulloch* and *Benz* presumption permits the Court 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. Nothing nearly so dramatic is at stake when Congress merely seeks to regulate the conduct of United States nationals abroad.¹⁰⁵

Moreover, a determination that a statute is consistent with international law and overcomes the presumption against extraterritoriality may itself be based on foreign relations concerns. This commonly is the situation when our antitrust laws are enforced against foreign conduct of foreign nationals that has a substantial effect on the United States. Such a scenario subjects congressional regulation to an international rule of reason, which incorporates concerns for international conflict.¹⁰⁶ As the Court in *Hoffman* recently noted, "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."¹⁰⁷ *Charming Betsy* counsels that Congress intended to regulate foreign acts of foreign actors because such conduct imposes substantial harms on the domestic market. Doing so is a reasonable exercise of prescriptive jurisdiction.¹⁰⁸ But for structural reasons we impute no congressional intent to regulate foreign conduct that causes only foreign harms, unless the executive branch has made the calculus that the public interest in enforcement overcomes considerations of foreign governmental sensibilities.¹⁰⁹ Foreign relations concerns explain why both

¹⁰³ *Aramco*, 499 U.S. at 248–49.

¹⁰⁴ *Id.* at 265 (Marshall, J., dissenting).

¹⁰⁵ *Id.*

¹⁰⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).

¹⁰⁷ *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (emphasis added).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 172 (distinguishing between private party and government enforcement of the Sherman Act based on the government's increased self-restraint and consideration of foreign governmental sensibilities).

Charming Betsy and the presumption against extraterritoriality protect against exorbitant enforcement of our laws to police foreign harms.

Most recently, *Charming Betsy* was used in the case of *Spector* to narrowly interpret a provision of the Americans with Disabilities Act in light of international obligations.¹¹⁰ *Spector* involved a claim that barriers on foreign cruise ships should be removed to accommodate disabled passengers. The case did not precisely fit into the presumption against extraterritoriality, for the foreign cruise ships traversed international and territorial waters.¹¹¹ The Court noted that remedial action under the statute was required only if it was “readily achievable,” that is, if it could be accomplished without “much difficulty or expense.”¹¹² Significantly, the Court adopted the position of the United States and interpreted “difficulty” to include considerations other than cost, finding that “[s]urely a barrier removal requirement . . . that would bring a vessel into noncompliance with . . . any . . . international legal obligation would create serious difficulties for the vessel and would have a substantial impact on its operations.”¹¹³ Conflict with international law was thus imaginatively imported into a statutory exception to eliminate its application to foreign vessels and thereby to avoid the potential for international discord.¹¹⁴

The presumption against extraterritoriality lends further support to *Charming Betsy* as a rule to avoid international discord. The confluence of the two presumptions diminishes the role that congressional directives of foreign conduct will inadvertently create an adverse impact on foreign relations. Only when Congress clearly has spoken will courts divine such an intent.

¹¹⁰ *Spector v. Norwegian Cruise Line, Ltd.*, 125 S. Ct. 2169, 2185 (2005) (Ginsburg, J., concurring in part and concurring in the judgment) (plurality opinion).

¹¹¹ A plurality of the Court nonetheless viewed the clear statement rule applicable in the case as a near equivalent of the presumption against territoriality. *Id.* at 2182 (plurality opinion).

¹¹² *Id.* at 2180.

¹¹³ *Id.*

¹¹⁴ See *id.* at 2185 (Ginsburg, J., concurring in part and concurring in the judgment) (describing the Court’s interpretation as ensuring that the statute “will not provoke ‘international discord’ of the kind *Benz* and *McCulloch* sought to avoid”). The dissent did not disagree with the importance of avoiding international discord, simply finding that in the absence of a clear statement, the statute did not apply to foreign-flag vessels. *Id.* at 2188 (Scalia, J., dissenting). “Even if the Court could, by an imaginative interpretation of Title III, demonstrate that in this particular instance there would be no conflict with the laws of other nations or with international treaties, it would remain true that a ship’s structure is preeminently part of its internal order; and it would remain true that subjecting ship structure to multiple national requirements invites conflict.” *Id.* at 2191 (Scalia, J., dissenting).

D. Charming Betsy and Executive Authority

A conclusion that *Charming Betsy* is grounded in separation of powers also underscores its application as a gloss on the scope of executive authority. It is now accepted that the scope of executive authority depends on the integration of dispersed powers, with presidential powers fluctuating depending on their disjunction or conjunction with those of Congress.¹¹⁵

Justice Jackson's landmark concurrence in *Youngstown* delimits executive authority based on express or implied congressional approval or disapproval. One might say that Jackson's trilogy is dependent on congressional intent, with two of the categories relying on implied understandings for their vitality. The first—"[w]hen the President acts pursuant to an express or implied authorization of Congress"¹¹⁶—is the Executive's maximalist position, including all he possesses and all Congress can delegate. The third—"[w]hen the President takes measures incompatible with the expressed or implied will of Congress"¹¹⁷—is the Executive's minimalist position, including only that which his own powers confer and Congress cannot remove.

But rarely can one discern when congressional authorization or prohibition is implied. *Charming Betsy* is an oracle to divine implied congressional intent in the foreign affairs arena. *Charming Betsy* requires that congressional action should not be construed to violate the law of nations if any other possible construction is available.¹¹⁸ This would suggest that under *Youngstown's* first category, congressional statutes will rarely implicitly authorize executive violations of international law, but they may implicitly authorize executive compliance. Conversely, under *Youngstown's* third category, congressional statutes will rarely implicitly prohibit executive compliance with international law. But such statutes may implicitly prohibit executive violations. *Charming Betsy* thus shifts the "twilight zone" of the middle ground in *Youngstown*—"[w]hen the President acts in absence of either a congressional grant or denial of authority"¹¹⁹—toward international compliance. For congressional silence is not simply a matter of "inertia, indifference or quiescence."¹²⁰ It is also a matter of presumption. We presume Congress is not acting in certain ways, that is, to sanction violations

¹¹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹¹⁶ *Id.* at 636 (emphasis added).

¹¹⁷ *Id.* at 637 (emphasis added).

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

¹¹⁹ *Youngstown*, 343 U.S. at 637.

¹²⁰ *Id.*

or prohibit compliance with international law. That presumption inures to the benefit of the Executive in *Youngstown's* third prong, for it increases the arena of sole executive authority to act in compliance with international law, and imposes an obligation on Congress for a clear statement of prohibition. But it also narrows the Executive's authority in *Youngstown's* first prong, by limiting the scope of authority to act pursuant to an implied congressional direction inconsistent with international norms.

Put differently, a *Charming Betsy* gloss on *Youngstown* undercuts some of the significance attributed to *Dames & Moore v. Regan*, where the Court construed ambiguous congressional action in the face of longstanding executive practice to dramatically reshape the Jackson trilogy.¹²¹ The problem of *Dames & Moore*, as Harold Koh has put it, is that "by treating ambiguous congressional action as approval for a challenged presidential act, a court can manipulate almost any act . . . into Jackson's category one, where the president's legal authority would be unassailable."¹²² This may be true where international law is silent on the question. Presuming, however, that ambiguous congressional statutes should be interpreted consistent with international law, the ambit of executive authority is accordingly circumscribed, thereby shifting some executive authority away from *Youngstown* category one toward greater scrutiny under category two or three.

The facts of *Charming Betsy* aptly illustrate this point. Absent the *Charming Betsy* canon, a modern-day Captain Murray could have invoked *Youngstown* to find implicit congressional authorization to seize a Danish vessel formerly of American provenance. Such a seizure would have been supported by the strongest of presumptions and the widest latitude of judicial interpretation,¹²³ but the *Charming Betsy* canon required a clear statement of statutory authority to act in contravention of international law, something Captain Murray lacked. To paraphrase *Youngstown*, the seizure of the Dutch vessel is "eliminated from the first [category] by admission, for it is conceded that no congressional authorization exist[ed] for this seizure."¹²⁴ Nor has Congress clearly prohibited the seizure of the vessel under *Youngstown's* third category, for the statute addressed only non-intercourse

¹²¹ *Dames & Moore v. Regan*, 453 U.S. 654, 675-88 (1981).

¹²² HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 142 (1990).

¹²³ *Youngstown*, 343 U.S. at 637.

¹²⁴ *Id.* at 638.

between American and French vessels.¹²⁵ There were not clear “statutory policies inconsistent with this seizure.”¹²⁶ As such, Captain Murray finds himself in the twilight zone of *Youngstown*’s second prong, and his authority is curtailed, dependent upon the Executive’s inherent prerogatives and “the imperatives of events and contemporary imponderables.”¹²⁷ In this twilight zone, the Court would have given less latitude to executive claims of authority, recognizing that, “it being . . . a neutral unarmed vessel, [C]aptain 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.”¹²⁸ As applied to these facts, the *Charming Betsy* presumption supplants a *Youngstown* case of judicial deference based on implied congressional authority with a more exacting review of executive function in the face of judicial challenge and doubt.¹²⁹

This “exacting review” in no way suggests that *Youngstown* or *Charming Betsy* circumscribe the President’s inherent authority to violate international law. As the Court noted in *Brown v. United States*, although an ambiguous statute may not authorize conduct in violation of the law of nations, the President has the inherent authority to do so.¹³⁰ Customary international law is “a guide which the sovereign follows or abandons at his will. The rule . . . is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.”¹³¹ It simply suggests that a *Charming Betsy* gloss on *Youngstown* may limit implied congressional authority to violate international law. Of course, in the execution of core executive powers, whether delegated or inherent, the President may contravene international law at his discretion. “[U]nder our [c]onstitutional jurisprudence . . . an action by the President . . . that is within . . . [his] constitutional authority does not become a violation of the Constitution because the [a]ct places the United States in violation of a treaty

¹²⁵ The sole reference to neutral vessels in the Non-Intercourse Act was with respect to neutral vessels securing port clearances without security. Act of Feb. 27, 1800, ch. 10, § 2, 2 Stat. 7, 8 (expired).

¹²⁶ *Youngstown*, 343 U.S. at 639.

¹²⁷ *Id.* at 637.

¹²⁸ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 72 (1804).

¹²⁹ *Cf. Youngstown*, 343 U.S. at 637 n.3.

¹³⁰ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814).

¹³¹ *Id.*; see also *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *The Paquette Habana*, 175 U.S. 677, 700 (1900). For a discussion of international law being superseded as a rule of decision by a controlling executive act, see William S. Dodge, *The Story of The Paquette Habana: Customary International Law as Part of Our Law* (Nov. 15, 2005), available at <http://ssrn.com/abstract=847847>.

provision or . . . obligation under customary law.”¹³²

Nor is it to suggest that Congress may not expressly authorize the President to violate international law. A *Charming Betsy* gloss on *Youngstown* only addresses limits on the implied authority or implied prohibition consistent with the demands of international law. Of course, if the purpose of a federal statute is clear, an act of Congress may supersede an earlier rule of international law.¹³³

This interplay between *Charming Betsy* and *Youngstown* has never been expressly endorsed by the Court or identified in detail in the scholarly literature,¹³⁴ but it is inchoately expressed in Supreme Court jurisprudence. One of the Court’s most instructive comments on *Charming Betsy*’s role in the *Youngstown* analysis is to be found in the Haitian refugee case of *Sale*. In *Sale*, the Court suggested that had an international treaty imposed an obligation on the United States to refrain from returning aliens interdicted outside our territorial waters, then that obligation should inform the statutory obligation prohibiting deportation and return of an alien to a country that threatens the alien’s life or freedom: “[I]t might be argued that the extraterritorial obligations imposed by [the Convention] . . . were so clear that Congress . . . in amending the statute . . . meant to give the . . . [statute] a correspondingly extraterritorial effect.”¹³⁵ Had the Convention imposed such an obligation, *Youngstown*’s third category would suggest that Congress implicitly prohibited executive violations of it. The Court never reached the question, however, finding no extraterritorial international obligation.¹³⁶ As such, the Court left the Executive with a free-hand to interdict the refugees, recognizing that such decisions “may involve foreign and military affairs for which the President has unique responsibility.”¹³⁷

The impact of *Charming Betsy* on *Youngstown* was more directly

¹³² LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 236 (2d ed. 1996) [hereinafter HENKIN, FOREIGN AFFAIRS]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 n.3 (1987); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 878–85 (1987).

¹³³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987).

¹³⁴ The closest instances come from Jules Lobel, Curtis Bradley, and Jack Goldsmith. See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1119–20 (1985); see also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2096–100 (2005).

¹³⁵ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 (1993).

¹³⁶ *Id.* at 178–86.

¹³⁷ *Id.* at 188.

relevant in the recent detainee case of *Hamdi v. Rumsfeld*.¹³⁸ The question in *Hamdi* was whether the Executive had authority to detain American citizens who qualify as “enemy combatants” pursuant to congressional authorization to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.”¹³⁹ Hamdi, an American citizen, objected to the indefinite detention, but the Court *sub silentio* applied *Charming Betsy* to conclude the detention was authorized by Congress. A plurality of the Court found that “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities” and “we understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.”¹⁴⁰ Two other Justices conceded the merit of this position but found it factually inapposite.¹⁴¹ Thus, six Justices of the Court found implicit congressional authority to detain enemy combatants within the parameters of international law. *Charming Betsy*’s gloss on *Youngstown* was dispositive in finding implicit statutory authority to detain Hamdi consistent with the laws of war. International law was the accepted background norm against which Congress legislated.¹⁴²

The same could be said for the recent case of *Hamdan v. Rumsfeld*.¹⁴³ In addressing whether there was statutory authority permitting the President to convene military commissions, the Court read international law principles

¹³⁸ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion). For a detailed discussion of the application of *Charming Betsy* to the case of *Hamdi*, see Wuerth, *supra* note 86, at 330–57.

¹³⁹ *Hamdi*, 124 S. Ct. at 2635, 2639.

¹⁴⁰ *Id.* at 2641 (emphasis added).

¹⁴¹ Justices Souter and Ginsburg reasoned that “there is one argument for treating the Force Resolution as sufficiently clear to authorize detention of a citizen” but the “Government is in no position to claim its advantage.” *Id.* at 2657 (Souter, J., concurring in part, dissenting in part, concurring in the judgment). Conceding the potential merit in the argument that “if the usages of war are fairly authorized by the Force Resolution, Hamdi’s detention is authorized,” they nonetheless concluded that the Executive had not “made out its claim that in detaining Hamdi in the manner described, it [was] acting in accord with the laws of war authorized to be applied against citizens by the Force Resolution.” *Id.* at 2657, 2659. These Justices joined the plurality for purposes of giving practical effect to the judgment in order to remand on terms closest to those they would impose. *Id.* at 2660.

¹⁴² Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2685 (2005); Bradley & Goldsmith, *supra* note 134, at 2089–91.

¹⁴³ 126 S. Ct. 2749 (2006).

into the relevant statutes. "Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the laws of war."¹⁴⁴ Those statutes were interpreted as limiting the delegated authority of the President to act outside the parameters of the laws of war.

E. *Charming Betsy and Judicial Authority*

A conclusion that *Charming Betsy* is grounded in separation of powers also underscores its potential application as a gloss on the scope of judicial authority. Judicial authority depends on prudential doctrines of justiciability, and the judicial branch circumscribes its authority for matters that are deemed political rather than legal questions. The political question doctrine holds that the judiciary should not speak to issues that are not by their nature subject to judicial determination. Foreign relations cases are particularly sensitive to such political question analysis.

In one sense, one could argue that *Charming Betsy* is a particularly bad case to address the political question doctrine, because the specific grant of jurisdiction in Article III to the judiciary over admiralty and maritime questions¹⁴⁵ guaranteed a grant of jurisdiction that freed the Court from concerns that the decision made may be contrary to the political wishes of the political branches.¹⁴⁶ In another sense, the case provides a useful heuristic precisely because it implicates congressional regulation of foreign commerce and naval forces, executive branch prosecution of naval war, and the judicial resolution of individual rights—all core functions of the three branches.

In delineating what constitutes a political question, courts are admonished under *Baker v. Carr* to consider, among other things, whether deciding the case will have the potential "of embarrassment from multifarious pronouncements by various departments on one question."¹⁴⁷ This prong of the political question analysis

implies both the presence of an outside entity and a framework of responsibility; one cannot be embarrassed except in relation to others, and one is not embarrassed for anything for which one does not feel responsible. In this case the 'others' are foreign countries, and the responsibility has

¹⁴⁴ *Id.* at 2775.

¹⁴⁵ U.S. CONST. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . .").

¹⁴⁶ *Cf.* Lavinbuk, *supra* note 19, at 877–78.

¹⁴⁷ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

been imposed by international law.¹⁴⁸

Charming Betsy and the political question doctrine are thus corollary principles founded upon the separation of powers doctrine. The former admonishes the courts to avoid interpretations that might authorize executive violations of international obligations, for doing otherwise will engender international discord; the latter admonishes the courts to avoid altogether interpreting statutes that authorize executive action in the international arena if doing so will engender embarrassment through discordant pronouncements. Both seek “respectability in the eyes of foreign powers as a safeguard against foreign encroachments.”¹⁴⁹ Both advance on the horizontal plane the federalist desire that other nations find us “firmly united under one national Government” not “split into three . . . discordant” branches “played off against each other.”¹⁵⁰ The political question doctrine avoids foreign embarrassment for the Executive’s political acts; *Charming Betsy* avoids foreign embarrassment for the Executive’s legal acts.

The embarrassment factor is greatly diminished if one can presume that the courts will endeavor to interpret the statute to authorize international compliance and avoid non-compliance. That is, applying this rule of construction will diminish the likelihood of foreign embarrassment. As the Court put it in *Curtiss*, if “embarrassment . . . is to be avoided” in our international relations then “congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”¹⁵¹ *Charming Betsy* is one such limit on executive discretion acting under implied authority, imposed to avoid international friction.

The Court’s analysis of the political question doctrine in *Japan Whaling* is illustrative. In finding no political question, the Court noted that:

[w]e are cognizant of the interplay between these Amendments and the conduct of this Nation’s foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes,

¹⁴⁸ Peter Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 680 (2002).

¹⁴⁹ THE FEDERALIST NO. 15 (Alexander Hamilton).

¹⁵⁰ THE FEDERALIST NO. 4 (John Jay). Jay was speaking of federalist concerns of discordant republics each played off against the other; but the concerns for a firmly united national government likewise demand that we avoid inter-branch discord.

¹⁵¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

and we cannot shirk this responsibility merely because our decision may have significant political overtones.¹⁵²

In interpreting the statutory regime, the Court avoided precisely the foreign embarrassments that are a factor in *Baker*. The statute imposed sanctions on nations that violated whaling quotas established by international convention. The Court refused to construe the statute to require sanctions against Japan, recognizing that Japan had lawfully opted out of such quotas and was therefore not in violation of its international obligations.¹⁵³ Although never expressly referring to *Charming Betsy*, the statute was construed to grant executive discretion to mitigate its response to non-conforming countries that are nonetheless acting in compliance with international law. The statute was interpreted to permit Japan to lawfully opt out of international quotas without fear of sanction by the United States.¹⁵⁴ To conclude otherwise would engender embarrassment for the Executive by mandating a statutory remedy for conduct that was not an international wrong.

Charming Betsy thus simplifies the judicial understanding of the distinction between political versus legal questions. Since the time of *Marbury v. Madison*, the distinction has always been made between conclusive executive discretion over political subjects that “respect the nation, not individual rights” as compared to judicial scrutiny of the “rights of individuals [that] are dependent on the performance of [executive] acts.”¹⁵⁵ By interpreting a statute to avoid political consequences in deference to separation of powers concerns, the judiciary may be more inclined to seize hold of certain cases but address only legal and individual questions.

For example, the recent Ninth Circuit case, *Alperin v. Vatican Bank*, made the distinction between Holocaust property claims and “war objectives” claims—a distinction not made by the parties—and concluded that the former were justiciable while the latter were political questions.¹⁵⁶ The property claims were treated as “garden-variety legal and equitable claims for the recovery of property,”¹⁵⁷ while the other war claims required the court to “intrud[e] unduly on certain policy choices and value judgments that are constitutionally committed to [the political branches,]” such as

¹⁵² *Japan Whaling Ass'n. v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

¹⁵³ *Id.* at 232–33.

¹⁵⁴ *Id.*

¹⁵⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803).

¹⁵⁶ *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005).

¹⁵⁷ *Id.*

whether to prosecute the Vatican Bank for war crimes.¹⁵⁸ Although not expressly construing the scope of the Alien Tort Statute, *Alperin*'s framework suggests that human rights claims under that statute will have a greater likelihood of success if they are narrowly-tailored, individualized, depoliticized, and avoid national questions of executive policy-making. Certainly the language in *Sosa* is suggestive of such a cautious approach: "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."¹⁵⁹

III. FOREIGN RELATIONS AND CONSTITUTIONAL INTERPRETATION

Thus far this Article has sought to establish that *Charming Betsy* has a venerable role in statutory interpretation. That veneration has engendered enthusiasm for its application to the constitutional context. Advocates now contend that foreign relations concerns should inform our interpretation of constitutional guarantees. While such concerns are well founded in matters pertaining to foreign relations clauses of the Constitution, there is little basis to support the transplanting of a doctrine founded on separation of powers to the protection of constitutional liberties. To argue that constitutional guarantees must be interpreted to take account of foreign policy objections from our friends and allies presumes a greater role for foreign affairs in our constitutional system than is permitted. Foreign relations is an endogenous factor invoked by our political branches, not an exogenous concern our judiciary applies in addressing the scope of constitutional liberties.

A. *Charming Betsy and Foreign Relations Clauses*

The concerns that advance a strong role for foreign relations in statutory interpretation are concerns for separation of powers. In a similar vein, structural guarantees in the Constitution that relate to foreign relations are likewise informed by a generous spirit of cooperation and compliance with our international obligations. To avoid international discord, compliance with international obligations is assumed for what may be called "foreign relations clauses"—provisions of the Constitution that "directly appeal[] to matters of international relations such as declaring war, making treaties, and enforcing the law of nations."¹⁶⁰ These provisions textually anticipate that foreign

¹⁵⁸ *Id.* at 560.

¹⁵⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–28 (2004).

¹⁶⁰ Ramsey, *supra* note 5, at 71.

relations concerns will inform our constitutional understanding.¹⁶¹

For example, the nature of the treaty power indicates a peculiar intermixture of executive and legislative powers, relating neither to the execution of subsisting laws, nor to the enactment of new ones, but rather to the establishment of “contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith.”¹⁶² The participation of both the legislative and executive branches in the making of treaties is required because the Executive can “enjoy the confidence and respect of foreign powers” and is the “most fit agent” in the “management of foreign negotiations” but the “vast importance of the trust, and the operation of treaties as laws” plead strongly for participation by the Legislature.¹⁶³ In the delicate matter of foreign relations, the Constitution establishes structural safeguards to produce efficacy in treaty negotiations by presuming fidelity in treaty compliance.¹⁶⁴

Likewise, compliance with international law was a critical factor in removing from the several States the power to make treaties.¹⁶⁵

[J]ust causes of war . . . arise either from violation of treaties, or from direct violence It is of high importance to the peace of America, that she observe the laws of nations towards all . . . [p]owers [to which we have entered treaties], and . . . it appears evident that this will be more perfectly and punctually done by one national [g]overnment, than it could be . . . by thirteen separate States.¹⁶⁶

The states could not be trusted to remain faithful to treaty obligations to the same degree as the national government, and the breaching of such treaties could precipitate a just war against the United States.¹⁶⁷ As such, states “parted with the power of making treaties,” leaving the national government exclusively empowered with the “right to make peace” and

¹⁶¹ See, e.g., Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 12–33 (2006); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 82–83 (2004); Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 N.C. L. REV. 133 (1998); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) [hereinafter Ramsey, *Textualism and War Powers*].

¹⁶² THE FEDERALIST NO. 75 (Alexander Hamilton).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any treaty, alliance, or confederation.”).

¹⁶⁶ THE FEDERALIST NO. 3 (John Jay) (omission of emphasis).

¹⁶⁷ See, e.g., *Ware v. Hylton*, 3 U.S. 199, 235–38 (1796) (discussing Virginia’s refusal to honor Jay Treaty obligations with respect to British creditors).

determine the terms of peace, with any state's laws that work a violation of a treaty "prostrated before the treaty."¹⁶⁸ International peace required compliance with treaties, and compliance was enhanced by structural constraints on the authority to enter such arrangements. Even with these constraints, state compliance with federal treaties has remained difficult. Indeed, one of the singular failures of George Washington's Administration was its inability to secure state compliance with peace treaties established with the Indians and the British.¹⁶⁹

The war power is perhaps the most obvious example of the structural safeguards established by the Constitution to facilitate compliance with international law. Thus, even a skeptical scholar such as John Yoo happily admits that "[t]he Framers turned to international law to define phrases such as to 'declare war' because it was international law (and international politics) which gave these powers meaning."¹⁷⁰ In eighteenth-century practice, a declaration of war "serve[d] as a warning to subjects and neutrals of the existence of a state of war, and thus the applicability of the international laws of war" including those "relating to seizure of persons and property."¹⁷¹ The facts of *Charming Betsy* are a particularly evocative example of the importance of this power; the undeclared war between the United States and France left neutral vessels like the *Charming Betsy* in a state of uncertainty as to their status under the non-intercourse law.¹⁷² The obligation to interpret the statute to avoid violations of the law of nations recognized that international obligations change upon a declaration of war: Incident to a state of war is the right to search and seize neutral vessels in

¹⁶⁸ *Id.* at 236–37.

¹⁶⁹ JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 213–14 (2004); *Ware*, 3 U.S. 199.

¹⁷⁰ John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 244 (1996). As Chief Justice Marshall has found,

[i]n expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.

Brown v. United States, 12 U.S. 110, 125 (1814).

¹⁷¹ Ramsey, *Textualism and War Powers*, *supra* note 161, at 1586.

¹⁷² The international laws of war recognized that neutral vessels could only be searched and seized in the event of a declared state of war. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 70 (1804).

appropriate circumstances.¹⁷³ In short, a declaration of war alters the international obligations of the United States vis-à-vis neutral commerce and neutral vessels.¹⁷⁴ The power of Congress to declare war liberates the President to take action that international law might otherwise proscribe, and the judicious use of this legislative power broadens executive authority to act consistent with international law.¹⁷⁵ The constitutional authority to declare war, however, does not vest in Congress a power to authorize executive action inconsistent with the powers recognized by the laws of war.¹⁷⁶

These examples illustrate how structural safeguards have been constitutionally established to address foreign relations concerns, such as the war power and the treaty-making power. Compliance with international law is of presumed importance in establishing these structural safeguards, and one may well argue that courts should avoid interpretations of constitutional provisions, such as the treaty-making power or the war-making power, that undermine the ability of the Executive to conduct foreign affairs consistent with international obligations.

¹⁷³ *Id.* at 121–22. If the neutral vessel is armed, for example, then it could be in a condition to interfere with American commerce. In the case of *Charming Betsy*, there was only one musket on board, so its “capacity . . . for offence appear[ed] not sufficient to warrant the capture of her as an armed vessel.” *Id.* at 121.

¹⁷⁴ *The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1863) (“To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion”)

¹⁷⁵ *Id.* at 671 (noting that laws of war justify allegedly unconstitutional congressional ratification of Lincoln’s blockade of ports in possession of States in rebellion); see also *Ex Parte Quirin*, 317 U.S. 1, 28 (1942); *In re Yamashita*, 327 U.S. 1, 16 (1946); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640–41, 2651–52 (2004).

¹⁷⁶ *Brown v. United States*, 12 U.S. 110, 125 (1814). The Court stated:

It may be considered as the opinion of all who have written on the *ius belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.

Id.; see also *The Prize Cases*, 67 U.S. at 666, 670–74.

B. Charming Betsy and Individual Rights

While presumed compliance with international law in structural foreign relations clauses is uncontroversial, advocates of a constitutional *Charming Betsy* are not principally concerned with such issues. They contend that individual rights enshrined in the Constitution should be read consistent with international norms in furtherance of foreign relations concerns. This vests the *Charming Betsy* doctrine with the ambitious role of presuming an interpretation of constitutional liberties consistent with international norms simply to make the diplomat's brief more palatable to foreign sensibilities. Rather than burden executive officials with the task of defending American exceptionalism—which of course is exceptional in granting lesser and greater civil liberties¹⁷⁷—it is far better to conflate constitutional norms with international standards.

In the Eighth Amendment context, for example, advocates have argued that executing juveniles or the mentally retarded would further the United States' diplomatic isolation and harm its foreign policy interests.¹⁷⁸ Scholars such as Harold Koh writing on behalf of American diplomats have argued:

The United States is needlessly placed on the defensive in diplomatic missions. Instead of focusing on advancing U.S. interests, U.S. diplomats abroad are increasingly called into meetings to answer foreign criticisms of the death penalty The persistence of this practice . . . has allowed allies and adversaries alike to challenge the United States' claim to moral authority in the domain of international human rights. Such challenges deflect attention away from serious human rights violations in other countries that have exhibited far worse human rights records [T]his continuing state practice seriously disserves this nation's broader foreign policy objectives and undermines this nation's leadership role in the world.¹⁷⁹

The remarkable theory of such a position is that capital punishment

¹⁷⁷ Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1, 21–27 (2005).

¹⁷⁸ See, e.g., Petition for Writ of Certiorari for Morton Abramowitz et al. as Amici Curiae, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648607 at *12; Petition for Writ of Certiorari for Morton Abramowitz et al. as Amici Curiae, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636448 at *20–26. The briefs were filed on behalf of Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner.

¹⁷⁹ Petition for Writ of Certiorari, *Roper*, 543 U.S. 551 (No. 03-633) at *23–26 (citations omitted).

“strains diplomatic relations with close American allies, increases America’s diplomatic isolation, and impairs U.S. foreign policy interests,” and that such “considerations should lead the Court to hold that the practice” offends the Eighth Amendment.¹⁸⁰ A *Charming Betsy* gloss on the Eighth Amendment empowers diplomatic *demarches* to have constitutional relevance in interpreting the scope of constitutional guarantees. Geopolitical ends justify a generic constitution neutralized to sustain international equilibrium.¹⁸¹

Of course, these diplomats are not alone. Justice Blackmun famously argued that it “is appropriate to remind ourselves that the United States is part of the global community . . . and that courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with the ‘customs and usages of civilized nations.’”¹⁸² Renowned statesmen likewise have expressed their support for a constitutional *Charming Betsy*. In the recent juvenile death penalty case of *Roper v. Simmons*,¹⁸³ seventeen Nobel Peace laureates—representing perhaps the most illustrious group of persons to ever submit an amicus brief before the Supreme Court¹⁸⁴—cited *Charming Betsy* for the proposition that “[t]his Court always has maintained that United States courts must construe domestic law so as to avoid violating principles of international law.”¹⁸⁵ The brief went on to argue:

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 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

¹⁸⁰ Koh, *supra* note 8, at 1120 (explaining theory behind amicus briefs he filed on behalf of American diplomats).

¹⁸¹ Alford, *supra* note 177, at 22–23.

¹⁸² Blackmun, *supra* note 1, at 49 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

¹⁸³ *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

¹⁸⁴ Brief for President James Earl Carter, Jr., et al. as Amici Curiae Supporting Respondents, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636446. The brief was filed on behalf of Nobel Peace laureates President James Earl Carter, Jr., 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.

¹⁸⁵ *Id.* at 5.

fundamental, base-line standards.¹⁸⁶

Other scholars have made analogous arguments. For example, Daniel Bodansky has argued that we should look to international materials because it

helps avoid friction with the rest of [the] world The policy interest in avoiding friction with the rest of the world is reflected in the *Charming Betsy* doctrine, which states that, wherever possible, statutes, and presumably the Constitution as well, should be construed so as to be consistent with international norms.¹⁸⁷

While a traditional role for *Charming Betsy* has a firm structural justification, the novel suggestion of a constitutional *Charming Betsy* is far more troublesome. In its essence it suggests that executive authority requires judicial deference to foreign relations concerns in constitutional interpretation. It assumes that our allies will demand compliance with international law and constitutional interpretation makes room for such concerns. In short, a concern for the executive foreign affairs power begets a concern for international uniformity and compliance, which begets a judicial presumption of harmony between constitutional and international norms. Thus, the tail of international diplomacy is wagging the dog of constitutional guarantees.

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.

Regarding textual support for a foreign relations reading of individual liberties, proponents of a constitutional *Charming Betsy* have offered none. That is, nowhere have they established any textual support for the suggestion that constitutional liberties should be read consistent with international law in order to facilitate the executive branch's efficacious conduct in foreign relations. Indeed, neither the original Constitution, nor the Bill of Rights, nor the Reconstruction Amendments provide any hint that such concerns will be a factor in interpreting individual liberties.¹⁸⁸ There is simply no textually demonstrable commitment to suffuse constitutional liberties with a "decent respect" for international opinion in order to facilitate executive action

¹⁸⁶ *Id.* at 29.

¹⁸⁷ Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 427 (2004).

¹⁸⁸ Of course, foreign affairs concerns have long been considered by the Court to justify curtailment of individual liberties. See *infra* text accompanying notes 225–36.

abroad. As Louis Henkin has noted, “[n]one of the provisions in the Bill of Rights has particular relevance for U.S. foreign relations; all of its provisions might impinge on foreign relations in some contexts.”¹⁸⁹ That is, the Bill of Rights is not infused with foreign relations concerns, although its protections may at times implicate them.

One of the few clear textual references to foreign affairs in the Bill of Rights pertains to the Second Amendment, which provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹⁹⁰ Article II in turn vests in the President the power as commander-in-chief “of the militia of the several States” to call state militia into “service of the United States.”¹⁹¹ Early constitutional commentators understood the executive power to wage war depended on the individual right to bear arms.¹⁹² In the absence of a standing army, this individual right safeguarded a federal power. Of course, such an individual right is secured not to appease foreign sentiments in the halls of diplomacy but rather to defend against foreign encroachments in the theater of war.

More broadly, one might say that a distrust of foreign powers—in particular securing a common front against Europe—was a key factor in the decision to include a Bill of Rights at all. As Akhil Amar recently put it, national security was a principal motivation in the adoption of the Bill of Rights:

Co-opting the opposition agenda could . . . help achieve national cohesion and enhance national security. A thoughtfully drafted set of amendments could both cement the loyalty of Anti-Federalists across the continent and woo North Carolina and Rhode Island back into the union When Madison . . . tried to explain the urgency of amendment to his colleagues, he stressed not just the intrinsic propriety of a [B]ill of [R]ights, but also its usefulness as an olive branch to those who had

¹⁸⁹ HENKIN, FOREIGN AFFAIRS, *supra* note 132, at 285.

¹⁹⁰ U.S. CONST. amend. II. Other references to war in the Third and Fifth Amendments address executive authority in foreign affairs, but these references simply allow for an exceptional curtailment of individual rights in times of war. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”); U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”).

¹⁹¹ U.S. CONST. art. II, § 2, cl. 1.

¹⁹² Department of Justice: Office of Legal Counsel, *Whether the Second Amendment Secures an Individual Right* (2004), <http://www.usdoj.gov/olc/secondamendment2.pdf>.

opposed—and in two states were still opposing—the Constitution.¹⁹³

A newly formed union that did not include Rhode Island, and more importantly North Carolina, was a strategically insecure one that would not achieve the Preamble's objective of providing for the common defense against foreign invasion.¹⁹⁴ It was fear of foreign power, not affection for foreign opinion, which was the great international influence on the establishment of the Bill of Rights.

Internationalists fare no better when they search for historical support for a broader reading of foreign relations into the meat and sinews of the Bill of Rights. Of course, one can find strong support for the notion that the proposed amendments reflected inalienable rights derived from natural law in the original congressional debates. At the time, “[m]ost written enumeration of rights . . . were thought to be declarations rather than enactments of the listed rights.”¹⁹⁵ Consistent with this notion, early discussions by the framers and decisions of the Supreme Court relied upon comparative and international experiences to elucidate an understanding of the natural law underpinnings of the Constitution.¹⁹⁶ As Suzanna Sherry has noted, “[w]here the allocation of power among parts of the government was not at issue,” the law of nations elided with notions of natural law such that the Court “referred almost indiscriminately to the constitution . . . natural law, ancient custom, and inalienable rights.”¹⁹⁷ To the extent the early Court viewed the law of nations as a proxy for natural law, one can find numerous instances in which international law and practice informed the Court's jurisprudence.¹⁹⁸

But the constitutional *Charming Betsy* does not advance reliance on

¹⁹³ AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 318 (2005).

¹⁹⁴ Professor Amar provided this insight in a private discussion of his book *AMERICA'S CONSTITUTION: A BIOGRAPHY*. More generally on the importance of unity over disunity to the future national security of the fledgling nation, see *THE FEDERALIST* NO. 8 (Alexander Hamilton) (“If we are wise enough to preserve the Union, we may for ages enjoy an advantage similar to that of an insulated situation [of Great Britain] But if we should be disunited, and the integral parts should either remain separated, or which is most probable, should be thrown together into two or three confederacies, we should be, in a short course of time, in the predicament of the continental powers of Europe . . .”).

¹⁹⁵ DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 313 (2d ed. 2005).

¹⁹⁶ Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 *UCLA L. REV.* 639, 660–62 (2005); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907, 907–08 (1993); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127, 1134–46 (1987).

¹⁹⁷ Sherry, *supra* note 196, at 1135.

¹⁹⁸ Alford, *supra* note 196, at 659–62.

international opinion as reflective of the natural order of things. It suggests that constitutional guarantees should be interpreted consistent with international opinion *in order* to facilitate the Executive's performance in foreign affairs. That proposition finds no support in the seminal "natural law/law of nations" cases of the early Court. Indeed, very few decisions ever reached the Court in its first one hundred years addressing federal actions which offended the Bill of Rights,¹⁹⁹ and therefore one can scarcely test the proposition of a foreign relations interpretation of constitutional liberties.

As for modern decisional support, one can find numerous instances in which the Supreme Court has rendered decisions that confound any notion of a constitutional *Charming Betsy*. One searches in vain for signs that the Court's appraisal of foreign relations concerns is relevant in the adjudication of constitutional liberties. Most obvious is the line of cases addressing the Constitution abroad.

In some cases, the United States has signed a treaty with other countries to curtail individual rights. A presumption that constitutional liberties should be read consistent with international law would seek, wherever possible, to reconcile the international obligations with constitutional demands. In *Reid v. Covert*, the United States signed an executive agreement with the United Kingdom to try and punish American servicemen and their dependents in military courts.²⁰⁰ The Court discounted the importance of any international discord that might be engendered from a finding that an executive agreement violated constitutional guarantees.²⁰¹ It dismissed out of hand the United States' argument that the executive agreement was necessary and proper to carry out the United States' international obligations.²⁰²

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.²⁰³

But of course, a constitutional *Charming Betsy* might have attempted to interpret the constitutional guarantees to minimize international discord by

¹⁹⁹ DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 439 (1985).

²⁰⁰ *Id.*

²⁰¹ *Reid v. Covert*, 354 U.S. 1 (1957).

²⁰² *Id.* at 16.

²⁰³ *Id.* at 17.

finding, consistent with Supreme Court practice prior thereto,²⁰⁴ that the Constitution constrains the United States government only when it acts within the borders of the United States.²⁰⁵ Such an approach would have upheld the executive agreement in furtherance of efficacious executive branch foreign affairs conduct.

Most significantly, the Court's reaffirmation of *Kerr v. Illinois*²⁰⁶ in *Alvarez-Machain*²⁰⁷ illustrates the Court's potential for insensitivity to international law concerns in matters of constitutional interpretation. While scholars have suggested a colorable due process claim arising from the conduct at issue in that case,²⁰⁸ the Court narrowly interpreted the extradition treaty with Mexico and virtually ignored customary international law. As the Court put it, the abduction of Alvarez-Machain "may be in violation of general international law principles . . . [but] the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the executive branch."²⁰⁹ A *Charming Betsy* approach may have attempted to construe the obligations with greater sensitivity to international obligations and foreign sensibilities, as espoused in detail in Justice Stevens' dissent.²¹⁰

Even in those instances when one might construe a decision as consistent with a constitutional *Charming Betsy* approach, the result is not necessarily felicitous to the promotion of individual rights. In *Johnson v. Eisentrager*,²¹¹ the Constitution was interpreted consistent with customary international law to broadly confer on the executive branch the authority to detain, try, and punish enemy combatants before military tribunals without the constitutional protection of federal court review.

The jurisdiction of military authorities . . . to punish those guilty of offenses against the laws of war is long-established Certainly it is not the

²⁰⁴ See, e.g., *In re Ross*, 140 U.S. 453 (1891).

²⁰⁵ This is what has been described as the territorial model of constitutionalism. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (finding that no decision of the Court supports a view of the extraterritorial application of organic law); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 918 (1991).

²⁰⁶ *Kerr v. Illinois*, 119 U.S. 436, 444 (1886) (rejecting due process argument and holding that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court").

²⁰⁷ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

²⁰⁸ HENKIN, *FOREIGN AFFAIRS*, *supra* note 132, at 305.

²⁰⁹ *Alvarez-Machain*, 504 U.S. at 669.

²¹⁰ *Id.* at 670 (Stevens, J., dissenting).

²¹¹ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad²¹²

A constitutional *Charming Betsy* approach would sustain this withholding of constitutional liberties to nonresident aliens consistent with the laws of war.

The case of *United States v. Verdugo-Urquidez*²¹³ is similarly problematic in terms of applying a constitutional *Charming Betsy*. If the concern is to avoid international discord in constitutional interpretation by interpreting constitutional liberties consistent with international law, what is the Court to make of extraterritorial action by the United States in concert with Mexican authorities that potentially runs afoul of a defendant's Fourth Amendment right? One is hard-pressed to conclude that international law would require the exclusion of evidence that was the fruit of an unreasonable search and seizure.²¹⁴ Our Fourth Amendment exclusionary rule is "distinctively American" and has been "universally rejected" elsewhere.²¹⁵ One is even harder pressed to conclude that the Court's interpretation of the Fourth Amendment does not promote international harmony among interested states. The investigation and prosecution of criminal networks involved in matters such as international terrorism and drug trafficking assume a different standard for intelligence gathering abroad than at home. The Court in *Verdugo-Urquidez* recognized as much, stating that "[i]f there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation."²¹⁶ How does a constitutional *Charming Betsy* provide particular protections to individual liberties when such search and seizures are in want of international law and in demand by cooperating enforcement authorities?

Nor is the constitutional *Charming Betsy* supported by sound theory. The great theoretical problem with the proposed constitutional *Charming Betsy* is that it is a pragmatic approach that makes false assumptions that are inconsistent with the likely results that will obtain in varied and frequently unknown factual contexts.

²¹² *Id.* at 786, 789.

²¹³ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

²¹⁴ For a discussion of potential international law standards for search and seizure, see Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad after Verdugo-Urquidez*, 27 VAND. J. TRANSNAT'L L. 329 (1994).

²¹⁵ *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (quoting Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399-400 (2001)).

²¹⁶ *Verdugo-Urquidez*, 494 U.S. at 275.

First, why do proponents of a constitutional *Charming Betsy* assume that international protests will only come in the form of demands for compliance with international human rights law? The case frequently (and incorrectly)²¹⁷ cited in support of a constitutional *Charming Betsy* is *Crosby v. National Foreign Trade Council*,²¹⁸ despite the fact that it involved judicial cognizance of foreign protests against a state law that sought enhanced protection of fundamental international human rights in Burma. Certainly, the United States is subject to diplomatic protests regarding capital punishment, albeit in the absence of international obligations on the question. But it also is sharply criticized for unduly protecting hate speech, and for promoting human rights through civil litigation in the United States, through the embrace of exorbitant jurisdiction over foreign defendants, and the use of liberal evidentiary and procedural rules that enhance the redress of international wrongs. These practices also “strain . . . diplomatic relations with close American allies [and] increase . . . America’s diplomatic isolation.”²¹⁹ If the Eighth Amendment is interpreted in light of the national interest in avoiding international discord, should the First Amendment and the procedural Due Process Clause be likewise so interpreted?

Second, why do proponents of a constitutional *Charming Betsy* assume that the executive preference will be to appease the international protests? If the import of the doctrine is to clear constitutional impediments that “impair [] U.S. foreign policy interests,”²²⁰ what if the national interest is discordant with foreign sentiments? Does the presumption counsel deference to the executive policy preference, or does it accord relevance to the competing foreign protests? For example, in

²¹⁷ Incorrectly, because *Crosby v. National Foreign Trade Council*, addresses the structural concerns of federalism and preemption, and not concerns for constitutional liberties. 530 U.S. 363, 381 (2000). In *Crosby*, the state law compromised the

capacity of the President to speak for the Nation with one voice in dealing with other governments. We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.

Id. at 381. Foreign protests simply underscored the threat the state law posed “to the President’s power to speak and bargain effectively with other nations.” *Id.*

²¹⁸ *Id.* at 382–83; see Petition for Writ of Certiorari for Morton Abramowitz et al. as Amici Curiae, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648607 at *13; Petition for Writ of Certiorari for Morton Abramowitz et al. as Amici Curiae, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636448 at *20.

²¹⁹ Koh, *supra* note 8, at 1120.

²²⁰ *Id.*

Barclays Bank, many governments expressed strong disapproval of the method of California's taxation on foreign corporations,²²¹ but the United States disagreed, concluding that California had brought its law into acceptable harmony with federal and international tax practice.²²² The Court upheld the constitutionality of the state's tax laws—in large part on finding a federal policy of acquiescence to the state tax law—and advised the foreign governments to direct their threats of retaliatory action to the political branches.²²³ “The judiciary is not vested with power to decide ‘how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.’”²²⁴

Even more difficult for a constitutional *Charming Betsy* are those rare situations when the executive branch finds it in the national interest to violate international law. Although the facts of *Alvarez-Machain* were exceptional, less intrusive encroachments on territorial sovereignty are not uncommon, such as extraterritorial police and intelligence investigations, which may be viewed as a violation of international law in the absence of state consent. It is undeniable that the United States faces serious threats to its domestic security from international criminal organizations, and foreign governments' failure to interdict such predations may occasion extraterritorial law enforcement investigations, with or without foreign state consent. It is noteworthy that the Federal Bureau of Investigation, which must regularly investigate foreign criminal activities, sought guidance from the Justice Department's Office of Legal Counsel on whether the Fourth Amendment required compliance with international law. The Office of Legal Counsel concluded that it did not, finding that “[i]t would be contrary to the Fourth Amendment's purpose to incorporate into its rules of international law or analogous foreign statutes.”²²⁵ If the gravamen of the constitutional *Charming Betsy* is to interpret the Constitution, whenever possible, to advance effective pursuit of foreign affairs, in exceptional circumstances this may actually facilitate non-compliance with international law.

Finally, the constitutional *Charming Betsy*'s most obvious error is the

²²¹ *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 324 n.22 (1994).

²²² *Id.* at 330 n.32; Brief for the Respondent, *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (No. 92-1384), 1994 WL 135983 at *2 (“The Solicitor General has reported to this Court that those amendments “have brought that State's law into acceptable harmony with federal and international ‘arm's length’ tax practice.”).

²²³ *Barclays*, 512 U.S. at 327–28.

²²⁴ *Id.* at 328.

²²⁵ Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 U.S. Op. Off. Legal Counsel 163, 182 (1989); see also *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. Off. Legal Counsel 543, 551–54 (1980).

judicial usurpation of political branch authority and obligation to conduct foreign affairs. The courts fail to show proper deference to the political branches when they make an independent appraisal of the importance of foreign protests to the conduct of our nation's foreign policy under the guise of constitutional interpretation. Aberrant practices and international isolation may indeed engender diplomatic difficulties for our political leaders. History has proven that our country's leaders are more than capable of defending our record on fundamental rights. Surely the proper response to such protests is not, as Justice Blackmun suggested,²²⁵ for the courts to turn every constitutional question into an international referendum. Constitutional guarantees cannot wax and wane depending on the ebb and flow of allied alarm.

C. *The Proper Role for Foreign Relations*

If a constitutional *Charming Betsy* is inappropriate to delineate the content of constitutional liberties, what role, if any, should foreign relations play? If a foreign relations concern does not define constitutional guarantees, does it offer any illumination on the contours of constitutional law?

The answer, in brief, is that foreign relations concerns play a traditional and central role in justifying government authority to curtail constitutional liberties. From the perspective of constitutional guarantees, its role is thus almost always negative, by which the Government asserts the need to diminish individual liberties in furtherance of legitimate government ends. Far from securing freedoms consistent with international norms, foreign relations concerns circumscribe constitutional liberties consistent with reasonable political ends. 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. As the United States recently put it, "[i]n matters touching on foreign relations . . . Executive authority is at its apogee and judicial expertise at its nadir [T]he Constitution . . . should not be construed to disrupt the ability of that Branch 'to respond to foreign situations involving our national interest.'"²²⁷ A judicial reluctance to

²²⁶ See *supra* text accompanying note 14.

²²⁷ Brief for the Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-485), 2004 WL 182582 at *49-50, (citing *Chi. & S. Air Lines v. Waterman*, 333 U.S. 103, 111 (1948); *Dep't of Navy v. Egan*, 484 U.S. 518, 529-30 (1988); *Haig v. Agee*,

independently take foreign policy considerations into account absent executive guidance reflects the classic deference the courts must show to the political branches in the conduct of foreign affairs. Political branches, not the courts, should invoke an international rule. Such political acceptance “reduces possible concerns that a court might improperly impose an international obligation on the United States contrary to the views of the political branches.”²²⁸

Supreme Court jurisprudence is replete with such examples.²²⁹ In the due process context, the Court in *Mathews v. Eldridge* held that the process due in any given instance is determined by weighing the private interest affected by official action against the government’s asserted interest and the burdens it would face in providing greater process.²³⁰ That test was applied in *Hamdi v. Rumsfeld* to balance the government interest in detaining American enemy combatants, noting that “the law of war and the realities of combat may render . . . detentions both necessary and appropriate, and our due process analysis need not blink at those realities.”²³¹ That is, international law recognizes the need to detain American enemy combatants, and our Constitution is solicitous to such concerns. Our Constitution recognizes the ability to deny liberty to enemy combatants is among the core strategic matters of war-making that belong in the hands of the Executive.²³² Thus, the foreign relations interest competes for prominence with the private interest in Hamdi’s individual right to liberty.

Similarly, aliens enjoy far fewer protections under our Constitution because of important foreign relations considerations:

Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.²³³

In times of war and peace, such concerns have resulted in the Court

453 U.S. 280, 292–94 (1981); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990)).

²²⁸ *Cleveland*, *supra* note 161, at 116.

²²⁹ *See Spiro*, *supra* note 148, at 697–715 (discussing foreign relations’ impact on individual rights).

²³⁰ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²³¹ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647 (2004).

²³² *Id.*

²³³ *Demore v. Kim*, 538 U.S. 510, 521–22 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976)) (internal quotation omitted).

upholding the detention, exclusion, and deportation of aliens.²³⁴ Whatever constitutional rights resident and non-resident aliens may enjoy on such matters, the government enjoys near plenary power over aliens on such immigration and war-making matters. It seems the government almost always wins on matters pertaining to the treatment of aliens.

In some instances the foreign relations interest will counsel a curtailment of individual liberties in furtherance of international obligations. *Reid v. Covert* is an example, with executive agreements authorizing the military prosecution of civilian dependents without the constitutional protections of indictment and trial by jury. The United States argued that such prosecutions were “necessary and proper to carry out the United States’ obligations under international agreements.”²³⁵ Likewise in *Boos v. Barry*, the Government sought to limit speech near embassy properties to further the government’s interest in complying with international law obligations regarding the protection of diplomatic and consular personnel. The Court recognized that “the United States has a vital national interest in complying with international law” and “[t]he need to protect diplomats is grounded in our Nation’s important interest in international relations.”²³⁶ In neither case did the Court uphold the government restriction; rather, it decided not to do so because the national interest, while important, ran afoul of the protected constitutional interest.²³⁷

Perhaps the point is more obvious if one takes a domestic analogy. One year after the decision in *Boos v. Barry*, the Court relied on *Boos* in the case of *Texas v. Johnson*, which upheld the right to desecrate the flag notwithstanding the “serious offense” it would cause to others.²³⁸ The Court held that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²³⁹ The Court has not recognized an exception to this principle when such offense is expressed with a foreign accent. It is the very nature of principled

²³⁴ *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005); *Demore v. Kim*, 538 U.S. 510 (2003); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Hirota v. MacArthur*, 338 U.S. 197 (1949); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889); HENKIN, FOREIGN AFFAIRS, *supra* note 132, at 303–05.

²³⁵ *Reid v. Covert*, 354 U.S. 1, 16 (1957).

²³⁶ *Boos v. Barry*, 485 U.S. 312, 323 (1988).

²³⁷ *Id.* at 334; *Reid*, 354 U.S. at 30–31, 39–41.

²³⁸ *Texas v. Johnson*, 491 U.S. 397, 407 n.4, 408, 410–12, 420 (1989).

²³⁹ *Id.* at 414 (citation omitted).

constitutionalism to engender the occasional violent protest at home or abroad. Neither the decision nor the reaction is inappropriate. They are simply part of an enduring system that safeguards bedrock constitutional interests from the passing winds of majority preference. But if the government official that is seeking to curtail your rights can advance a legitimate reason for an infringement, then those reasons might begin to have constitutional relevance. Occasionally, foreign relations concerns provide such a reason.

In short, proponents of a constitutional *Charming Betsy* appear to assume that foreign relations are exogenous concerns that impinge upon the political structure in constitutional decision-making. External pressure is brought to bear on the Executive in its conduct of foreign affairs, and this is deemed to have constitutional import for the Court. Foreign affairs concerns are endogenous factors produced within the constitutional system which the political branches take into account in granting or curtailing individual liberties. The political branches afford rights consistent with international obligations, and sometimes they curtail rights consistent with legitimate foreign policy objectives. The exigencies of foreign affairs may afford occasion for the political branches to grant legislative or executive privileges that expand basic rights through the democratic process, but such exigencies may also occasion the curtailment of constitutional liberties. It is the political branches—not the courts—that factor the relevance of international discord in constitutional problems.

Executive assertions of foreign relations concerns, not the Court's independent appraisal of the importance of diplomatic *demarches*, are what give international politics its relevance in constitutional adjudication. The Bill of Rights does not expand or contract based on enflamed or muted protests beyond our waters edge.

IV. CONCLUSION

The *Charming Betsy* doctrine is an indispensable device for pursuing our nation's foreign policy objectives. It is a structural safeguard that arises out of the relationship between branches of government in a system of separation of powers. The competency of the political branches to make and implement foreign policy decisions depends on the courts avoiding interpretations that inadvertently authorize or obligate international law violations. Absent unambiguous guidance, it is presumed that the political branches will avoid international discord by abrogating international obligations.

The *Charming Betsy* doctrine, properly understood as a rule of separation of powers, clarifies the scope of legislative, executive, and judicial authority. Legislative authority to prescribe conduct abroad should be read consistent with *Charming Betsy*, so that the extraterritorial application of our laws will

be deemed less offensive if violations of international prescriptive jurisdiction would not result. It is one thing to presume a law does not apply abroad if doing so will work an international wrong, but it is quite another thing to apply it abroad consistent with accepted international practice. The 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. The presumption against extraterritoriality becomes more difficult to rebut when it is overlaid with the presumption of *Charming Betsy*.

Likewise, the Executive's ability to act pursuant to delegated authority should be read in light of *Charming Betsy*. Under the *Youngstown* trilogy, the scope of congressional authority is uncomplicated where legislative authority or prohibition is explicit, but the ambiguities of authorization are clarified by the presumption that Congress does not vaguely acquiesce to an international law violation, much less inchoately require one. The executive freedom presumed by *Charming Betsy* is the freedom to comply with the international law. *Charming Betsy* thus shifts *Youngstown's* implied congressional guidance in the first and third categories toward international compliance. The Executive may well find it appropriate and necessary to depart from international obligations in the absence of congressional authorization, but in so doing it will be subject to more exacting second category judicial review, assuming the question is subject to legal review at all.

The scope of judicial authority is likewise clarified in light of *Charming Betsy*. *Baker v. Carr* cautions against judicial pronouncements that might embarrass the Executive, but so too does *Charming Betsy*. Prudential concerns of executive embarrassment are diminished if one can presume that the courts will endeavor to interpret congressional authorization to avoid international discord. If *Charming Betsy* attempts to depoliticize disputes by interpreting statutes to avoid international political consequences, the judiciary may be more inclined to seize hold of certain cases and address the legal questions arising therein.

The enthusiasm for *Charming Betsy* is now finding application in the constitutional arena, with advocates contending that foreign relations concerns should inform our interpretation of constitutional guarantees. While such concerns are well founded in matters pertaining to foreign relations clauses, such as the war-making and treaty-making powers, there is little textual, historical, decisional, or theoretical support for such an approach when it comes to individual liberties. To argue that constitutional guarantees must be interpreted to take account of foreign policy objections from our friends and allies presumes a greater role for foreign relations in our constitutional system than is warranted.

The proper role for foreign relations is its traditional one—to justify government infringement of our protected interests. The political branches, not the judiciary, are vested with the power to decide how relevant foreign

policy objections are in furthering government interests. To the extent there is a government interest in displaying a decent respect for the opinion of humanity, the political branches can so indicate, and the courts in turn will balance that asserted public interest with the private interest in safeguarding individual rights.

Washington's fears of the wiles of foreign influence remain with us, albeit in a different time and context. Many independent-minded Americans remain alarmed at the opportunities for foreign attachments to "influence or awe [our] public councils."²⁴⁰ The Court's posture toward foreign opinion in interpreting constitutional guarantees should be neither sympathetic nor antipathetic, but apathetic. Rather than allowing foreign influence to usurp the confidence of the least diplomatic branch to surrender our interests, we should continue to entrust the political arm of the government with the task of balancing what weight foreign opinion should have in the calculus of constitutional protections. It alone has the foreign expertise to exercise such political judgment. If it asserts a national interest in countenancing foreign opinion, then the courts can entertain that expression of interest against the private claim of constitutional liberty. Until then, foreign relations is of little moment in the constitutional interpretation of our most precious freedoms.

²⁴⁰ *Washington's Farewell Address*, *supra* note 6, at 214. ("As avenues to foreign influence in innumerable ways, such [foreign] attachments are particularly alarming to the truly enlightened and independent patriot. How many opportunities do they afford to tamper with domestic factions, to practice the arts of seduction, to mislead public opinion, to influence or awe the public councils!").