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Locked In and Locked Out: Applying *Charming Betsy* to U.S. Felony Disenfranchisement

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This Note argues that the United States' practice of disenfranchising people with felony convictions runs counter to modern human rights law as expressed in the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. Although these treaties are non-self-executing, I suggest that they can be marshaled in the fight against felony disenfranchisement in conjunction with the Charming Betsy *canon to support interpretations of vague state disenfranchisement statutes—and, indeed, constitutional provisions—that accord with the United States' international obligations. By demonstrating how these treaties might aid the interpretation of ambiguous disenfranchisement laws, I offer a judicially driven solution to a pressing issue in criminal justice reform.*

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INTRODUCTION

On a Tuesday in early January 2019, Robert Eckford made his way to the local election supervisor's office in Orlando, Florida.[1] The former Marine, incarcerated for seven years following a drug conviction, openly wept after registering to vote; he was among the first wave of Floridians with felony records to do so on the day that the state's newly minted Amendment 4 went into effect.[2] The law allows more than a million formerly disenfranchised people to regain the right to vote in Florida, including Eckford.[3] "I'll be a human being again. I'll be an American citizen again," he reflected after filling out an application.[4]

1. Joshua Replogle, *Registering to Vote Brings Out Emotions Among Florida Felons*, PBS NEWS HOUR (Jan. 8, 2019), https://www.pbs.org/newshour/nation/registering-to-vote-brings-out-emotions-among-florida-felons [https://perma.cc/6W2G-84YC].

2. *Id.*

3. German Lopez, *Ex-felons Can Now Sign Up to Vote in Florida*, VOX (Jan. 8, 2019), https://www.vox.com/policy-and-politics/2019/1/8/18173651/florida-amendment-4-felon-voting-rights-effect [https://perma.cc/X3X6-M7LX].

4. Replogle, *supra* note 1.

U.S. felony disenfranchisement policies, among the harshest in the democratic world,[5] are intimately connected with the United States' history of racial oppression and inequality. During the 2016 presidential election, individual states excluded an estimated 6.1 million Americans like Eckford from the polls because of a criminal record, a figure that has nearly doubled since the mid-1990s.[6] While one in forty adults in the United States cannot vote due to a felony conviction,[7] among Black voters, that figure is one in thirteen.[8] Many state disenfranchisement statutes trace their origins to the post-Civil War period, when the Reconstruction Amendments enfranchised racial minorities.[9] Before poll taxes, literacy tests, and grandfather clauses,[10]

5. Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 562 (2003) ("[N]o other contemporary democracy disenfranchises felons to the same extent, or in the same manner, as the United States . . . ."); Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 724 (2006) ("American states are unique among post-industrial democracies (except with respect to those convicted of treason or election-related crimes) in permanently disenfranchising ex-felons . . . .").

6. Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-level Estimates of Felony Disenfranchisement, 2016*, SENT'G PROJECT 3 (2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016 [https://perma.cc/H524-L4GN].

7. A felony is the highest category of criminal offense in the United States. Felonies are ostensibly serious crimes punishable by at least a year in prison and, for the gravest offenses, by life imprisonment or the death penalty. *See* 18 U.S.C. § 3559 (2018); *Felony*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969). While one might expect states to classify heinous crimes, such as rape or murder, as felonies, many also designate non-violent offenses like drug possession and forgery as crimes sufficient to warrant a felony conviction. *See, e.g.*, DEL. CODE ANN. tit. 11, § 861 (2018) (classifying instances of forgery that qualify as felonies); FLA. STAT. § 893.13 (2019) (classifying possession of marijuana as a felony).

8. Uggen et al., *supra* note 6, at 3.

9. Behrens et al., *supra* note 5, at 560-63, 565-66 tbl.2.

10. Grandfather clauses were racially motivated state laws that declared citizens eligible to vote only if they had been able to vote before Black people were enfranchised or were the decedents of those eligible voters. Alan Greenblatt, *The Racial History of the 'Grandfather Clause'*, NPR CODE SWITCH (Oct. 22,

felony disenfranchisement laws "were the first widespread set of legal disenfranchisement measures . . . imposed on [Black Americans]."[11] Although states across the country enacted these voting restrictions, they played a special role in the South as a mechanism for maintaining the Democratic Party's control by excluding Black—and potentially Republican-leaning—voters from the polls, avoiding "the menace of negro domination."[12] In their sociological study of felony disenfranchisement statutes from 1850-2002, Angela Behrens, Christopher Uggen, and Jeff Manza found that "the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws" and that "[s]tates with greater nonwhite prison populations have been more likely to ban convicted felons from voting than states with proportionally fewer nonwhites in the criminal justice system."[13] The racialized effects of these disenfranchisement statutes persist, but unlike their literacy-test and poll-tax counterparts, felony disenfranchisement statutes have not become a relic of the past.

With the exception of Maine and Vermont, all states impose some form of voting ban on those convicted of a felony offense.[14] State disenfranchisement laws continue to evolve, but currently, eighteen states and Washington, D.C., disenfranchise individuals while they are incarcerated, with automatic restoration of rights thereafter.[15] Nineteen

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2013), https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause [https://perma.cc/JL34-QYHD].

11. Behrens et al., *supra* note 5, at 563.

12. *Id.* at 597-98 (quoting JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 12 (1901)).

13. *Id.* at 596.

14. The Brennan Center for Justice publishes a helpful map of disenfranchisement policies by state. *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST. (Aug. 5, 2020), https://www.brennancenter.org/sites/default/files/2020-08/Criminal%20Disenfranchisement%20Laws%20Map%2008.05.20%20%281%29.pdf [https://perma.cc/5EPD-3366] [hereinafter Brennan Center Disenfranchisement Map].

15. Colorado, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, and Washington, D.C. *Id.* In April 2018, New York Governor Andrew Cuomo issued an executive order

states disenfranchise post-incarceration, usually until an individual has completed her parole or probation and, in some cases, paid required fines and fees.[16] In the eleven states with the strictest policies, individuals convicted of some felonies are permanently disenfranchised and must appeal on a case-by-case basis to have their voting rights restored.[17] Iowa disenfranchises for life all those with felony convictions, unless the state or Governor chooses to restore rights individually.[18] By the terms of their state constitutions, Kentucky and Virginia do, too, but officials in both states have taken steps to facilitate the restoration of voting rights to those with

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restoring voting rights to most people under post-release community supervision following their incarceration. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs Executive Order to Restore Voting Rights to New Yorkers on Parole (Apr. 18, 2018), https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-restore-voting-rights-new-yorkers-parole [https://perma.cc/UJ4C-NHX2]. Efforts are also underway to eliminate felony disenfranchisement in Washington, D.C.: the District adopted emergency police reform legislation in July 2020 allowing incarcerated people to request absentee ballots, but the legislation will expire unless a permanent version is approved in the fall. Fenit Nirappil, *D.C. on the Brink of Allowing Inmates to Vote from Prison*, WASH. POST (July 8, 2020), https://www.washingtonpost.com/local/dc-politics/dc-prison-voting/2020/07/08/2683bd1e-c11d-11ea-b4f6-cb39cd8940fb_story.html [https://perma.cc/SVN2-GUZT].

16. Alaska, Arkansas, California, Connecticut, Georgia, Idaho, Kansas, Louisiana, Minnesota, Nebraska, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Washington, West Virginia, and Wisconsin. Brennan Center Disenfranchisement Map, *supra* note 14.

17. Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Missouri, Tennessee, Virginia, and Wyoming. *Id.* For instance, in Alabama, those convicted of a felony involving "moral turpitude" can appeal to the state's Board of Pardons and Paroles for restoration of their voting rights; without the board's approval, they will be disenfranchised for life. *Id.* In Missouri, people convicted of election-related offenses are permanently disenfranchised unless pardoned by the Governor. *Elections & Voting: Frequently Asked Questions*, MO. SEC'Y STATE JOHN R. ASHCROFT, https://www.sos.mo.gov/elections/goVoteMissouri/votingrights [https://perma.cc/6NE8-N543].

18. *See* Brennan Center Disenfranchisement Map, *supra* note 14; *Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map [https://perma.cc/2UCH-72GM] [hereinafter ACLU Disenfranchisement Map].

criminal convictions.[19] As recently as November 2018, in Florida (a state that disenfranchised nearly 1.7 million people and twenty-one percent of otherwise-eligible Black voters in the 2016 election[20]) a person could permanently lose her voting rights for stealing a fire extinguisher or a large amount of citrus.[21] With the passage of Amendment 4, however, an individual's voting rights will now be restored in most cases upon completion of her sentence, including terms of probation and parole.[22]

19. In Kentucky, Governor Andy Beshear restored voting rights to more than 140,000 Kentuckians via executive order in December 2019, enfranchising more than half of those with felony convictions. Michael Wines, *Kentucky Gives Voting Rights to Some 140,000 Former Felons*, N.Y. TIMES (Dec. 12, 2019), https://www.nytimes.com/2019/12/12/us/kentucky-felons-voting-rights.html [https://perma.cc/5UNN-CE4Z]. In Virginia, former Governor Terry McAuliffe began a campaign of mass clemency that restored voting rights to hundreds of thousands of Virginians with criminal convictions. Vann R. Newkirk II, *How Letting Felons Vote Is Changing Virginia*, ATLANTIC (Jan. 8, 2018), https://www.theatlantic.com/politics/archive/2018/01/virginia-clemency-restoration-of-rights-campaigns/549830 [https://perma.cc/9TEB-BNSE]. Virginia maintains a website detailing the restoration of rights process to facilitate enfranchisement. *Restoration of Rights Process*, SEC'Y OF COMMONWEALTH, https://www.restore.virginia.gov/restoration-of-rights-process [https://perma.cc/R7CU-5RZB].

20. *See* Hand v. Scott, 285 F. Supp. 3d 1289, 1310 (N.D. Fla. 2018); Garrett Epps, *The 'Slave Power' Behind Florida's Felon Disenfranchisement*, ATLANTIC (Feb. 4, 2018), https://www.theatlantic.com/politics/archive/2018/02/the-slave-power-behind-floridas-felon-disenfranchisement/552269 [https://perma.cc/TE4L-S9EV].

21. These relatively minor thefts are third-degree felonies that would have disenfranchised someone for life until the passage of Amendment 4 in November 2018. FLA. STAT. § 812.014(c)(8-9) (2019); Letitia Stein, *Politics Cloud Felon Voting Rights Restoration in Florida*, REUTERS (Dec. 15, 2018), https://www.reuters.com/article/us-usa-florida-felons/politics-cloud-felon-voting-rights-restoration-in-florida-idUSKBN1OE0C2 [https://perma.cc/L22J-LVWB].

22. *Voting Rights Restoration in Florida*, BRENNAN CTR. FOR JUST. (May 31, 2019), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida [https://perma.cc/25MW-ZGJX]. Those with convictions for murder or felony sexual offenses are excluded from the law's purview, and litigation over whether individuals must pay fines and fees before their voting rights are restored is ongoing. Amy Gardner & Lori Rozsa, *Supreme Court Deals Blow to Felons in Florida Seeking to Regain the Right to*

The United States' practice of blanket felony disenfranchisement is out of step with international norms conveyed by multiple courts and international agreements. As a 2006 ACLU report noted, "All non-U.S. constitutional courts that have evaluated disfranchisement law have found the automatic, blanket disqualification of prisoners to violate basic democratic principles."[23] For example, in a prisoners' voting rights case brought to the Constitutional Court of South Africa, the court wrote: "In a country of great disparities of wealth and power[, the vote] declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic . . . nation; that our destinies are intertwined in a single interactive polity."[24] "Rights may not be limited without justification," the court continued, "and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement."[25]

Similarly, in *Hirst v. The United Kingdom (No. 2)*, the European Court of Human Rights—a frequent arbiter of prisoner disenfranchisement disputes—held that the United Kingdom's automatic revocation of the right to vote for an incarcerated person sentenced to life in prison violated the European Convention on Human Rights.[26] The court has been more willing to accept voting restrictions targeted at specific offenses or long-term

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Vote, WASH. POST (July 16, 2020), https://www.washingtonpost.com/politics/supreme-court-deals-blow-to-felons-in-florida-seeking-to-regain-the-right-to-vote/2020/07/16/2ede827c-c5dd-11ea-a99f-3bbdffb1af38_story.html [https://perma.cc/8SSS-LKK4].

23. *Dimming the Beacon of Freedom: U.S. Violations of the International Covenant on Civil & Political Rights*, ACLU (June 2006), https://www.aclu.org/files/pdfs/iccprreport20060620.pdf [https://perma.cc/V6VP-GZHB].

24. *August & Another v. Electoral Commission & Others* 1999 (3) SA 1 (CC) at 23 para. 17 (S. Afr.).

25. *Id.*

26. The court found that blanket voting bans violated Article 3 of Protocol No. 1 of the European Convention on Human Rights. App. No. 74025/01, 2005-IX Eur. Ct. H.R. 189. The European Court found similar violations in *Greens and M.T. v. the United Kingdom*, 2010-VI Eur. Ct. H.R. 57; *Firth and Others v. the United Kingdom*, App. No. 47784/09, Eur. Ct. H.R. (2014); *McHugh and Others v. the United Kingdom*, App. No. 51987/08 Eur. Ct. H.R. (2015); and *Kulinski and Sabev v. Bulgaria*, App. No. 63849/09, Eur. Ct. H.R. (2016). In each case, the court held that blanket voting bans for convicted prisoners violated the European Convention on Human Rights. *See Prisoners' Right to Vote*, EUR. CT. HUM. RTS. (Apr. 2019), https://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf [https://perma.cc/RXG8-MYJX].

prison sentences, as in *Scoppola v. Italy (No. 3)*,[27] but remains opposed to automatic revocations of prisoners' voting rights, regardless of the offense. While the United States is not bound by the European Convention, the country's sweeping disenfranchisement policies run counter to two key human rights treaties that it *has* ratified. First, blanket disenfranchisement contravenes the United States' pledge to expand voting rights in the International Covenant on Civil and Political Rights (ICCPR) in 1992.[28] Second, this practice conflicts with the country's commitment to eschew laws with racially discriminatory effects in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1994.[29] Both of these agreements have more than 170 state parties across the globe.[30]

This Note explores the United States' policy of disenfranchising those with felony convictions from an international human rights perspective and considers ways in which international treaty law might be marshaled to support arguments against this practice. Part I examines the critical treaty provisions encompassing the right to vote in the ICCPR and CERD and highlights the racially skewed consequences of banning access to the ballot in a nation grappling with the highest total population of prisoners in the world.[31] Part II analyzes how both treaties could be used by judges and practitioners in U.S. courts to argue against felony disenfranchisement. It recommends using methods Oona Hathaway, Sabria McElroy, and Sara

27. App. No. 126/05, Eur. Ct. H.R. (2012) (holding that restrictions on the right to vote for specific crimes did not violate the European Convention on Human Rights).

28. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see* discussion *infra* Part I.

29. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]; *see* discussion *infra* Part I.

30. *See Status of Treaties: International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION (May 15, 2020), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en [https://perma.cc/ES26-HXMJ]; *Status of Treaties: International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION (May 15, 2020), https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND [https://perma.cc/J9KP-8PGR].

31. *Highest to Lowest—Prison Population Total*, INST. CRIME & JUST. POL'Y RES., http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All [https://perma.cc/3W3N-KRTL].

Solow have described as "interpretive enforcement," whereby treaties act as a "device for resolving ambiguity . . . [in U.S. laws by using] the international legal commitments of the United States to fill interpretive gaps and resolve uncertainty that would otherwise exist in statutory provisions."[32] This Part focuses on interpretive enforcement using the *Charming Betsy* canon, which instructs courts, where possible, to favor interpretations of domestic law that avoid violating international law.[33] The Sections within suggest that interpretive enforcement could be used to encourage courts to read state disenfranchisement statutes narrowly where their meaning is ambiguous and, perhaps, to offer a new understanding of the Fourteenth Amendment. The Note concludes by adopting a historical lens. In the final Section, I consider the United States' ambivalent relationship with international human rights treaties, embedding felony disenfranchisement in the country's history of racial segregation and positing that disenfranchisement is the next frontier of inequality ripe for challenge.

I. FELONY DISENFRANCHISEMENT AND INTERNATIONAL HUMAN RIGHTS LAW

Both the ICCPR and CERD have been understood by their respective parties and U.N. monitoring bodies to prohibit laws that introduce discrimination into voting rights.[34] This Part highlights the provisions of each treaty that call for equal—and, indeed, universal—access to the ballot and explores interpretations of the ICCPR and CERD in greater depth. The Sections that follow aim to place a spotlight on ways that other nations and U.N. bodies alike have applied the treaties to prisoner disenfranchisement, in each case finding that they prohibit blanket disenfranchisement policies with racially discriminatory effects.

32. Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 88 (2012).

33. *Id.* at 87.

34. The Human Rights Committee is the U.N. monitoring body for the ICCPR, and the Committee on the Elimination of Racial Discrimination is the U.N. monitoring body for CERD.

A. Voting Rights and Anti-discrimination Provisions in the ICCPR and CERD

Article 25 of the ICCPR declares that every citizen has the right to vote via "universal and equal suffrage" and "without unreasonable restrictions."[35] Although United States included a non-self-executing provision in its 1992 ratification of the ICCPR, meaning that the agreement cannot be enforced domestically absent implementing legislation,[36] it also attached a declaration stating:

> [I]t is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant.[37]

The United States is not living up to its own words. Incarcerated people in forty-eight out of fifty states lose the right to vote while they are in prison.[38] In more than half of all states, voting rights are not immediately restored upon release.[39]

The ICCPR also prohibits laws that lead to discrimination in voting rights.[40] Article 25, discussed above, notes that every citizen has the right to

35. ICCPR, *supra* note 28, art. 25.

36. A treaty is considered non-self-executing "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987) [hereinafter RESTATEMENT (THIRD)].

37. 138 CONG. REC. 8,071 (1992). The United States did not insert any RUDs concerning felony disenfranchisement specifically.

38. ACLU Disenfranchisement Map, *supra* note 18.

39. *See Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Oct. 14, 2019), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/5XSR-DCG2].

40. Although beyond the scope of this Note, some have argued that the United States is in violation of the voting-rights protections in the ICCPR in another area with racial overtones: denial of voting rights to U.S. citizens living in the United States' territories. *See, e.g.*, Igartua-De La Rosa v. United States, 417 F.3d 145, 173-75, 179 (1st Cir. 2005) (Torruella, J., dissenting) (contending that the United States' failure to extend equal voting rights to U.S. citizens

vote without Article 2 distinctions—in other words, "without distinction of any kind, such as race [or] colour."[41] As Article 26 states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."[42] A joint report produced by the Sentencing Project and Human Rights Watch argues that prisoner disenfranchisement in the United States disproportionally impacts non-white citizens to such a degree that it implicates these non-discrimination provisions in the ICCPR as well as the political rights protections in CERD.[43]

CERD mandates in Article 5 that states ensure "[p]olitical rights, in particular the right to participate in elections—to vote[—] . . . on the basis of universal and equal suffrage" without racial distinctions, intentional or otherwise.[44] Yet Black citizens of the United States are more than four times as likely as non-Black citizens to be among those disenfranchised due to a felony conviction.[45] Although CERD, like the ICCPR, is not self-executing,[46] its provisions nonetheless bind the United States under international law.

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living in Puerto Rico violates the ICCPR). Residents of U.S. territories are largely racial and ethnic minorities, and some are the descendants of enslaved Africans. *See* Justyna Goworowska & Steven Wilson, *Recent Population Trends for the U.S. Island Areas: 2000 to 2010*, U.S. CENSUS BUREAU 15, 17-18 (Apr. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p23-213.pdf [https://perma.cc/MF98-5V8E].

41. ICCPR, *supra* note 28, arts. 2, 25.

42. *Id.* art. 26.

43. *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, SENT'G PROJECT & HUM. RTS. WATCH 21 (Oct. 1998), https://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf [https://perma.cc/JB4F-RVR2].

44. CERD, *supra* note 29, art. 5.

45. Uggen et al., *supra* note 6, at 3 ("One in 13 African Americans of voting age is disenfranchised . . . . Over 7.4 percent of the adult African American population is disenfranchised compared to 1.8 percent of the non-African American population.").

46. *Status of Treaties: International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 30 ("The Senate's advice and consent is subject to the following declaration: That the United States declares that the provisions of the Convention are not self-executing.").

i. Interpretation by Other Nations

In other countries with disproportionate rates of imprisonment for minority and indigenous populations, racial discrimination, CERD, and the ICCPR have at times been an explicit part of debates surrounding prisoner disenfranchisement.[47] In Australia, where indigenous persons accounted for twenty-eight percent of the total prison population in 2019, yet only about two percent of the overall adult population,[48] prisoners incarcerated for three years or more are disqualified from voting.[49] One parliamentary briefing paper addressed the international law implications of Australia's disproportionate incarceration rates at length. Citing both the ICCPR and CERD, the author asserted: "Because of the disproportionate effect that prisoner disenfranchisement has on Indigenous Australians, it is arguable that such disenfranchisement conflicts with Australia's obligations under the Convention [on the Elimination of All Forms of Racial Discrimination]."[50]

47. *See generally Out of Step with the World: An Analysis of Felony Disenfranchisement in the U.S. and Other Democracies*, ACLU (May 2006), https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep_20060525.pdf [https://perma.cc/2NY9-WNCH] (providing helpful background on international approaches to prisoner disenfranchisement and summarizing the applicability of the ICCPR, CERD, and other international agreements to felony disenfranchisement). Notably, the Supreme Court of Canada has also invalidated a statute that disenfranchised prisoners serving sentences of two or more years, although the decision did not involve racial discrimination. Robin L. Nunn, Comment, *Lock Them up and Throw Away the Vote*, 5 CHI. J. INT'L L. 763, 777 (2005) (citing *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519, 520 (Can.)).

48. *Prisoners in Australia, 2019*, AUSTL. BUREAU STAT. (June 30, 2019), https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2019~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13 [https://perma.cc/32DP-RNU5]; *Prisoners in Australia, 2018*, AUSTL. BUREAU STAT. (June 30, 2018), https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13 [https://perma.cc/7QUM-23HH].

49. *Prisoners*, AUSTL. ELECTORAL COMMISSION (Feb. 22, 2019), https://www.aec.gov.au/Enrolling_to_vote/Special_Category/Prisoners.htm [https://perma.cc/Y9JQ-HFUR].

50. Jerome Davidson, *Inside Outcasts: Prisoners and the Right to Vote in Australia*, AUSTL. PARLIAMENTARY LIBR. (May 24, 2004),https://www.aph.gov.au/About_

Other commentators, including Australian human rights groups, have also critiqued the country's disenfranchisement practices for violating these treaties.[51]

In 2007, the Australian High Court invalidated a blanket ban on prisoner voting, though it upheld the disenfranchisement of prisoners serving sentences of three or more years.[52] Chief Justice Gleeson explained that the legislature had the right "to treat those who have been imprisoned for serious criminal offenses as having suffered a temporary suspension of their connection with the community," which was "reflected at the physical level in incarceration, and reflected also in temporary deprivation of the right to participate by voting in the political life of the community."[53] But, the judge noted, this rationale "breaks down at the level of short-term prisoners," who may not have committed serious violations of law and who may find themselves imprisoned because of poverty, homelessness, mental illness, or other issues that do not warrant suspension of their voting rights.[54] Moreover, the Australian Human Rights Commission, an independent government body that reports to the Australian Parliament, cited to the ICCPR when asserting that it "does not support the view that prisoners

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Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0304/04cib12 [https://perma.cc/L9F9-395S].

51. *See, e.g.*, Megan A. Winder, Comment, *Disproportionate Disenfranchisement of Aboriginal Prisoners: A Conflict of Law That Australia Should Address*, 19 PAC. RIM L. & POL'Y J. 385, 390, 396 (2010) (arguing that the three-year sentencing cutoff violates CERD and Australian anti-discrimination laws "by indirectly discriminating against Aboriginal people"); *Australia's Compliance with the International Covenant on Civil and Political Rights*, AUSTL. NGO COALITION 75 (Sept. 2017), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/INT_CCPR_NGO_AUS_28925_E.pdf [https://perma.cc/BT36-TFJQ] (criticizing Australia's disenfranchisement of prisoners as violating the ICCPR).

52. *Roach v Electoral Comm'r* [2007] 233 CLR 162 (Austl.). One of the lawyers who brought the case on behalf of an Aboriginal prisoner commented, "The decision of the High Court is a victory for representative democracy . . . and fundamental human rights . . . . With Aboriginal Australians incarcerated at a rate of almost 13 times that of their fellow Australians, it is also a vindication of Aboriginal rights." Karen Kissane, *Court Reverses Prisoner Vote Ban*, THE AGE (Aug. 31, 2007), https://www.theage.com.au/news/national/court-reverses-prisoner-vote-ban/2007/08/30/1188067277986.html [https://perma.cc/U5JG-SHEP].

53. *Roach*, 233 CLR at 179.

54. *Id.* at 182.

should have their right to vote suspended during their period of imprisonment" at all.[55]

In South Africa, another party to both treaties that shares a history of racially disproportionate incarceration,[56] the Constitutional Court unanimously struck down provisions depriving prisoners of the right to vote, enfranchising 146,000 incarcerated people.[57] The court noted that "[i]n light of our history where the denial of the vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected."[58] The same ought to be said for the United States, where felony disenfranchisement laws trace their roots to widespread efforts to stop Black citizens from voting.[59] As Carter Glass, a delegate to the Virginia constitutional convention of 1906, put it, states enacted these restrictions "to discriminate to the very extremity of permissible action under the limitation of the Federal constitution, with a view to the eliminating of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate."[60]

In some ways, these disproportionate effects on certain groups are analogous to Karl Josef Partsch's analysis of Peruvian voting requirements that excluded citizens unable to read and write from voting. Noting that the requirements disenfranchised the vast majority of Peru's indigenous population, Partsch wrote: "On the one hand, it may be said that a responsible decision can be taken only by a voter who is able to consider the candidates' platforms," but "[i]f, on the other hand, this requirement deprives a specific part of the population of the right to vote and has a

55. *Prisoners and Human Rights*, AUSTL. HUM. RTS. COMMISSION (2012), https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/prisoners-rights [https://perma.cc/GV3F-5E95].

56. *See* Amanda Dissel & Jody Kollapen, *Racism and Discrimination in the South African Penal System*, CTR. FOR STUDY VIOLENCE & RECONCILIATION & PENAL REFORM INT'L 48-49 figs.1 & 2 (2002), https://www.penalreform.org/wp-content/uploads/2013/06/rep-2002-south-african-racism-en_0.pdf [https://perma.cc/5B3Z-S6NQ].

57. Nunn, *supra* note 47, at 778.

58. *Minister of Home Affairs v. Nat'l Inst. for Crime Prevention & the Reintegration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) at 24 para. 47 (S. Afr.).

59. *See* Andrew L. Shapiro, *Challenging Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 537-43 (1993).

60. 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA 3076 (1906) (statement of Carter Glass).

discriminatory effect, the argument can hardly be maintained."[61] In the United States, we should recognize felony disenfranchisement for what it is: a practice that, like the literacy test, poll tax, and grandfather clause, excludes minority groups from the vote.[62]

ii. Interpretation by the U.N. Human Rights Committee

The U.N. Human Rights Committee, which monitors implementation of the ICCPR through periodic country reports, has addressed the

61. Karl Josef Partsch, *Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights*, 14 TEX. INT'L L.J. 191, 237 (1979).

62. *See, e.g.*, Simmons v. Galvin, 575 F.3d 24, 51 (1st Cir. 2009) ("Criminal disenfranchisement is an outright barrier to voting that, like the poll tax and literacy test, was adopted in some states with racially discriminatory intent and has operated throughout our nation with racially discriminatory results.") (quoting Shapiro, *supra* note 59, at 543); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 304 (2004) (explaining that "the historical use of felon disenfranchisement [was] as a tool of Jim Crow"); Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 612 (2004) ("The structure and effect of felon disenfranchisement laws have many similarities to . . . literacy tests. Courts and Congress (eventually) determined that literacy tests served as a tool of racial discrimination and political exclusion. Today, felon disenfranchisement laws discriminate against, and politically exclude, minorities in many similar ways."); Tara A. Jackson, Note, *Dilution of the Black Vote: Revisiting the Oppressive Methods of Voting Rights Restoration for Ex-felons*, 7 U. MIAMI RACE & SOC. JUST. L. REV. 81, 86-87 (2017) (arguing that felony disenfranchisement laws "have been conveniently manipulated to constantly dilute the black vote" and comparing them to poll taxes, literacy tests, and grandfather clauses in their "disproportionate impact . . . on the black vote"); Brent Staples, Opinion, *The Racist Origins of Felony Disenfranchisement*, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html [https://perma.cc/D7KM-5Y9M] (comparing felony disenfranchisement statutes to literacy tests and poll taxes and describing both as ways of undermining Black citizens' political power in the United States); *Felony Disenfranchisement*, EQUAL JUST. INITIATIVE (Nov. 30, 2019), https://eji.org/news/history-racial-injustice-felony-disenfranchisement [https://perma.cc/V7BV-7RG7] (describing felony disenfranchisement, alongside poll taxes and literacy tests, as a tool to "strip black communities of electoral power").

disenfranchisement of prisoners in the past, expressing skepticism that it comports with the commitments outlined in the treaty. In response to the United States' fourth periodic progress report, for example, the Committee recommended that the United States "ensure that all states reinstate voting rights to felons who have fully served their sentences; . . . remove or streamline lengthy and cumbersome voting restoration procedures; as well as review automatic denial of the vote to any imprisoned felon, regardless of the nature of the offence."[63] Furthermore, the Committee expressed "concern about the persistence of state-level felon disenfranchisement laws," highlighting their "disproportionate impact on minorities."[64] And this was not the first time the Committee had lambasted the racially skewed consequences of U.S. felony disenfranchisement.

Most strikingly, in response to the United States' second and third periodic reports, the Committee criticized the "significant racial implications" of disenfranchisement tied to criminal convictions, declaring:

> The Committee is of the view that general deprivation of the right [to] vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of articles 25 and 26 of the Covenant [on Civil and Political Rights], nor [serve] the rehabilitation goals of article 10 (3).[65]

A *New York Times* editorial published in the wake of the Committee's comments called them "scalding."[66] Given that the Committee is composed of independent experts tasked with interpreting the ICCPR and monitoring

63. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4, at 11 (Apr. 23, 2014).

64. *Id.*

65. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, at 11 (Dec. 18, 2006).

66. *Prisoners and Human Rights*, Editorial, N.Y. TIMES (July 31, 2006), https://www.nytimes.com/2006/07/31/opinion/31mon2.html [https://perma.cc/D2R3-L8QN].

compliance,[67] their conclusions provide strong evidence that the United States is not following the ICCPR's mandate in this area.

iii. Interpretation by the U.N. Committee on the Elimination of Racial Discrimination

The U.N. Committee on the Elimination of Racial Discrimination, which monitors CERD's implementation, has highlighted and criticized U.S. felony disenfranchisement practices in its responses to every progress report submitted by the United States. In its 2014 concluding observations to the United States' periodic report, the Committee wrote that it was "concerned at the obstacles faced by individuals belonging to racial and ethnic minorities and indigenous peoples to effectively exercise their right to vote, due, inter alia, to . . . state-level felon disenfranchisement laws."[68] The CERD Committee then recommended that the United States enact measures to reinstate voting rights to those convicted of felonies who are no longer incarcerated, ensure that incarcerated individuals are provided with information about registering to vote, and "review automatic denial of the right to vote to imprisoned felons, regardless of the nature of the offence."[69]

Similarly, in 2008, the Committee condemned "the disparate impact that existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons" and advocated for automatic restoration of voting rights upon the completion of an individual's sentence.[70] And, as far back as 2001, the Committee expressed "concern[] about the political disenfranchisement of a large segment of the ethnic minority population" of the United States, the result of "disenfranchising laws and practices based on the commission of more than a certain number of criminal offences."[71]

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67. *Human Rights Committee*, UNITED NATIONS OFF. HIGH COMMISSIONER FOR HUM. RTS., https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx [https://perma.cc/C8HV-EC9B].

68. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, U.N. Doc. CERD/C/USA/CO/7-9, at 5 (Sept. 25, 2014).

69. *Id.*

70. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, U.N. Doc. CERD/C/USA/CO/6, at 9 (May 8, 2008).

71. Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. A/56/18, at 66 (2001).

The Committee emphasized "that the right of everyone to vote on a non-discriminatory basis is a right contained in article 5 of the Convention [on the Elimination of All Forms of Racial Discrimination]" and reminded the United States of "its obligations under the Convention . . . to undertake to prohibit and to eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect."[72]

The data on felony disenfranchisement makes such discriminatory effects quite plain. One in thirteen Black citizens of voting age cannot vote because of a past felony conviction[73]—a rate more than four times that of the overall population.[74] In Kentucky, Tennessee, and Virginia, over twenty percent of Black adults were disenfranchised during the 2016 presidential election.[75] While in the past two decades, several states have taken positive steps towards expanding the right to vote for those with felony convictions,[76] many criminal justice and legal experts recommend that the

72. *Id.* at 65-66. As Judge Torruella of the U.S. Court of Appeals for the First Circuit has explained, a racially discriminatory "outcome, irrespective of the lack of discriminatory intent, is a violation of our international commitments under the International Convention on the Elimination of All Forms of Racial Discrimination . . . , which the United States ratified in 1994, and is therefore the Law of Our Land. Under []CERD, prohibited discrimination occurs where there is an unjustifiable disparate impact on a racial or ethnic group, regardless of whether there is any intent to discriminate against that group. Furthermore, where official policies or practices are racially discriminatory, the State party . . . must act affirmatively to prevent or end the situation. There is little, if any, evidence that the United States has acted to meet these obligations." Juan R. Torruella, *Déjà Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 194 (2011) (footnotes omitted).

73. Jean Chung, *Felony Disenfranchisement: A Primer*, SENT'G PROJECT (June 27, 2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer [https://perma.cc/FJH5-GYW3].

74. *Id.*

75. Uggen et al., *supra* note 6, at 3.

76. For example, Iowa eliminated permanent disenfranchisement and made restoration of voting rights upon completion of sentence automatic in 2005; Maryland did the same in 2007; and Washington removed its previous requirement that individuals must have fully paid all fines and fees before having their voting rights restored in 2009. *See* Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the

United States end felony disenfranchisement altogether.[77] To be in line with international norms as expressed in U.S. treaty law, the right to vote should be automatically restored upon completion of a convicted person's sentence—and, perhaps, it should never be taken away in the first place.

Covenant: Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/4, at 132-33 (Dec. 30, 2011). For a detailed list of state-by-state reforms since 1997, see Chung, *supra* note 73, at 5 tbl.2. *See also supra* notes 3, 15 & 19 and accompanying text (discussing recent reforms in Florida, Kentucky, New York, Virginia, and Washington, D.C.). But even in Florida—a state that exemplifies the recent movement for reform—those convicted of murder or of felony sexual offenses will not have their rights restored. Tim Mak, *Over 1 Million Florida Felons Win Right to Vote with Amendment 4*, NPR (Nov. 7, 2018), https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4 [https://perma.cc/Y69Y-2Z28].

77. *See, e.g.*, JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 236-37 (2017) (offering a multitude of suggestions for criminal justice reform, including "restoring voting rights to people who have served their sentences (or, better yet, allowing people to vote while incarcerated), and welcoming—not shunning and shaming—those who are returning from prison"); Eric H. Holder, Jr., Opinion, *Time to Tackle Unfinished Business in Criminal Justice Reform*, WASH. POST (Feb. 27, 2015), https://www.washingtonpost.com/opinions/time-to-tackle-unfinished-business-in-criminal-justice-reform/2015/02/27/e17878bc-bdf9-11e4-bdfa-b8e8f594e6ee_story.html [https://perma.cc/82U9-K8BJ] ("[I]n individual states, legislatures should eliminate statutes that prevent an estimated 5.8 million U.S. citizens from exercising their right to vote because of felony convictions. These unfair restrictions only serve to impede the work of transitioning formerly incarcerated people back into society."); Gideon Yaffe, Opinion, *Give Felons and Prisoners the Right to Vote*, WASH. POST (July 26, 2016), https://www.washingtonpost.com/opinions/let-felons-and-prisoners-vote/2016/07/26/f2da2d64-4947-11e6-acbc-4d4870a079da_story.html [https://perma.cc/A6JF-YR9S] ("Prisoners . . . should be allowed to vote, no matter their crimes . . . . [F]elon disenfranchisement fundamentally undermines the democratic rationale of our criminal laws."). *But see* George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 101, 145-48 (2005) (arguing that felony disenfranchisement is a justified practice in spite of its racially disproportionate effects).

II. INTERPRETIVE ENFORCEMENT OF THE ICCPR AND CERD

Although the ICCPR and CERD are non-self-executing, this Note suggests that they can still be used in U.S. courts to argue against domestic felony disenfranchisement laws that run afoul of treaty commitments. This Part proposes applying interpretive treaty enforcement, "a device for resolving ambiguity . . . [that] uses the international legal commitments of the United States to fill interpretive gaps and resolve uncertainty that would otherwise exist in statutory provisions,"[78] to ambiguous felony disenfranchisement laws. The Sections that follow provide an overview of non-self-executing treaties before explaining how interpretive enforcement via the *Charming Betsy* canon might be used as a tool to make domestic felony disenfranchisement laws to more closely align with the United States' international commitments in civil and human rights treaties.

A. Enforcing Non-self-executing Treaties Domestically

Generally, under the U.S. Constitution's Supremacy Clause, Article II treaties trump contradictory state laws.[79] During its consideration of a treaty, however, the Senate often conditions its approval on the attachment of certain provisions modifying the treaty's application, known as reservations, understandings, and declarations (RUDs).[80] One common RUD is a declaration stating that the ratified treaty will not be self-executing, meaning that it cannot be used as the sole basis for a claim in domestic court.[81] Such treaties can still create international legal obligations for the state party, but they do not establish private rights of action—which allow private parties to seek remedies from courts for violations of individual

78. Hathaway et al., *supra* note 32, at 88.

79. *See* Missouri v. Holland, 252 U.S. 416, 432 (1920) (noting that "by Article VI [of the U.S. Constitution,] treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land"); David Sloss, *The Domestication of International Human Rights: Non-self-executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 131 (1999).

80. *See* STEPHEN P. MULLIGAN, CONG. RES. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 4-5 (2018), https://fas.org/sgp/crs/misc/RL32528.pdf [https://perma.cc/Z5DG-P7TD].

81. *See id.* at 5.

rights provided by a treaty[82]—absent some other authority, like implementing legislation from Congress.[83] As the U.S. Supreme Court stated in *Medellín v. Texas*, "while [non-self-executing treaties] constitute international law commitments," they "do not by themselves function as binding federal law."[84]

During the ratification process of both the ICCPR and CERD, the President and Senate declared the treaty provisions discussed above, which appear to prohibit felony disenfranchisement as it is practiced in the United States, non-self-executing. Currently, Articles 1 through 27 of the ICCPR are non-self-executing,[85] as is the entirety of CERD.[86] Although both treaties remain binding on the United States as a matter of international law, neither is directly enforceable in federal or state court.[87] Nevertheless, the

82. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: TREATIES § 111, cmt. a (AM. LAW INST., Tentative Draft No. 2, Mar. 20, 2017) [hereinafter RESTATEMENT (FOURTH)].

83. It is worth noting that even self-executing treaties do not always establish a private right of action or an individual right to seek remedies. *See id.* § 111(1).

84. 552 U.S. 491, 504 (2008). For an in-depth discussion of this quote, see RESTATEMENT (FOURTH), *supra* note 82, § 110, Reporters' Note 12. The Court in *Medellín* seems to endorse a presumption that treaties are not self-executing absent implementing legislation or an explicit self-executing RUD, 552 U.S. at 505, but the *Restatement (Fourth)* indicates that there is not a presumption either for or against self-execution, RESTATEMENT (FOURTH), *supra* note 82, § 110, Reporters' Note 3.

85. *Status of Treaties: International Covenant on Civil and Political Rights*, *supra* note 30 ("[T]he United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing."). *But see* Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism"*, 131 HARV. L. REV. F. 65, 101-02 (2018) (arguing that declarations should be regarded differently from reservations and that the non-self-executing declaration in the ICCPR "is not judicially dispositive on self-execution" and is merely an expression of the Senate's opinion that "has no binding effect on the courts").

86. *Status of Treaties: International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 30; *see supra* note 46 and accompanying text.

87. RESTATEMENT (FOURTH), *supra* note 82, § 110(1); *see* Rebecca Crootof, Note, *Judicious Influence: Non-self-executing Treaties and the* Charming Betsy *Canon*, 120 YALE L.J. 1784, 1791 (2011) ("While a treaty may have been

possibility of interpretive enforcement remains: both treaties could be marshaled in the fight against felony disenfranchisement as devices for interpreting existing U.S. laws that impact voting rights with the aid of the *Charming Betsy* canon.

B. State-level Interpretation and the Charming Betsy *Canon*

The *Charming Betsy* canon of construction, first articulated by Chief Justice Marshall in the 1804 case *Murray v. The Schooner Charming Betsy*, instructs courts that domestic laws "ought never to be construed to violate the law of nations if any other possible construction remains."[88] Where a statute's meaning is ambiguous, this doctrine "encourages judges to select an interpretation . . . that accords with the United States' international obligations, including those expressed in non-self-executing treaties."[89]

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ratified as non-self-executing for a variety of reasons, the act of ratification formally binds the United States to the treaty's terms and creates international obligations.") [hereinafter Crootof, *Judicious Influence*].

88. 6 U.S. (2 Cranch) 64, 118 (1804); *see also* RESTATEMENT (THIRD), *supra* note 36, § 114 ("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."); *see also* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801) (instructing courts that "the laws of the United States ought not, if it be avoidable . . . be construed as to infract the common principles and usages of nations, or the general doctrines of national law").

89. Crootof, *Judicious Influence*, *supra* note 87, at 1783-84 & n.53 (explaining that "domestic courts generally seem to accept the use of the [*Charming Betsy*] canon in conjunction with non-self-executing treaties" but acknowledging that some judges, particularly then-D.C. Circuit Judge Kavanaugh, "deny the possibility of such an application entirely"); *see* Garcia v. Sessions, 856 F.3d 27, 42 (1st Cir. 2017) ("[W]e do not see why the non-self-executing status of the Refugee Protocol bears on the *Charming Betsy* canon's potential application."); *id*. at 53 n.28 (Stahl, J., dissenting) ("The government's cursory argument, that the Refugee Protocol is not a self-executing treaty and thus it is inappropriate to apply the *Charming Betsy* canon, is a clear misfire . . . . The question of whether a treaty is self-executing speaks to whether the international agreement in question can be enforced as domestic law in the courts of the United States without implementing legislation, not whether the treaty is an international obligation on the part of the country as a whole."); Khan v. Holder, 584 F.3d 773, 783 (9th Cir. 2009) (using the *Charming Betsy* canon to interpret the Immigration and Nationality Act so as to avoid conflict with the 1967 United

The famous case concerned a trading schooner that found its sails caught in the middle of a maritime "Quasi-War" between the United States and France.[90] Because of repeated French seizures of American vessels, the United States passed the Nonintercourse Act of 1800, which prohibited trade between U.S. ships and residents of France and its territories.[91] Soon after, U.S. naval officer Alexander Murray seized the *Charming Betsy*, a ship that he believed was American-built and sailing under false Danish papers in order to trade with France.[92] Although the ship was initially American, it had been sold to a man named Jared Shattuck, who was born in the United States but moved to the Danish island of St. Thomas as a child and swore allegiance to Denmark.[93] The dispute concerning the legality of Murray's seizure eventually made its way to the U.S. Supreme Court, where the Court concluded that the *Charming Betsy* was not subject to seizure under the Act.[94] Chief Justice Marshall read ambiguous language in the statute to accord with the law of nations, meaning that it should not "be construed to violate neutral rights, or to affect neutral commerce,"[95] and held that the statute only applied where a ship was owned by a U.S. citizen.[96] The Court determined that "Shattuck, as a foreign domicile who swore allegiance to the Danish crown, took himself 'out of the description of the act.'"[97] Thus, the *Charming Betsy* was a Danish vessel through and through, and its trade

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Nations Protocol Relating to the Status of Refugees, which is non-self-executing but has been acceded to by the United States).

90. Frederick C. Leiner, *The* Charming Betsy *and the Marshall Court*, 45 AM. J. LEGAL HIST. 1, 1 (2001).

91. An Act Further to Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 10, § 1, 2 Stat. 7, 8 (1800).

92. *Charming Betsy*, 6 U.S. (2 Cranch) at 66-68; *see generally* William S. Dodge, The Charming Betsy *and* The Paquete Habana *(1804 and 1900)*, *in* LANDMARK CASES IN PUBLIC INTERNATIONAL LAW 11 (Eirik Bjjorge & Cameron Miles eds., 2017) (providing an overview of the *Charming Betsy* case).

93. Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of* Charming Betsy, 67 OHIO ST. L.J. 1339, 1348 (2006).

94. *Charming Betsy*, 6 U.S. (2 Cranch) at 120-21.

95. *Id.* at 118.

96. *Id.* at 119.

97. Alford, *supra* note 93, at 1350 (quoting *Charming Betsy*, 6 U.S. (2 Cranch) at 120).

with France "under a proper interpretation of the law was no offense at all."[98]

Today, the *Charming Betsy* canon is a critical "component of the legal regime defining the U.S. relationship with international law[,] . . . applied regularly by the Supreme Court and lower federal courts, and . . . enshrined in the black-letter-law provisions of the influential *Restatement (Third) of the Foreign Relations Law of the United States*."[99] The central goal of the canon is to avoid creating conflicts between domestic statutes and international law where they need not exist. Like the constitutional avoidance canon, the *Charming Betsy* canon is traditionally employed when a statute's meaning is murky.[100] In the case of felony disenfranchisement laws, this Part suggests it might be deployed to favor interpretations of state-level policies that are less restrictive of voting rights and more compliant with international commitments.

Charming Betsy instills in courts "a default position to interpret domestic statutes in accord with international law"[101] and is one of the most powerful tools for enforcing international law domestically.[102] While this canon has most commonly been applied to federal statutes—as it was in the *Charming Betsy* case itself[103]—the logic that underlies it applies to state

98. *Id.* at 1351.

99. Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1997) (citing RESTATEMENT (THIRD), *supra* note 36). *See also* Note, *The* Charming Betsy *Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1215 (2008) (describing the *Charming Betsy* canon as "deeply embedded in American jurisprudence").

100. *See* Crootof, *Judicious Influence*, *supra* note 87, at 1793 (citing United States v. Yousef, 323 F.3d 56, 92 (2d Cir. 2003)).

101. Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 113 n.17 (2005) (citing *Charming Betsy*, 6 U.S. (2 Cranch) at 118; The Paquete Habana, 175 U.S. 677, 700 (1900)); *see* Khan v. Holder, 584 F.3d 773, 783 (9th Cir. 2009); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19-22 (1963).

102. *See* Bradley, *supra* note 99, at 482 ("Today, the interpretive role of international law, as reflected in the *Charming Betsy* canon, is arguably more important that its substantive role.").

103. *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (applying this method of statutory interpretation to "an act of Congress").

statutes as well.[104] Ralph Steinhardt has suggested that the Supremacy Clause and "the federal interest in relatively uniform interpretation of international law should support a *Charming Betsy* norm," even in state and municipal contexts.[105] Building off of this (although he himself disagrees with this view), Curtis Bradley explains that if "the goal of the canon is to make it more difficult for the United States to violate international law, or to cause the United States to move closer to the aspirational goals of international law, then the canon arguably applies equally well to the states."[106]

The crux of *Charming Betsy* is not its initial application to federal statutes but its harmonization principle. This principle, termed the '"harmonization' theory" by David Sloss, holds that "judges should,

104. Curtis Bradley found that, as of 1997, no reported state decisions had applied the *Charming Betsy* canon. Bradley, *supra* note 99, at 535. I have yet to come across a state case that explicitly deploys *Charming Betsy* in reading a statute so as to accord with an international treaty, but it is possible that state courts apply the spirit of the principle without citing to *Charming Betsy* by name. Additionally, some state courts have characterized *Charming Betsy* as akin to the principle of constitutional avoidance, which both state and federal courts apply. *See* Indiana Wholesale Wine & Liquor Co. v. State *ex rel.* Indiana Alcoholic Beverage Comm'n, 695 N.E.2d 99, 107 (Ind. 1998) (describing the *Charming Betsy* canon as stemming from the same principle as constitutional avoidance and noting that the latter is applied by both federal and state courts); JPMorgan Chase Bank v. Franklin Nat. Bank, No. M2005-02088-COA-R3CV, 2007 WL 2316450, at *4 n.7 (Tenn. Ct. App. Aug. 13, 2007) (regarding the *Charming Betsy* canon as in line with constitutional avoidance and describing the principle of seeking not to invalidate a statute where possible as "a widely embraced canon of construction"). For his part, Bradley argues that assessing whether the canon should be applied in state courts requires a determination about "the proper conception of the canon." *Id.* at 534. If it is merely evidence of congressional intent or a device for preserving separation of powers and keeping federal courts in their lane, for example, then it is less likely to bind courts seeking to ascertain the intentions of state legislatures. *Id.*

105. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1114 n.45 (1990). To support his argument, Steinhardt cites to *Guaranty Trust Co. v. United States* (among other cases) as one example of the Supreme Court reading treaty provisions so as to avoid conflict with a state statute. *Id.* (citing 304 U.S. 126 (1938)).

106. Bradley, *supra* note 99, at 535-36. Bradley favors instead the conception of *Charming Betsy* as a tool for maintaining the federal separation of powers. *Id.* at 484, 536.

whenever possible, strive to construe treaty provisions so as to harmonize them with corresponding constitutional and statutory provisions."[107] On the federal level, courts have taken up this mantle,[108] but *Charming Betsy*'s spirit of harmonization can and should be applied to all domestic laws in the United States, both state and federal, where such laws implicate provisions of ratified international treaties.

When defending the practice of felony disenfranchisement before the U.N. Human Rights Committee, American representatives have at times avoided explaining its logic by emphasizing that such policies are the product of state-level decisions and not the federal government.[109] Therefore, individual states' disenfranchisement policies are a fitting starting point for testing out the *Charming Betsy* canon's utility in international-human-rights-based arguments against felony disenfranchisement.

i. *Charming Betsy* at Work

At least some disenfranchisement statutes are ambiguous enough that, if challenged in court, they would fall under *Charming Betsy*'s purview.[110] As demonstrated in previous sections, the ICCPR and CERD—both of which remain binding on the United States under international law—appear to contravene blanket felony disenfranchisement as practiced in the vast majority of U.S. states. For courts, applying *Charming Betsy* will mean allowing state governors to re-enfranchise those with felony convictions en

107. Sloss, *supra* note 79, at 193.

108. Multiple federal courts have used treaties, including the ICCPR, to aid interpretation of statutory provisions. *Id.* at 200 n.340 (cataloging cases in which federal courts have cited the ICCPR in statutory interpretation since its ratification in 1992). Sloss highlights, among other cases, *United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997), in which the court used the ICCPR to help justify departure from the United States Sentencing Guidelines.

109. *See Prisoners and Human Rights*, *supra* note 66 ("The American representative weakly defended the practice's legality, but dodged explaining its rationale, saying the rules come from the states, not the federal government.").

110. Under this canon, statutes that "allow for multiple permissible constructions" ought to be interpreted in line with the United States' international commitments. Crootof, *Judicious Influence*, *supra* note 87, at 1793.

masse, reading disenfranchising statutes narrowly so as to impact as few individuals as possible, and interpreting legislation restoring voting rights broadly so as to benefit as many people as possible.

To take one real-world example, consider the controversy surrounding Virginia's felony disenfranchisement provision. One of the harshest in the country, it reads: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."[111] In 2016, Virginia Governor Terry McAuliffe used this authorization to issue an executive order restoring voting rights to more than 200,000 individuals convicted of felonies who had completed parole.[112] Shortly thereafter, state legislators filed suit against the Governor, arguing that this wholesale restoration of rights exceeded his powers under the Virginia Constitution, which only authorized individual clemency.[113] The case made it all the way to the Supreme Court of Virginia, where the court declared Governor McAuliffe's blanket restoration of voting rights unconstitutional.[114] However, the *Charming Betsy* canon suggests the possibility of a different outcome.

The Virginia disenfranchisement provision allowed the Governor to restore voting rights, but it left the question of *how* the Governor might restore voting rights unanswered. This would have been a perfect opening for *Charming Betsy* to be brought in as a thumb on the scale in favor of broad restoration in line with both CERD and the ICCPR. Instead, in its ruling, the Virginia Supreme Court leaned heavily on a different constitutional provision that requires the Governor to "communicate to the General Assembly . . . particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons

111. VA. CONST. art. II, § 1.

112. Laura Vozzella, *McAuliffe to Turn over List of Restored Felons to Settle Suit from State Prosecutor*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/local/virginia-politics/mcauliffe-to-turn-over-list-of-restored-felons-to-settle-suit-from-state-prosecutor/2017/06/15/7d73635a-51e4-11e7-b064-828ba60fbb98_story.html [https://perma.cc/6PNG-AM52].

113. *Id.*

114. *See* Howell v. McAuliffe, 788 S.E.2d 706, 722 (Va. 2016) (holding that the executive order sought "not to mitigate the impact of the general voter-disqualification rule of law on an individualized basis but, rather, to supersede it entirely for an indiscriminately configured class of approximately 206,000 convicted felons, without any regard for their individual circumstances").

for remitting, granting, or commuting the same."[115] However, even this provision leaves some ambiguity with regard to restoration of voting rights.

While the latter provision enables the Governor "to remove political difficulties consequent upon conviction," it fails to specify whether such removals must also be communicated to the legislature.[116] Furthermore, it leaves the question of exactly what qualifies as "communicating . . . particulars of every case . . . with his reasons for remitting" open to interpretation.[117] For example, if Governor McAuliffe had provided the legislature with a list of the names of everyone with a felony conviction and explained that their voting rights were being restored because felony disenfranchisement violates U.S. treaty law, would that have satisfied the requirement?

Ultimately, Governor McAuliffe found a different path to restoring a smaller number of Virginians' voting rights on an individual basis.[118] However, if the Virginia Supreme Court had employed the *Charming Betsy* canon in reading these state laws, many thousands more might have gained their CERD- and ICCPR-protected voting rights with a single stroke.

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115. VA. CONST. art. V, § 12; *see also Howell*, 788 S.E.2d at 718-19 ("The assertion that a Virginia Governor has the power to grant blanket, group pardons is irreconcilable with the specific requirement in Article V, Section 12 that the Governor communicate to the General Assembly the 'particulars of every case' and state his 'reasons' for each pardon.").

116. VA. CONST. art. V, § 12. (Political disabilities might be characterized as a type of "fine or penalty" or "punishment" that does fall under the umbrella of Section 12—but there is at least some ambiguity either way. *Id.*)

117. *Id.*

118. *See* Michael Wines, *Virginia's Governor Restores Voting Rights for 13,000 Ex-felons*, N.Y. TIMES (Aug. 22, 2016), https://www.nytimes.com/2016/08/23/us/virginia-governor-mcauliffe-voting-rights-felons.html [https://perma.cc/4GQJ-AAYM]; Press Release, Office of the Sec'y of the Commonwealth of Va., Governor McAuliffe's Restoration of Rights Policy (Aug. 22, 2016), https://www.restore.virginia.gov/media/governorvirginiagov/restoration-of-rights/pdf/restoration-of-rights-policy-memo-82216.pdf [https://perma.cc/928Z-8DBV]. Governor Ralph Northam, who succeeded Governor McAuliffe, has continued efforts to restore voting rights to Virginians with felony convictions. Rachel Frazin, *Virginia Governor Says He Has Restored Voting Rights for 22K People with Felony Convictions*, THE HILL (Oct. 10, 2019), https://thehill.com/homenews/state-watch/465262-virginia-gov-says-he-restored-voting-rights-for-22000-people-with-felony [https://perma.cc/5X3C-PPJ6].

A 2016 Iowa case presented another situation in which deploying *Charming Betsy* might have altered a state court's interpretation of a felony disenfranchisement provision. The case centered upon Article 2 of the Iowa Constitution, which disqualifies "person[s] convicted of any infamous crime" from voting.[119] Plaintiff Kelli Jo Griffin, a woman with a felony conviction for delivering "100 grams or less of cocaine" attempted to vote in a municipal election after completing probation.[120] Her vote was rejected, and she was subsequently prosecuted.[121] Griffin then filed suit against state officials, arguing that her felony conviction for delivery of a controlled substance was not an infamous crime that should result in disenfranchisement. In evaluating her claim, the court stated that "the concept of infamy is not locked into a past meaning, but embodies those judgments that reflect its meaning today."[122] "Our founders utilized infamy as a concept to govern the disqualification of voters and knew it would ultimately be defined by the *prevailing standards of each generation*," the court wrote, explaining that "[c]ommunity standards exist to shape these constitutional principles."[123]

At this point, in its quest to ascertain what civil consequences were appropriate in the wake of a criminal conviction,[124] the court could have consulted U.S. treaty law setting limits on exactly that. The broad voting rights protections laid out in the ICCPR and CERD, supplemented with Committee comments calling upon signatories to do away with blanket voting bans and disenfranchise as narrowly as possible, would have formed a heady combination in favor of limiting the definition of infamous crime.

Although the court did cite some international practice in its foray into the common-law history of infamy, the opinion quickly zeroed in on infamy's definition in the United States, dismissing some evidence that, in the past, "infamous crimes included many, but not all, crimes that today would be described as felonies."[125] Ultimately, the court held that infamous

119. IOWA CONST. art. II, § 5.

120. Griffin v. Pate, 884 N.W.2d 182, 184 (Iowa 2016).

121. *Id.*

122. *Id.* at 186.

123. *Id.*

124. *Id.*

125. *Id.* at 198 (citing THE STATUTE LAWS OF THE TERRITORY OF IOWA § 109 (1839); REVISED STATUTES OF THE TERRITORY OF IOWA, ch. 49, § 48 (1843)).

crimes were synonymous with felonies and denied Griffin's claim.[126] The majority opinion provoked lengthy dissents from three justices, one of whom argued that "an infamous crime that disqualifies a citizen from voting must at least feature some nexus to the electoral process" and emphasized that the right to vote is "fundamental."[127] One wonders whether *Charming Betsy* might have brought other justices into this line of thought by providing the court with an interpretive method rooted in U.S. Supreme Court doctrine and international perspective.

In Alabama, too, *Charming Betsy* might have made a meaningful difference in judicial interpretation of disenfranchisement policies. Felony disenfranchisement in Alabama is especially significant given that, as in many states, it has a dark history of use as a tool to maintain power for certain groups.[128] In the 1985 case *Hunter v. Underwood*, the U.S. Supreme Court considered an Alabama constitutional provision that disenfranchised those convicted of crimes of "moral turpitude."[129] The appellees, one Black and one white, brought suit after having been purged from the voter rolls for writing bad checks, a misdemeanor offense.[130] The lower court found that this law, despite being facially neutral, "would not have been enacted in absence of the racially discriminatory motivation" to disenfranchise Black voters and that it had a racially discriminatory impact almost from its inception.[131] Finding a discriminatory purpose to have been a motivating factor for the enactment of this provision, the Supreme Court unanimously

126. *Id.* at 205.

127. *Id.* at 206-07 (Hecht, J., dissenting).

128. As John Pinkard has written, "African American felon disenfranchisement is a story about intended and unintended social and political exclusion." JOHN E. PINKARD, SR., AFRICAN AMERICAN FELON DISENFRANCHISEMENT: CASE STUDIES IN MODERN RACISM AND POLITICAL EXCLUSION 155 (2013); *see infra* note 131 and accompanying text.

129. 471 U.S. 222, 224 (1985) (citing ALA. CONST. of 1901, art. VIII, § 182).

130. *Id.*

131. *Id.* at 225, 227. Notably, the president of the Alabama constitutional drafting convention declared in 1901, "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." *Id.* at 229 (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, at 8 (1940)).

affirmed the ruling below that the Alabama law violated the Fourteenth Amendment.[132]

Yet, in 1996, Alabama amended its constitution to read, "No person convicted of a felony involving moral turpitude . . . shall be qualified to vote,"[133] inserting a provision that is a "direct successor"[134] to the earlier disenfranchisement law struck down by the Court. For more than twenty years, Alabama law did not directly define which felonies involved "moral turpitude,"[135] a state of affairs widely criticized by voting rights experts and in court filings.[136] This would have been an ideal opportunity for supporters of voting rights in Alabama to invoke *Charming Betsy*. Using this canon, courts would have been encouraged to interpret the amorphous moral turpitude standard narrowly, applying it only to the gravest offenses.

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132. *Id*. at 233.

133. ALA. CONST. art. VIII, § 177(b).

134. Complaint at 2, Thompson v. Alabama, No. 2:16-CV-783-WKW, 2017 U.S. Dist. LEXIS 118606 (M.D. Ala. July 28, 2017), http://www.campaignlegalcenter.org/sites/default/files/Thompson%20v.%20Rucho%20Complaint%20FILED.pdf [https://perma.cc/GZ3F-MXW5].

135. The Alabama Attorney General provided a list of felonies that courts had determined to involve moral turpitude in 2005 but noted that his "office cannot provide an exhaustive list of every felony involving moral turpitude." Ala. Op. Att'y Gen. No. 2005-092, at 1 (Mar. 18, 2005).

136. *See, e.g.*, Complaint, *supra* note 134, at 2 ("The lack of any definition and the vagueness of [moral turpitude] has left the fundamental right to vote of hundreds of thousands of voters to ad hoc and arbitrary determinations by individual county registrars across the state . . . . The result is the disenfranchisement of approximately 7% of Alabama's total voting-age population and 15% of Alabama's black voting-age population."); Brief of Appellees at 18, Chapman v. Gooden, 974 So. 2d 972 (Ala. 2007) (No. 1051712), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_47717.pdf [https://perma.cc/7N25-QLPE] ("[U]nless and until the Alabama legislature declares which felonies involve moral turpitude and which do not, Alabama may not disenfranchise anyone based on a felony conviction. Such legislative guidance is essential because the State's disenfranchisement law is now unduly vague . . . and presents an unreasonable risk of erroneous deprivations of a protected liberty interest."); Mark Joseph Stern, *Alabama's Failure of Moral Turpitude*, SLATE (Oct. 26, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/10/alabama_s_grossly_unconstitutional_felony_disenfranchisement_scheme.html [https://perma.cc/9UBY-TU5T] (citing voting rights and constitutional law scholar Pamela Karlan and an interview with Danielle Lang, deputy director of voting rights at the Campaign Legal Center).

In 2017, the Alabama Legislature passed a new law clearly defining which felony convictions fall under the umbrella of moral turpitude and restoring rights to many individuals who had previously been disenfranchised.[137] By cataloging these crimes, the Definition of Moral Turpitude Act ended the discretion of individual counties to interpret which crimes involve "moral turpitude," a practice that disproportionately disenfranchised Black voters.[138] With the passage of this bill, the most obvious opening for employing the *Charming Betsy* canon in the state has

137. H.B. 282, 2017 Leg., Reg. Sess. (Ala. 2017) (codified at ALA. CODE § 17-3-30.1 (2019)).

138. As Kenneth Culp Davis has observed, discretion too often breeds discrimination. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 170 (1969) ("The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate." (footnote omitted)). Discretion pervades the criminal justice system, empowering police officers, prosecutors, and judges to exercise leniency when and if they wish to, a state of affairs that harms people of color, and Black Americans in particular. *See* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 202-203 (2007) ("There are many complex reasons for the unwarranted racial disparities that plague the American criminal justice system, but one of the most significant contributing factors is the exercise of prosecutorial discretion, especially at the charging and plea bargaining stages of the process . . . . Most prosecutors are motivated by a desire to enforce the law in ways that will produce justice for everyone in the communities they serve. However, all too often, prosecutors' well-intentioned charging and plea bargaining decisions result in dissimilar treatment of similarly situated victims and defendants, sometimes along race and class lines." (footnotes omitted)); *see also* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 25-26 (1998) ("Prosecutors typically do not become involved in a criminal case unless and until a police officer makes an arrest. If race is a factor in the decision to arrest a suspect, the police officer has infused the process with a layer of racial discrimination even before the prosecutor has an opportunity to exercise her discretion."); Marvin E. Wolfgang & Marc Riedel, *Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 133 (1973) ("[S]entences of death have been imposed on blacks, compared to whites, in a way that exceeds any statistical notion of chance or fortuity . . . . Discretion at earlier stages in the administration of justice could also carry elements of racial discrimination: arrest, hearing, plea bargaining, decisions to prosecute or drop charges, and many others . . . .").

now been closed; nevertheless, Alabama serves as a useful illustration of how *Charming Betsy* might be used to interpret similarly ambiguous laws in other states. As litigation on the issue of felony disenfranchisement continues,[139] *Charming Betsy* can be used in future cases to aid arguments that, where disenfranchisement does occur, it should be as limited as possible.

ii. Benefits of Applying *Charming Betsy* to State Law

Although *Charming Betsy* has yet to be routinely applied in cases concerning the interpretation of state statutes,[140] doing so has the potential to be a powerful vehicle for strengthening the United States' adherence to international commitments and avoiding unnecessary breaches of international law in this area. Many of the benefits of *Charming Betsy*'s use identified by scholars and courts are amplified in the context of its application to the states. It is a serious matter when Congress disregards international commitments—particularly those it may have helped initiate in the first place—but it is perhaps an even more serious federalism concern

139. *See, e.g.*, Associated Press, *Civil Rights Groups Sue North Carolina over Felon Voting Restrictions*, NBC NEWS (Dec. 17, 2019), https://www.nbcnews.com/politics/politics-news/civil-rights-groups-sue-north-carolina-over-felon-voting-restrictions-n1107856 [https://perma.cc/E2ZJ-9KT4]; Benjamin Barber, *The Push to Overturn Felony Disenfranchisement in Southern States*, FACING SOUTH (Dec. 10, 2019), https://www.facingsouth.org/2019/12/push-overturn-felony-disenfranchisement-southern-states [https://perma.cc/VU5E-H4JK]; Michael Wines, *Judge Temporarily Blocks Florida Law Restricting Voting by Ex-felons*, N.Y. TIMES (Oct. 18, 2019), https://www.nytimes.com/2019/10/18/us/felons-vote-fine-florida.html [https://perma.cc/BVJ8-BRCX].

140. *See* Crootof, *Judicious Influence*, *supra* note 87, at 1818 ("While the extent to which . . . non-self-executing treaty commitments should affect state statutory interpretation is still undetermined, the . . . arguments [made in Crootof's piece] still favor its application."). Some state courts have dismissed parties' attempts to invoke non-self-executing human rights treaties in court because they do not provide for a private right of action, but the question of whether such a right of action exists is irrelevant when it comes to *Charming Betsy*. For examples of state courts evaluating the applicability of international commitments, *see Domingues v. State*, 961 P.2d 1279, 1280 (Nev. 1998); and *Abdullah v. Cheshire*, No. CV010457822, 2009 WL 1140526, at *6 (Conn. Super. Ct. Mar. 26, 2009), *aff'd sub nom. Abdullah v. Comm'r of Correction*, 1 A.3d 1102 (Conn. App. Ct. 2010).

when an individual state law is interpreted in a way that violates commitments made at the national level. Where a state statute's provisions are ambiguous, the canon can help to "ensure[] that Congress alone decides whether to contravene international law" in the form of ratified treaties.[141]

One lingering concern with using treaties to aid state statutory interpretation is whether such a move might be an illegitimate interference with state power. Given that treaties have no obvious subject-matter limits and have been enacted in realms traditionally left to state authority—including criminal law, family law, and environmental regulation—some argue that the "tension between the potentially unlimited treaty power and the limited and enumerated powers structure of the Constitution" presents serious federalism concerns.[142] Indeed, in its 1920 decision in *Missouri v. Holland*,[143] the Supreme Court indicated that the treaty power can extend beyond the scope of the Congress's enumerated powers in some cases (such as the protection of migratory birds).[144] This state of affairs may be problematic from a Tenth Amendment standpoint, but even in this context, *Charming Betsy*'s use should not provoke anxiety. Again, *Charming Betsy* is a simply a framework to interpret murky statutes in a way that aligns with international commitments.[145] If a statute's meaning is ambiguous, then the canon empowers judges to read it so as to minimize conflicts with agreements made at the federal level. If the statute is not ambiguous, *Charming Betsy* does not come into play at all. Furthermore, even after a

141. Alex O. Canizares, *Is* Charming Betsy *Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the* Chevron *Doctrine*, 20 EMORY INT'L L. REV. 591, 605 (2006).

142. Curtis A. Bradley, *Federalism and the Treaty Power*, *in* 98 PROCEEDINGS OF THE ASIL ANNUAL MEETING 341, 341 (2004).

143. 252 U.S. 416 (1920).

144. *Id.* at 433 ("It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found.") (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)); Bradley, *supra* note 142, at 342; *see also* United States v. Lara, 541 U.S. 193, 201 (2004) ("[A]s Justice Holmes pointed out [in *Holland*], treaties made pursuant to [Congress's Article II] power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'") (citing *Holland*, 252 U.S. at 433).

145. *See supra* Section II.B.

judge has interpreted a murky statute using *Charming Betsy*, if the state legislature disagrees with her decision, the legislature can amend the statute to eliminate any ambiguity.

Charming Betsy's use in state statutory interpretation also has positive implications for the separation of powers. This is because the canon "allows judges to interpret law without fear of treading too far into foreign relations issues, and it reduces the likelihood that legislative enactments will unintentionally undermine executive diplomatic efforts."[146] As then-Judge Kavanaugh wrote in *Al-Bihani v. Obama*, "Violating international-law norms and breaching international obligations may trigger serious consequences, such as subjecting the United States to sanctions, undermining U.S. standing in the world community, or encouraging retaliation against U.S. personnel abroad."[147] The federal government forms these international commitments and likely intends that they be carried out, whereas the governments of individual states may be less attuned to the domestic implications of international law. When a statute can be read either to conflict with international obligations or not, as in the examples above, *Charming Betsy* can step in to offer a "rebuttable presumption" that it be read to accord with these obligations.[148]

C. Applying Charming Betsy *in Federal Constitutional Interpretation*

A second, and more controversial, role the *Charming Betsy* canon might play in felony disenfranchisement cases is in aiding interpretation of the U.S. Constitution itself. By applying *Charming Betsy* to Section Two of the Fourteenth Amendment—a constitutional provision that may or may not

146. Rebecca Crootof, Treaties in Constitutional Interpretation 2 (2018) (unpublished manuscript) (on file with author) (citing Bradley, *supra* note 99, at 525-26) [hereinafter Crootof, Treaties in Constitutional Interpretation]. Steinhardt argues that the Supreme Court highlighted this separation-of-powers view in *Weinberger v. Rossi*, 456 U.S. 25 (1982), when it explained that in an earlier case, the Court had applied the *Charming Betsy* canon "to avoid construing the National Labor Relations Act in a manner contrary to State Department regulations, for such a construction would have had foreign policy implications." Steinhardt, *supra* note 105, at 1131-32 (quoting *Weinberger*, 456 U.S. at 32, which referenced McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)).

147. 619 F.3d 1, 11 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

148. Crootof, *Judicious Influence*, *supra* note 87, at 1811.

justify blanket disenfranchisement—parties seeking to overturn disenfranchisement policies could argue against interpreting this ambiguous provision in a way that violates the United States' international obligations. The discussion that follows shows that the U.S. Supreme Court has alluded to employing international human rights law in its constitutional interpretation in the past and argues that there is a clear opening to do so in the case of felony disenfranchisement with the help of *Charming Betsy*.[149]

i. The Influence of International Treaty Law in Constitutional Interpretation

In cases involving the Eighth and Fourteenth Amendments, Supreme Court Justices have hinted at utilizing the *Charming Betsy* canon to support interpretations of constitutional provisions that are in line with treaty obligations.[150] For example, in *Thompson v. Oklahoma*, a case concerning the

149. See, for example, Justice Ginsburg's concurrence in *Grutter v. Bollinger*, which cites the Convention on the Elimination of All Forms of Discrimination Against Women and CERD. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring); *infra* notes 154-157 and accompanying text; *see also* Crootof, Treaties in Constitutional Interpretation, *supra* note 146, at 7-8 (discussing the concurrence in greater depth).

150. *See* Rebecca Crootof, Judicious Influence: How Non-self-executing Treaties Affect Domestic Decisions 34 (Mar. 2010) (unpublished draft manuscript) (on file with author) [hereinafter Crootof, Judicious Influence draft manuscript]; *see also* Garcia v. Sessions, 856 F.3d 27, 60 (1st Cir. 2017) (Stahl, J., dissenting) ("Notwithstanding its non-self-executing status, the Supreme Court and lower federal courts have frequently consulted the ICCPR as an interpretive tool to determine important issues in the area of human rights law."); Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 237 (2011) (discussing the Court's use of international law to determine the meaning of the Eighth Amendment). In addition to its use of treaties, the Court has also used general international practice in the past to aid in its interpretation of the Constitution. Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 335 (2004) (describing multiple cases in which the Justices have used international practice to guide their decision-making and noting that the Court's '"island' or 'lone ranger' mentality is beginning to change[as o]ur Justices . . . are becoming more open to comparative and international law perspectives"); *see, e.g.*, Graham v. Florida, 560 U.S. 48, 80 (2010) ("The

imposition of the death penalty on a juvenile offender under sixteen, Justice O'Connor's concurrence cited the United States' treaty commitments in support of reading the Eighth and Fourteenth Amendments so as to accord with international law.[151] Justice O'Connor wrote that "the United States has agreed by treaty to set a minimum age of 18 for capital punishment in certain circumstances," citing Article 68 of the Geneva Convention and noting that it "tend[ed] to undercut any assumption that the [federal law in question] signal[ed] a decision by Congress to authorize the death penalty for some 15-year-old felons."[152] Although Justice Stevens's plurality opinion did not explicitly mention the Geneva Convention, he, too, read the constitutional provisions in a way that accorded with it, referencing "evolving standards of decency that mark the progress of a maturing society."[153]

Similarly, Justice Ginsburg alluded to international law commitments in her *Grutter v. Bollinger* concurrence.[154] The Justice used CERD to support her view that "special and concrete measures to ensure the adequate development and protection of certain racial groups . . . for the purpose of

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judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But '[t]he climate of international opinion concerning the acceptability of a particular punishment' is also 'not irrelevant.'") (quoting Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982)); Lawrence v. Texas, 539 U.S. 558, 576-77 (2003) ("Other nations . . . have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries." (internal citation omitted)); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved" as evidence that the Eighth Amendment prohibits the execution of mentally disabled individuals).

151. 487 U.S. 815, 851-52 (1988) (O'Connor, J., concurring).

152. *Id.* at 851-52 (Ginsburg, J., concurring) (citing the Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 68, Aug. 12, 1949, 6 U.S.T. 3516, 5360, 75 U.N.T.S. 287).

153. 487 U.S. at 821 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)); *see also* Crootof, Judicious Influence draft manuscript, *supra* note 150, at 34-35 (examining the *Thompson* decision through a *Charming Betsy* lens).

154. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring); Crootof, Judicious Influence draft manuscript, *supra* note 150, at 35.

guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms" do not run afoul of the Equal Protection Clause of the Fourteenth Amendment.[155] Still, it should be noted that Justice Ginsburg did not explicitly employ *Charming Betsy*, and her reason for invoking international law is uncertain.[156] Perhaps the treaties she cites, CERD and the Convention on the Elimination of All Forms of Discrimination Against Women, are decisive interpretive influences, or perhaps they are one piece of evidence among many weighing in favor of the Court's decision.[157]

In another set of juvenile death penalty cases, the Justices turned to the ICCPR. In his dissent in *Stanford v. Kentucky*,[158] a case upholding the imposition of the death penalty on a defendant who committed crimes while just over seventeen, Justice Brennan cited "three leading human rights treaties ratified or signed by the United States explicitly prohibit[ing] juvenile death penalties," including the ICCPR, as evidence of unconstitutionality.[159] This line of reasoning appeared again in *Roper v. Simmons*,[160] which overruled *Stanford*. In *Roper*, the majority used international law to inform its conclusion that the Eighth Amendment (as applied to the states through the Fourteenth Amendment) forbade the imposition of a death sentence on offenders under eighteen. Although Justice Kennedy rooted his opinion in national practice, he nevertheless

155. *Grutter*, 539 U.S. at 344 (citing G.A. Res. 2106 (XX), Annex Part I ¶ 4 (Dec. 21, 1965)).

156. Crootof, quoting Melissa Waters, explains that in some cases, the Supreme Court's invocation of international human rights treaties may be "'gilding the lily,' a technique wherein treaties provide 'additional support for [the Court's] own interpretation (based on traditional canons of analysis) of a domestic legal text,"' and "the integrity of the opinion would stand even if the discussion of treaties were excised entirely." Crootof, Treaties in Constitutional Interpretation, *supra* note 146, at 6 (quoting Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 654-55 (2007)); *see id.* at 7-8; Glensy, *supra* note 150, at 242 (explaining that in Justice Ginsburg's concurrence, "[n]o real reason for the consultation with these two international treaties was given").

157. Crootof, Treaties in Constitutional Interpretation, *supra* note 146, at 7-8 (discussing Justice Ginsburg's concurrence).

158. 492 U.S. 361 (1989), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005).

159. *Id.* at 389-90, 390 n.10 (Brennan, J., dissenting); *see* Glensy, *supra* note 150, at 239.

160. 543 U.S. 551 (2005).

wrote, "[T]he task of interpreting the Eighth Amendment remains our responsibility. Yet . . . the Court has referred to . . . international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[161] Justice Kennedy went on to cite numerous international agreements prohibiting use of the death penalty on juvenile offenders, including the ICCPR (ratified subject to a U.S. reservation on this juvenile death penalty issue).[162] Here, too, international law did not play a definitive role in the Court's interpretation of a constitutional provision; however, the Court's apparent willingness to incorporate international treaties ratified by the United States into its interpretive method leaves an opening for it to do so in a more formalized way using the *Charming Betsy* canon.

ii. *Charming Betsy* and Section Two of the Fourteenth Amendment

If the Court is beginning to create a constitutional *Charming Betsy* jurisprudence, it should be more explicit about this practice in order to avoid confusion (and concern) about what kinds of international law may be used to influence constitutional interpretation.[163] For instance, allowing an Article II treaty ratified by the United States through democratic processes to provide guidance in reading a vague constitutional provision generally provokes much less discomfort than suggesting the Court use all of customary international law as an interpretive tool.[164] Felony

161. *Id.* at 575.

162. *Id.* at 576; *see* Crootof, Judicious Influence draft manuscript, *supra* note 150, at 32 (discussing the international law influences in Justice Kennedy's opinion).

163. Crootof, Judicious Influence draft manuscript, *supra* note 150, at 36-40; *see* Glensy, *supra* note 150, at 243-44; *see also* Note, *The* Charming Betsy *Canon, supra* note 99, at 1235 (suggesting that courts refine the *Charming Betsy* canon in various ways, including "wholly abandon[ing] the *Charming Betsy* canon where [customary international law] is concerned").

164. Crootof develops this argument in depth, acknowledging that while even Article II treaties are not approved by the United States' most democratic body—the House of Representatives—a *Charming Betsy* canon that takes them into account in constitutional interpretation would have many benefits. Crootof, Judicious Influence draft manuscript, *supra* note 150, at 36-40. For more on customary international law, see RESTATEMENT (THIRD), *supra* note 36, § 102(2), describing it as a type of international law that "results from a

disenfranchisement, a policy that no longer aligns with modern human rights law, provides an opportunity for the Court to clarify its use of *Charming Betsy* by openly deploying it with two Article II treaties. By applying *Charming Betsy* in conjunction with the ICCPR and CERD to Section Two of the Fourteenth Amendment, which instructs that the right to vote shall not be "in any way abridged, except for participation in rebellion, or other crime,"[165] the Court could choose to read the definition of "other crime" narrowly so as to fulfill the United States' international obligations as expressed in these treaties.

The justification for using the Fourteenth Amendment to disenfranchise those with felony convictions stems from a single U.S. Supreme Court case in 1974, a year that predates U.S. ratification of both CERD and the ICCPR.[166] In *Richardson v. Ramirez*,[167] the Court granted certiorari to review a California judgment that formerly incarcerated individuals whose paroles had terminated were entitled to vote under the Equal Protection Clause of the Fourteenth Amendment. Writing for a six-Justice majority, Justice Rehnquist reversed, citing the "except for participation in rebellion, or other crime" language of Section Two of the same Amendment.[168] After a review of the meager legislative history on the meaning of this provision, the majority adopted a "plain reading"[169] of Section Two as giving an "affirmative sanction"[170] for felony disenfranchisement and concluded that

general and consistent practice of states followed by them from a sense of legal obligation"; and Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 373-74 (2002), explaining that customary international law is derived from patterns of state practice, "international and national judicial decisions," and "the practice of international organs," among other sources, and is "presumed to be universally binding on all the world."

165. U.S. CONST. amend. XIV, § 2.

166. By this point, the United States had neither signed nor ratified the ICCPR, and although it had signed CERD, the treaty had yet to be ratified. *See* sources cited in notes 28-29, *supra*, and accompanying text. As a result, the Court would not have considered the language of either treaty when deciding this case.

167. 418 U.S. 24 (1974).

168. *Id.* at 43.

169. *Id.* at 45.

170. *Id.* at 54.

barring those with felony convictions from voting was consistent with the Court's previous jurisprudence.[171]

However, a plain reading of Section Two does not necessarily justify *blanket* disenfranchisement.[172] "[O]ther crime" might refer to only the most serious offenses, to only those crimes involving election fraud, or to only crimes involving treason against the United States. Even the majority characterized the legislative history on this point as "scant indeed,"[173] and what little relevant history the opinion was able to cite[174] was read differently by Justice Marshall in dissent.[175] The meaning of this section is not plain at all.

Underscoring this lack of obvious interpretation, Justice Marshall emphasized in his dissent that none of the respondents in *Richardson* had been convicted of an election-related felony and criticized the majority's analysis of the Fourteenth Amendment's legislative history.[176] Marshall noted that during drafting, Section Two

> went to a joint committee containing only the phrase "participation in rebellion" and emerged with "or other crime" inexplicably tacked on. In its exhaustive review of the lengthy legislative history of the Fourteenth Amendment, the Court has come upon only one explanatory reference for the "other crimes" provision—a reference which is unilluminating at best.[177]

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171. Strikingly for the modern reader, the Court cites *Lassiter v. Northampton County Board of Elections*, a case upholding North Carolina's literacy test for voting, as persuasive evidence of the constitutionality of felony disenfranchisement. *Id.* at 53 (citing 360 U.S. 45, 51 (1959)).

172. *See, e.g.*, PINKARD, *supra* note 128, at 163 ("Contrary to Justice Rehnquist's argument that the majority opinion represents a 'plain reading of [Section Two],' it is clear that his conclusion was an attempt to restrict the law rather than to interpret the law.").

173. *Richardson*, 418 U.S. at 43.

174. *Id.* at 45-53. For more on the legislative history of Section Two of the Fourteenth Amendment, see Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584 (2012).

175. *Richardson*, 418 U.S. at 72-78 (Marshall, J., dissenting).

176. *Id.* at 75.

177. *Id.* at 72-73 (referencing CONG. GLOBE, 39th Cong., 1st Sess. 2667 (1866) (Statement of Rep. Eckley)).

The purpose of this section, Justice Marshall argued, was not "to deny or abridge the right to vote" to certain groups;[178] rather, it was added to ensure that formerly enslaved people in the South (likely Republican sympathizers) *were enfranchised* at a time when the Republicans were threatened by an influx of increased southern congressional representation in the wake of abolition.[179]

Notably, this phrase in Section Two of the Fourteenth Amendment forms part of the Reduction in Representation Clause, which states that when a state "den[ies] . . . or in any way abridge[s]" the right to vote, "except for participation in rebellion, or other crime," it will be penalized by having its congressional representation reduced in proportion to the voter infringement.[180] Presumably, the penalty applies both to explicit racial discrimination and to less overt methods of voter suppression, such as "literacy tests, . . . property qualifications, tests based on the ability to read and 'understand' the state constitution, and a host of other methods of denying the right to vote."[181] As commentators have lamented, however, "If the reduction clause were intended as a loaded gun to be wielded against those states that might infringe on voting rights, it's never been fired—or even pointed in their direction in earnest."[182] To date, the Reduction in Representation Clause has never been enforced,[183] but, paradoxically, its

178. *Id.* at 74 (quoting Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-ninth Congress*, 1965 SUP. CT. REV. 33, 65 (1965)).

179. *Id.* at 73-75; *see* Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 109 (1960) (noting that the leaders of the Republican Congress sought to "enfranchise the Negro who was bound, they reasoned, to vote for his Republican saviors" when drafting the Fourteenth Amendment).

180. U.S. CONST. amend. XIV, § 2.

181. Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 957 (2008).

182. Joshua Geltzer, *The Lost 110 Words of Our Constitution*, POLITICO MAG. (Feb. 23, 2020), https://www.politico.com/news/magazine/2020/02/23/the-lost-constitutional-tool-to-protect-voting-rights-116612 [https://perma.cc/ET54-57KR].

183. Curtis, *supra* note 181, at 958; Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-imposed Voter Qualifications*, 63 LOY. L. REV. 447, 473 (2017) (explaining that the Reduction in Representation Clause "has never been enforced by Congress, and the judiciary has refused to compel compliance").

language has been used to justify exactly what the clause as a whole appears to prohibit.[184]

Ultimately, Justice Marshall concluded, "I think it clear that measured against the standards of this Court's modern equal protection jurisprudence, the blanket disenfranchisement of ex-felons cannot stand."[185] The Court can and should employ *Charming Betsy* in future disenfranchisement cases to vindicate Justice Marshall's dissent. Even if one reads the Fourteenth Amendment as sanctioning disenfranchisement for *some* crimes, it is not clear that it justifies a blanket voting ban for all those with felony convictions. And, moreover, it is also not obvious that this ban should extend from an individual's sentence into parole, probation, payment of fees and fines, and beyond.

E. Criticisms of Charming Betsy *as an Interpretive Device*

Some scholars have criticized the *Charming Betsy* canon as "displac[ing] domestic lawmaking processes,"[186] introducing a "counter-majoritarian" element into judicial decision-making,[187] and "allow[ing] the courts to usurp a political function."[188] They worry that *Charming Betsy* results in courts incorporating foreign laws not subject to democratic approval into

184. Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 397 (2011) ("[Courts] put great stock in the Constitution's 'affirmative sanction' of criminal disenfranchisement in the Fourteenth Amendment's Reduction in Representation Clause . . . [but], at least where permanent disenfranchisement is concerned, the racial consequences of protecting criminal voting bans contravene the primary goal of the very constitutional text on which the courts rely—to prevent racial vote dilution.").

185. Richardson v. Ramirez, 418 U.S. 24, 86 (1974) (Marshall, J., dissenting). Justice Marshall argued that felony disenfranchisement should be subjected to the compelling-state-interest test of the Equal Protection Clause in Section 1 of the Fourteenth Amendment—a test it would fail. *Id.*; *see* Reynolds v. Sims, 377 U.S. 533, 555 (1964) (observing that voting is "the essence of a democratic society, and any restrictions on that right strike at the heart of a representative government").

186. John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1748 (2009); *see* Crootof, Judicious Influence draft manuscript, *supra* note 150, at 42.

187. Steinhardt, *supra* note 105, at 1183 (citing ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962)).

188. *Id.* at 1187.

American jurisprudence and, in the process, acting against the will of the people.[189] The sharpest critiques of the canon's use emerge when one suggests it ought to apply to constitutional provisions. Roger Alford, for example, argues that courts should treat *Charming Betsy*'s use in constitutional interpretation "with grave caution," contending that "courts should decide cases by paying a decent respect to the interest of our nation and its people, and that foreign influence on judicial authority should be greeted with a skeptical eye."[190] Other scholars suggest that *Charming Betsy*'s use in constitutional interpretation is unnecessary in the first place, because the Constitution is superior to both domestic statutes and treaty law.[191]

But these critiques begin to buckle when one recalls that *Charming Betsy* is used to interpret domestic laws to accord with international obligations freely made *by the United States*. The ICCPR and CERD, the treaties most significant for our purposes, were both signed and ratified by those elected to represent the interests and wishes of the people of the United States. In this sense, *Charming Betsy* is not the "mascot" of "foreign opinion" at work in judicial decision-making but a device for maintaining consistency with commitments the United States has already undertaken.[192] *Charming Betsy* is simply an added tool in the court's box of interpretive methods when a statute's meaning is ambiguous. It encourages judges to avoid creating a domestic conflict with international law when one need not exist, and nothing more.

It is true, however, that understandings of an international treaty's provisions may evolve over time. In that sense, as a result of committee observations or other states' practices, a treaty may move away from what the United States initially agreed to. Still, if the federal government truly takes issue with a treaty's current interpretation, it can express its disapproval by withdrawing from the agreement.[193] Treaties that remain in force are ones by which the United States consents to be bound.

189. For a more extensive discussion of critiques of the *Charming Betsy* canon, see Crootof, *Judicious Influence*, *supra* note 87, at 1815-18.

190. Alford, *supra* note 93, at 1340-41.

191. *See, e.g.*, Crootof, *supra* note 146, at 3 (discussing arguments against *Charming Betsy*'s use in constitutional interpretation).

192. Alford, *supra* note 93, at 1341.

193. Under the Vienna Convention on the Law of Treaties, parties can withdraw from treaties either "[i]n conformity with the provisions of the treaty"; or "[a]t any time by consent of all the parties after consultation with other

As discussed above, the U.S. Supreme Court is already taking international law into account in its interpretation of some constitutional amendments. Especially in the context of felony disenfranchisement cases, *Charming Betsy* would be a tool for harmonizing the United States' domestic and international legal obligations where possible, not an opening to haphazardly insert foreign law into the Constitution.[194] The essence of *Charming Betsy* is maintaining domestic consistency with international law that is binding on the United States where ambiguity exists—acting as a "braking mechanism"[195]—not seeking to align U.S. law with the norms of other nations for its own sake.[196]

CONCLUSION

The United States has long exhibited discomfort with human rights treaties, a consequence of the country's racial past. Despite U.S. leaders and diplomats playing a foundational role in the drafting of the Universal Declaration of Human Rights in the 1940s,[197] the specter of domestic racial

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contracting States." Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 331.

194. See Rebecca Crootof for an illuminating discussion of this debate. She posits, "While not all international law should be used in constitutional interpretation, domestically approved international agreements are unique among other types of international law. The varied and significant barriers to domestic approval of a treaty's text may increase the likelihood that a ratified treaty serves as evidence of a national consensus or evolving fundamental American norms." Crootof, Treaties in Constitutional Interpretation, *supra* note 146, at 3.

195. Bradley, *supra* note 99, at 532.

196. Some commentators have suggested that customary international law should also be used in the interpretation of U.S. law and constitutional provisions, but that argument falls outside the scope of this piece. As Bradley notes, "[T]hese commentators are seeking to use the *Charming Betsy* canon not as a braking mechanism to avoid violations of international law, but rather as an engine to conform U.S. law to the aspirations of international law." *Id.* at 503 n.120, 504.

197. *See generally* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001) (offering a comprehensive overview of the drafting process for the Universal Declaration).

discrimination loomed ever-present in the background.[198] By the 1950s, fear of human rights agreements' potential to challenge Jim Crow laws and racial segregation ran rampant.[199] Republican Senator John W. Bricker went so far as to propose amending the Constitution to curb the government's treaty-making power, "a thinly veiled effort to prevent the use of international human rights agreements to curtail racial segregation in the United States."[200] Although Bricker's amendment was ultimately defeated, it resulted in President Dwight Eisenhower and his successors acceding to "the core commitment of Bricker to prevent the use of international human rights agreements to effect internal changes."[201] In practical terms, this meant the insertion of RUDs, such as non-self-executing provisions, intended to neuter treaties' domestic enforcement.

Racial discrimination is the stain of the United States' relationship with international human rights law and continues to be part and parcel of the country's reluctance to embrace it. Felony disenfranchisement—which so disproportionately impacts Black voters—is a modern-day holdover of this history of disadvantage.[202] Today, however, there is an opening to turn the tables and deploy human rights agreements in the fight against this racially discriminatory and undemocratic practice.

Felony disenfranchisement in the United States is a clear violation of international law as expressed in the ICCPR and CERD, treaties by which the United States remains bound. Aided by interpretive enforcement using the *Charming Betsy* canon, these treaties stand ready to be used as a tool to challenge blanket disenfranchisement policies and affirm the United States'

198. Mary Ann Glendon describes the tensions during the drafting process for the Universal Declaration: "Soviet-bloc delegates repeatedly played their trump card in tirades against the United States: the United States posed as a humanitarian country but permitted flagrant racial discrimination." *Id.* at 100.

199. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1240-41, 1276 (2008).

200. *Id.* at 1303.

201. *Id.* at 1303-04.

202. As Jeff Manza and Christopher Uggen write, "Over the past 200 years, virtually all restrictions on the right to vote have melted away . . . . Only felon status remains as a legal means to bar participation." JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 221 (2006) (citing ALEC EWALD, PUNISHING AT THE POLLS: THE CASE AGAINST DISENFRANCHISING CITIZENS WITH FELONY CONVICTIONS 34 (2000)).

commitment to equality. As Judge Walker of the Northern District of Florida wrote in 2018, "A person convicted of a crime may have long ago exited the prison cell and completed probation. Her voting rights, however, remain locked in a dark crypt. Only the state has the key—but the state has swallowed it."[203] The key, in fact, may be hiding in plain sight. Through interpretive enforcement of international obligations the United States has already undertaken, the time is at hand to scrutinize felony disenfranchisement policies in a new and skeptical light.

203. Hand v. Scott, 285 F. Supp. 3d 1289, 1295 (N.D. Fla. 2018).