
NOTES

CHARMING BETSY AND THE INTELLECTUAL PROPERTY PROVISIONS OF TRADE AGREEMENTS

For over three decades, a paramount goal of U.S. trade policy has been to ensure robust protection of intellectual property (IP) rights across national borders.¹ Beginning with the Agreement on Trade-Related Aspects of Intellectual Property Rights² (TRIPS) in 1994, the United States has repeatedly sought to “export” its own comparatively protective IP regime through multilateral and bilateral trade agreements.³ The currently pending Trans-Pacific Partnership⁴ (TPP) is arguably the culmination of this trend toward greater focus on the harmonization of IP policy.⁵ TPP’s architects aim to seize the initiative from China — a nation with notoriously lax IP protections — and set the rules of Pacific trade on American terms,⁶ with the hope that China will eventually accede to those rules in order to gain greater market access.⁷ In addition to its economic significance, the agreement’s IP provisions are a key part of a geopolitical strategy endorsed by presidential administrations from both parties.

But the project of exporting American IP law is built on a more brittle domestic foundation than most realize. The U.S. Trade Representative (USTR) is always negotiating some agreement or another and can promote new IP rules to settle issues that arise in the course of technological and economic change. Our domestic IP statutes, on the

¹ See SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW* 13 (2003); see also Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (codified as amended in scattered sections of the U.S. Code) (establishing that inadequate protection of IP rights could constitute an unfair trade practice under section 301 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975)).

² Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1867 U.N.T.S. 154.

³ See SELL, *supra* note 1, at 7–28 (discussing TRIPS); Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 985–86 (2014) (discussing the Trans-Pacific Partnership and similar agreements seeking to harmonize the global IP regime); James Surowiecki, *Exporting I.P.*, NEW YORKER (May 14, 2007), <http://www.newyorker.com/magazine/2007/05/14/exporting-i-p> [<https://perma.cc/36UG-YQEC>] (discussing the Central American and South Korean free trade agreements).

⁴ *Opened for signature* Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/8RQ3-P55V>] (not yet in effect, and signed but not ratified by the United States).

⁵ See Paul Krugman, *Opinion, Trade and Trust*, N.Y. TIMES (May 22, 2015), <http://www.nytimes.com/2015/05/22/opinion/paul-krugman-trade-and-trust.html> [<https://perma.cc/98T8-NBEN>].

⁶ Barack Obama, *The TPP Would Let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-ofdo-11e6-93ae-50921721165d_story.html [<https://perma.cc/JX2P-SGBB>].

⁷ See THOMAS J. CHRISTENSEN, *THE CHINA CHALLENGE* 250 (2015).

other hand, are updated only sporadically. As a result, the IP provisions in trade agreements often address issues that the federal patent, copyright, and trademark acts do not clearly resolve. On several important questions of IP policy, U.S. trade agreements clearly commit the nation to a rule internationally, while our courts continue to disagree, as a matter of statutory interpretation, on whether the rule is part of our domestic law.⁸

U.S. courts have long sought to avoid such conflicts between foreign and domestic commitments — and the negative foreign policy consequences that can follow — by applying the *Charming Betsy*⁹ canon, which counsels that “where 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.”¹⁰ But in 1998, in *Quality King Distributors, Inc. v. L’Anza Research International, Inc.*,¹¹ the Supreme Court departed from this principle without explanation and dismissed as “irrelevant”¹² five trade agreements that ran counter to its interpretation of the Copyright Act of 1976¹³ (Copyright Act). In the years since, the few lower courts to confront the issue have indicated that the *Charming Betsy* canon should apply to conflicts between domestic law and trade agreements. But the observance of the canon in IP cases has been irregular at best — and litigants often fail to even raise the issue.

This Note argues that courts and litigants should invoke the *Charming Betsy* canon more frequently to avoid inconsistencies between trade agreements and ambiguous provisions of domestic IP law. Part I briefly introduces and comments on the legal framework underlying trade agreements and the procedure by which Congress approves them. To give an example of the problems posed by nonobservance of the canon, Part II looks at the dispute in U.S. courts over the “making-available” right, which is secured by treaty but unsettled in domestic law. Part III examines the principles underlying the *Charming Betsy* canon, canvasses the case law on *Charming Betsy* and trade agreements, and argues that the separation of powers values that provide the strongest justification for the canon apply with particular force when courts are reviewing conflicts between domestic IP law and trade agreements. Finally, Part IV explores what the institutional implications are when courts apply a robust version of the *Charming*

⁸ See Kaminski, *supra* note 3, at 1019–23.

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

¹⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (AM. LAW INST. 1987).

¹¹ 523 U.S. 135 (1998).

¹² *Id.* at 153–54.

¹³ Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S. Code).

Betsy canon to conflicts between domestic IP law and trade agreements, and argues that the canon's critics overstate the risk of executive branch overreach.

I. THE DOMESTIC LEGAL BASIS FOR TRADE AGREEMENTS

Trade agreements are negotiated by the Executive and are approved domestically as “congressional-executive agreements” that are enacted by an implementation statute passed by both houses of Congress.¹⁴ This differs from the process for approving a treaty, which requires a two-thirds vote of the Senate.¹⁵

Since 1974, nearly all trade agreements have been approved under “fast track” or “trade promotion authority” (TPA). This procedure expedites congressional consideration of the agreements and forbids amendments, preventing Congress from reopening issues settled in negotiation.¹⁶ Under TPA, the Executive must also submit to Congress a “statement of administrative action” that explains what statutory and regulatory changes will be necessary to comply with the agreement.¹⁷ Congress then passes an implementing bill explicitly approving the agreement and the statement of administrative action. Such bills also state that any provision inconsistent with any U.S. law will have no effect and that none of the language will be construed to modify or amend any U.S. law.¹⁸ These limiting provisions make clear that such trade agreements are non-self-executing, and forbid courts from invoking trade agreements to alter established domestic law.

But, as discussed more below, the provisions do not prevent courts from looking to trade agreements for guidance when a statute is ambiguous and the Supreme Court has not yet settled on the proper interpretation.¹⁹ In such cases, if a court invokes the *Charming Betsy* canon and chooses an interpretation consistent with the trade agreements, it is not “amending” or “modifying” domestic law — it is deciding, in the first instance, what the law is.

¹⁴ See JANE M. SMITH ET AL., CONG. RESEARCH SERV., 97-896, WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL-EXECUTIVE AGREEMENTS RATHER THAN TREATIES (2013).

¹⁵ U.S. CONST. art. II, § 2, cl. 2.

¹⁶ See generally IAN F. FERGUSSON, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY (2015).

¹⁷ *Id.* at 9.

¹⁸ See, e.g., United States–Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, § 102(a), 125 Stat. 428, 430 (2011).

¹⁹ See *infra* notes 80–108 and accompanying text. *Contra* Brief Amici Curiae of Law Professors & Scholars in Support of Respondents, *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461) [hereinafter Brief of Law Professors & Scholars].

II. CONFLICTS BETWEEN DOMESTIC IP LAW AND TRADE AGREEMENTS: THE “MAKING-AVAILABLE” RIGHT

Most of the conflicts between domestic IP law and trade agreements concern the scope of copyright protection. In large part, this is because more international copyright law has been made than patent or trademark law, and so there is more opportunity for conflict. Also, while patent offices delineate patent rights in the course of accepting and rejecting inventors’ applications, copyright protection emerges automatically upon production of an original work — which means that judges are the chief custodians of copyright, determining the scope of its protections and when those protections may be invoked. And as the Internet has revolutionized the capacity for transnational communication of copyrighted work,²⁰ trade negotiators have in some respects gotten ahead of Congress in updating the copyright regime for a new technological era.

This Part introduces one particularly salient divergence between the U.S. courts’ interpretation of domestic copyright law and our international commitments: the existence of a “making-available” right. In 1996, the member states of the World Intellectual Property Organization (WIPO) signed the WIPO Copyright Treaty²¹ (WCT), which adapted the exclusive rights of copyright for the online environment. In particular, the treaty secured the prerogative of authors to authorize “the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”²² This right “covers all formats in which a work may be digitally communicated, including downloads [and] streams,”²³ which ensures that a copyright owner can bring an infringement action against anyone who digitally disseminates an original work without authorization. Eighty of the ninety-four signatories to the WCT have codified a making-available right in their domestic copyright statutes.²⁴ Even among the fourteen countries that have not explicitly provided for the right, the United States is the only one in which courts have refused to recognize the right’s core elements.²⁵ It

²⁰ See Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC’Y U.S.A. 265, 266 (2000).

²¹ Dec. 20, 1996, 2186 U.N.T.S. 121.

²² *Id.* art. 8; see also MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES 1 (2016).

²³ PALLANTE, *supra* note 22, at 1.

²⁴ *Id.* app. E, at 1.

²⁵ *Id.* at 72. The sole, partial exception is Singapore, which has directly incorporated the “making available” language from the treaty but has held that the copyright owner does not have exclusive rights over individualized transmissions. *Id.* at 61–62. However, the Singapore court largely followed the lead of the Second Circuit’s decision in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008), which it cited extensively, demonstrating that the dis-

is particularly ironic that U.S. courts have been uniquely resistant to the making-available right given that, as the world leader in the software, music, and film industries, the United States stands to gain the most from strong antipiracy protections. The U.S. International Trade Commission has estimated that Chinese copyright infringement cost U.S. firms approximately \$24 billion in 2009 alone.²⁶

Congress directly incorporated some of the WCT's provisions into the implementation statute after ratifying the treaty, but did not incorporate the making-available right.²⁷ The United States has since reaffirmed its international commitment to the making-available right in eleven trade agreements, all of which have been approved by Congress under TPA. For each agreement, the USTR submitted a statement of administrative action, subsequently approved by Congress, concluding that no change to domestic law was needed to implement the agreement's guarantee of a making-available right.²⁸

According to the U.S. Copyright Office, there are two *sine qua non* elements of the making-available right: the right to control one-to-one transmission of works to members of the public through streaming and the right to control the offering of copyrighted works for download.²⁹ The Copyright Office's view has always been that a making-available right was created by section 106 of the Copyright Act, which gives rightholders "the exclusive rights . . . to perform the copyrighted work publicly" and "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."³⁰ Only two interpretive moves are needed to reach this conclusion: streaming a work online is a "public performance," just as broadcasting it on television would be, and uploading it to a website for download by other users constitutes "distribut[ion]."³¹ These are, at the very least, reasonable interpretations of the statute.

regard of U.S. courts for the agreements may undermine observance of those agreements in other signatory nations. See *RecordTV Pte Ltd. v. MediaCorp TV Sing. Pte Ltd.* [2010] SGCA 43, at ¶¶ 15–22, <http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/14385-recordtv-pte-ltd-v-mediacorp-tv-singapore-pte-ltd-and-oth> [<https://perma.cc/9BNR-SQ9R>].

²⁶ U.S. INT'L TRADE COMM'N, CHINA: EFFECTS OF INTELLECTUAL PROPERTY INFRINGEMENT AND INDIGENOUS INNOVATION POLICIES ON THE U.S. ECONOMY, at xv (2011).

²⁷ See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 and 28 U.S.C.); see also Study on the Right of Making Available, 79 Fed. Reg. 10,571 (Feb. 25, 2014) ("The United States implemented the [WCT] through the Digital Millennium Copyright Act . . . in 1998. . . . Congress did not amend U.S. law to include explicit references to 'making available.'").

²⁸ PALLANTE, *supra* note 22, at 17–18.

²⁹ See *id.* at 57.

³⁰ 17 U.S.C. § 106 (2012); see PALLANTE, *supra* note 22, at 4–5.

³¹ See PALLANTE, *supra* note 22, at 19–47.

They have been repeatedly endorsed by the USTR and Copyright Office,³² and avoid conflict with a rule to which ninety-four nations have committed. But the U.S. courts have nonetheless been resistant.

It was not until sixteen years after the adoption of the WCT that the U.S. courts definitively recognized the first element of the making-available right. In *ABC, Inc. v. Aereo, Inc.*,³³ the Supreme Court held that 17 U.S.C. § 106(4), which grants the copyright owner an exclusive right in the public performance of the work, forbade Aereo from streaming live television to individual subscribers without authorization from the networks.³⁴ Prior to *Aereo*, courts in the First and Second Circuits had refused to recognize the copyright owner's exclusive right when a stream was sent only to an individual user on the grounds that such a targeted "performance" of the work was not "public."³⁵ Though three amicus briefs argued that the Court should apply the *Charming Betsy* canon³⁶ (and one argued strenuously in opposition³⁷), the Court's opinion in *Aereo* rested on purely textual grounds.³⁸

The second element of the making-available right is the subject of a split among the district courts. At least four have held, through a strict interpretation of the word "distribute," that evidence of an actual download is needed to establish infringement.³⁹ Distribution, they have reasoned, "requires an actual dissemination of either copies or phonorecords."⁴⁰ In reaching this conclusion, two district courts suggested that the *Charming Betsy* canon might apply generally to conflicts with trade agreements, but "inexplicably" held that interpreting "distribute" to embrace a making-available right was untenable.⁴¹ But

³² See *id.* at 16.

³³ 134 S. Ct. 2498 (2014).

³⁴ *Id.* at 2502–03.

³⁵ See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008); *Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32, 38–39 (D. Mass. 2013).

³⁶ Brief of Amici Curiae the American Society of Composers, Authors & Publishers (ASCAP) et al. in Support of Petitioners at 35, *Aereo*, 134 S. Ct. 2498 (No. 13-461); Brief of Amici Curiae International Federation of the Phonographic Industry (IFPI) et al. in Support of Petitioners at 6–9, *Aereo*, 134 S. Ct. 2498 (No. 13-461); Brief of National Football League & Major League Baseball as Amici Curiae in Support of Petitioners at 21–22, *Aereo*, 134 S. Ct. 2498 (No. 13-461).

³⁷ Brief of Law Professors & Scholars, *supra* note 19.

³⁸ *Aereo*, 134 S. Ct. at 2504.

³⁹ *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 149 F. Supp. 3d 634, 666–68 (E.D. Va. 2015); *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216–23 (D. Minn. 2008); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981–85 (D. Ariz. 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 166–69 (D. Mass. 2008). Decisions rejecting the actual-download requirement include *Atlantic Recording Corp. v. Anderson*, No. H-06-3578, 2008 WL 2316551, at *7 (S.D. Tex. Mar. 12, 2008); and *Motown Record Co. v. DePietro*, No. 04-2246, 2007 WL 576284, at *3 (E.D. Pa. Feb. 16, 2007).

⁴⁰ *Howell*, 554 F. Supp. 2d at 981 (quoting *Nat'l Car Rental Sys. v. Comput. Assocs. Int'l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993)).

⁴¹ David O. Carson, *Making the Making Available Right Available*, 33 COLUM. J.L. & ARTS 135, 162 (2010).

it's hard to see why that interpretation is unreasonable; in fact, the leading copyright treatise has concluded, based on exhaustive research of the history of the copyright statute, that "[n]o consummated act of actual distribution need be demonstrated in order to implicate the copyright owner's distribution right."⁴² No other court in any other WCT-signatory nation has burdened the making-available right with an actual-download requirement, which requires costly discovery and may force courts to issue subpoenas to Internet service providers to reveal the identity of downloaders.⁴³

The reluctance of many U.S. courts to recognize the making-available right is perhaps the most obvious conflict between the interpretation of domestic law and our international obligations, but it is far from the only one. To briefly mention three other examples: The Second Circuit has held that some temporary copies of a file (such as those created in RAM when software runs on a computer) are not true "copies" under the Copyright Act and cannot give rise to an infringement claim,⁴⁴ in contravention of several bilateral trade agreements.⁴⁵ The Federal Circuit has held that 17 U.S.C. § 1201(a), which prohibits circumventing a technological measure designed to protect a copyrighted work,⁴⁶ applies only when the circumventer goes on to actually infringe the work — a requirement that cannot be found in the text, but which the court inferred from policy considerations and statutory structure.⁴⁷ This holding ran contrary to the U.S.-Singapore Free Trade Agreement at the time of decision and is now in tension with three more bilateral agreements.⁴⁸ Finally, the Second Circuit has

⁴² 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11[B][4][d] (Matthew Bender rev. ed.) (LEXIS) (last visited Oct. 23, 2016).

⁴³ PALLANTE, *supra* note 22, at 76.

⁴⁴ *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127–30 (2d Cir. 2008).

⁴⁵ See Free Trade Agreement, Austl.-U.S., art. 17.4, ¶ 1, May 18, 2004, https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf [<https://perma.cc/8GPU-UMQ3>]; Free Trade Agreement, Sing.-U.S., art. 16.4, ¶ 1, May 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf [<https://perma.cc/88YA-8968>]; see also Free Trade Agreement, S. Kor.-U.S., art. 18.4, ¶ 1, Dec. 3, 2010, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf [<https://perma.cc/LTY4-4HYD>] (enacted after the Second Circuit's decision). For an appellate decision consistent with trade agreements, though made prior to their enactments, see *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517–19 (9th Cir. 1993).

⁴⁶ "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." 17 U.S.C. § 1201(a) (2012).

⁴⁷ *Chamberlain Grp. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1192–203 (Fed. Cir. 2004). For the opposite view, see *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 952 (9th Cir. 2010).

⁴⁸ See Free Trade Agreement, Morocco-U.S., art. 15.5, ¶ 8(a), June 15, 2004, https://ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file797_3849.pdf [<https://perma.cc/X2YZ-VP6G>]; Free Trade Agreement, Austl.-U.S., *supra* note 45, art. 17.4, ¶ 7(a); Free Trade Agreement, Chile-U.S., art. 17.7, ¶ 5(a), June 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file912_4011.pdf [<https://perma.cc/AE3Q-XMLH>].

ruled that U.S. trademark law does not protect well-known foreign marks, relying on a general principle of territoriality rather than any statutory language,⁴⁹ and despite explicit commitments to mutual recognition in two trade agreements.⁵⁰

Decisions like these make the United States a laggard in the enforcement of the robust IP rules that it has promoted in international negotiations for decades, undermining the position of the United States in future negotiations and thwarting the strategic goals that have been pursued by Presidents and Congresses of both parties. Not one of these decisions has been dictated by the statutory text — courts have come out on both sides of every interpretive issue discussed above. Domestic law is, at a minimum, ambiguous on these issues. In some cases, it even seems explicitly to support the rule codified in trade agreements. As discussed at greater length in the next Part, it is in cases precisely like these, where courts are choosing between viable interpretations of domestic law, that the *Charming Betsy* canon directs courts to choose the interpretation that honors the United States' international commitments.

III. CHARMING BETSY AND TRADE AGREEMENTS

A. Charming Betsy as a Separation of Powers Rule

The *Charming Betsy* canon has its origins in Chief Justice Marshall's 1804 opinion in *Murray v. Schooner Charming Betsy*, which stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."⁵¹ Chief Justice Marshall's formulation of the canon would seem to create a clear statement rule,⁵² but the canon is now understood as a rebuttable presumption.⁵³ Like many other substantive canons, it comes into play only when a statute is ambiguous — that is, when a court determines, after "employing traditional tools of statutory construction," that Congress left the issue under consideration unresolved.⁵⁴

Charming Betsy was first applied to avoid conflict with customary international law, but the canon evolved as international law became

⁴⁹ See *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 155–65 (2d Cir. 2007).

⁵⁰ See Free Trade Agreement, Austl.-U.S., *supra* note 45, art. 17.2, ¶ 6; Free Trade Agreement, Sing.-U.S., *supra* note 45, art. 16.2, ¶ 4; see also Kaminski, *supra* note 3, at 1022 n.213.

⁵¹ 6 U.S. (2 Cranch) 64, 118 (1804).

⁵² Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1792 (2011).

⁵³ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (AM. LAW INST. 1987); WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 883 (4th ed. 2007).

⁵⁴ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

more positivist.⁵⁵ The canon has been applied by the Court to avoid conflict both with treaties⁵⁶ and executive agreements concluded without congressional approval.⁵⁷

The Court has offered a number of mutually reinforcing rationales for the *Charming Betsy* canon: respect for international comity concerns,⁵⁸ a desire to avoid adverse foreign policy implications,⁵⁹ and an aversion to undermining the United States' standing in international negotiations,⁶⁰ among others. The basic insight underlying them all is that when sovereigns have bound themselves to an international rule, disavowing that rule may have negative consequences — from the diminishment of diplomatic standing to direct retaliation — that should, all things being equal, be avoided.⁶¹

Judges who are moved by these rationales and hold a generally favorable view of international law may be attracted to the expansive version of the *Charming Betsy* canon that Professor Curtis Bradley has dubbed the “internationalist conception.” On this view, the canon is a “means of supplementing U.S. law and conforming it to the contours of international law.”⁶² Courts are to act as “agents of the international order”⁶³ rather than “agents of Congress,”⁶⁴ and would be able to “essentially rewrit[e] a statute to conform it with international law.”⁶⁵

⁵⁵ See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 509–13 (1998).

⁵⁶ See, e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

⁵⁷ See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

⁵⁸ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring in part and concurring in the judgment).

⁵⁹ See *Rossi*, 456 U.S. at 31–32.

⁶⁰ See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

⁶¹ On this understanding of *Charming Betsy*, the canon should be considered a comity doctrine in that it “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted); accord Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1179 (2007). This is a fitting classification given that one of the oldest and most prominent comity doctrines, the presumption against extraterritoriality, grew out of *Charming Betsy*. See Bradley, *supra* note 55, at 489–90. Professor William Dodge has recently argued that *Charming Betsy* is not a comity doctrine and should be likened instead to constitutional avoidance. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2080 n.48 (2015). But by analogizing international law to the Constitution, Dodge’s characterization seems of a piece with the internationalist conception, which is rejected below. Because Congress has the power to violate international law, but not the Constitution, the two canons operate very differently in practice and must rest on distinct rationales.

⁶² Bradley, *supra* note 55, at 498.

⁶³ *Id.* (quoting RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 72 (1964)).

⁶⁴ *Id.*

⁶⁵ *Id.* at 499 (quoting Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1180 n.159 (1985)).

This Note relies on a more limited version of the *Charming Betsy* canon: the separation of powers conception originally formulated by Bradley. As distinct from the internationalist view, the separation of powers conception of *Charming Betsy* “takes no view as to whether particular violations of international law are desirable or undesirable from the U.S. perspective,” and does not dispute Congress’s ability to ignore international law when it so desires.⁶⁶ Instead, the canon “rests on the belief that . . . the political branches [and not the courts] should determine when and how the United States violates international law.”⁶⁷ The executive branch and the legislature are jointly responsible for the foreign policy of our nation — the judiciary has no constitutional role in crafting foreign policy.

The *Charming Betsy* canon recognizes this constitutional division of labor and reinforces it by ensuring that the judiciary orders a violation of the country’s international legal obligations only when the political branches have required it.⁶⁸ If a statute is ambiguous or does not speak to an issue that is otherwise settled by international agreement, the judiciary should not second-guess the foreign policy judgment of the political branches and manufacture a conflict with a binding obligation entered into by Congress and the President. This more limited conception of the canon is sufficient to avoid the needless conflicts discussed in Part II between ambiguous domestic law and the clear IP rules established by trade agreements. This conception also — as argued in section III.C below — avoids the criticisms that have been leveled against some of the more expansive uses of the canon.

B. *Quality King and Developments in the Lower Courts*

Based on the principles underlying the *Charming Betsy* canon and its past application to treaties and executive agreements, there is no clear reason why it should not be invoked to resolve conflicts with trade agreements. Nonetheless, Justice Stevens’s opinion for the Court in *Quality King* dismissed the unified position of several trade agreements as “irrelevant” to the interpretation of domestic copyright law, a remark that continues to be cited by litigants to counter statutory arguments that invoke trade agreements.⁶⁹

In *Quality King* the Court determined that the “first sale doctrine,” which entitles an owner of a particular copy of a work to resell it

⁶⁶ *Id.* at 526.

⁶⁷ *Id.*

⁶⁸ *Id.* at 525–26; see also Melissa A. Waters, *International Law as an Interpretive Tool in the Supreme Court: 1946–2000*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT* 380, 397 (David L. Sloss et al. eds., 2011).

⁶⁹ See, e.g., Brief of Law Professors & Scholars, *supra* note 19, at 11 (quoting *Quality King Distribs., Inc. v. L’Anza Research Int’l, Inc.*, 523 U.S. 135, 153 (1998)).

without the authorization of the copyright owner, applies to products manufactured in the United States but then sold abroad.⁷⁰ This ruling meant that copyright owners could no longer prohibit the importation of works sold abroad, as long as they were initially manufactured in the United States. *Quality King* conflicted with several bilateral executive agreements that secured the right of copyright owners to prohibit the importation of works that are sold abroad, which, because sellers sometimes offer “concessionary pricing” to developing countries, are often sold at lower prices than are charged domestically.⁷¹ The Solicitor General mentioned the potential conflict with the agreements in his brief, but did not explicitly invoke *Charming Betsy*.⁷²

The Court’s opinion dismissed the interpretive value of trade agreements in a three-sentence paragraph, without discussing the *Charming Betsy* canon or the damage the decision might do to the United States’ foreign policy goals and international negotiating position. *Quality King*’s chief argument for discounting trade agreements — that because the agreements were enacted after the passage of the Copyright Act they “shed no light on [its] proper interpretation”⁷³ — is discussed and rebutted in the next section.

Appropriately, the lower courts have not treated this paragraph from *Quality King* as a direct holding that the *Charming Betsy* canon does not apply to conflicts with trade agreements. When they have confronted such conflicts, the lower courts have suggested that the canon should generally apply in such cases.⁷⁴ The Federal Circuit — which hears appeals from the Court of International Trade, as well as all patent and many trademark appeals, and thus confronts conflicts with trade agreements more often than any other appellate court — has not been entirely consistent in applying *Charming Betsy*,⁷⁵ but has

⁷⁰ *Quality King*, 523 U.S. at 152.

⁷¹ See Brief for the United States as Amicus Curiae Supporting Respondent, *Quality King*, 523 U.S. 135 (No. 96-1470), 1997 WL 588864, at *22–24, *25–26 [hereinafter Brief for the United States, *Quality King*] (listing agreements with Cambodia, Trinidad and Tobago, Jamaica, Ecuador, and Sri Lanka).

⁷² See *id.* at *22–24.

⁷³ *Quality King*, 523 U.S. at 154.

⁷⁴ One exception comes from the Fifth Circuit, in a decision prior to *Quality King*, in which the court stated that the *Charming Betsy* canon should not apply to international “commercial” law such as the General Agreement on Tariffs and Trade (GATT). *Miss. Poultry Ass’n v. Madigan*, 992 F.2d 1359, 1365–67 (5th Cir. 1993). This is a curious argument given that international commercial law was invoked in the *Charming Betsy* case itself. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress . . . can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations . . .”).

⁷⁵ See *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1360 n.21 (Fed. Cir. 2006) (suggesting that *Charming Betsy* does not apply to conflicts with trade agreements); *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1303–04 (Fed. Cir. 2002) (declining to apply *Charming Betsy* to conform an ambiguous statute with a World Trade Organization Appellate Body ruling).

nonetheless repeatedly held that the canon applies to conflicts with trade agreements, including in a recent trademark decision.⁷⁶ Of the four district courts⁷⁷ to have considered *Charming Betsy*'s application to trade agreements, one has squarely held that the canon does apply,⁷⁸ and the other three decisions — two of which were “making-available” right cases — suggested that the canon applies in general but found the statutes at issue to be unambiguous.⁷⁹

C. Rebutting the Arguments Against Applying the Charming Betsy Canon to Conflicts with Trade Agreements

Most courts to address the issue have simply assumed that the *Charming Betsy* canon is applicable to conflicts with trade agreements. This is understandable given that the canon is generally understood to apply to obligations codified in treaties and international agreements. The burden of persuasion is on those who argue that *Charming Betsy* should *not* embrace trade agreements.

This section rebuts the arguments for narrowing the scope of the *Charming Betsy* canon to exclude trade agreements and defends the emerging consensus in the lower courts that the canon should apply with equal force to conflicts with trade agreements. The first argument, which was advanced in *Quality King*, is typically lodged in cases involving trade agreements, while the second and third arguments are more general attacks on the *Charming Betsy* canon developed in cases where plaintiffs relied on international human rights treaties.

1. *Charming Betsy Applies when an International Obligation Was Created After the Passage of a Statute.* — *Quality King*'s chief argument for discounting trade agreements⁸⁰ was that the agreements were

And as discussed in Part II, in *Chamberlain* the Federal Circuit created a stark conflict between U.S. copyright law and several trade agreements without mentioning the canon or the agreements. See *supra* note 47 and accompanying text.

⁷⁶ See *In re City of Houston*, 731 F.3d 1326, 1333–35 (Fed. Cir. 2013) (recognizing that *Charming Betsy* applies generally to trade agreements, but finding no conflict with domestic trademark law); *In re Rath*, 402 F.3d 1207, 1211 (Fed. Cir. 2005) (same); *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004) (interpreting statute to conform with GATT in customs duties challenge); *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1369–70 (Fed. Cir. 2002) (same); *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (same); see also *Lexmark Int'l, Inc. v. Impression Prods., Inc.*, 816 F.3d 721, 765–66 (Fed. Cir. 2016) (pointing to trade agreements as support for interpretation of the Patent Act).

⁷⁷ Excluding the Court of International Trade.

⁷⁸ *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 23 (D.D.C. 2015).

⁷⁹ *BMG Rights Mgmt. v. Cox Commc'ns, Inc.*, 149 F. Supp. 3d 634, 668–69 (E.D. Va. 2015) (declining to apply the canon in a making-available right case); *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008); *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1288–89 (D. Utah 2007). For more on the two making-available cases, see *supra* p. 706.

⁸⁰ Justice Stevens also noted that the trade agreements, which were enacted as executive agreements, had not “been ratified by the Senate.” *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 153 (1998). This statement is in direct tension with the Court's

enacted after the passage of the Copyright Act and thus “shed no light on [its] proper interpretation.”⁸¹ This argument, which continues to be cited in briefs opposing the application of *Charming Betsy* to conflicts with trade agreements,⁸² rests on a “legislative intent conception” of the canon. On this view, the canon is grounded on a presumption that Congress avoids violating international law, legislates with background principles of international law in mind, and violates those principles only by clearly expressing its intent to do so. But if the relevant international law did not yet exist when Congress wrote the statute, then that law couldn’t possibly have influenced the drafting, and thus should not influence courts’ interpretation of the statute today.⁸³

This is a perfectly coherent account of the *Charming Betsy* canon, but it relies on an outdated “pre-realist” conception of legislative intent. In the 1930s, legal realists cast doubt on the idea of a unitary legislative intent and argued that the canons rested on unfounded empirical assumptions about the drafting process.⁸⁴ The canons survived the realist onslaught and are in good health today, but contemporary “post-realist” arguments in favor of the canons — particularly so-called “normative” canons such as *Charming Betsy* — have generally dispensed with legislative intent and rely instead on “substantive and institutional values.”⁸⁵

The separation of powers conception of *Charming Betsy* is just such a post-realist justification, relying on a substantive view about the role of the judiciary rather than presumptions about congressional intent. From the separation of powers perspective, it is irrelevant whether an international obligation was created before or after the passage of the statute being interpreted. Either way, the judiciary is overstepping its institutional capacity by taking the United States out of compliance with an obligation approved by the President and Congress when a reading of the statute that is consistent with the obligation is available.⁸⁶

Furthermore, applying *Charming Betsy* only to later-enacted treaties would render the canon superfluous with respect to treaties and

prior application of *Charming Betsy* to avoid conflict with an executive agreement in *Weinberger v. Rossi*, 456 U.S. 25 (1982). And today’s trade agreements are approved by Congress, even if they are not ratified as treaties. Accordingly, this argument has not been adopted by opponents of applying *Charming Betsy* to conflicts with the trade agreements.

⁸¹ *Quality King*, 523 U.S. at 154.

⁸² See, e.g., Brief of Law Professors & Scholars, *supra* note 19, at 5–6; Appellants’ Consolidated Opening Brief at 54–55, *FilmOn X, LLC v. Fox Television Stations, Inc.*, No. 16-7013 (D.C. Cir. filed July 18, 2016).

⁸³ Bradley, *supra* note 55, at 495–96.

⁸⁴ See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

⁸⁵ Bradley, *supra* note 55, at 508.

⁸⁶ See *id.* at 524–29.

agreements because the Supreme Court has developed a related canon against implied abrogation of international agreements.⁸⁷ As the D.C. Circuit has held and as the weight of Supreme Court precedent indicates, this canon is stricter than *Charming Betsy*, requiring an express statement of intent to abrogate rather than just unambiguous language.⁸⁸ The canon against implied abrogation is essentially a ratcheting up of the general *Charming Betsy* canon as applied to one particular source of binding international law⁸⁹ — preexisting international agreements. So courts tend to give the same justifications for this clear statement rule that they give for *Charming Betsy*'s ambiguity rule: that the decision to violate an international agreement is a weighty one that may undermine the United States' standing in negotiations,⁹⁰ among other adverse foreign policy consequences,⁹¹ and that courts should order such a violation only when they are confident that the political branches have authorized it.⁹² Those same concerns apply with equal force when the international obligation is formed after the statute was passed, but a clear statement rule would be infeasible in such situations because Congress could not refer to an agreement that does not yet exist. In these cases, the *Charming Betsy* canon's requirement of unambiguous language is the strictest possible safeguard of the political branches' foreign policy prerogatives. To apply *Charming Betsy* only to later-enacted statutes, thereby folding it into the canon against implied abrogation, would undermine those prerogatives — and thus the institutional values that support both canons.

2. *Charming Betsy Applies to Domestic Litigation.* — The next two arguments against applying the *Charming Betsy* canon to trade agreements were developed by appellate judges in cases where plaintiffs' claims were predicated on international human rights treaties. In rejecting these long-shot claims, both opinions advocate narrow readings of *Charming Betsy* that would severely constrain the canon's application. Neither interpretation of *Charming Betsy* has a strong grounding in precedent or the principles underlying the canon. And to

⁸⁷ See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . .").

⁸⁸ See, e.g., *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 724 F.3d 230, 234–36 (D.C. Cir. 2013). An earlier D.C. Circuit decision required only unambiguous language, see *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006), but this position was rejected in *Owner-Operator*, 724 F.3d at 235–36.

⁸⁹ See generally RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 109 (AM. LAW INST., Tentative Draft No. 1, 2016).

⁹⁰ See *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 238 (D.C. Cir. 2003) ("Executive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the parties.").

⁹¹ See *Owner-Operator*, 724 F.3d at 236.

⁹² See *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972).

the extent that legitimate concerns about the use of the canon when vague provisions of human rights treaties are at issue motivated the decisions, those concerns are not implicated when courts look to trade agreements for interpretive guidance.

In *Serra v. Lappin*,⁹³ a group of federal prisoners argued that the low wages they were paid by the government for work performed in prison violated the prohibition on “forced or compulsory labor” in the International Covenant on Civil and Political Rights.⁹⁴ Writing for a unanimous Ninth Circuit panel, Judge Clifton reasoned that the *Charming Betsy* canon did not apply because the statute at issue unambiguously conferred complete discretion on the Attorney General to set the wages for federal prisoners.⁹⁵ The court also made a more general argument about the *Charming Betsy* canon that would dramatically restrict its scope: because the canon’s chief purpose is to avoid the adverse foreign policy consequences of violating an international obligation, the canon has no application to disputes between American parties.⁹⁶

This limitation on the *Charming Betsy* canon would inhibit litigation aimed at resolving conflicts between domestic IP law and trade agreements because many of these suits are between two domestic parties. But thinking through how this limited version of the canon would apply to the IP statutes makes clear that the Ninth Circuit’s international-diversity requirement is untenable. First, it would lead courts to interpret our IP statutes differently depending on the nationality of the litigants. Giving a single statute two meanings depending on who invokes its protection would be contrary to the rule of law,⁹⁷ and would produce a highly unstable regulatory environment for the many U.S. companies that do IP-intensive business across the world — which is precisely what trade agreement IP provisions seek to avoid.

Second, the Ninth Circuit’s assumption that disputes between domestic parties can never have significant international consequences reflects an outdated conception of the scope of foreign policy that is inadequate in the era of globalization. As discussed in the introduction, the USTR’s promotion of robust IP protections in international trade agreements — particularly in the TPP — is a key part of a larger geopolitical campaign to entrench rules of global trade that are favorable to the United States before China uses its economic clout to create

⁹³ 600 F.3d 1191 (9th Cir. 2010).

⁹⁴ *Adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Brief of Appellants at 19, *Serra*, 600 F.3d 1191 (No. 08-15969) (citing ICCPR, *supra*, art. 8).

⁹⁵ *Serra*, 600 F.3d at 1199.

⁹⁶ *Id.* at 1198–99.

⁹⁷ *Cf.* *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) (“[A] statute is not a chameleon. Its meaning does not change from case to case.”).

an alternative trade regime in the Pacific.⁹⁸ By calling into question the very rules that the USTR promotes at the negotiation table, U.S. courts undermine one of the linchpins of American global strategy.

On the facts of *Serra*, it was reasonable for the court to suppose that the wages the U.S. government paid U.S. prisoners could not possibly trigger a foreign policy crisis. It might even be possible to use *Charming Betsy* to read in constraints on the Attorney General's treatment of foreign nationals without doing so for U.S. citizens. But trade negotiators and litigants in IP cases are concerned not with individual exercises of executive discretion, but with system-wide rules. In this context, inconsistent constructions of IP statutes undermine the rule of law as well as U.S. foreign policy.

3. *Charming Betsy Applies to Conflicts with Non-Self-Executing Agreements.* — In another far-reaching attack on the canon, Judge Kavanaugh argued in a concurrence from denial of rehearing en banc in *Al-Bihani v. Obama*⁹⁹ that *Charming Betsy* applies only to conflicts with self-executing treaties.¹⁰⁰ Al-Bihani, a Guantanamo detainee who had been captured in Afghanistan, claimed he was a civilian under international law and invoked *Charming Betsy* to argue that his detention as a combatant exceeded the scope of the 2001 Authorization for Use of Military Force.¹⁰¹

Judge Kavanaugh argued that, after *Erie*'s¹⁰² rejection of expansive common law-making by the federal judiciary, courts “may not enforce law that lacks a domestic sovereign source.”¹⁰³ *Medellin v. Texas*¹⁰⁴ made clear that non-self-executing treaties lack any domestic legal status. Courts would contravene *Erie* and usurp Congress's lawmaking power if they invoked *Charming Betsy* to alter the interpretation of a domestic statute to conform it with a treaty to which Congress has not given legal force.¹⁰⁵

Limiting *Charming Betsy* to self-executing treaties would effectively nullify the canon. Because self-executing treaties have the same domestic legal force as statutes, *Charming Betsy* would be subsumed

⁹⁸ See *supra* p. 701.

⁹⁹ 619 F.3d 1 (D.C. Cir. 2010).

¹⁰⁰ *Id.* at 9 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc). The Federal Circuit once briefly made this argument for limiting *Charming Betsy*, but has not followed it in subsequent cases. See *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1360 n.21 (Fed. Cir. 2006).

¹⁰¹ *Al-Bihani*, 619 F.3d at 32 (Kavanaugh, J., concurring in denial of rehearing en banc).

¹⁰² *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁰³ *Al-Bihani*, 619 F.3d at 18 (Kavanaugh, J., concurring in denial of rehearing en banc).

¹⁰⁴ 552 U.S. 491 (2008).

¹⁰⁵ *Al-Bihani*, 619 F.3d at 34 (Kavanaugh, J., concurring in denial of rehearing en banc). Judge Kavanaugh also argued that the related canon against implied abrogation of international agreements should be limited to self-executing treaties in *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006) (Kavanaugh, J., concurring).

within the presumption against implied repeals, which requires courts to interpret domestic law to avoid contradictions when possible.¹⁰⁶ This wholesale rejection of the *Charming Betsy* canon seems like strong medicine for the potential ailment that Judge Kavanaugh recognized in *Al-Bihani* — judges invoking the canon and the sweeping language of human rights treaties to constrain the Executive’s prosecution of war and foreign policy.

If judges are sensitive to the separation of powers underpinnings of the *Charming Betsy* canon, they will steer clear of the hazards Judge Kavanaugh and the *Serra* court identified in the human rights context, but will give the canon forceful application when confronted with conflicts between trade agreements and domestic IP statutes. Human rights treaties contain many vague provisions — recognizing, for instance, “the inherent right to life”¹⁰⁷ and the right to be treated “with respect for the inherent dignity of the human person”¹⁰⁸ — that judges could invoke to alter any number of statutes and to limit executive discretion in politically sensitive policy areas such as criminal punishment and war-making. The purpose of the *Charming Betsy* canon is to protect the prerogatives of the political branches in foreign policy and to avoid judicially created international disputes, but by invoking the canon in human rights cases courts risk overstepping their role. Human rights agreements, like any other treaties, are covered by *Charming Betsy* — but judges should tread very carefully when considering arguments that ask them to treat vague language as a license to upset well-settled domestic rules and practices.

The IP provisions of trade agreements, on the other hand, often establish clear rules on which domestic law is ambiguous. International law does not enable judicial policymaking in this context — it gives courts a ready-made solution, endorsed by Congress and the President, to what would otherwise be a difficult question of statutory interpretation. The opportunities for judicial aggrandizement that worried Judge Kavanaugh and the *Serra* court simply are not present in this context. When it comes to the IP agreements, the *Charming Betsy* canon does not invite courts to insert themselves in decisions that should be entrusted to more accountable actors — instead, it invites them to excuse themselves.

¹⁰⁶ *Branch v. Smith*, 538 U.S. 254, 273 (2003).

¹⁰⁷ ICCPR, *supra* note 94, art. 6, ¶ 1.

¹⁰⁸ *Id.* art. 10, ¶ 1.

IV. SEPARATION OF POWERS IMPLICATIONS

A. *Executive Lawmaking?*

This Note has argued that robust application of the *Charming Betsy* canon to conflicts with trade agreements' IP provisions would give the political branches greater rulemaking power at the expense of the courts. But critics counter that the real transfer of power here is from Congress to the Executive.¹⁰⁹ The Executive has enjoyed great discretion in setting the trade agenda at least since the advent of TPA in 1974. Critics on the left argue this discretion has come at the expense of transparency and democratic accountability, enabling powerful economic interests to shape trade deals without public scrutiny.¹¹⁰ On this view, the *Charming Betsy* canon would exacerbate the problem by enabling the President to bypass Congress and introduce new, restrictive IP rules that might not be able to command majorities were they not packaged within fast-tracked trade deals.

Whatever concerns one might have with the USTR's substantive agenda or the TPA procedures, there is no usurpation of the legislative function in the negotiation and enactment of trade agreements. Congress has repeatedly given the President trade-promotion authority, often after intense debate and with full awareness of the implications.¹¹¹ That authority always comes with an expiration date, so Congress can periodically review the USTR's record and determine whether fast track should be renewed for another round of negotiations.¹¹² Furthermore, even if many of the customary procedural interventions are ruled out under fast track, both houses of Congress still have to approve each agreement by a majority vote, just like a standard piece of legislation. And many provisions sneak into the U.S. Code as low-profile parts of much larger bills — this arrangement is by no means unique to trade agreements.¹¹³ All of the IP provisions in trade agreements bear Congress's imprimatur, and there is no reason why courts should be warier of applying the *Charming Betsy* canon to these provisions than to any other treaty or international agreement.

¹⁰⁹ See Kaminski, *supra* note 3, at 980.

¹¹⁰ See, e.g., David Grewal, Opinion, *The President Wants to 'Fast Track' Two Massive Trade Deals. Congress Should Slow Him Down.*, L.A. TIMES (Mar. 26, 2015, 9:48 PM), <http://www.latimes.com/opinion/op-ed/la-oe-grewal-congress-should-not-okay-fast-track-20150327-story.html> [<https://perma.cc/Y4EX-LXWB>].

¹¹¹ See Jeff Chidester & Tony Lucadamo, *Former USTRs: President Must Have 'Fast Track' to Complete TPP, TTIP*, THE HILL: CONGRESS BLOG (Apr. 17, 2015, 10:30 AM), <http://thehill.com/blogs/congress-blog/foreign-policy/239123-former-ustrs-president-must-have-fast-track-to-complete> [<https://perma.cc/CN2G-4AJ2>].

¹¹² See FERGUSSON, *supra* note 16, at 13.

¹¹³ See, e.g., Deirdre Walsh, *Here's What's Tucked in the Spending Bill*, CNN (Dec. 11, 2014), <http://www.cnn.com/2014/12/10/politics/policy-riders-spending-bill> [<https://perma.cc/M6AA-ZCA>].

None of the preceding discussion of congressional approval through TPA implies that the *Charming Betsy* analysis would be any different if trade agreements were concluded as ex ante congressional-executive agreements — where the Executive enters into an international agreement pursuant to a congressional delegation, without seeking ex post congressional approval of the agreement itself.¹¹⁴ Under *Weinberger v. Rossi*,¹¹⁵ even obligations created by sole executive agreement are covered by the canon.¹¹⁶ *Charming Betsy*'s applicability to ex ante agreements is not just of theoretical importance. The Obama Administration has argued that Congress gave the Executive the authority to enter into international IP agreements in the Prioritizing Resources and Organization for Intellectual Property Act of 2008, which directed the Executive to “[w]ork[] with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights.”¹¹⁷ The Administration planned to enact the Anti-Counterfeiting Trade Agreement — a controversial IP enforcement agreement signed in 2011 but not yet ratified — pursuant to this authority without submitting the final text to Congress.¹¹⁸

There are good reasons to think that aggressive use of ex ante congressional-executive agreements may be unwise,¹¹⁹ and there is a respectable argument that the President has no constitutional authority to enact an IP-focused agreement as a sole executive agreement.¹²⁰ But once international obligations are created, by whatever means, the courts should eschew conflicts.

Regardless of how a trade agreement is enacted, applying the *Charming Betsy* canon to its terms poses no threat to Congress's legislative prerogatives. The USTR cannot propose rules that are inconsistent with existing IP law and give them domestic force through the canon. Courts will always look first to the statute and will default to the rule of a trade agreement only if they find the text ambiguous. Congress retains the power to settle these issues definitively, whether by codifying the position of the trade agreements or by squarely reject-

¹¹⁴ See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 144–45 (2009).

¹¹⁵ 456 U.S. 25 (1982).

¹¹⁶ *Id.* at 32.

¹¹⁷ 15 U.S.C. § 8113(a) (2012); see Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to Senator Ron Wyden (Mar. 6, 2012) [hereinafter Koh Letter].

¹¹⁸ Koh Letter, *supra* note 117.

¹¹⁹ See Hathaway, *supra* note 114, at 230–39.

¹²⁰ Oona A. Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, AM. SOC'Y INT'L L.: INSIGHTS (Aug. 24, 2011), <https://www.asil.org/insights/volume/15/issue/23/going-it-alone-anti-counterfeiting-trade-agreement-sole-executive> [<https://perma.cc/GK36-TKJ3>]

ing it. In lieu of such decisive congressional action,¹²¹ courts should avoid manufacturing conflicts with trade agreements.

B. The Courts and the USTR as Custodians of Congressional Intent

Though critics assume that the USTR is inclined to adopt tendentious interpretations of the IP statutes, the Executive has been a more faithful agent of Congress in this area than the courts. In fact, in departing from the trade agreements' understanding of the Copyright Act in *Quality King*, the Supreme Court painted itself into a corner and is now stuck with an interpretation that at least two Justices acknowledge is inconsistent with the intent of Congress.¹²²

The statutory question posed in *Quality King* was whether § 602(a) of the Copyright Act, which provides that unauthorized importation of a copyrighted work "is an infringement of the exclusive right to distribute copies . . . under section 106,"¹²³ is limited by the "first-sale" doctrine, which permits the owner of a lawfully made copy to sell that copy "[n]otwithstanding the provisions of section 106(3)."¹²⁴ The Court held that the author's right to bar importation is, like the other exclusive rights, limited by the first-sale doctrine.¹²⁵ The consequence of this holding is that once a copyrighted work has been sold abroad, it can be imported into the United States without the author's permission. The Solicitor General pointed to international agreements that guaranteed authors' rights to prohibit unauthorized importation of their works, and argued that applying the first-sale doctrine to § 602(a) would eviscerate the ban on unauthorized importation.¹²⁶ The *Quality King* Court rejected this superfluity argument, pointing out that its

¹²¹ The litigation in *Lexmark International, Inc. v. Impression Products, Inc.*, 816 F.3d 721 (Fed. Cir. 2016), *petition for cert. filed*, No. 15-1189 (U.S. Mar. 21, 2016), involves an interesting example of a congressional action disapproving of an IP provision in trade agreements, but stopping short of overruling it. The USTR included a provision making clear that patentees reserved the right to restrict the importation of foreign-sold articles in two trade agreements in 2003 and 2004. See Brief for the United States as Amicus Curiae at 19–20, *Impression Products, Inc. v. Lexmark Int'l, Inc.*, No. 15-1189 (U.S. Oct. 2016) [hereinafter Brief for the United States, *Lexmark*] (recommending a holding consistent with the trade agreements, but not citing *Charming Betsy*). In 2005, amid congressional interest in allowing importation of cheaper Canadian pharmaceutical drugs, Congress forbade the USTR from including the provision in future trade agreements through an appropriations rider. See Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, § 631, 119 Stat. 2290, 2344 (2005). This sort of action should not rule out application of the *Charming Betsy* canon. Because the obligations in the prior trade agreements remain binding, the separation of powers rationale for the canon is just as strong. And if enough political support builds for international patent exhaustion, as it nearly did during the drug-importation debate, trade agreements will not stop Congress from enacting that rule by statute.

¹²² *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1372–73 (2013) (Kagan, J., concurring).

¹²³ 17 U.S.C. § 602(a)(1) (2012).

¹²⁴ *Id.* § 109(a); see *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 145 (1998).

¹²⁵ *Quality King*, 523 U.S. at 152–54.

¹²⁶ Brief for the United States, *Quality King*, *supra* note 71, at *22–25.

holding only reached works that had been manufactured in the United States and then sold abroad.¹²⁷ Works made abroad would, the Court presumed, still be subject to the importation bar.

But fifteen years later in *Kirtsaeng v. John Wiley & Sons, Inc.*,¹²⁸ the Court judged that presumption untenable. In a wide-ranging opinion, Justice Breyer determined that the phrase “lawfully made under this title” in § 109(a) does not limit the first-sale doctrine to works made in the United States.¹²⁹ After examining the statutory language and context, he considered the perverse effects that a geographically limited first-sale doctrine would have on international markets.¹³⁰

Justice Kagan agreed with this interpretation of § 109(a), but in a concurrence joined by Justice Alito she noted that the holding rendered § 602(a) a dead letter, limiting it “to a fairly esoteric set of applications.”¹³¹ According to Justice Kagan, the fault lay with *Quality King*. Though Justice Kagan made no reference to the trade agreements that were dismissed in *Quality King*, she indicated agreement with the rule they endorsed: copyright owners should be able to control imports even when the first-sale doctrine applies. This rule would permit copyright owners to divide international markets and charge lower prices in poorer nations, as Congress likely intended, but without any of the “horribles” that would follow from a geographically limited first-sale doctrine.¹³² Justice Kagan ended by advising Congress that if it wants to restore § 602(a) to its original function, “a ready solution is at hand . . . the one the Court rejected in *Quality King*.”¹³³

In his recent book *The Court and the World*, Justice Breyer uses *Kirtsaeng* as an example of a case in which “to interpret American statutes, the Court must be reasonably familiar with foreign legal and commercial practices.”¹³⁴ The text alone could not resolve the question, and so the Court had to consider the consequences that would follow from either interpretation.¹³⁵ Justice Breyer’s attention to the practical implications of the ruling is commendable, but one might question whether it is desirable for the federal courts to regularly engage in these analyses the dynamics of global trade while interpreting

¹²⁷ *Quality King*, 523 U.S. at 148.

¹²⁸ 133 S. Ct. 1351 (2013).

¹²⁹ *Id.* at 1355–56.

¹³⁰ *Id.* at 1364–65. For example, vendors of electronic goods would need to obtain permission from the copyright holder of each piece of software in their products before reselling them, and libraries and museums would need to obtain permission from the authors of each foreign-made book or work of art they purchased before adding it to their collection. *Id.*

¹³¹ *Id.* at 1372 (Kagan, J., concurring).

¹³² *Id.* at 1372–73.

¹³³ *Id.* at 1373.

¹³⁴ STEPHEN BREYER, *THE COURT AND THE WORLD* 132 (2015).

¹³⁵ *Id.* at 127.

domestic law. When the President and Congress have weighed a multitude of commercial and geopolitical considerations and settled on a particular rule, the courts should be loath to second-guess that judgment. Indeed, if the Court had simply followed the lead of the trade agreements in *Quality King*, the *Kirtsaeng* litigation would have been unnecessary, and § 602(a) would still fulfill its intended purpose.

V. CONCLUSION

The Supreme Court does not lack for opportunities to correct course and endorse the application of *Charming Betsy* to conflicts with trade agreements. The Solicitor General has recommended that the Court take up *Lexmark International, Inc. v. Impression Products, Inc.*,¹³⁶ which presents the issue of whether *Kirtsaeng*'s internationalization of the first-sale doctrine for copyright extends to patent — in direct contravention of several trade agreements.¹³⁷ And two district courts have come to opposite conclusions regarding whether Aereo-like streaming services are “cable systems” entitled to compulsory licenses — with Judge Collyer of the District Court for the District of Columbia explicitly relying on the *Charming Betsy* canon in holding that they are not.¹³⁸ Both decisions are being appealed. Unless Congress updates and adds specificity to the IP statutes, companies, inventors, and authors will continue to ask the courts what rules prevail. The question is whether, when faced with these disputes, courts will adopt rules endorsed by the political branches and woven into the international trade regime, or whether they will attempt to divine answers in vague statutory text drafted long before the relevant policy debates even began. This Note has argued that, as a matter of both doctrine and policy, the answer is obvious. At the earliest opportunity, the Supreme Court should disavow *Quality King*'s dicta and breathe new life into the *Charming Betsy* canon. There is no reason to tolerate contrived conflicts with the rules bargained for by our negotiators and approved by the political branches.

¹³⁶ 816 F.3d 721 (Fed. Cir. 2016), *petition for cert. filed*, No. 15-1189 (U.S. Mar. 21, 2016).

¹³⁷ Brief for the United States, *Lexmark*, *supra* note 121, at 19 (recommending a holding consistent with the trade agreements, but not citing *Charming Betsy*).

¹³⁸ *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1 (D.D.C. 2015); *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152 (C.D. Cal. 2015).