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INTRODUCTION

For over two centuries, the *Charming Betsy* doctrine has guided United States courts when international obligations and domestic law collide. The *Charming Betsy* doctrine has signaled to courts that when international obligations and domestic law conflict with one another, statutes enacted by Congress "ought never to be construed to violate the law of nations if any other possible construction remains . . . ."[1] Since it was first applied, numerous courts have implemented the *Charming Betsy* doctrine as a tool of statutory interpretation.

Undoubtedly, Congress has the power and authority to disregard and abrogate international agreements by passing subsequent domestic legislation, so long as Congress demonstrates to the courts that it intended to abrogate the international agreement by doing so.[2] Therefore, the *Charming Betsy* doctrine essentially "acts as a rebuttable presumption that Congress did not intend to place the United States in breach of international law."[3] In order for Congress to rebut this presumption, Congress must provide the courts with an "affirmative expression of congressional intent" to abrogate the international agreement.[4] When such an affirmative expression of congressional intent is absent from the statute's text, the statute is deemed ambiguous, and the interpreting court, in accordance with the *Charming Betsy* doctrine, interprets the statute in such a way that it remains consistent with international law.[5]

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

2. Michael Franck, Note, *The Future of Judicial Internationalism: Charming Betsy, Medellin v. Dretke, and the Consular Rights Dispute*, 86 B.U. L. REV. 515, 521 (2006).

3. *Id.* at 521–22.

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

5. *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . .").

But what does it mean for Congress to provide an "affirmative expression of congressional intent" to abrogate an international agreement? Unfortunately, courts have not provided a definitive answer.[6]

Almost all cases that involve a conflict between a statute and an international obligation can be put into one of two categories. The first category consists of cases that involve a textually *ambiguous* statute that conflicts with an international agreement. In these cases, courts readily apply the *Charming Betsy* canon to interpret the statute in such a way as to avoid a conflict with the international agreement.[7] A second category is comprised of cases that involve a textually *unambiguous* statute that *expressly* abrogates an international agreement.[8] Courts are precluded from applying the *Charming Betsy* doctrine in these cases because congressional intent to abrogate the relevant international agreement is expressly stated in the statute and is therefore so clear and explicit that no "other possible construction [of the statute] remains . . . ."[9]

Although courts' willingness to apply the *Charming Betsy* doctrine to cases that fit into these two categories has received extensive attention,[10] this Article presents the first analysis of the appropriateness of *Charming Betsy*'s application to a third category of cases. This "new" category consists of cases that involve a conflict between an international obligation and a textually *unambiguous* statute that does *not* expressly abrogate an international agreement. In other words, the statutes involved in this third category are unlike the statutes in the first category because they are textually unambiguous and unlike the statutes in the second category because they do not expressly abrogate the conflicting international agreement.

This Article proposes that courts should not apply *Charming Betsy* to this third category of cases because *Charming Betsy*'s application is predicated on textual ambiguity. Because of this, there is no room for

6. Franck, *supra* note 2, at 522.

7. *See, e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.").

8. *See, e.g.*, Kappus v. C.I.R., 337 F.3d 1053 (D.C. Cir. 2003).

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

10. *See, e.g.*, Franck, *supra* note 2; *see also* Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of* Charming Betsy, 67 OHIO ST. L.J. 1339 (2006).

courts to apply the *Charming Betsy* doctrine when a statute is textually unambiguous, regardless of whether the statute contains an express reference to the conflicting international agreement. A textually unambiguous statute serves as an "affirmative expression of congressional intent," thereby rebutting the *Charming Betsy* presumption. In essence, this Article contends that cases that fall into this third category should be treated the same as the textually unambiguous statutes found in the second category.

This Article proceeds as follows: Part I sets forth the background to the *Charming Betsy* doctrine and analyzes recent landmark cases invoking the doctrine, including cases falling within the third category. Part II addresses three major concerns that arise when courts fail to strictly abide by the unambiguous text of statutes. Section II.A addresses concerns about the courts upsetting the precedential baseline upon which Congress legislated. Section II.B addresses concerns about denying ordinary citizens fair notice by depriving them of the ability to decipher a statute's meaning and know how the statute applies to them. Finally, Section II.C addresses the separation-of-powers concerns that arise when Congress is required by the courts to include a clear statement in addition to a textually unambiguous statute to abrogate an international agreement.

I. APPLYING *CHARMING BETSY*

A. Background: Charming Betsy *the Case*

The *Charming Betsy* doctrine began with *Murray v. The Schooner Charming Betsy*,[11] when the Supreme Court confronted the seizure of the Charming Betsy, a privately owned schooner that was sailing on the open seas, by a U.S. military vessel.[12] The captain of the Navy vessel seized the schooner under the authority of the Federal Nonintercourse Act, a statute that prohibited any form of trade between France and American citizens.[13] Between the time that the Act was passed and the time that the schooner was seized by the U.S.

11. 6 U.S. (2 Cranch) 64 (1804).

12. *Id.* at 116; Franck, *supra* note 2, at 520.

13. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 77 (quoting the Federal Nonintercourse Act, ch. 10, 1, 2 Stat. 7, 8 (1800) (repealed 1801); *see also* Franck, *supra* note 2, at 520.

Navy, the vessel was sold from an American to a Danish citizen that had been born in America.[14] The captain of the U.S. Navy vessel seized the schooner believing it was still an American vessel and in violation of the Act by engaging in trade with France.[15] Even though the Danish citizen had papers that demonstrated that the ship was Danish, the U.S. Navy captain seized the ship.[16] The Danish government contested the legality of the seizure, claiming that the ship was not American, and, therefore, seizing the ship violated recognized principles of international law.[17]

When the case was presented before the United States Supreme Court, the issue was whether the "Charming Betsy [was] subject to seizure and condemnation for having violated a law of the United States."[18] The Supreme Court agreed with the Danish government, determining that the seizure of the schooner was unlawful because there was no reason to believe that the schooner was an American vessel within the meaning of the statute.[19] In his opinion, Justice Marshall declared that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[20] Applying this standard, the Court held that the "correct construction" of the ambiguous wording of the Act was that a vessel must be owned by a citizen of the United States "not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed."[21] As the Court explained, "[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."[22] Over the years that followed, courts have relieved the tension

14. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 65–66; *see also* Franck, *supra* note 2, at 520.

15. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 66.

16. *Id.* at 122.

17. *Id.* at 116; *see also* Franck, *supra* note 2, at 520.

18. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118; *see also* Alford, *supra* note 10.

19. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 121–22; *see also* Alford, *supra* note 10, at 1350.

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

21. *Id.* at 119; *see also* Alford, *supra* note 10, at 1350.

22. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 119.

between international obligations and domestic statutes in numerous cases by applying *Charming Betsy*. Section I.B below discusses three landmark cases that demonstrate how courts have applied the *Charming Betsy* doctrine in a modern context.

B. Textual Ambiguity as a Prerequisite to the Charming Betsy *Doctrine*

Each of the modern landmark cases involving *Charming Betsy* involves a textually ambiguous statute that conflicts with an international agreement. Courts have routinely required that Congress clearly express its intent in order to abrogate an international agreement.[23] The following cases demonstrate that applying the *Charming Betsy* canon is predicated on a textually ambiguous conflicting statute.

1. Weinberger v. Rossi

In *Weinberger v. Rossi*, for instance, the President entered into an executive agreement with the Philippines providing that Filipino citizens would receive preferential treatment for employment at U.S. military facilities in the Philippines.[24] Three years after the agreement, Congress enacted a statute that prohibited employment discrimination against United States citizens at overseas military facilities, "unless such discrimination [was] permitted by a '*treaty*' between the United States and the host country."[25] The issue that the Court faced was that the word "treaty" was ambiguous—did

23. *See, e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.").

24. Weinberger v. Rossi, 456 U.S. 25, 27 n.2 (1982). This 1968 agreement was known as the Base Labor Agreement, U.S.-Phil., May 27, 1968, 19 U.S.T. 5892 [hereinafter BLA].

In relevant part, Article I of the BLA provided:

> 1. Preferential Employment.—The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed. . . .

Weinberger, 456 U.S. at 27 n.2.

25. *Weinberger*, 456 U.S. at 29 (emphasis added); Military Selective Service Act § 106 of 1971, Pub. L. No. 92–129, § 106, 85 Stat. 348, 355.

Congress's use of the word "treaty" in the statute refer exclusively to treaties found in Art. II, § 2, cl. 2 of the Constitution, which are "concluded by the President with the advice and consent of the Senate," or did it also include executive agreements like the one entered into between the President and the Filipino government, without the advice and consent of the Senate?[26]

The Court noted that if it were to interpret the statute's use of the word "treaty" to mean only Article II treaties, the statute would repudiate the executive agreement obligation of the United States to the Filipino government.[27] Accordingly, because the word "treaty" was textually ambiguous, the Court proceeded to apply the *Charming Betsy* canon and interpreted the statute in a way that avoided the conflict with the executive agreement altogether.[28]

2. Trans World Airlines, Inc. v. Franklin Mint Corp.

Trans World Airlines, Inc. v. Franklin Mint Corp. provides another example of textual ambiguity being a prerequisite to applying the *Charming Betsy* doctrine. The issue in *Trans World Airlines* concerned a potential conflict between a 1929 international air carriage treaty[29] and, surprisingly enough, the 1978 repeal of the gold standard in the United States.[30] The international air carriage treaty set limits on the liability that air carriers could incur for lost cargo.[31] The liability limit for U.S. air carriers set by this treaty depended on the price of gold in the United States.[32] In 1978, Congress repealed the gold standard,[33] which had been used to set

26. *Weinberger*, 456 U.S. at 29.

27. *Id.* at 31–32.

28. *Id.* at 32 ("It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2L.Ed. 208 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .'").

29. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in Note following 49 U.S.C. § 1502; Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 245 (1984).

30. *Trans World Airlines*, 466 U.S. at 245.

31. *See id.* at 247.

32. *See id.* at 245.

33. Bretton Woods Agreements Act of 1976, Pub. L. No. 94–564, § 6, 90 Stat. 2660, 2661.

this liability limit for U.S. airlines.[34] After the repeal of the gold standard, the Civil Aeronautics Board[35] continued to use the last official price of gold in the United States to set the liability limit.[36]

The primary issue addressed by the Court was whether the 1978 repeal of the gold standard rendered the liability limitation set by the earlier treaty unenforceable in the United States.[37] The Court determined that Congress's intent as expressed in the repealing statute's text was ambiguous because "there was no direct conflict between the treaty and the statute, so the Court refused to find abrogation given that the statute did not speak to the question at issue."[38] It was because of the ambiguous nature of the statute that the Court determined that *Charming Betsy* applied.[39] The Court held that the treaty controlled the subsequent statute because Congress failed to "clearly express[]" an intent to modify or repeal the treaty.[40]

3. Roeder v. Islamic Republic of Iran (Roeder I)

Roeder v. Islamic Republic of Iran (Roeder I) is another landmark case that demonstrates that *Charming Betsy*'s application is predicated on textual ambiguity.[41] As a result of the 1979 Iranian hostage crisis, the United States entered into the Algiers Accords with Iran, which precluded "the prosecution against Iran of any . . . claim of . . . a United States national arising out of the events . . . related to (A) the seizure of the 52 United States nationals on

34. *See Trans World Airlines*, 466 U.S. at 248–49.

35. The Civil Aeronautics Board is the executive agency that is responsible for overseeing the economic regulation of U.S. airlines. *See id.* at 245.

36. *See id.* at 251. The price of gold that the Civil Aeronautics Board used was $9.07 per pound of lost cargo. *Id.* at 245.

37. *See id.* at 251; *see also* Franck, *supra* note 2, at 527–28.

38. *See* Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp. (*OOIDA*), 724 F.3d 230, 241 (D.C. Cir. 2013) (Sentelle, J., dissenting).

39. *Trans World Airlines*, 466 U.S. at 252 ("There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.").

40. *Id.* (citing Cook v. United States, 288 U.S. 102, 120 (1933); *see also* Franck, *supra* note 2, at 528.

41. 333 F.3d 228, 237–38 (D.C. Cir. 2003).

November 4, 1979, [and] (B) their subsequent detention."[42] Despite Iran's apparent immunity from civil suits in the United States, several Americans that were hostages during the 1979 hostage crisis sued the Iranian government for damages,[43] and default judgment was entered against Iran.[44] The State Department promptly moved to intervene and vacate the default judgment, claiming that the lawsuit was barred by Iran's sovereign immunity that resulted from the Algiers Accords.[45] In response to the State Department's intervention, Congress amended the Foreign Sovereign Immunities Act (FSIA) of 1976 and specifically referred to the case by its case number in the legislative history in an apparent effort to exempt the plaintiffs' case from the Act and allow the lawsuit against Iran to continue.[46]

The question that the D.C. Circuit faced was whether the Algiers Accords survived the FSIA amendments.[47] Despite the apparent intent of Congress found in the amendment's legislative history, the court nonetheless determined that there was enough textual ambiguity to apply the *Charming Betsy* doctrine.[48] The court concluded that the required congressional intent to abrogate the Algiers Accords was not present in the text of the statute, and, therefore, it affirmed the order vacating the default judgment.[49] In applying *Charming Betsy*, the court emphasized the amending

42. *Id.* at 232 (quoting Iran–United States: Settlement of the Hostage Crisis, 20 I.L.M. 223 (1981)). The Algiers Accords is an executive agreement signed in 1980. *Id.* at 231.

43. The former hostages sued the Iranian government under the Anti-Terrorism and Effective Death Penalty Act of 1996.

44. *Roeder I*, 333 F.3d at 230 (noting that default judgment was entered against Iran because it failed to defend against the suit).

45. *Id.* at 231.

46. *Id.* at 235; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001) (amending 28 U.S.C. § 1605(a)(7)(A) (2000)). The amended Foreign Service Immunities Act of 1976 stated that sovereign immunity would not apply if "the act is related to Case Number 1:00CV03110(EGS) [sic] in the United States District Court for the District of Columbia." Foreign Service Immunities Act of 1976, 28 U.S.C. § 1605(a)(7)(A) (2000).

47. *Roeder I*, 333 F.3d at 235–36.

48. *Id.* at 237. Although the court does not invoke *Charming Betsy* by name, the court nonetheless draws on the line of precedent that applies *Charming Betsy*. *See, e.g.*, Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (quoting Cook v. United States, 288 U.S. 102, 120 (1933)); Weinberger v. Rossi, 456 U.S. 25, 32 (1982).

49. *Roeder I*, 333 F.3d at 237–39; *see also* Franck, *supra* note 2, at 525–26.

statute's textual ambiguity by stating that "the legislation itself [was] silent" on the precise point of conflict between the statute and the prior agreement.[50] The statute was deemed insufficiently clear because it never specifically addressed the Algiers Accords.[51]

C. Textually Unambiguous Statutes that Expressly Abrogate the Conflicting International Agreement

Courts do not apply the *Charming Betsy* doctrine when the text of a statute is unambiguous and the statute expressly abrogates the conflicting international agreement. For example, in *Kappus v. Comm'r of Internal Revenue*, a potential conflict existed between a section of the Internal Revenue Code and a tax treaty between the United States and Canada.[52] An American couple resided and worked in Canada for a year and paid Canadian taxes on their Canadian-source income.[53] When filing their U.S. taxes, the couple claimed a credit against their U.S. tax for all the Canadian taxes they had paid, supposedly leaving the couple with no U.S. tax liability.[54] However, the couple received a notice from the IRS informing them that the Internal Revenue Code limits the amount of foreign tax credit[55] and that they were still liable to pay $6,152 in U.S. taxes.[56]

The couple contended that the Code violated the terms of a tax treaty between the United States and Canada that required the United States to grant a credit for the entire amount of the Canadian tax that they paid.[57] The court, however, determined that the Code's language was an unambiguous statutory provision enacted *after* the U.S.-Canada Tax Treaty that expressly overrode any treaty obligations that conflicted with it.[58] Because the conflict between the

50. *Roeder I*, 333 F.3d at 238.

51. Franck, *supra* note 2, at 526 (citing *Roeder I*, 333 F.3d at 237).

52. Kappus v. C.I.R., 337 F.3d 1053, 1053–54 (D.C. Cir. 2003).

53. *Id.*

54. *Id.*

55. 26 U.S.C. § 59(a)(2) (2005).

56. *Kappus*, 337 F.3d at 1054. $6,152 is "equal to 10% of [the couple's] pre-credit tentative minimum tax as recalculated by the Commissioner, who applied § 59(a)(2)'s 90% cap on the AMT foreign tax credit." *Id.*

57. *Id. at* 1055 (citing US-Canada Tax Treaty, Art. XXIV, "Elimination of Double Taxation").

58. *See id.* at 1057–58. The U.S.-Canada Tax Treaty was signed by the United States and Canada in 1980 and went into effect in 1984. In 1988, Congress passed the Technical and

statute and the treaty was irreconcilable, the court applied the last-in-time rule and determined that the statute, being the more recent legal pronouncement, abrogated the U.S.-Canada Tax Treaty.[59]

D. The Problem Child: Textually Unambiguous Statutes with No Express Reference to Conflicting International Agreements

Section I.B discussed cases in which *ambiguous* statutes were interpreted to preserve preexisting international agreements or treaties, and Section I.C discussed a case in which *unambiguous* statutes *expressly* overrode a treaty. A third "new" category of cases involves textually unambiguous statutes that contain *no express* reference to conflicting international agreements.[60]

In *Owner-Operator Independent Drivers Ass'n, Inc. v. United States Department of Transportation (OOIDA)*, the Owner-Operator Independent Drivers Association (OOIDA) challenged the Federal Motor Carrier Safety Administration's (FMCSA) decision "to exempt commercial vehicle operators licensed in Canada or Mexico from certain statutory medical certification requirements applicable to drivers licensed in the United States."[61] Federal law requires that commercial vehicle operators be licensed and have a separate medical certification attesting to their fitness to operate a commercial vehicle safely.[62] In order to facilitate trade, "the United States . . . entered into 'executive agreements' with Mexico and Canada for reciprocal

Miscellaneous Revenue Act (TAMRA), Pub. L. No. 100–647, 102 Stat. 3342, that included a provision that expressly stated that § 59(a)(2), as well as other specified amendments, were intended to apply regardless of any treaty obligation: "(2) Certain Amendments to Apply Notwithstanding Treaties.——The following amendments made by the [Tax] Reform Act [of 1986] shall apply *notwithstanding any treaty obligation of the United States* in effect on the date of the enactment of the Reform Act." *Kappus*, 337 F.3d at 1057 (emphasis added) (quoting TAMRA, § 1012(aa)(2) (codified at 26 U.S.C. § 861 note) (2012)).

59. *Kappus*, 337 F.3d at 1057; *see also* Chae Chan Ping v. United States, 130 U.S. 581, 599–602 (1889) (the Chinese Exclusion Cases); Edye v. Robertson, 112 U.S. 580, 597–99 (1884) (The Head Money Cases); S. Afr. Airways v. Dole, 817 F.2d 119, 121, 125–26 (D.C. Cir. 1987). *But see* Cook v. United States, 288 U.S. 102, 119–20 (1933) (explaining that the relevant treaty was not abrogated, because the Act, though enacted later, made no mention of it).

60. Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 724 F.3d 230, 234 (D.C. Cir. 2013).

61. *Id.* at 232.

62. *Id.* (citing 49 U.S.C. § 31136(a)(3) (2012)).

licensing of commercial drivers operating across national borders."[63] Unlike the American licensing requirement, which required a separate medical certification, the Mexican and Canadian licensing processes incorporated physical fitness criteria as part of their licensing program.[64] In 2005, after the United States had entered into reciprocal licensing agreements with Mexico and Canada that allowed for the other two countries to continue to incorporate physical fitness criteria as part of their licensing program, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act, which requires "*all* commercial vehicle operators" to abide by specific requirements that include obtaining a separate medical certificate.[65] The Act made no mention of the reciprocal agreements with Canada and Mexico.[66] The FMCSA proceeded to propose a rule exempting Mexican and Canadian commercial drivers from the requirements of the Act, thus attempting to remain in accordance with the reciprocal agreements between the countries.[67] The OOIDA filed a petition for review with the D.C. Circuit asking the court to set aside the FMCSA's final rule that exempted Mexican and Canadian commercial drivers from the certification requirements.[68]

The D.C. Circuit, in a split-panel decision,[69] determined that while the text of the Act requiring "*all* commercial vehicle operators"[70] to obtain a separate medical certificate was in fact unambiguous, the court would not construe the statute to abrogate existing international agreements "absent some clear and overt indication from Congress."[71] The D.C. Circuit cited *Trans World Airlines*, *Weinberger*, and *Roeder I* to support its decision.[72]

Courts are not always this up-front about labeling a statute as textually "unambiguous" before they proceed to interpret the statute

63. *Id.*

64. *Id.*

65. *Id.* at 233 (emphasis added) (citing 49 U.S.C. § 31149(c)(1)(B), (d)(1), (d)(3) (2012)).

66. *Id.*

67. *Id.*

68. *Id.*

69. Judge Brown issued the opinion for the court, joined by Chief Judge Garland. Judge Sentelle filed the dissenting opinion. *Id.* at 232.

70. *Id.* at 233 (emphasis added).

71. *Id.* at 234.

72. *Id.* at 234–35.

in a way that avoids a conflict with international agreements. Indeed, *OOIDA* was the first time that a federal appellate court had gone as far as to label the conflicting statute as textually unambiguous before holding that it must give way to an existing international obligation.[73] This does not mean, however, that *OOIDA* is the first case of this sort. To the contrary, courts sometimes strain to label a statute that conflicts with an international agreement as textually ambiguous, even when it is not. The D.C. Circuit in *OOIDA* should be commended for tackling this issue squarely.

One such instance of a court straining to find textual ambiguity in order to not abrogate an international agreement is *United States v. Palestine Liberation Organization (PLO)*.[74] In *PLO*, a conflict arose between a treaty that the United States had entered into with the United Nations and the newly passed Anti-Terrorism Act of 1987 (ATA). The United States, as host country to the United Nations Headquarters, had entered into a treaty with the United Nations in 1947 that provided that "federal, state or local authorities of the United States" would "not impose any impediments to transit to or from the headquarters district" of representatives of member nations or "other persons invited to the headquarters district by the United Nations . . . on official business."[75] In 1974, the United Nations granted the Palestine Liberation Organization (PLO) "observer" status,[76] and the United States accordingly permitted the PLO observer mission to set up offices in New York and Washington, D.C.[77] In 1987, however, Congress passed the ATA, and in doing so explicitly labeled the PLO as "a terrorist organization and a threat to the interests of the United States, its allies, and to international law."[78]

73. *Id.* at 234 ("But the parties cite no case of quite this kind: a textually clear statute with no express reference—or any other indication of its intended application—to conflicting international agreements.").

74. 695 F. Supp. 1456 (S.D.N.Y. 1988) [hereinafter *PLO*].

75. Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, U.S.–U.N., art. IV, § 11, June 26, 1947, 61 Stat. 756, 761.

76. *See PLO*, 695 F. Supp. at 1459.

77. *See* John M. Rogers, *Intentional Contexts and the Rule that Statutes Should Be Interpreted as Consistent with International Law*, 73 NOTRE DAME L. REV. 637, 651 (1998) ("There were only two PLO offices in the United States at the time of the ATA, one in Washington D.C. and the observer mission in New York.").

78. 22 U.S.C. 5201(b) (1994).

The ATA made it illegal for the PLO, "*notwithstanding any provision of law to the contrary*, to establish or maintain an *office*, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States."[79]

Notwithstanding this seemingly unambiguous text of the ATA,[80] the district court determined that the statute's text was ambiguous and therefore the United States could avoid reneging on its obligations under the U.N. Headquarters Agreement.[81] The court reasoned that the ATA did not expressly mention the PLO observer mission or the Headquarters Agreement.[82] Furthermore, the words "notwithstanding any provision of law to the contrary" did not specifically say "notwithstanding any *treaty*" to the contrary.[83] Even so, it is hard to say that the statute was textually ambiguous.

II. CONCERNS THAT ARISE FROM APPLYING *CHARMING BETSY* TO TEXTUALLY UNAMBIGUOUS STATUTES

Genuine textual ambiguity should be recognized as a prerequisite for applying the *Charming Betsy* canon of construction. In this Part, I discuss three major concerns that arise from applying *Charming Betsy* to textually unambiguous statute—whether that textual unambiguity is expressly recognized by the court or not.

The benefits from and reasons for applying the *Charming Betsy* canon when ambiguous statutes and international agreements conflict are well established. By interpreting an ambiguous statute as to not interfere with a conflicting international agreement, *Charming Betsy* "eliminate[s] international discord in furtherance of an executive prerogative to comply with international obligations."[84] The canon also supports the notion that "[i]nternational obligations are serious matters" and that "[t]he international reputation of the United States ought not to be jeopardized" when a conflicting statute can be interpreted so as not to interfere with international

79. 22 U.S.C. 5202(3) (1994) (emphasis added).

80. *See* Rogers, *supra* note 77, at 650 ("[I]t is a stretch to say that there is any interpretative gap for the court to fill here. There is only in the most fictional sense an ambiguity as to whether the language [of the ATA] covered the mission in New York.").

81. *See* PLO, 695 F. Supp. at 1468.

82. *Id.*

83. *Id.*

84. Alford, *supra* note 10, at 1342.

obligations.[85] Furthermore, the doctrine serves as an indication of "[t]he judiciary's respect for coordinate branches of government, to avoid the embarrassment of declaring a statute in violation of international law in the absence of a clear statement of repudiation by Congress."[86]

Although *Charming Betsy*'s application recognizes the importance of international obligations and protects those obligations from unintentional Congressional abrogation, applying the canon to cases involving textually unambiguous statutes raises three serious concerns. The first is that requiring a clear statement from Congress in addition to unambiguous statutory text in order to abrogate an international obligation upsets the baseline upon which Congress legislated. This is akin to the courts changing the rule in the middle of a game, undoing whatever deals and bargains were made internally within the legislature to enact the statute. The second concern that arises from applying *Charming Betsy* to a statute's unambiguous text is that doing so deprives ordinary citizens of fair notice of the law and prevents them from understanding which laws apply to them. By abiding to the unambiguous text of a statute, courts can promote a more predictable judicial system where citizens can reliably act without fear of personal liability and with confidence in their business decisions. Finally, requiring a clear statement when the statute's text is unambiguous interferes with the separation of powers between the judiciary and the other two branches of federal government, thereby potentially leading to the encroachment of personal liberties.

A. Concerns about Upsetting the Precedential Baseline

When Congress legislates, it does so against a predictable baseline established by court precedent. As Congress creates new laws, it expects federal courts to interpret those laws in a manner that is consistent with past interpretation. With regards to international agreements, Congress is presumably operating against the background assumption that, according to federal court precedent, the *Charming Betsy* doctrine will only be applied to a statute in order to avoid abrogating an international agreement when the statute is

85. Franck, *supra* note 2, at 528.

86. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1115 (1990).

textually ambiguous.[87] If a court were to apply *Charming Betsy* in a situation where the text of the conflicting statute is unambiguous, the court would upset and contradict the baseline precedent upon which Congress framed and passed its legislation. If the courts truly wish to change the rules mid-game, they should do so only prospectively, thereby communicating to Congress that the baseline has changed and allow the legislature to act accordingly in the future.

Cannon v. University of Chicago[88] serves as an illustration of the appropriate way for courts to change the rules mid-game. In *Cannon*, the Supreme Court recognized the existence of a private right to sue for an alleged Title IX claim.[89] Justice Rehnquist, who typically disfavored determining that such implied private rights of action existed,[90] stated in his concurring opinion that he was willing to side with the majority because, at the time that Congress had enacted Title IX of the Civil Rights Act, "the legislature had generally assumed that courts would decide whether a civil rights statute contained an implied private right of action."[91] In other words, Justice Rehnquist recognized that Congress took into account and relied upon the baseline that courts could, and often would, determine that various civil rights statutes contained an implied right of action. Because of this reliance, Congress did not see a need to explicitly state in this context whether a private right of action existed.[92]

Although Justice Rehnquist was willing to find that a judicially inferred private right of action existed in *Cannon*, he made a special point of noting that, going forward, the Court would change

87. *See supra* Section I.B.

88. 441 U.S. 677 (1979).

89. *Id.* at 689.

90. *See id.* at 718 (Rehnquist, J., concurring) (arguing against liberal judicial implication of private rights of action and that courts should encourage Congress to explicitly state whether it intends to authorize such rights); *see also* Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 869 (2002).

91. Mank, *supra* note 90, at 849–50 (citing *Cannon*, 441 U.S. at 718).

92. *See Cannon*, 441 U.S. at 718 ("Cases such as *J.I. Case Co. v. Borak* . . . and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.").

course.[93] Justice Rehnquist warned Congress that it would no longer be sufficient to rely on the courts to determine whether there would be private rights of action, and that the legislature itself must directly confront the issue.[94] If Congress wished to provide for private rights to sue for violations of statutorily defined duties in the future, Congress must explicitly provide for such rights.[95] Justice Rehnquist commented that after Congress was put on notice by his opinion, "the ball, so to speak, may well now be in [Congress's] court."[96] Because it was put on notice, Congress could then "take this changed legal climate into account and its failure to expressly mention a private right of action in statutes subsequently enacted will reflect a conscious decision that it not exist."[97]

By applying the *Charming Betsy* canon to textually unambiguous statutes, courts are changing the rules mid-game and upsetting the precedential baseline upon which Congress enacted the statute. The clear precedent that has been established by the courts creates the baseline that *Charming Betsy*'s application is predicated on textual ambiguity. When Congress passes a textually unambiguous statute, the established baseline justifiably results in Congress's expectation that the statute would abrogate a conflicting treaty because the statute is textually unambiguous. When courts subsequently choose to upset that baseline retroactively and require that Congress provide a clear statement that expressly abrogates the international agreement *in addition to* unambiguous text, courts undo any and all of Congress's bargains that were in place when the statute was passed.[98]

Whether or not it would have been a good rule at the outset for courts to require such a clear statement when the text of a statute is unambiguous is wholly irrelevant—the reality remains that upsetting the baseline upon which Congress legislates carries with it the

93. Sure enough, in later decisions following *Cannon*, the view of Justice Rehnquist carried a majority of the Court. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 561–62.

94. *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring).

95. *Id.*

96. *Id.*

97. William V. Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211, 254 (1983).

98. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540–41 (1983) (discussing how legislation is best understood as the result of compromises).

consequence of undermining the intent and expectations of Congress. Although Justice Rehnquist would have likely preferred that Congress had not originally left it to the courts to determine whether implied private rights of action existed in civil rights cases at the outset, he recognized that such precedent did exist and that there is danger in upsetting the baseline upon which Congress legislated without first giving Congress notice of the change.[99] Only after Justice Rehnquist provided notice to Congress that it would be required to expressly state whether it intended to create a private right of action was Congress held to that standard.

If courts wish to require Congress to provide a clear statement in which it must expressly abrogate an existing treaty regardless of textual unambiguity, then courts should exercise constraint and do so only prospectively and after clear notice is given to Congress that such will be the courts' course of action moving forward. Doing so will be in line with the principle established by Justice Rehnquist's concurring opinion in *Cannon*, properly provide Congress with the appropriate notice, and alert it to the fact that the baseline is changing prospectively.

B. Concerns about Denying Citizens Fair Notice of the Law

When courts interpret a statute to mean something other than the plain meaning of the statute's unambiguous text, they deprive ordinary citizens of the ability to decipher the statute's meaning and know how the statute applies to them. Although the benefits that result from promoting textualism have been documented in other contexts,[100] significant benefits also result from abiding by the unambiguous text of a statute in the context of situations where statutes and international agreements conflict. If a statute's text is unambiguous, and that statute conflicts with an international agreement, courts should abide by that unambiguous text in order to give citizens fair notice of the law.

99. *See Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring) (holding that an implied private right of action exists while arguing against liberal judicial implication of private rights of action and that courts should, going forward, encourage Congress to explicitly state whether it intends to authorize such rights).

100. *See, e.g.*, Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009).

Giving citizens fair notice of what the law is and how it applies to them is "an essential element of the rule of law" and promotes "fairness, legitimacy, and social utility."[101] When citizens have notice of the laws and know whether those laws are applicable to them, social efficiency increases and citizens are better able "to order their behavior within an established legal framework."[102] Furthermore, citizens become "more confident taking the business risks that drive our economy" because they "are confident that they are aware of the applicable laws."[103] On the other hand, if courts interpret statutes in a way that is inconsistent with the plain meaning of their text, citizens would be inclined to view the legal system as unpredictable and believe that they are unable to determine what a law means by just reading its text.[104] This is problematic because "an unpredictable legal system can place severe limits on productivity and perpetrate immense injustice against well-meaning individuals"[105] that take action thinking that they know what a textually unambiguous statute means, only to learn later courts have interpreted the statute to mean something entirely different.

When a statute's text is unambiguous on its face, courts cannot expect ordinary citizens to parse through the legislative history of a statute or strain to find ambiguity in order to understand the meaning of a statute. Indeed, by definition, the word "unambiguous" suggests that the text is not open to more than one interpretation;[106] therefore, an ordinary citizen would read the text of a textually unambiguous statute and not think that an appeal to extrinsic sources is necessary.

Courts should first look at the plain text of the statute and determine whether the plain meaning of the text unambiguously

101. *Id.* at 543.

102. *Id.*

103. *Id.*

104. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. . . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean.").

105. *Textualism as Fair Notice*, *supra* note 100, at 551.

106. Unambiguous: "[H]aving or being a single clearly defined or stated meaning." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2482 (1993).

contradicts an international agreement. If it does, then courts should "stop[] there and appl[y] the text according to that clear meaning."[107] Doing so would ensure that courts "reach the interpretation of the text that most accurately reflects how citizens would understand it,"[108] thereby interpreting the statute in the way that the citizens that are subject to the statute would fairly expect it to apply.[109]

It is true that canons of construction, such as the *Charming Betsy* doctrine, "facilitate fair notice in a more general way [b]y establishing predictable, objective rules for interpreting statutes."[110] But using a canon of construction is appropriate *only when* there is textual ambiguity.[111] When the text of a statute is unambiguous, a court's application of a canon of construction such as *Charming Betsy* is likely to lead to more confusion rather than providing the ordinary citizen with fair notice by establishing a predictable, objective rule. This is especially true in situations where applying the canon of construction leads the court to reach the *exact opposite* conclusion about the statute that an ordinary citizen would reach by simply reading the statute's text.

For example, an ordinary citizen that reads a federal statute that requires "*all* commercial vehicle operators" to abide by a specific medical requirement[112] is almost certainty going to reach the conclusion that the medical requirement statutorily applies to all commercial vehicle operators, irrespective of national origin or any other factors because that is what the text of statute plainly says. The statute says "all," so the ordinary citizen reader would have no reason to think the statute meant anything other than "all." Even

107. *Textualism as Fair Notice*, *supra* note 100, at 558.

108. *Id.*

109. *See generally* Karl N. Llewellyn, THE COMMON LAW TRADITION: DECIDING APPEALS 17 (1960) (noting that all laws should be predictable to their subjects).

110. *Textualism as Fair Notice*, *supra* note 100, at 560.

111. *See generally* Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915 (2001) (encouraging judges to implement substantive canons of construction when statutes' text are ambiguous); *see also Textualism as Fair Notice*, *supra* note 100, at 559 ("[W]hen ambiguity cannot be resolved by the use of definitional tools or simple attention to context, the textualist turns to traditional canons of construction.").

112. Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 724 F.3d 230, 233 (D.C. Cir. 2013) (emphasis added).

though the court interpreting this statute expressly stated that the text was "unambiguous,"[113] the court proceeded to deviate from that unambiguous text by implicitly applying the *Charming Betsy* canon of construction and ultimately holding that, by saying "all commercial vehicle operators," the legislature really must have meant "all commercial vehicle operators besides those that operate out of Mexico and Canada."[114] An ordinary citizen would not have thought to apply the *Charming Betsy* doctrine[115] because the text of the statute in this situation was clear and unambiguous.

Applying *Charming Betsy* when the text of a statute is unambiguous deprives ordinary citizens of fair notice, undermines their ability to apply the law for themselves, and decreases the legal literacy of the general public. On the other hand, faithful adherence to the legislature's commands as unambiguously expressed through the text of statutes "ensures that parties to a suit will be bound by the law as they would have reasonably interpreted it."[116] Abiding by the unambiguous text of statutes promotes fair notice to citizens, which in turn promotes a system in which judicial interpretation is more predictable.[117] A more predictable judicial system has high social utility because it promotes fundamental fairness and equality. As a result of a predictable judicial system that promotes these values, "citizens can reliably act without fear of personal liability and with confidence in their business decisions."[118]

C. Separation of Power Concerns

The Supreme Court has stated, "[T]he separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."[119] There has always existed a "hydraulic

113. *Id.* at 234.

114. *Id.* at 236–38.

115. This is assuming, of course, that an ordinary citizen even knows what the *Charming Betsy* canon of construction is, which he or she almost certainly would not. This even further bolsters the argument that, in situations when the text of a statute is unambiguous and it conflicts with an international agreement, courts should abide by the unambiguous text because that is what the ordinary citizen can know and familiarize him or herself with.

116. *Textualism as Fair Notice*, *supra* note 100, at 562.

117. *Id.* at 563.

118. *Id.*

119. Mistretta v. United States, 488 U.S. 361, 380 (1989).

pressure" within each of the three branches of government to exceed their constitutional limits and encroach upon the powers of the other branches.[120] Although the separation-of-powers doctrine is not explicitly set forth in the Constitution, it "is nonetheless deeply rooted in the Constitution and is designed to prevent the 'commingling' of the various powers of the government."[121] It is therefore vital that the separation of powers be maintained.

Requiring Congress to provide a clear statement, in addition to unambiguous statutory text, in order to abrogate an international agreement interferes with the separation of powers between the judicial, executive, and legislative branches. In implementing this heightened clear statement requirement in the context of executive agreements, the judiciary is essentially siding with the executive branch because it increases the burden placed on Congress of what it must do to abrogate an executive agreement.

This separation-of-powers concern is magnified when the international agreement is an executive agreement and not a treaty. While treaties are entered into pursuant to the Constitution's Treaty Clause,[122] executive agreements can be entered into by relatively low-ranking members of the executive branch.[123] "If '[d]istorting statutory language simply to avoid conflicts with treaties would elevate treaties above statutes in contravention of the Constitution,' distorting statutory language to avoid conflicts with international [executive] agreements even more obviously contravenes the Constitution."[124]

120. *See* Jamil Jaffer, Comment, *Congressional Control over Treaty Interpretation*, 70 U. CHI L. REV. 1093, 1097 (2003) (citing INS v. Chadha, 462 U.S. 919, 951 (1983)).

121. *Id.* at 1097 (quoting O'Donoghue v. United States, 289 U.S. 516, 530 (1933)).

122. *See* U.S. CONST. art. II, § 2, cl. 2 (giving the President "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided that two thirds of the Senators present concur").

123. For example, in *OOIDA*, the executive agreement with Mexico was made between the U.S. Secretary of Transportation and the Mexican Secretary of Communications and Transportation, and the agreement with Canada was entered into as a result of letters exchanged between "two transportation bureaucrats in the United States and Canada." *See* Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp. (*OOIDA*), 724 F.3d 230, 241 (D.C. Cir. 2013) (Sentelle, J., dissenting).

124. *OOIDA*, 724 F.3d at 241 (quoting Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 879 (D.C. Cir. 2006)).

The choice of whether to renege on a promise made in an international agreement is a choice best left to the political branches of government, not the judiciary.[125] The Supreme Court has stated that the choice to act in direct contravention of a treaty or international agreement "belong[s] to diplomacy and legislation, and not to the administration of the laws."[126] Indeed, it is entirely within Congress's authority to abrogate or rescind international agreements, and "[t]he political considerations that must be balanced prior to such a decision are beyond both the expertise and mandate of [the courts]."[127] Therefore, it is inappropriate for the courts to second-guess Congress's decision to abrogate an international agreement if the abrogating statute's text is unambiguous. Second-guessing Congress's action interferes with the legislature's constitutionally sanctioned ability to abrogate such agreements and risks putting a court in a position where it is making a diplomatic policy decision.

Although courts are sometimes asked to fill a quasi-legislative role with regard to international obligations when a conflicting statute is ambiguous, such instances should be limited to occasions where the abrogating statute's text is ambiguous and not expanded to include instances where the statute's text is unambiguous. Sometimes, "when a court is faced with two possible constructions of the law, and the court is not entirely sure which is correct, it in effect has a legislative choice."[128] In this sense, "the court acts as a sort of interim legislature, deciding which way the statute should operate until the legislature says otherwise."[129] This quasi-legislative role of the courts, however, should be strictly limited to situations where Congress's intent is not clearly expressed in the statute's text. If the text of a statute is unambiguous, then the interpreting court does not have a legislative role to fill because Congress has already done the work for the court. For the court to continue in this legislative role despite the presence of unambiguous text is cause for serious separation-of-powers concerns. The courts should not

125. *See* Jaffer, *supra* note 120, at 1098.

126. *See* Whitney v. Robertson, 124 U.S. 190, 195 (1888).

127. Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 144–45 (D.D.C. 2002) *aff'd*, 333 F.3d 228 (D.C. Cir. 2003).

128. Rogers, *supra* note 77, at 640.

129. *Id.*

supplant the legislature in enacting anything other than the words of the statute when those words are unambiguous. If the unambiguous text leads to a result that Congress did not intend or foresee, it can resolve any issues by enacting additional legislation. Indeed, when "[t]he language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct."[130] It is certainly not the job of the judiciary to protect Congress from itself, especially when doing so interferes with separation of powers.

CONCLUSION

Applying the *Charming Betsy* canon of construction should be predicated on textual ambiguity as the modern precedent applying *Charming Betsy* suggests. When courts apply *Charming Betsy* to textually unambiguous statutes—whether the statute is expressly recognized by the court as textually unambiguous or not—three major concerns arise. The first concern is that applying *Charming Betsy* to a textually unambiguous statute upsets the precedential baseline upon which Congress legislated. If courts wish to change course and require a clear statement rule from Congress despite textual unambiguity, they should do so only prospectively after they have provided the legislature with appropriate notice that there is a change in direction going forward. Such notice will give Congress the opportunity to take the necessary measures going forward to avoid confusion with the courts.

The second concern that arises from applying *Charming Betsy* to a textually unambiguous statute is that doing so denies ordinary citizens fair notice of the law by depriving them of the ability to determine a statute's meaning and to know how the statute applies to them. Because of this, courts should limit their use of canons of construction generally, and *Charming Betsy* specifically, to situations in which the statute's text is ambiguous. Fostering fair notice among citizens increases citizens' confidence in the judiciary, which in turn promotes individual decisions that benefit society.

Finally, separation-of-powers concerns arise when Congress is required by the courts to include a clear statement in addition to a

130. Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring in the judgment).

textually unambiguous statute to abrogate an international agreement. The choice of whether to abrogate an international agreement is a choice best left to the political branches of government—not the judiciary. Although courts must sometimes fill a quasi-legislative role when the text of a statute is ambiguous, fulfilling this role is wholly inappropriate when Congress has expressed its will through unambiguous statutory text.

In sum, to determine whether a statute abrogates a conflicting treaty or executive agreement, courts should first look to the statutory text. If the text provided by the legislature is unambiguous, the judiciary's role is finished, and it should ignore any conflicting international agreements or treaties that might exist. If the text is ambiguous, only then should the deciding court apply the *Charming Betsy* canon and interpret the statute in a way that is consistent with the existing treaties or agreements.

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