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.

INTRODUCTION

I. FELONY DISENFRANCHISEMENT AND INTERNATIONAL HUMAN RIGHTS LAW

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

   i. Interpretation by Other Nations

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

   iii. Interpretation by the U.N. Committee on the Elimination

* Yale Law School, J.D. 2020; University of Cambridge, M.Phil. approved 2017; Rice University, B.A. 2016. I am immensely grateful to Oona A. Hathaway and Rebecca Crootof for their invaluable feedback, encouragement, and wisdom. I am also indebted to the editors of the Yale Law & Policy Review for their excellent edits and to Charlotte E. Yust, whose support made this Note possible. All remaining errors are my own.
INTRODUCTION

On a Tuesday in early January 2019, Robert Eckford made his way to the local election supervisor’s office in Orlando, Florida. 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. The law allows more than a million formerly disenfranchised people to regain the right to vote in Florida, including Eckford. “I’ll be a human being again. I’ll be an American citizen again,” he reflected after filling out an application.

U.S. felony disenfranchisement policies, among the harshest in the democratic world, are intimately connected with the United States’ history of racial oppression and inequality. During the 2016 presidential

---


2. Id.


4. Replogle, supra note Error: Reference source not found.
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. While one in forty adults in the United States cannot vote due to a felony conviction, among Black voters, that figure is one in thirteen. Many state disenfranchisement statutes trace their origins to the post-Civil War period, when the Reconstruction Amendments enfranchised racial minorities. Before poll taxes, literacy tests, and grandfather clauses, felony disenfranchisement laws were the first widespread set of legal

---


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 Error: Reference source not found, at 3.

9 Behrens et al., supra note Error: Reference source not found, 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, 2013), https://www.npr.org/sections/codeswitch/2013/10/21/239081586/
disenfranchisement measures . . . imposed on [Black Americans].”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{15} Nineteen

\textsuperscript{11} Behrens et al., supra note Error: Reference source not found, at 563.

\textsuperscript{12} Id. at 597-98 (quoting JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 12 (1901)).

\textsuperscript{13} Id. at 596.

\textsuperscript{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%202008.05.20%20%281%22.pdf [https://perma.cc/5EPD-3366] [hereinafter Brennan Center Disenfranchisement Map].

states disenfranchise post-incarceration, usually until an individual has completed her parole or probation and, in some cases, paid required fines and fees. 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. Iowa disenfranchises for life all those with felony convictions, unless the state or Governor chooses to restore rights individually. 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 criminal convictions. As recently as


[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].


[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-
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.\(^{22}\)


constitutional courts that have evaluated disfranchisement law have found the automatic, blanket disqualification of prisoners to violate basic democratic principles.” 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.” “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.”

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. The court has been more willing to accept voting restrictions targeted at specific offenses or long-term prison sentences, as in Scoppola v. Italy (No. 3), but remains opposed to automatic revocations of prisoners’

25. Id.
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. 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. Both of these agreements have more than 170 state parties across the globe.

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. 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 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


locked in and locked out

uncertainty that would otherwise exist in statutory provisions." 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. 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. 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.

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.” Although United States included a non-self-executing

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.
35 ICCPR, supra note Error: Reference source not found, art. 25.
provision in its 1992 ratification of the ICCPR, meaning that the agreement cannot be enforced domestically absent implementing legislation,\textsuperscript{36} it also attached a declaration stating:

\begin{quote}
[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.\textsuperscript{37}
\end{quote}

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.\textsuperscript{38} In more than half of all states, voting rights are not immediately restored upon release.\textsuperscript{39}

The ICCPR also prohibits laws that lead to discrimination in voting rights.\textsuperscript{40} Article 25, discussed above, notes that every citizen has the right to vote without Article 2 distinctions—in other words, “without distinction of any kind, such as race [or] colour.”\textsuperscript{41} As Article 26 states:  

\textsuperscript{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.” \textsc{Restatement (Third) of the Foreign Relations Law of the United States} § 111(4) (1987) [hereinafter \textsc{Restatement (Third)}].

\textsuperscript{37}138 \textsc{Cong. Rec.} 8,071 (1992). The United States did not insert any RUDs concerning felony disenfranchisement specifically.

\textsuperscript{38}ACLU Disenfranchisement Map, supra note Error: Reference source not found.


\textsuperscript{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. \textit{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 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. \textit{See} Justyna Goworowska & Steven Wilson, \textit{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].

\textsuperscript{41}ICCPR, supra note Error: Reference source not found, arts. 2, 25.
“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” A joint report produced by the Sentencing Project and Human Rights Watch argues that prisoner disenfranchisement in the United States disproportionately 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.

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. 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. Although CERD, like the ICCPR, is not self-executing, its provisions nonetheless bind the United States under international law.

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. In Australia, where indigenous persons

---

42. *Id.* art. 26.
44. CERD, *supra* note Error: Reference source not found, art. 5.
45. Uggen et al., *supra* note Error: Reference source not found, 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 Error: Reference source not found (“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.”).
accounted for twenty-eight percent of the total prison population in 2019, yet only about two percent of the overall adult population.\textsuperscript{48} Prisoners incarcerated for three years or more are disqualified from voting.\textsuperscript{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].”\textsuperscript{50} Other commentators, including Australian human rights groups, have also critiqued the country’s disenfranchisement practices for violating these treaties.\textsuperscript{51}

\textsuperscript{48}Prisoners in Australia, 2019, AUSTL. BUREAU STAT. (June 30, 2019), [https://perma.cc/32DP-RNU5]; Prisoners in Australia, 2018, AUSTL. BUREAU STAT. (June 30, 2018), [https://perma.cc/7QUM-23HH].

\textsuperscript{49}Prisoners, AUSTL. ELECTORAL COMMISSION (Feb. 22, 2019), [https://perma.cc/Y9JQ-HFUR].


\textsuperscript{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
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. 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.” 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. 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 should have their right to vote suspended during their period of imprisonment” at all.

In South Africa, another party to both treaties that shares a history of racially disproportionate incarceration, the Constitutional Court

---


53. Id. at 179.

54. Id. at 182.


unanimously struck down provisions depriving prisoners of the right to vote, enfranchising 146,000 incarcerated people. 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.” 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. 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.”

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 discriminatory effect, the argument can hardly be maintained.” 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.

---

african-racism-en_0.pdf [https://perma.cc/5B3Z-S6NQ].

57 Nunn, supra note Error: Reference source not found, at 778.


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
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 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 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

64. Id.


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.”

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.”

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. 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.” 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.”

---

69. Id.
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 [ICERD, prohibited discrimination occurs where there is an unjustifiable disparate impact on a racial or ethnic group, regardless of whether there is any intent to
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—a rate more than four times that of the overall population. In Kentucky, Tennessee, and Virginia, over twenty percent of Black adults were disenfranchised during the 2016 presidential election. While in the past two decades, several states have taken positive steps towards expanding the right to vote for those with felony convictions, many criminal justice and legal experts recommend that the United States end felony disenfranchisement altogether. To be in line with international norms as expressed in U.S.

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).


74 Id.

75 Id.


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
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.

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” 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 more closely align with the United States’ international commitments in civil and human rights treaties.


78 .Hathaway et al., supra note Error: Reference source not found, at 88.
A. Enforcing Non-self-executing Treaties Domestically

Generally, under the U.S. Constitution’s Supremacy Clause, Article II treaties trump contradictory state laws. 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). 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. 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 rights provided by a treaty—absent some other authority, like implementing legislation from Congress. 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.”


\[81\] See id. at 5.

\[82\] See RESTATMENT (FOURTH) OF FOREIGN RELATIONS LAW: TREATIES § 111, cmt. a (AM. LAW INST., Tentative Draft No. 2, Mar. 20, 2017) [hereinafter RESTATMENT (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 RESTATMENT (FOURTH), supra note Error: Reference source not found, § 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, RESTATMENT (FOURTH), supra note Error: Reference source not found, § 110, Reporters’ Note 3.
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, as is the entirety of CERD. Although both treaties remain binding on the United States as a matter of international law, neither is directly enforceable in federal or state court. Nevertheless, the 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.” Where a statute’s meaning is ambiguous, this doctrine

85. Status of Treaties: International Covenant on Civil and Political Rights, supra note Error: Reference source not found (“[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. 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 Error: Reference source not found; see supra note Error: Reference source not found and accompanying text.

87. RESTATEMENT (FOURTH), supra note Error: Reference source not found, § 110(1); see Rebecca Crootof, Note, Judicial Influence: Non-self-executing Treaties and the Charming Betsy Canon, 120 YALE L.J. 1784, 1791 (2011) (“While a treaty may have been 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, Judicial Influence].

88. 6 U.S. (2 Cranch) 64, 118 (1804); see also RESTATEMENT (THIRD), supra note Error: Reference source not found, § 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
“encourages judges to select an interpretation . . . that accords with the United States’ international obligations, including those expressed in non-self-executing treaties.”

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

---

89. Crootof, *Judicious Influence*, supra note [Error: Reference source not found], 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 non-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 Nations Protocol Relating to the Status of Refugees, which is non-self-executing but has been acceded to by the United States).


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).

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. 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. 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,” and held that the statute only applied where a ship was owned by a U.S. citizen. 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.’” Thus, the *Charming Betsy* was a Danish vessel through and through, and its trade with France “under a proper interpretation of the law was no offense at all.”

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*.” 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. In

---

94 *Charming Betsy*, 6 U.S. (2 Cranch) at 120-21.
95 *Id.* at 118.
96 *Id.* at 119.
98 *Id.* at 1351.
100 See Crootof, *Judicious Influence*, *supra* note Error: Reference source not found, at 1793 (citing United States v. Yousef, 323 F.3d 56, 92 (2d Cir. 2003)).
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 itself¹⁰³—the logic that underlies it applies to state statutes as well.¹⁰⁴ Ralph Steinhardt has suggested that

---


¹⁰² See Bradley, supra note Error: Reference source not found, 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”).

¹⁰⁴ Curtis Bradley found that, as of 1997, no reported state decisions had applied the _Charming Betsy_ canon. Bradley, supra note Error: Reference source not found, 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.
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. 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.”

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, whenever possible, strive to construe treaty provisions so as to harmonize them with corresponding constitutional and statutory provisions.” On the federal level, courts have taken up this mantle, 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. Therefore, individual states’ disenfranchisement policies are a fitting

---

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 Error: Reference source not found, 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.


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 Error: Reference source not found (“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.”).
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. 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 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.” 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. 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. 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

---

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 422, at 1793.


113 *Id.*
unconstitutional. 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 for remitting, granting, or commuting the same.”

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. Furthermore, it leaves the question of exactly what qualifies as “communicating . . . particulars of every case . . . with his reasons for remitting” open to interpretation. 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.\footnote{See Michael Wines, Virginia’s Governor Restores Voting Rights for 13,000 Ex-}{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.

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. 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. Her vote was rejected, and she was subsequently prosecuted. 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.” “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.”

At this point, in its quest to ascertain what civil consequences were appropriate in the wake of a criminal conviction, the court could have

---

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.
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." Ultimately, the court held that infamous crimes were synonymous with felonies and denied Griffin's claim. 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." 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. 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." The appellees, one Black and one white, brought suit after having been purged from the voter rolls for writing bad checks, a misdemeanor offense. The lower court found that this law, despite being facially neutral, "would not have been enacted in absence of the racially

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)).
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 Error: Reference source not found and accompanying text.
130 .Id.
discriminatory motivation” to disenfranchise Black voters and that it had a racially discriminatory impact almost from its inception.\textsuperscript{131} Finding a discriminatory purpose to have been a motivating factor for the enactment of this provision, the Supreme Court unanimously affirmed the ruling below that the Alabama law violated the Fourteenth Amendment.\textsuperscript{132}

Yet, in 1996, Alabama amended its constitution to read, “No person convicted of a felony involving moral turpitude . . . shall be qualified to vote,”\textsuperscript{133} inserting a provision that is a “direct successor”\textsuperscript{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,”\textsuperscript{135} a state of affairs widely criticized by voting rights experts and in court filings.\textsuperscript{136} This would have been an ideal opportunity

\textsuperscript{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)).

\textsuperscript{132} Id. at 233.

\textsuperscript{133} ALA. CONST. art. VIII, § 177(b).


\textsuperscript{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).

\textsuperscript{136} See, e.g., Complaint, supra note Error: Reference source not found, 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
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.

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

---


\(^{138}\)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
obvious opening for employing the *Charming Betsy* canon in the state has 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,\(^\text{139}\) *Charming Betsy* can be used in future cases to aid arguments that, where disenfranchisement occurs, 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,\(^\text{140}\) 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 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.\(^\text{141}\)

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.\(^\text{142}\) Indeed, in its 1920 decision in *Missouri v. Holland*,\(^\text{143}\) 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).\(^\text{144}\) This state of affairs may be problematic from a Tenth

---


\(^{143}\) 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 Error: Reference source not found, 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
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. 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 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.” 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.” 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.\textsuperscript{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 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.\textsuperscript{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.\textsuperscript{150} For example, in Thompson v. Oklahoma, a

\textsuperscript{148} Crootof, Judicious Influence, supra note Error: Reference source not found, at 1811.

\textsuperscript{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 Error: Reference source not found-Error: Reference source not found and accompanying text; see also Crootof, Treaties in Constitutional Interpretation, supra note Error: Reference source not found, at 7-8 (discussing the concurrence in greater depth).

\textsuperscript{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
case concerning 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. 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.” 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.”

---

Similarly, Justice Ginsburg alluded to international law commitments in her *Grutter v. Bollinger* concurrence. 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 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. Still, it should be noted that Justice Ginsburg did not explicitly employ *Charming Betsy*, and her reason for invoking international law is uncertain. 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.

In another set of juvenile death penalty cases, the Justices turned to the ICCPR. In his dissent in *Stanford v. Kentucky*, a case upholding the imposition of the death penalty on a defendant who committed crimes while just over seventeen, Justice Brennan cited “three leading

---

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 Error: Reference source not found, at 34-35 (examining the Thompson decision through a Charming Betsy lens).


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 Error: Reference source not found, 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 Error: Reference source not found, at 242 (explaining that in Justice Ginsburg’s concurrence, “[n]o real reason for the consultation with these two international treaties was given”).


human rights treaties ratified or signed by the United States explicitly prohibiting juvenile death penalties," including the ICCPR, as evidence of unconstitutionality.\textsuperscript{159} This line of reasoning appeared again in \textit{Roper v. Simmons},\textsuperscript{160} which overruled \textit{Stanford}. In \textit{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 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.’"\textsuperscript{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).\textsuperscript{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 \textit{Charming Betsy} canon.

\textbf{ii. \textit{Charming Betsy} and Section Two of the Fourteenth Amendment}

If the Court is beginning to create a constitutional \textit{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.\textsuperscript{163} For instance,

\begin{itemize}
  \item \textsuperscript{159} Id. at 389-90, 390 n.10 (Brennan, J., dissenting); see Glensy, \textit{supra} note Error: Reference source not found, at 239.
  \item \textsuperscript{160} 543 U.S. 551 (2005).
  \item \textsuperscript{161} Id. at 575.
  \item \textsuperscript{162} Id. at 576; see Crotof, Judicial Influence draft manuscript, \textit{supra} note Error: Reference source not found, at 32 (discussing the international law influences in Justice Kennedy’s opinion).
  \item \textsuperscript{163} Crotof, Judicial Influence draft manuscript, \textit{supra} note Error: Reference source not found, at 36-40; see Glensy, \textit{supra} note Error: Reference source not found, at 243-44; \textit{see also} Note, \textit{The Charming Betsy Canon}, \textit{supra} note Error: Reference source not found, at 1235 (suggesting that courts refine the \textit{Charming Betsy} canon in various ways, including “wholly abandon[ing] the \textit{Charming Betsy} canon where [customary international law] is concerned”).
\end{itemize}
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.\textsuperscript{164} Felony disenfranchisement, a policy that no longer aligns with modern human rights law, provides an opportunity for the Court to clarify its use of \textit{Charming Betsy} by openly deploying it with two Article II treaties. By applying \textit{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,”\textsuperscript{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.\textsuperscript{166} In \textit{Richardson v. Ramirez},\textsuperscript{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

\textsuperscript{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 \textit{Charming Betsy} canon that takes them into account in constitutional interpretation would have many benefits. Crootof, Judicious Influence draft manuscript, supra note Error: Reference source not found, at 36-40. For more on customary international law, see RESTATEMENT (THIRD), supra note Error: Reference source not found, § 102(2), describing it as a type of international law that “results from a general and consistent practice of states followed by them from a sense of legal obligation”; and Ernest A. Young, \textit{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.”

\textsuperscript{165} U.S. CONST. amend. XIV, § 2.

\textsuperscript{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 Error: Reference source not found-Error: Reference source not found, supra, and accompanying text. As a result, the Court would not have considered the language of either treaty when deciding this case.

\textsuperscript{167} 418 U.S. 24 (1974).
“except for participation in rebellion, or other crime” language of Section Two of the same Amendment. After a review of the meager legislative history on the meaning of this provision, the majority adopted a “plain reading” of Section Two as giving an “affirmative sanction” for felony disenfranchisement and concluded that barring those with felony convictions from voting was consistent with the Court’s previous jurisprudence.

However, a plain reading of Section Two does not necessarily justify blanket disenfranchisement. “[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,” and what little relevant history the opinion was able to cite was read differently by Justice Marshall in dissent. 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. 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

---

168 Id. at 43.
169 Id. at 45.
170 Id. at 54.
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 Error: Reference source not found, 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.
The 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.\footnote{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,\footnote{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)).} rather, it was added to ensure that formerly enslaved people in the South (likely Republican sympathizers) \textit{were enfranchised} at a time when the Republicans were threatened by an influx of increased southern congressional representation in the wake of abolition.\footnote{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).}

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[i]es . . . 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.\footnote{U.S. CONST. amend. XIV, § 2.} 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.”\footnote{Michael Kent Curtis, The Fourteenth Amendment: Recalling What the Court Forgot, 56 DRAKE L. REV. 911, 957 (2008).} 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.”\footnote{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].} To date, the Reduction in Representation Clause has never
been enforced,\textsuperscript{183} but, paradoxically, its language has been used to justify exactly what the clause as a whole appears to prohibit.\textsuperscript{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."\textsuperscript{185} The Court can and should employ \textit{Charming Betsy} in future disenfranchisement cases to vindicate Justice Marshall's dissent. Even if one reads the Fourteenth Amendment as sanctioning disenfranchisement for \textit{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.

\textbf{E. Criticisms of Charming Betsy as an Interpretive Device}

Some scholars have criticized the \textit{Charming Betsy} canon as “displac[ing] domestic lawmaking processes,”\textsuperscript{186} introducing a “counter-majoritarian” element into judicial decision-making,\textsuperscript{187} and “allow[ing] the

\textsuperscript{183}Curtis, supra note Error: Reference source not found, 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").

\textsuperscript{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.").

\textsuperscript{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").

\textsuperscript{186}John O. McGinnis & Ilya Somin, Democracy and International Human Rights Law, 84 NOTRE DAME L. REV. 1739, 1748 (2009); see Crotof, Judicious Influence draft manuscript, supra note Error: Reference source not found, at 42.

\textsuperscript{187}Steinhardt, supra note Error: Reference source not found, at 1183 (citing \textit{ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH} 16 (1962)).
courts to usurp a political function.” 188 They worry that Charming Betsy results in courts incorporating foreign laws not subject to democratic approval into 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

188 Id. at 1187.
189 For a more extensive discussion of critiques of the Charming Betsy canon, see Crootof, Judicious Influence, supra note Error: Reference source not found, at 1815-18.
190 Alford, supra note Error: Reference source not found, at 1340-41.
191 See, e.g., Crootof, supra note Error: Reference source not found, at 3 (discussing arguments against Charming Betsy’s use in constitutional interpretation).
192 Alford, supra note Error: Reference source not found, at 1341.
disapproval by withdrawing from the agreement.\textsuperscript{193} Treaties that remain in force are ones by which the United States consents to be bound.

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, \textit{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.\textsuperscript{194} The essence of \textit{Charming Betsy} is maintaining domestic consistency with international law that is binding on the United States where ambiguity exists—acting as a “braking mechanism”\textsuperscript{195}—not seeking to align U.S. law with the norms of other nations for its own sake.\textsuperscript{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,\textsuperscript{197} the specter of

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

\textsuperscript{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 Error: Reference source not found, at 3.

\textsuperscript{195}Bradley, supra note Error: Reference source not found, at 532.

\textsuperscript{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 \textit{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.

\textsuperscript{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).
domestic racial discrimination loomed ever-present in the background.\textsuperscript{198} By the 1950s, fear of human rights agreements' potential to challenge Jim Crow laws and racial segregation ran rampant.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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 \textit{Charming Betsy} canon, these treaties stand ready to be used as a tool to challenge blanket disenfranchisement policies and affirm the United States' commitment to equality. As Judge

\textsuperscript{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." \textit{Id.} at 100.


\textsuperscript{200} \textit{Id.} at 1303.

\textsuperscript{201} \textit{Id.} at 1303-04.

\textsuperscript{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, \textit{Locked Out: Felon Disenfranchisement and American Democracy} 221 (2006) (citing Alec Ewald, \textit{Punishing at the Polls: The Case Against Disenfranchising Citizens with Felony Convictions} 34 (2000)).
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.” 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.

---