THE FUTURE OF JUDICIAL INTERNATIONALISM: *CHARMING BETSY, MEDELLIN V. DRETKE*, AND THE CONSULAR RIGHTS DISPUTE

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INTRODUCTION

Jose Ernesto Medellin, a citizen of Mexico, was convicted for the 1993 gang rape and murder of two teenage girls.[1] When arrested by police, Medellin informed them that he was born in Laredo, Mexico, and further notified pretrial services that he was not an American citizen.[2] Under the Vienna Convention, signed and ratified by the United States, Medellin had the right to speak to his consulate and to be informed of his right to do so.[3] Nonetheless, the State of Texas arrested, tried, convicted, and sentenced Medellin to death without informing him of this right.[4] As a result, the Mexican government did not learn of Medellin's situation until six weeks after his conviction was affirmed on appellate review.[5]

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[1] Medellin v. Dretke, 371 F.3d 270, 274 (5th Cir. 2004).

[2] Medellin v. Dretke, 125 S. Ct. 2088, 2096 (2005) (O'Connor, J., dissenting).

[3] Vienna Convention on Consular Relations, art. 36(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter *Vienna Convention*] (requiring that states permit communication between foreign nationals and their consulates, and that states inform arrested nationals of this right "without delay"); *Medellin*, 371 F.3d at 279 (acknowledging that the State conceded that Medellin was not notified of his right to contact his consul).

[4] *Medellin*, 125 S. Ct. at 2097 (O'Connor, J., dissenting).

[5] *Id.*

Medellin subsequently filed petitions for writ of habeas corpus in state and federal court based in part on Texas' denial of his Vienna Convention rights.[6] Unfortunately for Medellin, the rule of procedural default bars a defendant from raising any claim not raised at trial, subject to narrowly construed exceptions.[7] Since Medellin had not raised treaty rights of which he was unaware, Texas state courts and the Fifth Circuit Court of Appeals held his Vienna Convention claim was procedurally barred.[8] They did so pursuant to the Supreme Court's per curiam decision in *Breard v. Greene*,[9] which procedurally defaulted a Vienna Convention claim.[10] In effect, both state and federal courts denied Medellin's claim because he failed to raise the very rights of which the government had wrongfully failed to inform him.

The Fifth Circuit's decision disregarded not only Medellin's clear treaty rights, but also two separate decisions of the International Court of Justice (I.C.J.).[11] Reflecting the failure of state authorities to comply with the Vienna Convention, three separate nations have filed suit against the United States for Vienna Convention violations, resulting in two adverse judgments.[12] In the

[6] *Id.* at 2089.

[7] *See* Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125, 1162 (2005) (detailing procedural default and its narrow exceptions); Brittany P. Whitesell, Note, *Diamond in the Rough: Mining Article 36(1)(B) of the Vienna Convention on Consular Relations for an Individual Right to Due Process*, 54 DUKE L.J. 587, 597-98 (2004) (discussing the application of the procedural default rule in consular rights cases).

[8] *Medellin*, 371 F.3d at 279-80; Petition for Writ of Certiorari, *Medellin*, 125 S. Ct. 2088 (No. 04-5928) (describing the rejection of Medellin's claims in Texas courts under procedural default). The Fifth Circuit also rejected Medellin's Vienna Convention claim by concluding that he lacked standing to raise the claim because the Vienna Convention did not create individually enforceable rights. *Medellin*, 371 F.3d at 280.

[9] 523 U.S. 371 (1998) (per curiam) (considering whether the death sentence of a Paraguay national should be overturned because of an alleged violation of the Vienna Convention when arresting authorities failed to inform the defendant that he had consular rights).

[10] *Id.* at 375-76:

> By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.

[11] *Medellin*, 371 F.3d at 279-80 (rejecting rulings of the International Court of Justice in *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 21-22, 71-72 (Mar. 31) [hereinafter *Avena*], and *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 515-16 (June 27)).

[12] *See Avena*, 2004 I.C.J. at 71-72 (finding that the U.S. breached Article 36 of the Vienna Convention by failing to notify arrested Mexican nationals of their consular rights); *LaGrand Case*, 2001 I.C.J. at 515-16 (finding that the U.S. breached Article 36 by not informing Karl and Walter LaGrand of their consular rights; by refusing to review the convictions and sentences of the LaGrand brothers; and by failing to ensure that Walter

Avena case, the I.C.J. specifically held that the United States had violated actionable rights of Medellin and other Mexican nationals, and ordered the United States to provide "review and reconsideration" of all relevant convictions.[13] Furthermore, the I.C.J. held that the procedural default rule could not be cited as justification for denial of adequate review and reconsideration.[14] The *Avena* judgment was issued in accordance with the Vienna Convention Optional Protocol, which empowered the I.C.J. to address "[d]isputes arising out of the interpretation or application of the Convention."[15] The Fifth Circuit flatly refused to give any weight to the decisions of the International Court of Justice, adhered to United States precedent issued prior to the I.C.J. decisions, and held that Medellin's Vienna Convention claims remained procedurally defaulted.[16]

The Supreme Court granted certiorari in order to decide what legal effect, if any, should be given to the I.C.J. decisions.[17] Subsequent to the grant of certiorari, however, President Bush issued an executive memorandum directing state courts to give effect to the *Avena* judgment only with respect to the

LaGrand was not executed before the I.C.J.'s final decision was announced); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 250 (Apr. 9), *available at* http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm (last visited Apr. 14, 2006) (summarizing Paraguay's claim that the United States, "in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard . . . violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention"). Paraguay's I.C.J. suit did not reach final judgment because Virginia executed the Paraguayan national involved before the I.C.J. could hear the case. *Vienna Convention on Consular Relations*, 1998 I.C.J. at 427 (terminating proceedings at Paraguay's request); *see also* Frederic L. Kirgis, *The Avena Case in the International Court of Justice and the U.S. Response*, 17 FED. SENT'G. REP. 223 (2005); Press Release, Case Removed from the Court's List at the Request of Paraguay, Int'l Court of Justice, Nov. 11, 1998, http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm (follow hyperlink).

[13] *Avena*, 2004 I.C.J. at 72.

[14] *Id.* at 57 (stating that "application of the procedural default rule would have the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violate paragraph 2 of Article 36") (alteration in original) (quoting *Vienna Convention*, *supra* note 3, art. 36(2)).

[15] *Vienna Convention*, *supra* note 3, art. 1. The United States has since withdrawn from the Optional Protocol, though it remains a party to the Vienna Convention itself. Frederic L. Kirgis, *Addendum to ASIL Insight, President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, AMER. SOC'Y OF INT'L LAW, Mar. 2005, http://www.asil.org/insights/2005/03/insights050309a.html (quoting letter from U.S. Secretary of State Condoleezza Rice to the United Nations Secretary-General, in which the U.S. withdraws from the Optional Protocol, and further asserting that "[i]f the United States is no longer bound by the Optional Protocol, there would be no basis for compulsory ICJ jurisdiction over the United States in similar proceedings").

[16] *Medellin*, 371 F.3d at 279-80.

[17] Medellin v. Dretke, 125 S. Ct. 2088, 2089 (2005).

specific criminal defendants raised in that suit.[18] Medellin then filed a new writ of habeas corpus in Texas state court, seeking review of his conviction based on the executive memorandum.[19] In light of these developments, the Supreme Court dismissed the writ of certiorari as "improvidently granted, since Medellin could now achieve his sought-after remedy in state court."[20] Therefore, the underlying legal issues of the case remain unresolved.[21]

Federal courts should follow the I.C.J.'s *Avena* decision pursuant to the *Charming Betsy* doctrine. The *Charming Betsy* doctrine is a canon of statutory interpretation, stating that, absent clear congressional intent to the contrary, courts should construe statutes in order to avoid violations of international law.[22] The federal courts that have procedurally defaulted Vienna Convention claims have done so pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), which codifies procedural default rules in federal courts.[23] After the I.C.J.'s specific holdings on the Vienna Convention, it is now clear that any interpretation of the AEDPA that procedurally defaults valid Vienna Convention claims violates international law.[24] Moreover, the legislative history of the AEDPA reveals no intent by Congress to breach international law.[25] Therefore, under *Charming Betsy*, courts should interpret the AEDPA so as to not default valid Vienna Convention claims.

The *Medellin* case and the ongoing consular rights dispute out of which it grew are significant for several reasons. First, as Justice O'Connor recognized in her dissent from the dismissal of writ of certiorari in *Medellin*, the dispute involves the rights of a significant number of defendants.[26] As of 2003, non-

[18] *Id.* at 2090. Accordingly, the memorandum only affects the 51 Mexican nationals, including Medellin, on whose behalf the I.C.J. suit was filed.

[19] *Id.*

[20] *Id.* Litigation in the case will resume in Texas state courts, with the additional issue of what legal effect, if any, the executive memorandum has on state courts. *Id.*

[21] *See id.* at 2096 (O'Connor, J., dissenting) ("It seems to me unsound to avoid questions of national importance when they are bound to recur.").

[22] *See infra* Part I.A (explaining the proposition that an act of Congress should not be construed to violate the law of nations if another possible construction exists).

[23] Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(e)(2) (2000) (stating that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim" unless one of the very narrow exceptions listed by the statute is met); *see* Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam) (stating that the Act generally precludes habeas review where the factual basis for the claim was not developed at trial).

[24] *See supra* notes 12-14 and accompanying text (summarizing judgments in *Avena* and *LaGrand* declaring that use of the procedural default rule violates Article 36 of the Vienna Convention).

[25] *See infra* Part II.A for a discussion of Congress's goals in enacting the AEDPA.

[26] *Medellin*, 125 S. Ct. at 2096 (O'Connor, J., dissenting) ("The problem may have considerable ramifications, because foreign nationals are regularly subject to state criminal justice systems.").

citizens composed over ten percent of the prison populations of California, New York, and Arizona.[27] Secondly, the underlying treaty is of tremendous importance – over 167 nations are a party to the Vienna Convention.[28] Repeated and unaddressed violations of it thus not only endanger foreign nationals in the United States, but also threaten to undermine the foreign relations of the United States and potentially endanger Americans traveling overseas.[29]

Furthermore, the future of the *Charming Betsy* doctrine is of great importance for American law. The proper role of international law in domestic court proceedings is a growing point of contention among judges and scholars.[30] Courts, however, rarely invoke international law as a direct restraint on either federal or state government actors.[31] In light of this, the *Charming Betsy* doctrine has emerged as a central focus of those seeking a role for international law in United States courts.[32] In fact, these efforts have met with some success, as the Supreme Court has repeatedly affirmed the *Charming Betsy* doctrine.[33] Therefore, it is particularly important to understand the purpose and operation of this doctrine. The consular rights dispute provides a useful opportunity to do so.

Part I of this Note provides an overview of the *Charming Betsy* doctrine. This Part demonstrates that courts have diverged on the application of the *Charming Betsy* doctrine, which has led to different standards that will be referred to as the "internationalist" and "moderate" standards. Additionally, Part I.D shows that courts have occasionally ignored *Charming Betsy* altogether in favor of the doctrine expounded in *Whitney v. Robertson*.[34] Part

[27] *Id.*

[28] *Id.*

[29] Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1217 (2005) ("Critics of strong domestic procedural default rules in the consular relations cases, for example, have suggested that such rules encourage similar substantive breaches by other nations that may endanger Americans abroad.").

[30] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans." (quoting Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari))); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 47-50 (2004) (discussing the ongoing debate on the proper role of international law in the Supreme Court and among scholars).

[31] Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482-83 (1997) ("[T]here have been few instances in recent years in which courts have applied international law directly to restrain domestic governmental actors, at either the federal or the state level.").

[32] *Id.* at 483 ("Indeed, some . . . have been pushing to expand both the nature of the canon and its role in U.S. litigation, so that the canon itself can be a vehicle for direct incorporation of international law.").

[33] *See infra* notes 44-45 and accompanying text.

[34] 124 U.S. 190, 194 (1888) (stating that when a treaty and statute conflict, "the one last

II of this Note applies the *Charming Betsy* standards to the consular rights dispute. Part II.A describes the legislative history of the AEPDA, while Parts II.B and II.C examine that legislative history in light of the internationalist and moderate *Charming Betsy* standards, respectively. This Part reveals that Congress did not clearly intend to override the Vienna Convention, and that accordingly, the AEDPA should be construed in conformity with the Vienna Convention. Finally, Part III of this Note discusses the policy reasons behind the *Charming Betsy* doctrine, and argues that courts should apply the internationalist *Charming Betsy* standard.

I. THE *CHARMING BETSY* DOCTRINE

A. *Overview*

In 1800, a United States frigate seized the schooner *Charming Betsy* on the open seas.[35] The captain of the frigate did so under presidential order pursuant to the Federal Nonintercourse Act, which prohibited all trade between France and "any person or persons resident within the United States or under their protection."[36] The owner of the *Charming Betsy*, Jared Shuttock, was born in the United States but had moved to a Danish island as a child and had become a Danish citizen.[37] The Danish consul promptly contested the legality of the seizure, claiming that it violated recognized principles of international law.[38]

The Supreme Court agreed, holding the seizure to be unlawful.[39] Significantly, Justice Marshall declared at the outset of the Court's opinion that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[40] This principle has endured over two centuries and has come to be known as the *Charming Betsy* doctrine.[41] Though some scholars have questioned the importance of international law in

in date" will govern).

[35] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 116 (1804); Jonathan Turley, *Dualistic Values in the Age of International Jurisprudence*, 44 HASTINGS L.J. 185, 211-13 (1993).

[36] *Charming Betsy*, 6 U.S. at 77 (quoting the Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (repealed 1801)).

[37] *Id.* at 65-66; Bradley, *supra* note 31, at 486.

[38] *Charming Betsy*, 6 U.S. at 116 (stating that the Danish consul claimed the ship as property of a Danish subject); Turley, *supra* note 35, at 213.

[39] *Charming Betsy*, 6 U.S. at 121.

[40] *Id.* at 118. The *Charming Betsy* principle had actually been expounded a few years earlier in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43-44 (1801), where the Supreme Court similarly interpreted a naval seizure statute in order to conform with principles of neutrality under international law. Bradley, *supra* note 31, at 485-86 (explaining that *Talbot* was the actual case that first announced the *Charming Betsy* canon).

[41] Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1110 (1990).

the Supreme Court's resolution of the *Charming Betsy* decision,[42] it nonetheless became a foundational case on the role of international law in United States courts.[43] The Supreme Court has affirmed the *Charming Betsy* doctrine as recently as 1982 in *Weinberger v. Rossi*[44] and in 1984 in *Trans World Airlines, Inc. v. Franklin Mint Corp*.[45] The *Charming Betsy* doctrine has developed as a norm of statutory interpretation and has been applied by numerous courts to adhere to treaties despite conflicting statutes passed at a later date.[46] The doctrine has also been incorporated into the Third Restatement of the Foreign Relations Law of the United States, which states that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[47]

Of course, Congress undoubtedly has the power to disregard international law as it sees fit.[48] The *Charming Betsy* doctrine requires only a showing that Congress intended to breach the relevant rule of international law.[49] Effectively, then, the *Charming Betsy* rule acts as a rebuttable presumption that

[42] *E.g.*, Bradley, *supra* note 31, at 487-88 ("It is not entirely clear from the opinion how international law actually influenced the Court's conclusion . . . ."); Steinhardt, *supra* note 41, at 1138-39 ("The opinion reveals no explicit consideration or assessment of the law of nations standards governing admiralty, neutrality, or nationality . . . .").

[43] Turley, *supra* note 35, at 213 (stating that the *Charming Betsy* case "became the bedrock for a series of later decisions involving international law and judicial construction").

[44] 456 U.S. 25, 32 (1982) (holding that various executive agreements with foreign countries that established military bases overseas trumped a conflicting later-in-time statute).

[45] Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 251-53 (1984) (holding that the Warsaw Convention's liability limitations were still enforceable – despite a later conflicting statutory enactment – due in part to Weinberger's restatement of *Charming Betsy*).

[46] *E.g.*, McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 20-21 (1963) (construing the National Labor Relations Act in order to avoid violating international law); Hegna v. Islamic Republic of Iran, 287 F. Supp. 2d 608, 610 (D. Md. 2003) (holding that the Vienna Convention on Consular Relations governs despite the later-in-time Terrorism Risk Insurance Act); United States v. PLO, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988) (finding that the doctrine of *Charming Betsy* is "a rule of statutory construction" requiring the court to find that the U.N. Headquarters Agreement governs despite a later-in-time statute).

[47] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 114 (1987).

[48] *See, e.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam) (stating that Congress may overrule a treaty in whole or in part via subsequent statute); *PLO*, 695 F. Supp. at 1465 (observing that a later statute of Congress can overrule an earlier treaty if the act's intent to supersede the earlier agreement is made clear).

[49] *Weinberger*, 456 U.S. at 35 (holding that a later-in-time statute did not abrogate earlier treaties because there was no showing of "the kind of affirmative congressional expression necessary to evidence an intent to abrogate provisions in 13 international agreements").

Congress did not intend to place the United States in breach of international law.

Yet this formulation simply begs the question: what will suffice to rebut the *Charming Betsy* doctrine? That is, what is required to provide the "affirmative expression of congressional intent" that *Weinberger* requires? For example, in *Weinberger*, Congress clearly intended to restrict the use of habeas corpus proceedings by convicted inmates – particularly death row inmates – and to restrict federal court oversight of state hearings.[50] Accordingly, Congress clearly dictated that procedural default would apply across the board, with only a few stated exceptions.[51] Is this sufficient intent to rebut the *Charming Betsy* doctrine?

Unfortunately, no definitive exposition exists of what kind of showing is necessary to establish congressional intent to abrogate a treaty or other rule of international law.[52] As such, courts differ significantly in their approaches to this question.[53] Broadly, courts' applications of *Charming Betsy* can be grouped into three categories: some courts essentially demand a statement that the specific treaty is to be overruled (the "internationalist" approach); some courts allow a showing of intent by implication (the "moderate" approach); and some courts essentially ignore the doctrine altogether (the *Whitney* approach).

B. *The Internationalist Standard*

The line of cases embodying the internationalist *Charming Betsy* standard suggests that Congress should directly and unequivocally state that it intends to overrule the existing treaty.[54] Absent such a statement courts will refuse to override the treaty, even given a direct and fundamental conflict.[55] The most far-reaching and recent embodiment of this line of precedent is in *United States v. PLO*.[56] In *PLO*, the federal government sued the Palestine Liberation Organization (PLO) in order to obtain an injunction shutting down the PLO's office in New York.[57] The PLO maintained that office at the invitation of the United Nations and subject to the United Nations Headquarters Agreement, to

[50] *See infra* Part II.A (discussing Congress's intent behind the AEDPA).

[51] *See* Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(e)(2) (2000) (specifying the few exceptions in which a hearing may be granted despite failure to develop the claim in state court).

[52] *See* Steinhardt, *supra* note 42, at 1164 (identifying "inferred intent" as one of the difficulties of applying the *Charming Betsy* principle).

[53] *See id.* at 1165-76 (discussing the difficulty of defining intent under *Charming Betsy* caselaw).

[54] *See infra* note 87 and accompanying text.

[55] *See, e.g.*, United States v. PLO, 695 F. Supp. 1456, 1469 (S.D.N.Y. 1988) (refusing to override then U.N. Headquarters Agreement, even though it conflicted with the ATA, because Congress failed to provide "unequivocal interpretive guidance").

[56] *Id.* at 1456.

[57] *Id.* at 1458.

which the United States was and is a party.[58] In 1987 Congress passed the Anti-Terrorism Act of 1987 (ATA),[59] which had, as the district court described it, the "explicit purpose" of closing the PLO's office.[60] The ATA prohibited, "notwithstanding any provision of law to the contrary," the establishment or maintenance of office or any other type of "facilities or establishments" that used PLO money or that were established at the behest of the PLO.[61]

The conflict in this case was about as clear and fundamental as possible. The United States had a duty under the U.N. Headquarters Agreement to refrain from impeding U.N. invitees,[62] yet the ATA mandated the closing of one invitee's office.[63] In addition, both the executive and Congress were aware at the time of the ATA's passage of the possible conflict with the U.N. Headquarters Agreement.[64] Indeed, the efforts to close down PLO offices focused on the office in New York at issue in the lawsuit, as well as an office in Washington, D.C.[65] Despite this, and despite the ATA's statement that the PLO's office must be closed "notwithstanding any other provision of law,"[66] the court cited *Charming Betsy* and held that the ATA was simply inapplicable to the PLO's United Nations office.[67]

The court stated that *Charming Betsy* conflicts "require the clearest of

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[58] *See* U.N. Headquarters Agreement, U.S.-U.N., June 26, 1947, 61 Stat. 756 [hereinafter *Headquarters Agreement*] (establishing the headquarters of the United Nations in New York City); *PLO*, 695 F. Supp. at 1459.

[59] Pub. L. No. 100-204, § 1003(3), 101 Stat. 1406 (codified at 22 U.S.C. §§ 5201-5203 (2000)).

[60] *PLO*, 695 F. Supp. at 1459-60.

[61] 22 U.S.C. § 5202(3) (2000).

[62] *Headquarters Agreement*, *supra* note 58, § 11(5) at 761 (imposing duty on the United States to not create impediments to transit for those invited to the U.N. Headquarters or for those agencies on official business).

[63] 22 U.S.C. § 5202(3) (making it unlawful to maintain an office using PLO funds within the jurisdiction of the United States); *PLO*, 695 F. Supp. at 1466-68 (explaining the conflict between the U.S. obligations under the Headquarters Agreement, as well as forty years of practice, and the ATA's provision closing the PLO office).

[64] *PLO*, 695 F. Supp. at 1466, 1469-70 (discussing how the executive branch believed that the ATA would violate the U.N. Headquarters Agreement, while in Congress opinion was divided, with proponents of the ATA generally arguing that there was no conflict because they believed the U.N. Headquarters Agreement did not grant the PLO the right to an office).

[65] *See, e.g.*, Comments by and Letter of Rep. Jack Kemp, 133 CONG. REC. E1635-02 (1987):

> [F]or too long the United States has allowed the PLO to maintain an office in Washington D.C., *and we have tolerated the presence of a PLO U.N. mission in New York*. We have the legal authority, as a matter of policy, to shut down these terrorist outposts on U.S. soil. I believe it is past time for us to do so.

(emphasis added).

[66] 22 U.S.C. § 5202(3) (2000).

[67] *PLO*, 695 F. Supp. at 1471.

expressions on the part of Congress."[68] Accordingly, while the ATA said "notwithstanding any provision of law," it did not specify any law *or treaty*.[69] While Congress considered that the ATA might conflict with the U.N. Headquarters Agreement, it did not clearly state how to resolve any such conflict, and made no mention of the Headquarters Agreement in the law.[70] These problems, in the court's view, created insufficient clarity and thus proved fatal to the ATA in its conflict with the U.N. Headquarters Agreement.[71]

The *PLO* court never specified an exact standard by which to judge what would constitute "the clearest of expressions."[72] However, when reading the decision in context, it seems fairly clear that only a direct statement (i.e., "we intend to overrule the previous treaty") or something very close to that would qualify. Given that, as the opinion concedes, Congress was aware of the possible international conflict and that Congress enacted the ATA with the "explicit purpose" to close the PLO's U.S. offices,[73] Congress's actual intent seems beyond serious dispute. Accordingly, only a direct statement of intent appears to be missing here. Under this standard, therefore, a court should not infer intent to overrule even from a clearly-worded statute and strong circumstantial evidence, but should instead defer to the international status quo. This would also comport with Supreme Court statements that the judiciary ought to avoid entangling the United States in international disputes,[74] while still allowing Congress to alter the international framework if

[68] *Id.* at 1468.

[69] *Id.* ("[W]hile the section of the ATA prohibiting the maintenance of an office applies 'notwithstanding any provision of law to the contrary' . . . it does not purport to apply notwithstanding any *treaty*.").

[70] *Id.* at 1469-71 (observing that while Congress discussed the Headquarters Agreement in debate, the law did not mention it and "no member of Congress, at any point, explicitly stated that the ATA was intended to override any international obligation of the United States").

[71] *Id.* at 1468-69 (concluding that Congress's failure to provide unequivocal interpretive guidance left open the possibility that the law could be seen as one of general application and enforced without encroaching on the Headquarters Agreement).

[72] *Id.* at 1471.

[73] *Id.* at 1459.

[74] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (stating that the act of state doctrine "expresses the strong sense of the Judicial Branch that its engagement in . . . passing on the validity of foreign acts of state may hinder . . . this country's pursuit of goals . . . in the international sphere") *superseded by statute*, Hickenlooper Amendment to the Foreign Assistance Act of 1964, Pub. L. No. 89-171, 79 Stat. 658-659; *see also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 872 (1997) (stating that to the extent that *Charming Betsy* is "designed to ensure that courts do not involve the political branches in unintended international controversy," it furthers democratic and separation of powers values).

it so chooses.

Similar standards are applied in several other cases. The D.C. Circuit Court of Appeals followed a similar standard in *Roeder v. Islamic Republic of Iran*,[75] and was arguably even clearer on the matter. In that case, Americans taken hostage in Iran during the 1979 hostage crisis sued the Iranian government for damages under the Antiterrorism and Effective Death Penalty Act.[76] Iran did not defend against the lawsuit, and a default judgment was entered for the plaintiffs.[77] However, the State Department intervened in an effort to vacate the judgment, arguing that the lawsuit was precluded by Iranian sovereign immunity and by the Algiers Accords with Iran.[78] Congress promptly responded by amending the Foreign Sovereign Immunities Act of 1976 to specifically exempt this case from the Act – and thus allow the lawsuit to continue – referring to it by case number.[79] Indeed, in this case there was legislative history – contained in the committee report – indicating an intent to permit the default judgment to stand.[80]

In spite of the apparent intent of Congress to preserve this judgment,[81] the court invoked the *Charming Betsy* line of precedent, concluded that the requisite intent to abrogate the earlier-in-time Algiers Accords had not been

[75] 333 F.3d 228, 238 (D.C. Cir. 2003) ("Congress . . . may abrogate an executive agreement, but legislation must be clear to ensure that Congress . . . [has] considered the consequences.").

[76] *Id.* at 230-31.

[77] *Id.*

[78] *Id.* at 231. The Algiers Accords is an executive agreement signed in 1980. *Id.* Part of that agreement obligated the United States to "bar and preclude" any lawsuit against the government of Iran by any U.S. citizen arising out of the hostage crisis. Declaration of the Government of the Democratic and Popular Republic of Algeria, U.S.-Alg., para. 11, Jan. 19, 1981, 20 I.L.M. 223.

[79] 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 revised Foreign Service Immunities Act of 1976 stated that sovereign immunity would not apply if "the act is related to Case Number 1:00CV03110(ESG) [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). Congress passed a technical amendment six weeks later to correct a typo in the case number. Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 208, 115 Stat. 2230, 2299 (2002) (codified at 28 U.S.C. § 1605(a)(7)(A) (2000)).

[80] H.R. REP. NO. 107-350, at 422-23 (2001) (Conf. Rep.) ("[N]otwithstanding any other authority, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand . . . .").

[81] The court avoided the question of whether such a naked attempt to interfere with the judicial outcome of a particular case poses any constitutional questions. *Roeder*, 333 F.3d at 237.

satisfied, and thus affirmed the order vacating the default judgment.[82] The language of the statute itself was deemed insufficiently clear because it addressed only one of the two grounds raised in the motion to dismiss – sovereign immunity – and not the Algiers Accords.[83] Moreover, the legislative history was deemed inadequate both as to its form[84] and its nature. Specifically, in searching for an expression of intent to abrogate, the court observed: "The way Congress expresses itself is through legislation."[85] The court went on to quote the Supreme Court for the proposition that if ""Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile . . . .""[86]

Here, the *Roeder* court adopted an understanding of the *Charming Betsy* doctrine similar to that of the *PLO* court. Essentially, it would seem that a direct statement of intent to abrogate the specific treaty, or any and all inconsistent treaties, is required.[87] Moreover, that intent should be expressed in the legislation itself, or perhaps in the conference report. Here, the fact that the apparent purpose of Congress's action was to preserve this one default judgment does not appear to factor into the result. This is similar to *PLO*, where the fact that Congress's understood aim was to close down the PLO's New York and D.C. offices did not factor into consideration.[88] Under this standard, a 'common-sense' understanding of what Congress meant to do is insufficient; Congress needs to put that intent clearly in dry ink.

The standard evinced in *PLO* and *Roeder* – the internationalist *Charming Betsy* standard – appears in many other cases as well. The Eighth Circuit, in *U.S. v. White*,[89] upheld the Indian treaty right to hunt bald eagles and golden eagles despite a subsequent statute prohibiting that practice in all U.S.

[82] *Id.* at 237-39.

[83] *Id.* at 237.

[84] *Id.* at 236 (observing that the statements were in a committee report, rather than a conference report).

[85] *Id.* at 238.

[86] *Id.* (quoting Dellmuth v. Muth, 491 U.S. 223, 230 (1989) *superseded by statute*, Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 103, 104 Stat. 1103). *Dellmuth* addressed whether Congressional legislation met the "clear intent" requirement necessary to abrogate Eleventh Amendment immunity. 491 U.S. at 228. The *Roeder* Court used the case to define a general standard of "clear intent." 333 F.3d at 238.

[87] The Court observed that a statement that the judgment would be allowed to stand "notwithstanding any other authority" would be the type that would abrogate a prior treaty, if enacted as part of the statute. *Roeder*, 333 F.3d at 237 (citing H.R. REP. NO. 107-350, at 422 (2001) (Conf. Rep.)).

[88] *See supra* notes 57-74 and accompanying text (concluding that a court should not infer intent from a clearly-worded statute and circumstantial evidence).

[89] 508 F.2d 453 (8th Cir. 1974) (considering whether a member of the Red Lake Band of Chippewa Indians violated a federal statute against unlawful taking of a bald eagle).

jurisdictions.[90] The Federal Circuit, in *Allegheny Lublum Corp. v. United States*,[91] interpreted a trade statute so as to be consistent with international law in response to a decision of the WTO Appellate Report.[92] These cases exhibit the same type of general deference to treaties and international law obligations. Importantly, they all deny broadly-worded statutes specific application to the case before the court because the statute conflicted with a prior treaty or international law obligation.

Support for this standard can be garnered from the *Weinberger* and *TWA* decisions as well. In *Weinberger*, the Court was forced to choose between two plausible interpretations of a statute. One of these interpretations would abrogate a series of executive agreements,[93] thereby triggering *Charming Betsy* concerns. The Court made some helpful remarks to help navigate through its standards in this area. The Court defined its standard to require "some affirmative expression of congressional intent to abrogate."[94] Further, in seeking that expression in this case, the Court made two central observations: first, that the legislative history of the subsequent statute contained no specific mention of the international agreements in question; and, second, that Congress's main aim in enacting the subsequent statute did not concern the subjects of the international agreements.[95]

The Supreme Court applied *Weinberger*'s view of the *Charming Betsy* doctrine just two years later. In *Trans World Airlines v. Franklin Mint Corp.*, the question was whether Congress, in passing a statute repealing the official set price of gold in the United States, also repudiated a liability limitation set

[90] *Id.* at 457-58 (finding that Congress had not clearly expressed an intent to abrogate or modify the Indian treaties because Congress did not discuss Indian hunting rights in the legislative history and because the Department of the Interior viewed the treaties as still valid).

[91] 367 F.3d 1339 (Fed. Cir. 2004) (considering whether the Commerce Department's calculation of countervailing duties was unlawful).

[92] *Id.* at 1348 (stating that the WTO specifically rejected the statutory interpretation at issue and citing *Charming Betsy* as a basis for rejecting that interpretation). However, the Court was careful to state that the WTO report was a "guide," rather than binding law. *Id.*

[93] Weinberger v. Rossi, 456 U.S. 25, 31 (1982) (claiming that interpreting the "treaty" exception of an act as including only Article II treaties would mean repudiating numerous executive agreements with countries hosting U.S. military bases).

[94] *Id.* at 32.

[95] *Id.* at 33-34 (claiming that Congress's Conference Report "provides no support whatsoever for the conclusion that Congress intended in some way to limit the President's use of international agreements that may discriminate against American citizens who seek employment at United States military bases overseas"). As to this last point, the Court concluded that the focus of Congress in enacting the statute was to limit the hiring authority of military commanders, rather than that of the executive branch. *Id.* at 33. Additionally, the Court stated that Congress seemed primarily concerned with soldiers in Europe, rather than with the countries involved in the executive agreements. *Id.* at 34.

by an earlier international treaty that depended on that set price.[96] The Court stated that a treaty will govern over a subsequent statute unless Congress has "clearly expressed" an intent to modify or repeal the treaty.[97] Beyond that, similar concerns are cited here, as in *Weinberger*, to justify the continuing vitality of the treaty. Namely, the legislative history of the statute made no mention of the treaty, and Congress had a distinct reason for enacting the statute unrelated to the treaty.[98] A similar standard therefore seems to come out of both cases, although there are additional factors weighing in favor of non-abrogation of the treaty in *TWA*.[99]

Both the *Weinberger* and *TWA* cases support the internationalist *Charming Betsy* interpretation insofar as they require more than a mere conflict between statute and treaty; affirmative intent by Congress to abrogate the treaty is required. *Weinberger* states the standard as "some affirmative expression;"[100] *TWA* requires purpose "clearly expressed."[101] The Court thus rejects abrogation where Congressional intent must be inferred. Thus, even in cases like *PLO* and *Roeder* – where Congress's intent seems very clear as a matter of common sense – the previous treaty ought not to be understood as void. This result is logical because international obligations are serious matters. The international reputation of the United States ought not to be jeopardized by a single judge or a small group of judges. Thus, even where courts can be reasonably confident of what Congress's intent must have been, requiring an affirmative expression of intent by Congress is still a useful procedural safeguard.

However, there are elements of the *Weinberger* and *TWA* decisions that a court could draw upon to abrogate a prior treaty without having to make a clear statement that "treaty X is abrogated." Both *Weinberger* and *TWA* analyze the legislative history of the subsequent statutes and note not only the lack of intent to abrogate, but also the presence of an alternative, unrelated intent.[102] In *Weinberger*, the Court stated that Congress's purpose was to curtail the

[96] 466 U.S. 243, 245 (1984).

[97] *Id.* at 252 (citing Cook v. United States, 288 U.S. 102, 120 (1933)). Interestingly, the Court also cited *Weinberger* for the general proposition that "[l]egislative silence is not sufficient to abrogate a treaty." *Trans World*, 466 U.S. at 252 (referencing *Weinberger*, 465 U.S. at 32).

[98] 466 U.S. at 252. Specifically, the repeal of the official price of gold was, according to the Court, for the purpose of ratifying the existing international economic system generally. *Id.*

[99] First, the treaty in *TWA* – the Warsaw Convention – was self-executing and accordingly law of its own effect. *Id.* Therefore, repeal of domestic legislation was deemed less relevant. *Id.* Second, the Warsaw Convention had a detailed method for withdrawal. *Id.* at 252-53. The fact that Congress and the President had not followed this method made it more difficult to imply an intent to abrogate. *Id.*

[100] 456 U.S. at 32.

[101] 466 U.S. at 252.

[102] *See supra* notes 93-101 and accompanying text.

hiring authority of military commanders, and especially, if not exclusively, commanders in Europe.[103] In *TWA*, the Court observed that Congress's purpose was to undo the former monetary system, a purpose unrelated to the treaty at issue.[104] While these statements are generally dicta, they inject an element of "what Congress must have meant" into the analysis. In a case where there is a conflict between statute and treaty, and where Congress's intent is less separate and distinct from the treaty, a court could cite these statements to support a finding that the earlier-in-time treaty was abrogated by Congress.

C. *The Moderate Charming Betsy Standard*

Naturally, however, there are other interpretations of the breadth and application of the *Charming Betsy* doctrine. Some courts, applying what this Note will refer to as the "moderate" approach to *Charming Betsy*, have given subsequent statutes preference over treaty obligations despite the lack of specific congressional statements of intent to abrogate. This approach is perhaps best exemplified by the Second Circuit's opinion in *Havana Club Holding v. Galleon*.[105] There, an international trademark convention (providing for the free transfer of valid trademarks) conflicted with a subsequent statute enforcing the Cuban embargo.[106] Although it recited the usual *Charming Betsy* line that a treaty will not be abrogated absent clear congressional intent to abrogate, the Second Circuit nonetheless applied the statute over the treaty.[107] Indeed, the court stated that Congress does not need to name treaties it wishes to abrogate; rather, Congress merely needs to clearly express its intent to "override protection that a treaty would otherwise provide."[108] In *Havana Club*, the statute at issue had the clear purpose of preventing any Cuban from getting hard currency into Cuba through transfer of property rights.[109] This clearly evident purpose was deemed sufficient to override the conflicting treaty, even though Congress never expressed an intent to overrule the treaty itself.[110]

South African Airways v. Dole displays a similar rationale.[111] There, in possible contravention of a treaty with South Africa, Congress had passed a statute revoking the airline rights of South African Airways.[112] Despite finding

[103] 456 U.S. at 34.

[104] 466 U.S. at 252.

[105] 203 F.3d 116 (2d Cir. 2000).

[106] *Id.* at 124.

[107] *Id*. at 125-26 (summarizing the reasons behind application of the statute).

[108] *Id.* at 124.

[109] *Id.*

[110] *Id.*

[111] 817 F.2d 119 (D.C. Cir. 1987).

[112] *Id.* at 121.

a "lack of an express congressional intent to abrogate,"[113] the court rejected the *Charming Betsy* argument, stating that plaintiff's proposed interpretation of the statute was untenable, and commenting that Congress's purpose in enacting the statute was "unambiguous."[114] Because Congress's purpose was clear, that purpose governed. Indeed, the court even stated that whether Congress had departed from the treaty intentionally or by accident was irrelevant.[115] The court distinguished *Weinberger* as a case devoid of the same "unambiguous statutory mandate" found in *Dole*.[116]

The moderate standard of the *Charming Betsy* doctrine, as exemplified in the preceding cases and others,[117] acknowledges prior inconsistent treaties as obstacles to effectuating statutes, but makes those treaties less insurmountable.[118] In particular – and in stark contrast with *PLO* and *Roeder*'s internationalist standard – these cases reject any requirement that Congress list the treaties it wishes to abrogate, or demonstrate in the legislative history full consideration of the statute's international consequences.[119]

These courts are willing to accept common sense interpretations of congressional intent, and common sense answers to whether Congress would have wished to abrogate the present treaty had the issue arisen during congressional debates. For example, the *Havana Club* court wrote that it had "no doubt" that Congress expected that a restrictive interpretation of the statute would "override any conflicting treaty protection."[120] The moderate view tends to regard international obligations as less sacrosanct, or at least does not

[113] *Id.* at 125.

[114] *Id*. at 126.

[115] *Id*. at 125:

> When a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed . . . The duty of the courts is to construe and give effect to the latest expression of the sovereign will.

(quoting Whitney v. Robertson, 124 U.S. 190, 195 (1888)).

[116] *Id.* at 126.

[117] *See* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (stating that a subsequent statute will abrogate or modify any prior treaties to the extent of the inconsistency, but that if legislative intent is ambiguous, then "courts will not blind themselves to potential violations of international law").

[118] *See* James Thuo Gathii, *Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions*, 34 GA. J. INT'L & COMP. L. 1, 14-19 (2005) (discussing WTO decisions where courts have acknowledged the *Charming Betsy* doctrine in light of a subsequent inconsistent statute, but have applied the statute over *Charming Betsy* objections).

[119] *See, e.g.*, *Dole*, 817 F.2d at 125-26 (reviewing congressional power to denounce treaties as it sees fit); Havana Club Holding v. Galleon, 203 F.3d 116, 125-26 (2d Cir. 2000) (following the congressional purpose behind the Act).

[120] *Havana Club*, 203 F.3d at 125.

regard courts as the proper enforcers of those obligations.[121] Accordingly, *Charming Betsy* considerations come into play only when there is ambiguity in Congress's action, at which point the international obligation serves as a kind of tiebreaker. Therefore, under the moderate standard, so long as Congress's purpose for enacting the statute is clear, a court will likely favor the statute over any treaty.

D. *Sinking* Charming Betsy*: The* Whitney *Standard*

Finally, it should be noted that there is a line of decisions, exemplified by *Whitney v. Robertson*,[122] that emphasizes the supremacy of domestic law and that would all but deny *Charming Betsy* any value. These cases form what shall be referred to as the *Whitney* standard. This standard essentially ends the treaty-statute conflict debate before it begins by relying entirely on Congress's unquestioned ability to abrogate prior treaties.[123] As the courts are obliged to give effect to the latest expression of sovereign will, and as treaties are constitutionally on par with statutes, this approach concludes that prior treaties are essentially irrelevant.

Whitney v. Robertson is the archetypal and most frequently cited case for this approach.[124] In *Whitney*, trade duties imposed by a statute were attacked as inconsistent with a treaty between the U.S. and the Dominican Republic.[125] The Court considered it a "complete answer" that the duties were authorized by an act of Congress of "general application."[126] Therefore, the Court concluded that when a law is clear it simply "cannot be assailed" for lack of conformity with an earlier treaty; accordingly, it is "wholly immaterial" to even inquire into whether the statute conflicts with the treaty, and whether Congress intended it to conflict.[127] As a result, the *Whitney* approach means that any statute will govern over any earlier treaty, even if the statute is broad (of "general application") and even if there are compelling reasons to believe

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[121] *E.g.*, *Yunis*, 924 F.2d at 1091 ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.").

[122] 124 U.S. 190 (1888).

[123] *See* Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam) (discussing how an act of Congress can render a treaty null to the extent that the treaty conflicts with the statute).

[124] 124 U.S. 190, 195 (1888) (upholding statutory duties regardless of any conflict with the treaty with the Dominican Republic).

[125] *Id.*

[126] *Id.* at 193. Note that this strongly suggests that Congress did not take particular consideration of the Dominican Republic or its treaty in passing the duties in question, which would almost certainly be fatal under the internationalist standard.

[127] *Id.* at 195 (suggesting that once the power to determine a matter is vested in Congress, "it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad").

that Congress did not wish to abrogate the relevant treaty.

This approach appears in a number of decisions.[128] Indeed, the Fifth Circuit Court of Appeals, confronted with a potential conflict between a statute and U.S. obligations under the General Agreement on Tariffs and Trade (GATT), appeared hesitant to acknowledge that the *Charming Betsy* doctrine even exists.[129] Although it appears to be almost entirely inconsistent with the *Charming Betsy* doctrine,[130] both *Charming Betsy* and *Whitney* currently co-exist, and both are actively cited by courts. As the AEDPA is quite clear,[131] it seems very likely that a court applying *Whitney* and its progeny would apply the AEDPA rather than the Vienna Convention as the governing law.

Accordingly, to ensure U.S. compliance with the Vienna Convention, we should conclude not only that the Vienna Convention ought to govern over the AEDPA under the *Charming Betsy* doctrine, but also that courts should cite *Charming Betsy* over *Whitney*. Accordingly, Part II of this Note applies *Charming Betsy* to the consular rights dispute, while Part III of this Note argues that *Charming Betsy* is preferable to the *Whitney* rationale.

II. *CHARMING BETSY* GOES TO VIENNA: THE CONSULAR RIGHTS DISPUTE

The preceding discussion brings us back to the consular rights dispute – in this predicament, should the courts effectuate the AEDPA or the Vienna

[128] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion) (stating that the Court "has also repeatedly taken the position than an Act of Congress . . . is on full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null"); Edye v. Robertson (*Head Money Cases*), 112 U.S. 580, 597 (1884) (concluding that "so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they must prevail in all the judicial courts of this country"); Vorhees v. Fischer & Krecke, 697 F.2d 574, 575-76 (4th Cir. 1983) ("A self-executing treaty is considered to be of equal dignity with acts of Congress and, where the two conflict, the latter in time prevails.").

[129] Miss. Poultry Ass'n v. Madigan, 992 F.2d 1359, 1365 (5th Cir. 1993) ("Even when we grant arguendo that these truisms of statutory construction exist, we find them inapplicable and therefore not controlling in the instant case.")

[130] *Whitney v. Robertson* does at least contain the statement that courts "will always endeavor to construe [treaties and statutes] so as to give effect to both." 124 U.S. at 194. This statement is largely overshadowed, however, by the rest of the opinion regarding the immateriality of treaties. Nonetheless, the Third Circuit Court of Appeals has cited *Whitney* for the proposition that "courts must try to reconcile competing legislation so as to effectuate the purposes of both while not sacrificing the terms of either." MacNamara v. Korean Air Lines, 863 F.2d 1135, 1144 (3d Cir. 1988) (citing *Whitney*, 124 U.S. 190) (reconciling a U.S.-South Korea treaty with Title VII and civil rights legislation).

[131] Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(e)(2) (2000) (providing that, if the applicant did not develop the factual basis for his habeas claim in state court, he does not get an evidentiary hearing, unless he is relying on a new, retroactive rule of constitutional law or on a factual predicate that he could not have discovered previously through due diligence).

Convention? Given that the AEDPA is the latest expression of sovereign will from Congress, should it govern, or should the United States' international Vienna Convention obligations override the statute? Ultimately, the question to be answered under either standard is whether Congress's will, as embodied in the AEDPA, was sufficiently "clearly expressed" so as to overcome the United States' treaty obligations contained in the Vienna Convention.

A. *The Legislative History of the AEDPA*

The AEDPA on its face contains no mention of the Vienna Convention or any other international obligations. Further, it does not contain a "notwithstanding any conflicting provision of law" clause.[132] Accordingly, it is necessary to turn to the legislative history of the Act to determine Congress's purpose in enacting the legislation.

Not surprisingly, the main purposes evinced by the legislative history of the AEDPA are prompt enforcement of the death penalty[133] and fighting terrorism.[134] The anti-terrorism aim of the habeas corpus provisions was largely secondary; most comments on that purpose are limited to asserting that terrorists are particularly deserving of swift punishment and undeserving of habeas corpus proceedings.[135] Accordingly, and because most of the claimants under the Vienna Convention appear to be uninvolved in terrorism, of main concern is the first purpose of the habeas corpus portion of the AEDPA: prompt enforcement of the death penalty to ensure that it is an effective deterrent.

The AEDPA Conference Report describes the habeas corpus portions of the legislation as "reforms to curb the abuse of the statutory writ of habeas corpus,

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[132] *See* 28 U.S.C. § 2254 (2000).

[133] *See, e.g.*, 142 CONG. REC. H2247, H2258 (1996) (statement of Rep. Gekas) ("We need deterrence. Deterrence can only be accomplished by a swift carrying out of the sentence. The people on death row should be given one chance and one chance alone, not 11 years' worth of chances to fight their death sentence . . . ."); 141 CONG. REC. S7479, S7479 (1995) (statement of Sen. Hatch) ("Habeas corpus allows those convicted of brutal crimes, including terrorism, to delay the just imposition of punishment for years."). Senator Hatch was a co-sponsor of a bill, "The Comprehensive Terrorism Prevention Act," which would later become the AEDPA. Timothy Scahill, Comment, *The Domestic Security Enhancement Act of 2003: A Glimpse into a Post-Patriot Act Approach to Combating Domestic Terrorism*, 38 J. MARSHALL L. REV. 327, 335 n.63 (2004).

[134] *See, e.g.*, 142 CONG. REC. H2247, H2262 (1996) (statement of Rep. Hyde) (claiming that "habeas corpus law applies to murderous terrorists" who "depend on habeas corpus, an indefinite prolongation of habeas corpus proceedings, so they never get the sentence executed"); 141 CONG. REC. S7479, S7480 (1995) (statement of Sen. Hatch) ("Unless habeas corpus reform is enacted, capital sentences for such acts of senseless violence will face endless legal obstacles. This will undermine the credibility of the sanctions, and the expression of our level of opprobrium as a nation for acts of terrorism.").

[135] *See generally* 142 CONG. REC. H2247 (1996) (statement of Rep. Hyde); 141 CONG. REC. S7479, S7480 (1995) (statement of Sen. Hatch).

and to address the acute problems of unnecessary delay and abuse in capital cases."[136] The driving force behind this legislation, which was years in the making, was outrage over convicted murderers living for decades on death row due to their successive habeas corpus petitions.[137] These scenarios are mentioned time and time again by the proponents of the habeas corpus reform – cases of people sentenced to death, yet filing appeal after appeal in order to delay their punishment.[138]

Nowhere in the AEDPA is there any reference to the Vienna Convention, to international treaties, or to international obligations in general.[139] Nor is there any explanation as to how the legislation applies to foreign nationals.[140] Clearly, with respect to the habeas corpus debate, Congress did not consider any treaty or international law concerns. Nonetheless, we undoubtedly have a very clear picture of Congress's sovereign will: to starkly limit habeas corpus petitions, defer to state court proceedings,[141] and execute those fairly sentenced to death in a prompt manner.

B. *Applying the Internationalist Standard*

Given this legislative history, should courts apply the strict text of the AEDPA, or should they interpret the AEDPA so as to not conflict with Vienna Convention obligations? The AEDPA clearly conflicts with United States' obligations under the Vienna Convention,[142] thus triggering the *Charming*

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[136] H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.).

[137] *See, e.g.*, 142 CONG. REC. H2247, H2249 (1996) (statement of Rep. Hyde):

> Today the average time of habeas corpus closure is about 10 years. The families of the victims are the forgotten people in this situation. John Wayne Gacy, Members must be sick of hearing his name, I see his face, because I represented where he lived and where they found 27 bodies buried in his house: *14 years and 52 separate appeals*. My God, what an outrage that is.

(emphasis added)); 141 CONG. REC. S7479, S7479 (1995) (statement of Sen. Hatch) ("[The habeas corpus bill] will stop the frivolous appeals that have been driving people nuts throughout this country and subjecting victims and families of victims to unnecessary pain for year after year after year.").

[138] *See, e.g.*, 141 CONG. REC. S7479, S7481 (1996) (statement of Sen. Hatch) ("There were 2,976 [death row inmates] as of January 1995. Since 1977, almost 20 years ago, 18 years ago, there are only 281 who have had to suffer the punishment."); 141 CONG. REC. S7479, S7488 (statement of Sen. Thurmond):

> I am informed that one [inmate] has been on death row for 18 years. Two others were sentenced to death in 1980 for a murder they committed in 1977 . . . although convicted and sentenced to death, these two murderers have been on death row for 15 years and continue to sit awaiting execution.

[139] *See generally* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (2000).

[140] *Id.*

[141] *Id.* (denying habeas relief for claims decided on the merits in state court unless the state court made an "unreasonable" determination of fact or law).

[142] *See supra* notes 12-15 and accompanying text (discussing the I.C.J.'s interpretation of

Betsy doctrine. The question now becomes: from this conflict, and from legislative history, can we infer an intent to abrogate the Vienna Convention? Judged under the internationalist standard, the answer is probably no. The cases applying the internationalist standard demonstrate that congressional discussion of the relevant application of the statute is a prerequisite to abrogating a treaty.[143] At the very least, this standard requires that Congress have considered whether the AEDPA would conflict with international treaties, if not whether the AEDPA would conflict with the Vienna Convention specifically. Evidence of such consideration would clarify whether Congress intended the treaty or statute to govern. But even this may not be sufficient. In *PLO*, Congress considered and debated the relevant treaty, but because Congress did not specify how to resolve that conflict, the court deferred to the treaty.[144] The *PLO* case is the furthest this strict approach has been taken. Nonetheless, failure to mention the international obligation at issue in the competing treaty is often fatal to a statute (or, specifically, the statute's application to the relevant situation) under internationalist *Charming Betsy* analysis.[145]

The strongest argument under the internationalist standard is that the language and breadth of the AEDPA is simply too precise to ignore. One could argue that Congress wrote the AEDPA to apply to every application for a writ of habeas corpus, and so it should then be read to apply to every application. This argument has some force given that courts begin any statutory interpretation problem with the bare language of the statute.[146] Also, because the *Charming Betsy* doctrine, like most canons of statutory interpretation, is about divining the will of Congress, one could argue that the clear language and breadth of the statute overwhelm any contrary inference of intent under *Charming Betsy*. Arguably the breadth and clarity of the AEDPA language, combined with both the "preeminent canon" that unambiguous language is conclusive[147] and a common-sense understanding of what

the Vienna Convention under the Optional Protocol of the treaty).

[143] *See, e.g.*, Roeder v. Islamic Republic of Iran, 333 F.3d 228, 237 (D.C. Cir. 2003) (stating that "[t]he joint explanatory statement relating to Congress's first amendment, § 626(c), contains nothing to indicate that any conferee took account of the Algiers Accords"); United States v. White, 508 F.2d 453, 457-58 (8th Cir. 1974) (observing that Congress did not discuss the application of the statute to Indian reservations).

[144] United States v. PLO, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988) (suggesting that the Act and its legislative history "do not manifest Congress' intent to abrogate" the treaty).

[145] *See, e.g.*, *supra* notes 95, 98, 143.

[146] *See* BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004) (plurality opinion) (describing adherence to statutory language as the "preeminent canon" of statutory interpretation); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

[147] *BedRoc Ltd.*, 541 U.S. at 183.

Congress must have meant here, should force the *Charming Betsy* presumption to give way.

However, such an argument is unlikely to carry much weight with a court that views the *Charming Betsy* doctrine in the internationalist manner. Under the internationalist standard, *Charming Betsy* counsels caution: do not overrule an international agreement and thus place the United States in breach unless Congress clearly so intended. Applying simple logic, Congress cannot intend to overrule an earlier treaty if it did not consider and is not aware of a conflict between the statute and that treaty. The clarity of statutory language is therefore irrelevant, as it does not speak to whether Congress was aware of the earlier treaty. Moreover, the breadth of the AEDPA could actually cut against abrogating the treaty. By definition, a broadly phrased statute has innumerable potential applications. Any number of these could run afoul of international obligations of the United States in ways unanticipated by Congress at the time.[148] Here, for example, in reworking the complicated doctrine of habeas corpus, Congress breached the Vienna Convention without any evidence that it even considered consular rights at all.[149] Thus, for generalized statutes, it is particularly prudent to protect a treaty from abrogation in the absence of clear congressional intent. Congress may then deliberately revisit the issue if it so wishes. Accordingly, many courts have applied *Charming Betsy* against broadly phrased statutes.[150]

C. *Applying the Moderate Standard*

The analysis under the moderate *Charming Betsy* standard is more complex, and the result less predictable. As previously discussed, the internationalist standard views *Charming Betsy* akin to a command, while the moderate standard tends to view it as merely a guide, and perhaps even as just a tie-breaker.[151]

Certainly, a reasonable argument can be made for applying the AEDPA over the Vienna Convention under the moderate *Charming Betsy* standard. In the consular rights conflict, there is a clear, common-sense interpretation of

[148] Similarly, Congress might pass a law in the erroneous belief that it does not violate international law. *See, e.g.*, *PLO*, 695 F. Supp. at 1470 (stating that the proponents of the statute generally did not believe that the statute violated international law).

[149] *See supra* Part II.A.

[150] *See, e.g.*, Cook v. United States, 288 U.S. 102, 107 (1933) (involving a broad statute authorizing Coast Guard officials to stop and search any vessel within twelve miles of the U.S.); United States v. White, 508 F.2d 453, 458 (8th Cir. 1974) (involving a broadly phrased statute that applies to "whoever" trades in bald eagles or golden eagles within U.S. jurisdiction); *PLO*, 695 F. Supp. at 1460 (involving a statute applying to any office, facility, or establishment concerning PLO money or involvement). In all of these cases, the treaty was deemed to govern over the subsequent inconsistent statute, despite the broad language of the statutes, which would otherwise govern the case.

[151] *See supra* Part I.B.

Congress's intent in enacting the AEDPA: to deny new hearings on issues not raised in state court and to ensure that people sentenced to death do not continue raising new issues so as to frivolously delay their executions.[152] In so doing, the AEDPA aims to earn its name by ensuring an effective death penalty that will serve as a deterrent to future criminals.[153]

Because under the moderate *Charming Betsy* standard, this understanding of Congress's purpose could theoretically suffice as the "clear intent" required under the *Charming Betsy* doctrine, the next question is whether it actually is sufficient. The bare language of the AEDPA, as well as Congress's clearly expressed intent to preclude habeas corpus appeals and ensure rapid implementation of the death penalty, covers the consular rights cases. The appeals at issue in the *Avena* I.C.J. judgment[154] and in cases like *Medellin*[155] will delay the defendants' punishment, particularly if they receive new hearings based on their Vienna Convention claims. In addition, given the substantial evidence of guilt in Medellin's case,[156] even if he receives a new hearing, he may well have substantial difficulty showing prejudice – specifically, that his case might have had a different result if he had been able to contact his consulate.[157] Accordingly, one could argue that, especially as the Vienna Convention claim could have been litigated in state court, this situation falls within Congress's clear intent to deny further appeals, to rely upon state court judgments, and to promptly execute those who have been properly convicted.

However, there are many reasons to conclude that this case does not fall within Congress's clear intent, and to conclude that Congress would not have wanted to deny Vienna Convention hearings to defendants like those in *Aveda* and *Medellin*. In order to conclude that Congress intended to reach cases like *Medellin* with the AEDPA, one must make a much more significant and unlikely inference from the existing legislative history than was required in either *Havana Club* or *South African Airways*. In *Havana Club*, Congress's aim in passing the relevant statutes was to implement the Cuban embargo, which had the overall purpose of cutting off virtually all economic ties

[152] *See supra* Part II.A.

[153] *See, e.g.*, 141 CONG. REC. S7479, S7480 (1995) (statement of Sen. Hatch) (arguing that delays in enforcement of capital punishment undermine the "expression of our level of opprobrium" and ultimately "undermine[] the credibility of the sanctions").

[154] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 22, 59-60 (Mar. 31) (holding that the United States must grant adequate "review and reconsideration" in cases where individuals' Vienna Convention rights were violated).

[155] Medellin v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004) (denying a Vienna Convention-based appeal due in part to the AEDPA).

[156] *Id.* at 281 (explaining that Medellin confessed to the crime, that a witness placed him at the scene of the crime, and that he gave the victim's jewelry to his girlfriend).

[157] *See, e.g.*, Breard v. Greene, 523 U.S. 371, 377 (1998) (per curiam) (concluding that the petitioner, seeking a hearing on a Vienna Convention claim, almost certainly could not establish prejudice in his case).

between the United States and Cuba.[158] Specifically, the relevant statute barred transfers of property or property interests between the United States and Cuba.[159] This is a general and clearly expressed intent to cut off all economic ties with Cuba.[160] The *Havana* court only needed to infer from this a specific intent to cut off protection of trademark transfers from Cuba, and hence an intent to overrule the prior treaty.[161] This is a fairly straightforward and entirely reasonable inference to make, especially given the reaffirmation and extension of the Cuban embargo in subsequent legislation.[162]

The leap from expressed intent to implied intent is at least as short, if not shorter, in *South African Airways*. In that case, an air transportation treaty between the United States and South Africa required one year's notice to terminate the agreement.[163] Congress passed an act giving such notice, ending the agreement as of one year from the enactment of the statute.[164] With the same statute, however, Congress simultaneously directed the President to cancel the permit of South African Airways – providing air service under the

[158] *See supra* notes 105-110 and accompanying text (discussing Havana Club Holding v. Galleon, 203 F.3d 116, 125-26 (2d Cir. 2000)).

[159] 31 C.F.R. § 515.201(b)-(c) (2005); *Havana Club*, 203 F.3d at 122, 124-25 (discussing the statute, and finding a clear purpose to "prevent any Cuban national or entity from attracting hard currency into Cuba by selling, assigning, or otherwise transferring rights subject to United States jurisdiction").

[160] 31 C.F.R. § 515.201(b)-(c); *Havana Club*, 203 F.3d at 124.

[161] *See* General Inter-American Convention for Trade Mark and Commercial Protection, Feb. 20, 1929, 46 Stat. 2907, 2922-24 (1929) (providing for general recognition of international transfer of trademarks); *Havana Club*, 203 F.3d at 124 (framing the issue as whether the Cuban embargo acts abrogated the protection of the Inter-American Convention).

[162] *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. § 6023(12)(A) (2000)). The LIBERTAD Act further codified the Cuban Embargo regulations and broadly defined the term "property" so as to include trademarks. 22 U.S.C. § 6023(12)(A). The LIBERTAD Act was passed subsequent to the trademark transfers at issue in *Havana Club*, but the court reasonably took it as evidence that Congress intended Cuban embargo regulations to override other protections, including the Inter-American Convention. *Havana Club*, 203 F.3d at 125-26.

[163] Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, U.S.-S.Afr., May 23, 1947, 61 Stat. 3057, 3061, *as amended by* Agreement Between the United States of America and the Union of South Africa, U.S.-S.Afr., Nov. 2, 1953, 4 U.S.T. 2205, *and* Air Transport Services Agreement, U.S.-S.Afr., June 28, 1968, 19 U.S.T. 5193 (substituting "Republic" for "Union" throughout Agreement, as amended).

[164] Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, 1100 (1986) (announcing the suspension of the rights of any air carrier designated by the South African government, and providing instructions to be given to the Secretary of Transportation).

treaty – just ten days later.[165] South African Airways contended that this violated the notice requirement of the treaty, but its *Charming Betsy* argument was rejected on the grounds that Congress's intent, while not directly expressed, was "unambiguous."[166] There the court merely had to make the inference from a direct command to cancel South African Airways' permit that Congress intended that command to be exercised regardless of any conflicting treaty. Given that Congress specifically considered the issue of treaty conflict in debate but did not specify a resolution if a treaty conflict was found,[167] the court's finding is a relatively straightforward and reasonable inference of intent.

By contrast, the distance is far greater between the expressed congressional intent regarding the AEDPA and the implied inference of intent to abrogate that would be required to override the Vienna Convention's protections. Congress did not discuss international obligations during the debate on the AEDPA.[168] The habeas corpus portions of the debate overwhelmingly focused on frivolous, abusive habeas corpus appeals filed on any number of grounds.[169] Vienna Convention appeals are undoubtedly a minuscule subset of all habeas corpus appeals. Additionally, as the majority of prison inmates are U.S. nationals, most habeas corpus petitioners will be unable to make frivolous Vienna Convention claims. Therefore, it by no means follows from Congress's express statements of intent to curb habeas corpus appeals generally that Congress specifically intended to abrogate the protections granted by the Vienna Convention.

Additionally, the policy arguments that the *Charming Betsy* doctrine embodies strongly favor having the Vienna Convention control over the AEDPA. International treaties are solemn and important agreements, not to be abrogated lightly and especially not accidentally. As the Supreme Court stated in *Chew Heong v. United States*:

> [T]he court cannot be unmindful of the fact[] that the honor of the government and people of the United States is involved in every inquiry whether rights secured by [treaties] shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.[170]

The Court further stated that "according to the established rules of international law," the stipulations of treaties should be observed with

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[165] *Id.*; S. African Airways v. Dole, 817 F.2d 119, 121 (D.C. Cir. 1987).

[166] *S. African Airways*, 817 F.2d at 125-26.

[167] *Id.* at 124 (discussing the legislative history of the Aviation Act at issue).

[168] *See* discussion *supra* Part II.A.

[169] *Id.*

[170] Chew Heong v. United States, 112 U.S. 536, 540 (1884) (alteration in original).

"inviolable fidelity."[171]

Chew Heong is a foundational *Charming Betsy* case, frequently cited for the basics and policy of the doctrine.[172] The *Charming Betsy* doctrine thus exists precisely to add a layer of protection to those agreements, particularly given that their existence and vitality are entrusted to small groups of unelected judges. The *Charming Betsy* doctrine thereby directs judges, when Congress's intent is not clear, to defer to the political and foreign-policy oriented branches of government, and to avoid placing the entire nation into breach of international obligations.

The purpose of the *Charming Betsy* doctrine is clearly illustrated here. The AEDPA, a broadly phrased statute enacted without express congressional intent to meddle with the protections granted by treaty, threatens to overrule the Vienna Convention. A court deciding that the AEDPA's procedural bar overrides Vienna Convention protections would, doubtlessly, place the United States in breach of the Vienna Convention.[173] So doing would damage the honor, image, and potentially the foreign policy of the United States, and could hinder the ability of United States consulates to use the Vienna Convention to protect Americans overseas. The danger of this happening due to judges interpreting statutes lacking clear congressional intent is why the *Charming Betsy* doctrine is part of American law. Given that a moderate *Charming Betsy* analysis could resolve the Vienna Convention dispute either way, these policy arguments underlying the *Charming Betsy* doctrine ought to convince a court to allow the Vienna Convention to operate in spite of the AEDPA.

III. WHITHER *CHARMING BETSY*?

As previously explored, there is precedent for the internationalist *Charming Betsy* standard, for the moderate *Charming Betsy* standard, and for the *Whitney* standard, which essentially rejects the doctrine altogether. This contradiction – entirely separate from the Vienna Convention dispute – is a distinct and important issue for the Supreme Court to resolve. Regardless, a court facing the Vienna Convention dispute and considering the *Charming Betsy* doctrine has a choice: it can cite *Charming Betsy* and apply it in the internationalist

[171] *Id.* at 550.

[172] *See, e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933) (citing *Chew Heong*, 112 U.S. 536)); Havana Club Holding v. Galleon, 203 F.3d 116, 124 (2d Cir. 2000) (citing *Chew Heong*, 112 U.S. 536)); *S. African Airways*, 817 F.2d at 125 (discussing the roots of the "Court's extreme reluctance to find a conflict between an act of Congress and a pre-existing international agreement of the United States").

[173] *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 57, 71-72 (Mar. 31) (finding that AEDPA's procedural bar violated Vienna Convention Art. 36(2)). Given the I.C.J.'s authority under the Optional Protocol to the Vienna Convention to resolve conflicts as to "[d]isputes arising out of the interpretation or application of the Convention," failure to adhere to the I.C.J.'s ruling in *Avena* would be as clear a breach of treaty as is possible. *Vienna Convention*, *supra* note 3, art. 1.

standard;[174] it can cite *Charming Betsy* and apply it in the moderate standard;[175] or it can cite *Whitney* and simply ignore the *Charming Betsy* doctrine altogether.[176] Accordingly, this Note now lays out the arguments for each approach, and explains why courts should conclude that the internationalist *Charming Betsy* standard is the preferable rule.

A. *Battle of the* Charming Betsy *Standards*

The choice between the internationalist and moderate *Charming Betsy* standards is largely one of degree. Courts adopting the internationalist approach essentially require an expressed *written* intent of Congress to overrule the treaty.[177] Only with clear written intent – either in the statute itself or in the legislative history – do internationalist courts feel confident in disregarding a previously enacted treaty.[178] Indeed, the *Roeder* court even went so far as to suggest that even legislative history might not suffice.[179] Meanwhile, courts adopting the moderate approach examine the problem under the same framework, but are more generous in defining "clear intent."[180] Essentially, if Congress clearly expresses an intent to accomplish something, then a court applying the moderate standard will give effect to that will regardless of any prior inconsistent treaties, even if Congress did not specify that the treaty – or indeed any treaty – was to be abrogated.[181]

The choice between approaches is predicated mainly on how important one regards the policies that underlie the *Charming Betsy* doctrine: caution, deference to the executive and legislative branches in foreign relations, and, most fundamentally, respect for international agreements. Counter-balancing these are many of the same policies underlying *Whitney*: a more traditional view of international law (as primarily a matter between executives), adherence to the direct language of statutes, and, most fundamentally, deference to the latest expression of the sovereign will of Congress.

Ultimately, as a general matter, courts ought to favor the internationalist

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[174] *See* discussion *supra* Part I.B.

[175] *See* discussion *supra* Part I.C.

[176] *See, e.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998) (plurality opinion) (citing, as support for rejection of a Vienna Convention claim, Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

[177] *See* discussion *supra* Part I.B.

[178] *Id.*

[179] Roeder v. Islamic Republic of Iran, 333 F.3d 228, 238 (D.C. Cir. 2003) (suggesting that legislative history is unnecessary if Congress is clear, and futile if Congress is not clear) (citing Dellmuth v. Muth, 491 U.S. 223, 230 (1989)).

[180] *See* discussion *supra* Part I.C.

[181] *See, e.g.*, Havana Club Holding v. Galleon, 203 F.3d 116, 124 (2d Cir. 2000) (stating that Congress does not need to specify that international agreements are to be abrogated, but merely needs to express an intent to override protection that a treaty would otherwise provide).

view of *Charming Betsy*. Legislating is a complicated matter, and divining legislative intent when it is not immediately clear from statutory text is an uncertain venture.[182] This counsels caution in any circumstance; a court with too sure a sense of what Congress "must have meant" may wind up imposing the court's rule, rather than Congress's rule, upon the population. This is all the more true when an international treaty is at issue. In such circumstances, the court is not only meddling in territory where sovereign will is unclear, but it may wander into the complicated world of foreign relations. If courts feel free to resolve statute-treaty conflicts without express statements of congressional intent, small groups of judges could abrogate international agreements that Congress and the President never intended to override. Such a result is contrary both to the seriousness of international obligations and to the United States' duty to adhere to its commitments.[183] Additionally, a standard that invites courts to disregard treaties that conflict with ambiguous statutes will lead courts to intrude upon international relations, which they are frequently reluctant to do.[184]

Furthermore, potential conflicts with international agreements are not necessarily evident to Congress when it is legislating, particularly when it is enacting broad statutes. Certainly the Vienna Convention conflict was not obvious at the time that Congress was writing the AEDPA.[185] It is not obvious from the text of the Vienna Convention that it grants any rights to individuals – U.S. courts have resolved the issue both ways,[186] and the I.C.J. could easily

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[182] *See* Weinberger v. Rossi, 456 U.S. 25, 28 (1982):

> Simply because the question presented is entirely one of statutory construction does not mean that the question necessarily admits of an easy answer. Chief Justice Marshall long ago observed that '[where] the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . .'

(quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805)) (alteration in original).

[183] Chew Heong v. United States, 112 U.S. 536, 539 (1882) (quoting with approval that "[t]here would no longer be any security . . . no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises") (citation omitted).

[184] *See, e.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 769-70 (1972) (plurality opinion) (commenting on the restraint of courts under the act of state doctrine because of "fear that adjudication would interfere with the conduct of foreign relations").

[185] At the least, there is no mention of the Vienna Convention in the AEDPA legislative history. *See supra* Part II.A. Moreover, the I.C.J. did not decide that the Vienna Convention created individual rights until the *LaGrand* decision in 2001. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27) (determining that Article 36 of the Vienna Convention creates individual rights).

[186] *See* Breard v. Greene, 523 U.S. 371, 376 (1998) (plurality opinion) (stating that the Vienna Convention "arguably" confers rights on individuals); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1095-96 (S.D. Cal. 1998) (suggesting that the Vienna Convention creates individual rights. *But see* United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001) (concluding that the Vienna Convention does not confer rights on

have concluded that it did not. If the I.C.J. had decided in the negative, there would be no international conflict. In addition, the Vienna Convention is but one treaty among countless treaties.

Therefore, merely because the language of a statute governs the same area as a treaty does not mean that Congress has considered the conflicting subject matter of the treaty. So while courts must give effect to the sovereign will of Congress, Congress has not expressed its will as to how to resolve the conflict between the AEDPA and the Vienna Convention.[187] If courts adhere to the Vienna Convention, Congress can always revisit the issue to clearly state that the statute should govern, if it indeed so wishes. In this way, both Congress's sovereign will and international concerns can be protected. Accordingly, courts should favor the internationalist approach, and require an express statement of intent by Congress – written into either the statute or the legislative history – in order to abrogate a prior inconsistent treaty.

B. *The* Whitney *Challenge to* Charming Betsy

Many of the same policy concerns that militate in favor of the internationalist standard do so even more strongly in favor of choosing the *Charming Betsy* rule over the *Whitney* rationale. The *Whitney* Court viewed its primary duty as "constru[ing] and giv[ing] effect to the latest expression of the sovereign will."[188] In addition, *Whitney* gave little weight to the internationalist concerns, regarding treaties in the same way as statutes.[189] This approach stemmed from a traditional view of international law that considered the ramifications of treaty-breach to be a matter between the executive branches of the respective nations, and not of judicial or individual concern.[190]

These are valid arguments, but they are sufficiently rebutted by policies already articulated. First, despite *Whitney*'s professed fidelity to Congress's sovereign will, in many ways *Charming Betsy* better preserves Congress's sovereignty and control over foreign affairs.[191] As we have seen, Congress's sovereign will regarding the interaction between the AEDPA and the Vienna

individuals).

[187] *See supra* Part II.A.

[188] Whitney v. Robertson, 124 U.S. 190, 195 (1888).

[189] *Id.* at 194 ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.").

[190] *Id.*:

> If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance.

[191] *See supra* note 188 and accompanying text.

Convention is entirely unclear.[192] Congress clearly expressed an intent to restrict habeas corpus petitions and evidentiary hearings, but did not convey any clear purpose regarding hearings that are mandated by international treaties.[193] Moreover, by adopting the Optional Protocol, Congress expressed its sovereign will to abide by its terms and therefore to submit disputes to the I.C.J.[194]

It is unclear which expression of will – its adoption of AEDPA or its adoption of the Vienna Convention and Optional Protocol – Congress intends to govern here. Faced with such ambiguity, *Whitney* resolves the conflict based solely on which came later in time, regardless of whether Congress intended the statute or treaty to govern. *Charming Betsy*, by contrast, mandates an analysis of actual congressional intent, and in the absence of a clear answer, preserves the status quo as much as possible. This approach allows Congress to resolve the conflicting enactments as it sees fit, rather than as the courts see fit.[195] Thus, it is *Charming Betsy*, and not *Whitney*, that better ensures that Congress' actual sovereign will is followed.

Second, *Whitney* relies on a misunderstanding of the relationship between treaties and statutes. *Whitney* analogizes treaties to statutes, and puts them on the same level during conflict analysis.[196] Given that statutes are on par with treaties as a constitutional matter, it is certainly true that a treaty can be overruled by a subsequent statute.[197] However, it does not follow that treaties ought to be regarded as identical to statutes when courts resolve conflicts between the two. Because treaties are negotiated and approved in a different manner than statutes, they each embody congressional intent differently. Moreover, as reflected in the *Charming Betsy* doctrine, policy concerns motivate courts to regard treaties differently than statutes because unlike statutes, when treaties are at issue, the honor, image, and foreign policy of the United States are at stake.[198] Judicial endangerment of international commitments of the United States could not only damage foreign policy goals in a specific case, but also make the United States a generally unreliable party with which to bargain. These concerns mandate careful preservation of the

[192] *See supra* Part II.A (discussing Congress's failure to consider the Vienna Convention and other international treaties in drafting the AEDPA).

[193] *Id.*

[194] *See supra* note 15 and accompanying text (explaining the terms of the Optional Protocol).

[195] *See* Bradley, *supra* note 31, at 524-29 (defending the *Charming Betsy* doctrine on the grounds that it preserves separation of powers in the foreign affairs arena).

[196] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[197] *Breard*, 523 U.S. at 376 ("We have held that 'an Act of Congress . . . is on a full parity with a treaty, and that when a statute that is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" (quoting Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion))).

[198] *See* Chew Heong v. United States, 112 U.S. 536, 539-40 (1884) (emphasizing the need to honor treaties with other nations).

status quo except in those cases where congressional intent is entirely clear. The *Charming Betsy* doctrine is an essential tool to do so.[199]

The consular rights dispute compellingly illustrates the importance of both following the *Charming Betsy* doctrine generally and the internationalist standard specifically. Congress passed a broad statute (the AEDPA) in order to reform an important area of domestic law, and, without any evidence of intent to do so,[200] placed the United States in breach of international law,[201] thereby igniting an international controversy that included three separate suits against the United States in the International Court of Justice.[202] If courts, following *Charming Betsy*, adhered to the Vienna Convention and granted the "review and reconsideration" mandated by the I.C.J. in *Avena* pursuant to the Optional Protocol, then the international status of the United States could be preserved, and petitioners could have their claims fairly adjudicated. Congress and the President could then, at the time of their choosing, resolve the underlying law of the consular rights dispute as they wish.

CONCLUSION

The *Charming Betsy* doctrine, properly interpreted and applied, should operate to grant Vienna Convention claimants a hearing, notwithstanding the Antiterrorism and Effective Death Penalty Act. The I.C.J., which was granted authority to interpret the Vienna Convention by the Vienna Convention's Optional Protocol, held that the Vienna Convention compels such a hearing. Failure to so provide would therefore violate United States treaty obligations. Such a breach accordingly triggers *Charming Betsy* considerations. As this Note has demonstrated, internationalist interpretations of *Charming Betsy* strongly favor applying the Vienna Convention in spite of the AEDPA. Indeed, even moderate *Charming Betsy* standards militate in that direction as well.

The question then becomes which standard ought to be applied in the consular rights dispute, or indeed whether to apply the *Charming Betsy* doctrine at all. *Medellin* demonstrates the policy reasons behind the *Charming Betsy* doctrine. Congress has crafted a broad statute – the AEDPA – without considering the Vienna Convention or other international obligations. Strict

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[199] *See* Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 713 (2001) (describing the *Charming Betsy* doctrine as a "nuanced and discerning tool" for ensuring United States compliance with international antitrust rules).

[200] *See supra* Part II.A (analyzing the lack of any consideration of international treaties in the AEDPA's legislative history).

[201] *See supra* notes 12-15 and accompanying text (describing the charges against the U.S. for violating the Vienna Convention).

[202] Peter J. Spiro, *The Role of the States in Foreign Affairs: Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1251 (1999) (highlighting the international controversy generated by the Vienna Convention disputes); *see supra* note 12 (discussing the three I.C.J. suits against the United States based on the Vienna Convention).

adherence to the AEDPA would produce a clear breach of the Vienna Convention. Such a violation could quite possibly impede the foreign relations of the United States, and, as a practical matter, could damage the consular rights of Americans overseas.

Consequently, the need for continued and strong adherence to the *Charming Betsy* doctrine is evident. Given the weighty international concerns involved in the consular rights dispute, as well as the lack of clear Congressional intent, courts ought to be cautious. If Congress and the President wish to overrule or disregard the Vienna Convention, that is their sovereign prerogative. However, it must be Congress and the President that do so. Courts must not discount the Vienna Convention on their own, particularly when there is ample reason to believe that the conflict between treaty and statute was the result of accidental drafting rather than purposeful intent. Therefore, in this case and in the future, it is imperative that courts preserve the international obligations of the United States by preserving a strong *Charming Betsy* doctrine.