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Rethinking Treaty Interpretation

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How should the Judiciary structure its reasoning in determining the amount of deference it gives to executive-branch treaty interpretations? This question is evermore crucial as international agreements, notably those related to the "war on terror," increasingly impact substantive areas that have been historically considered solely domestic. This Article normatively assesses and ultimately rejects established and recent scholarly approaches to treaty-interpretation deference. For nearly half a century, courts have relied on a demonstratively unprincipled and impracticable doctrine of giving executive interpretations "great weight." Contemporary scholarly attempts to formulate more disciplined approaches to deference have applied the administrative law doctrine of Chevron*-style deference and its two-step inquiry of "ambiguity" and "reasonableness," resulting in the theoretical and doctrinal triumph of a system of "fixed-point" deference. This Article argues that the particularities of treaty formation and enforcement, especially their hybrid political–legal features, demand a more flexible account of deference than has been delineated thus far. The currently in vogue fixed-point theories of deference should cede to a system that produces variable deference levels while maximizing each Branch's institutional strengths.*

I. Introduction

How should the Judiciary structure its reasoning in determining appropriate deference to executive-branch treaty interpretations? This is a crucial question for the rule of law in U.S. foreign relations, for constitutional law, and for the creation of a calibrated approach to gauging and balancing principles of separation of powers.

The current doctrine is obtuse. The guiding principle is that the Judiciary should give "great weight" to views of the Executive. No one knows what this standard means, and the Judiciary has expended little effort in clarifying its position. Academic commentary is varied and ultimately unhelpful; some commentators argue that the standard means nothing while others argue that it provides dispositive effect. Neither view provides a compelling justification for any reasoning underlying the standard's vagueness or erratic application.

Devising a principled system of deference can be broadly contemplated as a choice among three options: absolute deference, no deference, or a coherent system operating somewhere between these two extremes. The systems of deference operating at the extremes, no deference and total deference, are both unfeasible and constitutionally suspect. In between these two extremes is the search for a principled standard of deference that harnesses the institutional virtues of all governmental branches and correspondingly minimizes their institutional weaknesses. There are two leading candidates for such a system: *Chevron*[1]-style deference and *Skidmore*[2]-style deference. Recent academic theory in foreign affairs greatly favors *Chevron*-style deference while dismissing *Skidmore* as *Chevron*'s antiquated predecessor. Ultimately, adopting *Chevron*-style deference would fail to solve many of the problems of the current doctrine while giving rise to new headaches. *Chevron*-style deference is too deferential in some cases and insufficiently deferential in others. It operates on an artificial plane that is not theoretically cogent in treaty interpretation and does not account for the peculiarities of treaty law that may compromise its effectiveness.

Skidmore-style deference enables application of a flexible scale of deference that is more appropriate to the particularities of treaty law and the institutional balance that must be struck in a thicket of constitutional questions. A *Skidmore*-style account of deference would assess: (1) whether the treaty regulates executive power; (2) the type of international agreement being interpreted; (3) whether the Executive possesses relevant expertise; and (4) the process of enforcement and consistency (or inconsistency) of the Executive's position.

The aim of this Article is to examine the doctrinal difficulties present in contemporary treaty interpretation and articulate a theory of a principled

1. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
2. *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

form of deference, inspired by the factors described in *Skidmore*, that addresses the characteristics of treaties and balances principles of separation of powers and executive discretion. The argument unfolds as follows. Part I highlights the urgent need for a coherent and cogent system of treaty-interpretation development demonstrated by U.S. policy in the "war on terror," as well as the expanding realm of regulation through international instruments. Part II discusses the infirmities present in the current doctrine of great weight deference and examines the historical and constitutional foundation of the doctrine. Part III provides a normative assessment of various proposed models and argues that a more flexible form of deference inspired by the factors outlined in *Skidmore* and its progeny in the administrative law context represents a theoretically sound choice that addresses the latent concerns animating the failure of great weight deference while providing a structured form of deference well suited for application in treaty interpretation.

II. The Importance of the Deference Question

The question of the extent to which the Judiciary should defer to executive interpretations in discerning the meaning of treaties has largely been overlooked in favor of a broader assessment of the role of deference in foreign affairs generally.[3] As a result there has been scant academic attention and divergent judicial application of treaty law, an area of law that has grown increasingly important and pervasive over the past fifty years.

The meaning of law is inextricably tied to its interpretation. At its core, deference is the ceding of one power in favor of another. As many scholars have noted, in the twentieth century courts have granted more deference to executive pronouncements in foreign affairs than ever before.[4] Such increased deference is appropriate in some cases but inappropriate in others.

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3. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 132 (2d ed. 1996) (highlighting the deference courts give to the statutory interpretations of the political branches of government when evaluating matters of foreign affairs); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650 (2000) (noting that courts have generally employed varying degrees of deference to the Executive Branch regarding foreign-affairs matters in order to avoid the uncomfortable choice of either applying the law to limit the international power of the Executive Branch or abdicating their judicial function); Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 805 (1989) (outlining the spectrum of judicial prerogatives when deciding matters regarding foreign affairs, from deferring completely to the Executive Branch's position to disregarding the position of the Executive entirely).

4. *See, e.g.*, David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1442–45 (1999) (discussing the increase in judicial deference during the twentieth century); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1741–52 (2007) (outlining the development of the U.S. Supreme Court's deference doctrine); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999) (documenting the "triumph of 'executive discretion' in the constitutional regime of foreign relations").

To date, the Judiciary has failed to provide any clarity in its doctrine for discerning between the two.[5]

As the U.S. population and its government have grown and policy questions have become more complex and persistent, law has not become clearer. The interpretation of all types of laws and the behaviors they permit and prohibit dictates who is punished, who is granted relief, and how individuals and institutions must behave.

A. The Proliferation of Treaties in the Domestic Sphere

The importance of treaty interpretation has been brought to the fore due to the increasingly globally integrated nature of politics, economics, and governance, as demonstrated by the proliferation of treaties,[6] as well as the content of U.S. policy in the ongoing "war on terror."

The latter half of the twentieth century and the beginning of the twenty-first have demonstrated remarkable growth in international connectedness, particularly on political and economic fronts. The result has been a dramatic proliferation of international treaties, both bilateral and multilateral, purporting to govern such diverse subject matters as state practice in warfare (e.g., the Geneva Conventions), taxation (typically bilateral treaties), government corruption (e.g., the Convention Against Corruption), civil and political rights (e.g., the International Covenant on Civil and Political Rights), criminal prosecution and civil litigation cooperation (e.g., the Mutual Legal Assistance Treaties), and many others.[7]

As the substantive field covered by treaties grows, the importance of treaties as instruments of domestic law is enhanced. Concurrently, the Executive Branch has gathered increasing power both domestically and internationally.[8] At the time the Supreme Court decided *Missouri v. Holland*,[9] holding that the federal government may regulate behavior it otherwise could not under the Tenth Amendment,[10] the idea of the federal

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5. *See* Chesney, *supra* note 4, at 1733 ("There is no question that a deference doctrine of some kind currently exists with respect to executive-branch treaty interpretations. But the precise nature of that doctrine, its triggering conditions, and the obligations it imposes on judges are far from clear.").

6. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON NOVEMBER 1, 2007 (2007), *available at* http://www.state.gov/documents/treaties/83046.pdf (listing over 10,000 treaties and executive agreements as "in force" within U.S. law).

7. *See generally, e.g.*, United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/4 (Oct. 31, 2003); International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

8. *See generally* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY, at xv, xv–xvii, 420–21 (First Mariner Books ed. 2004) (observing a long-term trend toward greater executive control over "the war-making power, the power of the purse, and the power of oversight and investigation").

9. 252 U.S. 416 (1920).

10. *Id.* at 435.

government regulating purely domestic behavior through an international treaty must have seemed an absurd possibility. The same cannot be said today.

Public debate regarding U.S. policy following the terrorist attacks of 9/11 has focused on the propriety of detaining terrorist suspects without trial, appropriate methods of interrogation, standards in targeting and methods of warfare, and the use of military commissions. All of these subjects are instrumental aspects of international humanitarian law and, in particular, the Geneva Conventions, a treaty to which the United States has been a signatory for over fifty years.[11]

B. The U.S. "War on Terror"

One of the essential questions since the beginning of the "war on terror" has been the extent to which U.S. treaties, especially the Geneva Conventions, have influenced, restricted, and governed federal action in pursuing terrorist suspects. The answer to this question largely begins with a determination of which branch of government may act as the arbiter of the meaning of treaties. Addressing the question of who interprets treaties necessarily affects other major questions of treaty enforcement, such as their role in domestic law and the self-executing or non-self-executing nature of individual treaties. Treaties possess an additional layer of politics not present in statutes: the relationship of the United States, as a singular nation, with foreign states and their citizens.[12] This imbues treaty interpretation with the sensitive political machinations of diplomatic policy and an aura that accountability to other foreign states and citizens as parties is lessened through the very nature of their outsider status.

The U.S. Supreme Court's decision in *Hamdan v. Rumsfeld*,[13] the preeminent case thus far in the post-9/11 world, is saturated with concern over the role of courts as the final arbiters of the meaning of treaties. However, *Hamdan*'s conclusion poses more questions than it resolves.

1. Hamdan v. Rumsfeld.—*Hamdan v. Rumsfeld* concerned an appeal to the Supreme Court from an individual being detained as an alleged enemy combatant at the U.S. Naval Station at Guantánamo Bay, Cuba.[14] Hamdan was a Yemeni national accused of acting against the law of war, designated for commission in accordance with a November 13, 2001 Executive Order that authorized the prosecution of laws of war in the "war on terror" through

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11. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

12. *See* John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 862 (2001) (book review) (explaining that treaties have reciprocal international and legal obligations).

13. 126 S. Ct. 2749 (2006).

14. *Id.* at 2761.

the creation of military commissions.[15] The specific purpose of the commissions was to provide a venue for the trial of individuals associated with al Qaeda or otherwise engaged in terrorist activities.[16] Hamdan, like many other detainees at the base, filed a writ of habeas corpus challenging his detention and the procedures of the military commissions established by the President and promulgated through regulations by the Department of Defense.[17] This habeas challenge, like that of nearly all habeas challenges emanating from Guantánamo Bay, included a series of claims under the Geneva Conventions.[18] One claim in particular was that Hamdan's detention was in violation of Common Article 3 of the Geneva Conventions, which provides:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum . . . the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[19]

Prior to Hamdan's habeas challenge, the President issued a memorandum finding that individuals detained as affiliated with al Qaeda or the Taliban were not entitled to protections under the Geneva Conventions,[20] a cornerstone of international humanitarian law.[21] The memorandum was specifically applied to Common Article 3 of the Geneva Conventions. The President stated, "[C]ommon Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope . . . ."[22]

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15. *Id.* at 2759.

16. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

17. *Hamdan*, 126 S. Ct. at 2759.

18. *Id.* at 2762.

19. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 11, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135. The Article is a "common" article as it is present in all four of the Geneva Conventions. *See id.*; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 11, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces and in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

20. Memorandum from President George W. Bush to the Vice President et al. (Feb. 7, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134–35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS].

21. *See* Susan L. Turley, Note, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEXAS L. REV. 139, 141 (1994) ("[T]he 1949 Geneva Conventions are the most well known and oft-quoted of the laws of war . . . .").

22. Memorandum from President George W. Bush to the Vice President et al., *supra* note 20, at 134–35.

In support of the President's memorandum finding that the Geneva Conventions did not cover al Qaeda and Taliban members, the Executive asserted that the conflict in Afghanistan was "international [in] character" and, as such, not encompassed by Common Article 3.[23] This view was consistent with an explanation of the coverage of Common Article 3 provided by the Office of Legal Counsel (OLC) to the President shortly following September 11th.[24] In a memorandum from OLC to the President and the General Counsel of the Department of Defense, OLC implies that Common Article 3's application to "armed conflict not of an international character" could be summarized geographically to mean "a war that does not involve cross border attacks."[25] The memorandum continues:

> Common Article 3's text provides substantial reason to think that it refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory. First, the text of the provision refers specifically to an armed conflict that a) is not of an international character, and b) occurs in the territory of a state party to the Convention. It does not sweep in all armed conflicts, nor does it address a gap left by common Article 2 for international armed conflicts that involve non-State entities (such as an international terrorist organization) as parties to the conflict. Further, common Article 3 addresses only non-international conflicts that occur within the territory of a single state party, again, like a civil war.[26]

Discerning the meaning and coverage of Common Article 3 played a central role in the *Hamdan* decision at the trial court and in subsequent appeals. The U.S. District Court ruled on the Geneva Conventions question in favor of Hamdan, explicitly holding that the Conventions bequeathed individual rights and that such rights precluded Hamdan's trial in front of the military commissions constructed under the President's order.[27] The D.C. Circuit reversed, holding squarely that the Third Geneva Convention (upon which Hamdan relied) "does not confer upon Hamdan a right to enforce its provisions in court."[28] In making this determination, the D.C. Circuit cited

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23. *Id.* at 135, 134–35 (quoting Common Article 3); *see* sources cited *supra* note 19.

24. *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 22, 2002), *in* THE TORTURE PAPERS, *supra* note 20, at 81, 90 (explaining that the conflict with al Qaeda is of "an international character" because "Al Qaeda operates in many countries and carried out a massive international attack on the United States on September 11, 2001").

25. *Id.* at 86.

26. *Id.*

27. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 160–62 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

28. Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749.

the proposition that the interpretation of the Executive in the "construction and application of treaty provisions is entitled to 'great weight.'"[29]

By the time Hamdan reached the Supreme Court, the implications of the Court's decision were enormous. The Supreme Court faced an objectively reasonable construction of a treaty in wartime. The Court's determination of the coverage of that treaty could impact U.S. wartime policy dramatically.

On June 29, 2006, the Supreme Court reversed the D.C. Circuit's decision and held that the President did not possess the requisite authority to create a military-commission structure as had been constructed.[30] The Court based this holding, in large part, on an interpretation of Common Article 3 of the Geneva Conventions directly in conflict with the Executive's proffered view.[31] Justice Stevens, writing for the majority, wrote flatly that the government's reasoning that underpinned its interpretation of the "international character" of the conflict with al Qaeda and the Taliban was "erroneous."[32] Instead, the majority held that the application to a conflict "not of an international character" refers to a conflict between a state and a nonstate entity.[33] The great weight standard relied upon by the D.C. Circuit as a central aspect of its decision is nowhere to be found.

The absence of the standard was not lost on the dissent. Justice Thomas, in a dissent joined in part by Justices Alito and Scalia, argued that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[34] Justice Thomas continued:

> [T]he Court, without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision ("not of an international character") is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.[35]

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29. *Id.* at 41 (quoting United States v. Stuart, 489 U.S. 353, 369 (1989)).

30. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2763 (2006).

31. *See id.* at 2796 ("Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." (internal quotation marks omitted)).

32. *Id.* at 2795.

33. *See id.* at 2796 ("Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not).").

34. *Id.* at 2846 (Thomas, J., dissenting) (quoting *Stuart*, 489 U.S. at 369 and Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982)).

35. *Id.* The dissent then concluded that, even if applicable, Common Article 3 is already satisfied under the President's military order and accompanying regulations. *See id.* at 2847 ("In any event, Hamdan's military commission complies with the requirements of Common Article 3. It is plainly 'regularly constituted' because such commissions have been employed throughout our history to try unlawful combatants for crimes against the law of war.").

In the view of the dissent, the case for deference was particularly strong in this case where the Executive was "acting pursuant to his constitutional authority as Commander in Chief . . . ."[36] In other words, the pull of great weight deference to judicial acquiescence should be heightened in the context of war.

2. The Military Commissions Act.—The lesson of *Hamdan* is incomplete without discussion of the statutory regime it wrought, the Military Commissions Act (MCA) of 2006.[37] While the majority opinion invalidated the President's system of military commissions, Justice Breyer's concurrence noted that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."[38]

The President requested and received explicit congressional authorization for a military-commission system for trying alleged enemy combatants for crimes against the law of war through the MCA.[39]

In addition to creating the infrastructure for a new program of military commissions and amending the habeas jurisdiction available to detainees, the MCA addresses the Geneva Convention interpretive issue by directly delegating to the President the power "to interpret the meaning and application of the Geneva Conventions."[40]

The President utilized this power explicitly in a new executive order outlining his interpretation of Common Article 3 as it relates to the ongoing detention and interrogation of individuals by the Central Intelligence Agency.[41]

III. The Current Doctrine Is Insufficient

The current judicial doctrine of deference to executive treaty interpretations is entirely unhelpful. The standard, originally articulated by Justice Black in *Kolovrat v. Oregon*,[42] is that while "courts interpret treaties for themselves," it is important that "the meaning given [to treaties] by the departments of government particularly charged with their negotiation and

36. *Id.*

37. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

38. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

39. *See* Military Commissions Act § 3(a)(1) (establishing procedures governing the use of military commissions to try alien unlawful enemy combatants violating the law of war and engaging in hostilities against the United States).

40. *Id.* § 6(a)(3)(A). *But see* 152 CONG. REC. S10,399 (daily ed. Sept. 28, 2006) (statement of Sen. McCain, with which Sen. Warner concurred) (arguing that with reference to the President's authority to engage in grave breaches of the Geneva Conventions, "Nothing in this bill gives the President the authority to modify the conventions or our obligations under those treaties").

41. *See* Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

42. 366 U.S. 187 (1961).

enforcement is given great weight."[43] The intrinsic tension present in the preeminent case creating the modern judicial doctrine of treaty-interpretation deference has only been heightened by subsequent judicial practice.

Courts have often stated that the views of the Executive Branch on the meaning of a treaty in question are "not conclusive."[44] The empirical data on the matter show otherwise. In his study of Supreme Court treaty-interpretation cases between 1986 and 1999, Professor David Bederman concluded that of the twelve cases the Court faced, "in all but one the holding followed the express wishes of the executive branch of the government."[45] One commentator has suggested that the question of the degree of deference to the Executive in interpreting (and thus enforcing) treaties is dependent on "who is accused of being the party in breach and the perceived competence of the judiciary to offer a remedy."[46]

A. The Doctrine of Treaty Interpretation at the Founding: Little Deference

Is the great weight standard derived from any generally understood conception of constitutional intent or meaning? Neither the constitutional text nor early case law indicates any such derivation.[47] There is remarkably little text in the Constitution detailing the division of powers between the Branches in foreign affairs. Article II governs the creation of treaties through submission by the Executive and supermajority ratification by the Senate.[48] Article VI, the Supremacy Clause, establishes treaties as the "supreme Law of the Land" alongside the Constitution and the laws of the United States.[49] Article III provides U.S. domestic courts with jurisdiction over their adjudication.[50]

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43. *Id.* at 194.

44. United States v. Stuart, 489 U.S. 353, 369 (1989) (quoting Sumitomo Shoji Am., Inc., v. Avagliano, 457 U.S. 176, 184–85 (1982)).

45. Bederman, *supra* note 4, at 1465 (emphasis omitted).

46. Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 573 (2007).

47. Professors Sloss and Yoo offer conflicting views of the originalist view of treaty-interpretation deference. *Compare* David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 506–07 (2007) (surveying judicial decisions of treaty construction in the first fifty years of the Supreme Court and concluding that the Court at this time period utilized a no-deference standard toward executive interpretations of treaties), *with* John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002) (using, *inter alia*, a textual and structural analysis of the Vesting Clause to support the proposition that an originalist understanding of the Foreign Affairs power would place the task of treaty interpretation within the Executive Branch rather than the Judiciary).

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

49. *See id.* art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

50. *See id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .").

The Federalist Papers also offer little guidance in unearthing a precise division of power over the function and execution of treaties as supreme federal law. In *Federalist No. 22*, Alexander Hamilton asserts, "The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."[51] Hamilton also suggested, "The power in question [the treaty power] seems . . . to form a distinct department, and to belong, properly, neither to the legislative nor to the executive."[52] Rather, instead of treaties representing an enactment of new laws, the objects of treaties:

> are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. . . . The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions . . . .[53]

The early American Supreme Court did not appear to possess the theoretical conflict typified by contemporary academia and courts. On the one hand, the Court's famous decision in *Marbury v. Madison*[54] also provided a basis for broad discretion to the Executive in foreign affairs by noting:

> [T]he President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The acts of . . . an officer [appointed by the President], as an officer, can never be examinable by the courts.[55]

One might think that the making of treaty interpretations within the context of the exercise of presidential powers in foreign affairs, and national security in particular, might be exactly the type of "political powers" that would require great deference or even abstention. However, other cases decided by the Supreme Court soon after the Founding indicate that the Court granted the Executive little to no deference in matters of treaty interpretation.[56] During the first fifty years of the Republic, the Court faced nineteen cases in which the U.S. government was a party and proffered an interpretation of a treaty. The government's proffered interpretation was accepted in only three of those cases.[57]

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51. THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

52. THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 51, at 451.

53. *Id.* at 450–51.

54. 5 U.S. (1 Cranch) 137 (1803).

55. *Id.* at 165–66.

56. *See* Sloss, *supra* note 47, at 506–08, 506 & n.59 (listing and discussing early cases decided by the Supreme Court).

57. *Id.*

The reasoning behind the early American Court's decisions betrays a view of the interpretation of treaties as a conclusively judicial function. *The Amiable Isabella*,[58] a case concerning a Spanish ship captured during the War of 1812, presented a government interpretation of a treaty between the United States and Spain.[59] The government argued that the ship was not immune from capture.[60] This position led to substantial commentary in the majority and the dissent. Justice Story wrote that the core of the controversy was "the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our Government could not violate without disgrace, and which this Court could not disregard without betraying its duty."[61] The dissent concurred in this aspect of the judgment, finding that "the views of the administration . . . are wholly out of the question in this Court" and that it was of no matter "whether [the Court's interpretation of the treaty] chime[s] in with the views of the Government or not."[62]

Founding Era courts did not provide deference to the Executive even in questions directly implicating national security issues. In *United States v. Laverty*,[63] the United States had detained individuals believed to be enemy aliens in Louisiana.[64] The treaty question at issue was whether the admission of Louisiana as a state implicitly granted citizenship to those residing in the territory prior to statehood.[65] In determining the answer to this question, the court referred to the treaty with France that provided the United States with the Louisiana Territory.[66] The government argued that the indigenous people of Louisiana (Creoles) were not citizens due to noncompliance with other citizenship regulations.[67] The majority decision in the case reviewed the treaty, which required admission of the native people "as soon as possible" as citizens, and found that a contrary reading would render the United States in violation of the treaty.[68] The finding implicitly rejected the government's preferred reading of the text.

B. Treaty Interpretation in the Contemporary Court: Near-Total Deference

If not originalism, what explains the move from the extraordinarily limited deference of treaty interpretation during the nation's infancy to the great weight deference practices subsequent to the *Kolovrat* decision in

58. 19 U.S. (6 Wheat.) 1 (1821).
59. *Id.* at 6.
60. *Id.* at 14.
61. *Id.* at 68.
62. *Id.* at 92 (Johnson, J., dissenting).
63. 26 F. Cas. 875 (D. La. 1812) (No. 15569A).
64. *Id.* at 875.
65. *Id.* at 876.
66. *See id.* (discussing the Treaty for the Cession of Louisiana, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200).
67. *Id.* at 876–77.
68. *Id.* at 876, 876–77.

1961? The implicit justification appears institutional in origin, girded by the belief that institutional benefits of the Executive in executing treaties outweigh any advantages of, and would thus be countermanded by, judicial interference in the ability of the federal government to act swiftly and "speak in 'one voice'" in foreign affairs.[69]

The case law of treaty-interpretation deference following *Kolovrat* sheds little light on a structured application of the great weight standard. Empirically, courts invoking the standard have routinely acquiesced to the interpretation advocated by the Executive.[70] In this sense, the great weight standard has portended, if not analytically justified, a victory for the executive view, despite judicial insistence that it maintains an independent role. The background of this determination seems to indicate several possible rationales for this recent deference: (1) a concern over judicial competence in matters of foreign affairs; (2) the enormous value placed in the ability of the Executive to be flexible in foreign affairs;[71] and (3) the increasing consolidation of power into the Executive Branch and away from both the Legislative and Judicial Branches.[72]

The emphasis on the role of the Executive in foreign affairs has not rendered the great weight doctrine any clearer. In the twenty-odd years following the decision in *Kolovrat*, the Court would assess the Executive's interpretation within the framework of its previous pronouncements on the subject, as well as for its consistency with the plain meaning of the text. The twin principles in tension in *Kolovrat*—the judicial power to construe treaties set against the great weight given to executive determinations—slipped dramatically to favor the Executive in the latter part of the twentieth century.[73]

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69. Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1202 (2007); *see id.* (reviewing courts' reasons for giving deference to the Executive in foreign-relations cases and concluding that "the underlying justifications are often less textual than functional, based on traditional practices and understandings" of institutional competency).

70. Professor Robert Chesney has conducted an extensive study of cases demonstrating the sometimes inconsistent, but often highly deferential, application of great weight deference by the courts. *See* Chesney, *supra* note 4, at 1775 (listing cases from 1984 through 2005 in which courts engaged the deference doctrine and indicating a high frequency of cases invoking great weight in which the court adopted the Executive's treaty interpretation). However, the decision of whether or not to invoke the standard itself may be less of an analytic exercise than results justification. Courts facing treaty-interpretation questions that do not invoke the great weight standard are far more likely to interpret a treaty contrary to the Executive's position. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795–97 (2006) (holding that, contrary to the Executive's assertions, Common Article 3 of the Geneva Conventions applies to an alien captured in connection with the United States' conflict with al Qaeda).

71. Posner & Sunstein, *supra* note 69, at 1202.

72. John S. Baker, Jr., *Competing Paradigms of Constitutional Power in "The War on Terrorism,"* 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 5–6 (2005).

73. Such substantive limitations were fatally compromised following the Court's decision in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). In *Alvarez-Machain*, a defendant abducted from Mexico and brought to the United States to face criminal charges asserted that the U.S. action was in violation of the U.S. extradition treaty with Mexico, which did not authorize removals absent Mexico's consent. *Id.* at 657–58. For another example of great weight treaty interpretation by the

In addition to the large number of cases in which the Court actually grants deference to executive interpretations, the Court's nominal forays into explaining the great weight standard have tended toward extreme deference. The Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*[74] demonstrated the Court's willingness to defer to an executive-branch interpretation even in the face of inconsistent interpretive practices within the Executive.[75] The Court similarly proclaimed the importance of great weight deference even in circumstances where the treaty text at issue was not considered ambiguous.[76]

Under cases like *Sumitomo* and *Stuart*, the Court's doctrine seemed to establish the concept that great weight, in its most simplistic form, meant that the executive interpretation triumphs. This simplicity was undermined by subsequent cases ignoring[77]—and then undermining[78]—the great weight standard as dependent upon the reasonableness of the Executive's interpretation.

C. *The Conundrum of Doctrine Without Theory*

The development of the case law over the last fifty years indicates that the driving force behind the Court's inconsistent approach to deference in treaty interpretation is based on institutional concerns rather than any developed theory. In essence, the Court engages in its own interpretive method when (1) the question presented is amenable to textual construction and (2) the contemplated effects of a decision contrary to the Executive's interpretation would not be serious.

When the Court believes that it is well equipped to settle a properly presented question of textual construction, it engages in interpretation alone. When enough concerns arise about the potential foreign effects of an interpretive decision, it defers.[79]

Rehnquist Court, see *Itel Containers International Corp. v. Huddleston*, 507 U.S. 60 (1993), which rejected the petitioner's challenge to the Executive's proffered treaty interpretation as inconsistent with earlier practice.

74. 457 U.S. 176 (1982).

75. *See id.* at 184 n.10, 184–85 (demonstrating the Court's deference to the State Department's treaty interpretation even though it was initially "ambiguous").

76. *See* United States v. Stuart, 489 U.S. 353, 366–70 (1989) (relying on an Internal Revenue Service interpretation of a treaty despite previously finding that the meaning of the treaty was plain on its face).

77. *See* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 133, 133–35 (1989) (rejecting the Executive's argument that a "drafting error" accounted for a discrepancy between the correct interpretation of a treaty and its clear text).

78. *See* El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

79. *See* Wu, *supra* note 46, at 573 (making a descriptive claim that judicial enforcement of treaties "turns mainly on who is accused of being the party in breach and the perceived competence of the judiciary to offer a remedy").

This tension is consistent with the conceptual difficulty posed by treaties as both political and legal instruments. Courts are institutionally designed for the practical application of legal norms but ill suited to balancing political interests, especially when those political interests are foreign in nature. Treaties, intrinsically both political and legal, thus pose a special challenge to courts in disentangling those competing threads.

Judicial deference in foreign affairs outside the treaty context is infused with the hesitance to impact foreign affairs. This hesitance has manifested itself in the creation of a variety of nonjusticiability and abstention doctrines.[80]

Nonjusticiability and abstention doctrines have been controversial as acts of judicial modesty.[81] Justice Douglas criticized excessive deference to the Executive as rendering the Judiciary "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'."[82] Ironically, the indeterminate nature of the Court's deference doctrines has turned the current critique into one in which the Judiciary, rather than the Executive, makes the final decision as to each petitioner's "chestnuts."[83]

Whatever the motive, case law throughout all divisions of the Judiciary demonstrates quite convincingly that judges genuinely struggle with a concern that foreign-affairs questions, particularly treaty questions, are "different" from other law.[84] Advocates of broad deference to the political branches in foreign affairs generally, and treaties in particular, have emphasized this concern in their writings.[85]

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80. Among these are the act-of-state doctrine and the political-question doctrine (largely dead within the context of domestic affairs).

81. *See* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1396 (1999) (arguing that courts are not qualified to engage in assessing the effects of judgments on foreign affairs).

82. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring).

83. *See* Goldsmith, *supra* note 81, at 1422 (characterizing this justification as indicative of the "lawlessness" of the foreign-relations-effects test, whether applied by the Executive or the Judiciary).

84. *See, e.g.*, Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . ."); Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 114 (2d Cir. 2001) ("When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations policy that are assigned to—and better handled by—the political branches of government.").

85. *See* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 130–34 (2000) (discussing the arguments against an active judicial role in foreign affairs, particularly that courts are institutionally incompetent in such matters and that sufficient political safeguards already exist); Yoo, *supra* note 47, at 1315 (arguing that considering the treaty power as another type of legislative power would

The inverse of concern over judicial *in*competence is a high valuation of the institutional capacity of the Executive Branch to act swiftly in times of crisis and alter foreign-affairs practice in response to changing circumstances. This value is typically encompassed in praise of retaining the Executive's "flexibility" in foreign affairs.[86]

Executive flexibility, however, is not an exclusive goal, even in times of war or national emergency. It is one value among many institutional values enshrined in the Constitution. A coherent separation-of-powers system requires recognizing and optimizing institutional powers to determine and provide meaning to the role and interpretation of treaties in U.S. law.

IV. Creating a Theory of Operation

There are three basic approaches to providing structure to the judicial doctrine of deference: no deference, total deference, or an intermediate standard. Each of these approaches is limited in elasticity. Total- and no-deference approaches require all circumstances of treaty interpretation to fall within tightly bound limits. *Chevron*-style deference, a popular intermediate option, recognizes a limited need for elasticity in deference but translates imperfectly from the strictures of its administrative context, due to its genesis as an instrument of congressional delegation and the procedural requirements that accompany the logic of this genesis.

Fundamentally, deference involves a willingness to acquiesce one's power in favor of another and an assessment of the wisdom of doing so. Wisely providing deference requires recognizing and balancing the particularities of the genre in which deference is requested and the institutional advantages and concerns that may counsel the exercise of deference.

The heightened academic concern of preserving executive flexibility may reflect current world events. Substantial executive discretion is of value in conducting foreign relations. However, the focus on this institutional value of the Executive should not obscure other institutional values inherent to the Judiciary that act to sharpen, and thus enhance, rule-of-law principles central to constitutional precepts of separation of powers.

This Part provides a brief assessment of institutional values at stake in both the Executive and Judicial Branches and then examines the prominent proposals of deference along the spectrum, from total deference to no deference. Eliminating the options at the extremes, which are both legally suspect and likely to be inappropriate in most circumstances, this Part proposes a new approach to ascertaining a middle ground in the context of treaty interpretation.

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contradict the Framers' understanding of the separation of powers between the Legislative and Executive Branches).

86. *See* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 161–81 (2007) (defending the judicial-deference approach against various alternative approaches regarding the President's exercise of emergency powers).

It examines two existing deference models—*Chevron*-style and *Skidmore*-style—and their applicability to treaty interpretation. Adapted from administrative law, *Chevron*-style deference is the current academic darling; however, as this Part outlines, it is inflexible in assessing the concerns that animate excessive executive interference in the implementation of treaties. As a result, while its exercise has been perverted into near-total deference, its application in foreign affairs suffers from both over- and underinclusiveness. In contrast, deference based on *Skidmore*, properly articulated and converted to assess the particularities of treaties, offers a flexible model of deference most likely to balance competing interests and leverage the core competencies and institutional advantages of the Branches.

A. Discerning Legal Thresholds and Institutional Values

A prerequisite to determining the proper scope of deference is determining the line between legal dictates and institutional preferences. In circumstances where the Constitution so requires, deference may be necessary even if a host of institutional values counsel for robust judicial inquiry.

In that vein, deference to the Executive is at its strongest when the action or judgment at issue is within the exclusive power of the Executive to determine. In the treaty context, such a situation arises when a court is asked to determine whether a foreign nation remains part of a relevant treaty regime.[87] Similarly, a court defers to the judgment of "international facts" that may be material to determining treaty content.[88] Such concerns are considered exclusively within the province of the Executive as the political branch charged with execution of the foreign policy of the United States.[89]

More controversially, deferring to an executive interpretation of a treaty may be judicially advisable even when not required by other law. Institutional concerns impose themselves with greater frequency and urgency as the purely legal basis for deference becomes more ambiguous.[90] It is in those circumstances where assessing the institutional values of choosing to act or

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87. *See, e.g.*, Then v. Melendez, 92 F.3d 851, 854 (9th Cir. 1996) (deferring to the interpretations of the State Department in determining that a valid extradition treaty existed between Singapore and the United States); *see also* Bradley, *supra* note 3, at 660 (explaining that the Supreme Court has accepted as legally binding the Executive Branch's decision on whether a foreign nation continues to remain a party to a treaty).

88. Bradley, *supra* note 3, at 661, 661–62; *see also, e.g.*, Regan v. Wald, 468 U.S. 222, 242 (1984) (noting foreign interest in economic sanctions targeting Cuba).

89. *See* Bradley, *supra* note 3, at 659–63 (discussing a variety of situations in which the courts generally defer to the Executive Branch in its handling of foreign affairs).

90. *See, e.g.*, Chesney, *supra* note 4, at 1732 ("[T]here is considerable confusion with respect to the obligation to give at least some deference to executive treaty interpretations"); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 975 (2004) (proposing a comparative-institutionalism approach to analyzing the political-question doctrine in the context of foreign affairs).

to defer is most crucial.[91] Issues of treaty interpretation are difficult precisely because they go beyond the threshold question of whether the case can be heard and venture into the territory of how the treaty should be applied, as law, within the courts. Examining the core competencies of each Branch, including institutional structure and values, helps clarify how each Branch should function in the realm of treaty operation.[92]

1. The Institutional Values and Deficiencies of Executive Action.—Flexibility, accountability, and specialization are the core institutional values offered by the Executive in foreign affairs.

a. Flexibility.—As a single branch with an unmistakable hierarchy leading to one person, the Executive possesses an inherent flexibility unmatched by the other branches of government. The Judiciary, steeped in precedent and dependent upon the happenstance of cases and controversies, is unable to act expeditiously. To a similar end, the Legislature is multitudinous, slow, and comprised of various interests and backgrounds. Flexibility enables the Executive to act quickly in a time of emergency, to alter application or enforcement of legal agreements it executes, and to engage in a number of other politically oriented actions to serve policy goals.

b. Accountability.—The Executive Branch is democratically accountable. In addition to elections, the President is accountable to his political party and motivated by a quest for historical legacy. Further, the personnel that make up the Executive are typically individuals whose future is tied to the perceived success of the administration. This accountability makes the Executive more responsible to the voters for failures and sensitive, nuanced political assessments than the Judiciary.

c. Specialization.—Finally, the Executive Branch is the primary governmental actor involved in both drafting and implementing treaty law. These actions naturally lead to a consolidation of legal and pragmatic knowledge as to the operation of international instruments. This power is not by accident. As evidenced by federalist writings and judicial conceptions of deference to the Executive Branch, the promulgation of treaties, with their inherent international reach, is inextricably part of the province of the Executive's prerogative to operate the federal foreign-affairs power.[93]

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91. *See generally* Nzelibe, *supra* note 90, at 967–75 (systematically criticizing the early Court's formalist approach to the foreign-affairs power, the "internationalist" approach to the problem, and the "liberalist" response to the internationalist approach, and advocating a comparative institutionalist analysis).

92. The institutional values and deficiencies included in this Part are not exhaustive in nature but rather designed to highlight core institutional concerns and values present in determining a system of deference.

93. *See supra* notes 20–21, 85–89 and accompanying text.

The drafting role of the Executive creates an initial and unlimited power of interpretation over treaty law. While the drafting power is subject to agreement with other parties, the United States' position as world hegemon creates unequaled negotiating power in crafting multilateral instruments and, of course, bilateral treaties. The execution of negotiating power and drafting decisions forms a crucial initial interpretation of the provisions being created. Drafting decisions include choosing broad and ambiguous terminology or precise language; choosing words between varying analogues; including or deleting differing provisions; and structuring the language to imply the envisioned right or remedy contemplated. The choice between an individually possessed right and an explicitly diplomatically enforced remedy can be weighed and determined among the parties.

At the conclusion of the drafting process, the Executive possesses the exclusive authority to determine whether the treaty it crafted will proceed to ratification. During this stage, the Executive determines whether it will sign the treaty and whether it will present the treaty to the Senate for ratification.[94]

The President then chooses whether he wants the instrument to take the form of an Article II treaty or prefers the flexibility of an executive agreement.[95]

Assuming the Senate ratifies the treaty, the Executive assumes the burden of executing the treaty obligations. Everyday compliance with U.S. treaty obligations occurs through the administration of the treaty by Executive bureaucracy. Other signatories will look to the Executive when they believe a breach has occurred and exert pressure to ensure compliance.[96] In short, the everyday decisions as to the meaning of U.S. treaty obligations fall, in the first instance, to the Executive bureaucracy.

The role of treaty administration also implies correlative determinations of how the treaty will be executed and enforced internally. Such determinations invariably require the bureaucratic actors and their supervisors to make determinations as to the relative importance of varying provisions and their own capability to implement compliance policy effectively. These enforcement (and nonenforcement) decisions frame the development of meaning of these provisions and the judicial cases that flow from government action (or inaction).

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94. *See* U.S. CONST. art. II, § 2, cl. 2.

95. Avoiding ratification procedures enables the President to create international agreements with other nations with the most minimal interference of other branches of government. *But see* John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5, S12–16 (2002) (outlining reasons why a rational, utility-maximizing President may desire to forego an executive agreement and attempt to gain congressional approval for ratification in conformance with Article II requirements).

96. This burden is not limited to self-executing treaties. Non-self-executing treaties may, in fact, place a greater burden on the Executive as other signatories pressure the Executive to craft and pass legislation implementing provisions of such a treaty.

Conversely, the structure of the Executive also creates institutional shortcomings. Executive action is made under intense time pressures, with highly incomplete information and with motivations designed to maximize power and flexibility rather than adherence to law. Institutional values of the other branches check these shortcomings. Values of the Judiciary are of particular relevance to this Article.

2. The Institutional Values and Deficiencies of Judicial Action.—The Judiciary offers quite different institutional values than the Executive. The disaggregated nature of the Judiciary results in diverse considered review that ultimately produces a long-term perspective on policy goals, promotes uniformity of decision, and enhances the overall legitimacy of law.

a. Long-Term Perspective.—The fact that federal judicial appointees serve life terms, together with the basic judicial doctrine of stare decisis, encourages judges to consider the long-term effects and legal implications of their judgments through a much different lens than that of the short-term-focused political branches. While purely political actors are highly motivated relative to short-term political judgments, judicial action tempers such short-term judgments through the political insulation of a life term and the obligation to justify future deviations from present judgments.

b. Diversity.—The federal Judiciary consists of hundreds of jurists chosen from presidential administrations spanning from present day to the Truman presidency. These judges carry with them substantially different life, intellectual, and legal experiences that influence their jurisprudence. The exchange of judicial opinions from various federal district and appellate courts plays an important role in the ultimate decisions of the Supreme Court. In addition to the natural-selection element of intellectual analysis each opinion may engender, the large span of experience represented in the Judiciary establishes continuity over time as executive administrations and legislative bodies revolve.

c. Promoting Uniformity.—The judicial doctrine of stare decisis and judicial modesty typically lead to very few contenders in legal interpretations. Court decisions, while ultimately vulnerable to changing judicial opinion, are structurally and procedurally more enshrined than executive determinations that are easily discarded from administration to administration or, in certain political circumstances, within an administration.[97]

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97. *See generally* RICHARD F. GRIMMETT, FOREIGN POLICY ROLES OF THE PRESIDENT AND CONGRESS (1999), http://fpc.state.gov/fpc/6172.htm (discussing different methods by which the Executive and Congress affect foreign policy).

d. Legitimacy Enhancing.—As demonstrated by the Bush Administration's interpretation of the requirements of the Geneva Conventions, a unilateral executive interpretation of international obligations is often viewed as subjectively biased rather than objectively reached. In contrast, the diverse, politically insulated federal Judiciary fares much better in world opinion polls.[98] Beyond basic popularity, the perception of an independent, structural check on executive power in foreign affairs assists in creating an aura of legitimacy surrounding the implementation of international law.

Conversely, the structural disaggregation and limited hierarchy of the Judiciary lead to divergent opinions, slow legal process, and a generalism that precludes routine and consistent experience-based application of specialized knowledge. Critics of judicial review of executive actions in foreign affairs argue, reasonably, that judicial action can act as a restraint on executive power that could otherwise be used to effectuate American policy goals.[99] This is undoubtedly true and only makes the current doctrinal morass more disconcerting.

These institutional characteristics of the Judiciary result in better, more-transparent national policy making in foreign affairs. Some of these benefits have long been recognized as inherent benefits in the domestic realm. Their importance is not diminished in the context of the enforcement and interpretation of U.S. treaty law. Instead, the procedural uniqueness of treaty law indicates a heightened importance in accruing the benefits bestowed by institutional exchange with the Judiciary.

Ultimately, the institutional value of ensuring executive flexibility is important. However, it should not be inflated to the extent that it nullifies the institutional values enshrined in constitutional principles of separation of powers and inherent in meaningful judicial review of executive action. This is true even in matters of national security.

The challenge of crafting a principled structure of treaty interpretation lies in combining competing values of flexibility of the Executive, as the nation's political actor on the international stage, while effectuating the legal instruments that treaties represent within our constitutional structure through judicial review.

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98. *See, e.g.*, World Opinion Roundup, http://blog.washingtonpost.com/worldopinionroundup/2006/07/guantanamo_reaction_seen_as_us.html (July 26, 2006, 12:38 EST) (discussing positive reaction to the Supreme Court ruling in *United States v. Hamdan* among world newspapers); *see also* Joseph Carroll, *Slim Majority of Americans Approve of the Supreme Court*, GALLUP, Sept. 26, 2007, http://www.gallup.com/poll/28798/Slim-Majority-Americans-Approve-Supreme-Court.aspx (highlighting a national opinion poll giving the Supreme Court a 51% approval rating, as compared with President Bush's 36% approval rating and Congress's 24% approval rating).

99. *See* POSNER & VERMEULE, *supra* note 86, at 272 ("To be able to respond to international crises, the president cannot be hemmed in by international treaties and constitutional limitations, as interpreted by judges.").

B. The Extremes of Deference

Theories of judicial deference fall on a spectrum bounded at the extremes by no deference and total deference. Reviewing the extremes is important because the doctrines established through case law, as explained above, have gravitated toward one pole or the other dependent on the circumstances of the time.

The key advantage to systems operating at the extremes of the deference spectrum lies in their simplicity. This simplicity, however, also leads to some of the most glaring aspects of inappropriate deference or nondeference. The inelasticity of the approach of each of these systems, fixed either at the pole of judicial supremacy or executive discretion, renders both systems constitutionally suspect in addition to pragmatically undesirable.

1. No Deference.—Some commentators advocate a system in which the Executive is granted no deference in the interpretation of treaties. Proponents of this model generally decry any movement away from de novo review of interpretive questions as an abdication of the *Marbury* prerogative of the Judiciary to "say what the law is."[100] Such commentators view the de novo judicial review of treaty interpretation questions as a crucial check on executive power. The primary benefit of such a system would be its innate simplicity and insulation from political manipulation. Such a system, however, is ultimately unfeasible and potentially infringes upon the Article II and Article I powers of the President and Congress, respectively.

A no-deference policy is unfeasible primarily because it unreasonably hinders executive operation in implementing treaties. It is ultimately undesirable because while it creates a robust buffer in consolidating executive power, it also unjustly impedes deference where it is appropriate and desirable. As disputes over treaties are infrequent relative to those over domestic statutes, the ability to rely upon an established and implemented interpretation can be crucial to effective foreign policy. The Executive Branch is empowered with the routine enforcement and execution of treaty obligations. Its diplomatic corps routinely operates under the interpretations of the Executive, and regulations are promulgated in reliance on those interpretations, a reliance that would break down in the face of complete judicial authority to reinterpret.

Providing no deference to executive interpretations could also constitute an infringement of the Article II powers of the President to exercise

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100. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). For example, Thomas Franck describes the Judiciary's retreat from cases involving "political questions" as a "Faustian pact." THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 13, 10–13 (1992); *see also, e.g.*, Bradley, *supra* note 3, at 665 ("Almost invariably these commentators [criticizing judicial deference to the executive] invoke the importance of the 'rule of law' and quote reverently from *Marbury*. . . . [They] use phrases like 'judicial abdication' and talk about the courts having made 'Faustian pacts.'" (citing FRANCK, *supra*, at 10–11 and Bederman, *supra* note 4, at 1442)).

executive powers related to treaty interpretation. The independent power of the Executive to provide interpretive meaning was demonstrated through the controversy over the reinterpretation of the Anti-Ballistic Missile Treaty (ABM Treaty) between the United States and the Soviet Union.[101] In 1985, President Reagan asserted that the Executive would, in the future, read the ABM Treaty to allow technological work designed to develop a missile-defense system.[102] Many in the Senate dissented to no avail.[103] The ultimate success of the executive reinterpretation of the treaty was, in part, due to inherent power that adheres to the execution of treaty provisions that, by their very nature, contain ambiguity.[104]

Similarly, a no-deference system could violate Article I powers of the Legislature in circumstances where the Congress has utilized its power to define and punish crimes against the law of nations,[105] taken steps to define U.S. treaty obligations and limitations,[106] or delegated power to the Executive to promulgate regulations.[107] As an example, it would be folly for the courts to reject an executive interpretation where that interpretation was endorsed by Congress or represented the exercise of clearly delegated powers from the Legislature.[108]

As noted above, a no-deference approach may have held considerable sway immediately following the Founding, but the political circumstances and doctrine have moved decisively away from the approach. Instead, the Court has embraced a doctrine much closer to total deference.

2. Total Deference.—Proponents of total deference highlight the political nature of treaties as a part of international relations as well as the flexibility and democratic accountability of the Executive. Under a total-

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101. Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3435.

102. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2647, 2646–48 (1997) (book review) (outlining the Reagan Administration's proposed "reinterpretation" of the ABM Treaty, which would in essence have amended the treaty without the consent of either the Senate or the Soviet Union).

103. *Id.* at 2646–48.

104. *Id.* at 2647.

105. *See* U.S. CONST. art. I, § 8, cl. 10 (establishing that Congress shall have the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations").

106. *Id.* art. II, § 2, cl. 2 ("[The President] shall have Power, *by and with the Advice and Consent of the Senate*, to make Treaties, provided two thirds of the Senators present concur . . . ." (emphasis added)).

107. *Id.* art. I, § 8, cl. 18 (establishing Congress's power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

108. *Hamdan* serves as an example where the Court found such delegation lacking in the context of the Uniform Code of Military Justice. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774–75 (2006). Note, however, that the Court recognized that Congress did delegate some authority to promulgate regulations, procedures, and substantive law under U.S. courts-martial. *Id.*

deference system, the courts defer to treaty interpretations of the Executive regardless of their form or apparent inconsistency with treaty text or practice.

Under total deference, flexibility to conduct foreign affairs is tantamount. Advocates of sweeping deference argue that the political nature of treaties and changing landscape of international relations require the Executive to be able to change its interpretation of treaty obligations on the fly.[109] Legally, advocates contend that the treaty power is "executive in nature" and that it includes a structural power to interpret treaties independent from judicial infringement.[110] According to this argument, the fact that the Executive is the center of gravity in treaty interpretation as a practical matter is enough evidence that the consolidation of *all* treaty-interpretation concerns should be confined within that Branch.[111]

Functionally, the total-deference model places enormous strain on the institutional values present in executive action and correspondingly little value in judicial action. A model of total deference maximizes executive flexibility, resulting in a system of completely unchecked power over treaty interpretation, which would inevitably lead to manipulation and, ultimately, widespread treaty failure.[112]

The legal basis of a total-deference regime is also questionable. A core holding of Supreme Court jurisprudence is that an independent role of the Judiciary is required in interpreting treaties to provide meaning to federal law.[113] In the Supreme Court's 2006 decision in *Sanchez-Llamas v. Oregon*,[114] the Court examined the extent to which U.S. courts are bound by decisions of the International Court of Justice (ICJ) relative to the Vienna Convention on Consular Relations (VCCR).[115] While not deciding the issue

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109. *See* Yoo, *supra* note 12, at 870–77 (providing examples of the Executive's ability to better adapt to the turbulent landscape of international relations, such as the notion that the President's decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match).

110. *See, e.g.*, *id.* at 869 ("Article II's Vesting Clause must refer to inherent executive and judicial powers unenumerated elsewhere in the document.").

111. *Id.* at 870.

112. It is easy to imagine that after repeated instances of treaty "reinterpretations" rendering treaty violations lawful, the treaty partners will react similarly in retaliation. A rejoinder to this concern would contend that as long as those politically accountable are making that decision, they can be held responsible in the course of elections. This rebuttal is only effective to the extent one believes that such accountability will preclude "reinterpretations" generally. Alas, most evidence is to the contrary, essentially demonstrating that the political branches are the most likely to follow the path most politically expedient at that moment. *See generally* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006) (discussing perverse incentives in decision making by the political branches). As such, short-term calculations are likely to sacrifice long-term policy goals, such as generalized treaty compliance and good faith.

113. *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law is emphatically the province and duty of the judicial department." (internal quotation marks omitted)).

114. 126 S. Ct. 2669 (2006).

115. *Id.* at 2684–85.

of whether the VCCR created a private right of action, the Court rejected the petitioners' request for substantial deference[116] to the ICJ's holdings in *LaGrand Case (Germany v. United States of America)*[117] and *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*.[118] Without a private right of action, the question of the impact of the VCCR and the ICJ judgments interpreting the VCCR hinged, in part, on the Supreme Court's understanding of judicial power and nondelegation. To this end, the majority opinion written by Chief Justice Roberts noted: "[I]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department' headed by the 'one supreme Court' established by the Constitution."[119]

Accompanying the Court's protective stance from foreign interference is an assertive positioning of Article III powers against interference from other branches of the domestic government. This conception is underlined by Chief Justice Roberts's favorable citation and parenthetical[120] to Justice Stevens's opinion in *Williams v. Taylor*,[121] in which the Court held: "At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law."[122] Despite the consistent triumph of executive interpretations over the past fifty years, likely in part because of the reluctance of the Judiciary to completely cede all powers over treaty interpretation (as demonstrated by cases like *Sanchez-Llamas*), total deference has also not been in favor.

C. The Search for a Principled Standard of Deference

The infeasibility and constitutional infirmities of no-deference and total-deference regimes have led to a more considered approach to developing a principled system of deference that maximizes institutional benefits of the Branches. The system sought must be "principled" in its offering of guidelines and rules that can be readily ascertained and applied by judicial means.

There are two systems of deference, already present and applied in American jurisprudence, that serve as primary candidates for transplantation to the realm of treaty interpretation: *Chevron*-style deference and *Skidmore*-style deference. The academic literature to date has heavily favored *Chevron*

116. *Id.* at 2685–86.

117. 2001 I.C.J. 466 (June 27).

118. 2004 I.C.J. 12 (Mar. 31).

119. *Sanchez-Llamas*, 126 S. Ct. at 2684 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

120. *Id.*

121. 529 U.S. 362 (2000).

122. *Id.* at 378–79.

deference as the preferred alternative to the morass of great weight, while *Skidmore* deference has been largely unexamined.

1. Chevron *Deference.*—In recent years, several scholars have attempted to fill the theoretical void of deference in foreign-affairs law with the already-built administrative law doctrine of deference articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (commonly known as *Chevron* deference).[123] *Chevron* deference, as articulated by the famous decision that thrust it to prominence, consists of a two-part inquiry. First, has Congress directly decided the precise question at issue?[124] Second, if Congress has not so spoken—if the statute is silent or ambiguous with respect to the specific issue—was the agency's decision at issue reasonable and thus permissible?[125] Assuming the text is ambiguous and the views of the Executive are reasonable, the executive interpretation triumphs.

a. Chevron*'s Operation.*—The *Chevron* standard of "ambiguity" and "reasonableness" could, at the theoretical level, cut toward broad or limited deference. The test generally collapses into a reasonableness inquiry, as it is unlikely that an agency interpretation that acts directly contrary to unambiguous text could be considered reasonable.[126] As a result, the deferential nature of *Chevron* is dependent upon the judicial interpretation of reasonableness. To date, the courts have consistently interpreted the term to offer near-total deference to agency decisions when (1) congressional delegation of authority can be inferred; (2) agency specialization is evident; and (3) procedural safeguards are respected.[127]

Professor Curtis Bradley's piece, Chevron *Deference and Foreign Affairs*, starts his proposal for *Chevron* deference from the premise that the theoretical framework articulated by *Chevron* translates comfortably to foreign affairs.[128] Professors Eric Posner and Cass Sunstein extend Professor Bradley's argument into a more-broad-based functional and theoretical call

123. *E.g.*, Bradley, *supra* note 3, at 679 (focusing on three types of foreign-affairs law to which *Chevron* deference should apply: federal statutory law, both treaty-based and customary international law, and the federal common law of foreign relations); Posner & Sunstein, *supra* note 69, at 1228 (concluding that courts should defer to executive interpretations of ambiguous enactments and that because clear legislation is controlling under *Chevron* step one, nothing in that argument excludes the possibility that Congress is entitled to the last word).

124. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

125. *Id.* at 843.

126. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30–31 (1998) (analyzing court applications of the *Chevron* doctrine and finding a substantial majority of courts uphold agency interpretations, especially when courts reach the question of reasonableness).

127. *See, e.g.*, Texas v. United States, 497 F.3d 491, 501–04 (5th Cir. 2007) (applying versions of these three factors when determining the reasonableness of the agency's interpretation of the Indian Gaming Regulatory Act).

128. *See* Bradley, *supra* note 3, at 703 (arguing that *Chevron*-deference principles and values fit comfortably within the realm of foreign affairs generally and treaty interpretation in particular).

for applying *Chevron* deference in nearly all aspects of foreign-relations law and, in particular, applying it to questions significant to the "war on terror."[129] Posner and Sunstein's view of *Chevron* deference goes beyond traditional justifications present in the administrative realm and argues that *Chevron* deference is particularly suited to foreign affairs due to the institutional advantages possessed by the Executive over other branches of government.[130]

The thrust of these commentators' arguments is that *Chevron* is an appropriate system of deference because it acknowledges both the unique expertise of the Executive in foreign affairs and is generated through a politically accountable mechanism, the Executive Branch.[131] Further, the doctrine carries with it practical benefits that accrue through its familiar, established position in administrative law.[132]

b. Chevron *as Excessively Deferential.*—The common critique of *Chevron* deference in the context of treaty interpretations is that it is too deferential to executive interpretations. The question of whether a doctrine is excessively deferential is only answerable by assessing whether the stated goals and justifications of the proposed system of deference are achieved.

Proponents of *Chevron* deference place great importance on the role of the Judiciary in ascertaining the "reasonableness" of executive interpretations in the face of "genuinely ambiguous statutes."[133] In practice, however, this role is largely illusory. At the theoretical level, adopting *Chevron* deference in foreign affairs places great weight on genuine ambiguity and reasonableness determinations, concepts that are subject to interpretive differences of a wider variety than substantive limitations.[134] The practical level bears out the theoretical concerns. As Professors Schuck and Elliott demonstrate empirically, relatively few cases in which *Chevron* is applied result in a

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129. *See* Posner & Sunstein, *supra* note 69, at 1177 n.14 (distinguishing the approach offered by Professor Bradley).

130. *Id.* at 1176–77.

131. *See* Bradley, *supra* note 3, at 673 (explaining that the Executive is particularly well suited for "interpretive lawmaking" because it has "more expertise and democratic accountability than courts"); Posner & Sunstein, *supra* note 69, at 1177, 1176–77 (arguing that the resolution of statutory ambiguities in this context requires "judgments of policy and principle" and that the Executive has both the foreign-policy expertise and the "constitutional warrant" for making those underlying judgments).

132. Specifically, the doctrine has been the subject of substantial scrutiny and has gathered an increased level of procedural clarity as a result. The Judiciary is familiar with the doctrine and presumably comfortable with its application.

133. Posner & Sunstein, *supra* note 69, at 1226. While not a "proponent" of *Chevron* deference in foreign affairs, Professor Robert Chesney asserts that *Chevron* "preserves a relatively meaningful degree of judicial independence." Chesney, *supra* note 4, at 1766.

134. *See* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1269 (2007) (critiquing the application of "genuinely ambiguous" or "vague and ambiguous" standards (quoting Posner & Sunstein, *supra* note 69, at 1217, 1227)).

judicial finding that the agency interpretation is "unreasonable."[135] A study by Professors Sunstein and Miles indicate that "on both the Supreme Court and the courts of appeals, the application of the *Chevron* framework is greatly affected by the judges' own [political] convictions. . . . [T]he data reveal a strong relationship between the justices' ideological predispositions and the probability that they will validate agency determinations."[136] Judicial practice in other foreign-affairs nonjusticiability and abstention doctrines is instructive and indicates that it is likely that the deference afforded by judges utilizing *Chevron* in the treaty context would be based on an internal assessment of the foreign effects of their decisions that they are least likely to accurately gauge.[137]

c. Chevron *as Insufficiently Deferential.*—The overarching difficulty with *Chevron* is that its principles do not extend to the particularities of treaties. Ultimately, the problem with *Chevron* deference may not be solely that it provides too much deference to the Executive, but that in certain circumstances, it clearly does not provide *enough* deference to executive determinations.

There are a host of conceivable circumstances that could arise where deference would be desirable but where *Chevron* would not apply under established norms of deference.[138] Consider an executive interpretation of a treaty articulated purely as a litigation position. Under traditional conceptions of *Chevron* deference, litigation positions are not entitled to any deference.[139] The same would be true when the interpretive view is traceable to an executive officer or division that does not appear to have expertise in

135. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1057–59 (finding that circuit courts deferred to agency decisions at a higher rate after *Chevron* was decided—a rate that shows it is very unlikely an agency's interpretation will be deemed unreasonable if entitled to *Chevron* deference).

136. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825–26 (2006).

137. *See* Goldsmith, *supra* note 81, at 1396 (arguing that the foreign-relations doctrines involve judicial identification and assessment of the foreign-relations interests of the United States and predicting "the effects of certain acts . . . on these interests").

138. *See generally* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 236, 231–47 (2006) (noting the problems with the Supreme Court's current framework for deciding when to apply *Chevron* deference, including its apparent endorsement of an "exception" from *Chevron* deference for "major questions" of statutory interpretation that in the Court's view require judicial review).

139. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 234 (2001) (holding that classification rulings issued by the U.S. Customs Office are not entitled to *Chevron* deference because they are more akin to policy statements, agency manuals, and enforcement guidelines); Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 575 (7th Cir. 2001) ("Upon reading *Mead*, we find that a litigation position in an *amicus* brief, perhaps just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals, and enforcement guidelines are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*." (citation omitted)).

the subject matter regulated[140] or was not generated through an accountable mechanism.[141] The political nature of treaties might counsel for broad deference in such circumstances despite *Chevron*'s inapplicability. For example, even if not subject to notice-and-comment rule making and articulated as a litigation position, the Executive may be engaged in regularized diplomatic efforts that require reliance on a particular interpretation of the treaty in order to gain corresponding political advantages abroad. Even absent specialization, deference may be appropriate in such circumstances. Otherwise judgments forming a consistent diplomatic process would be in jeopardy, thus requiring a change in diplomatic practice and imposing a substantial burden on the Executive in conducting foreign policy.

One might think that the answer to the difficulty of utilizing traditional conceptions of *Chevron* in foreign affairs is to expand the already-expansive *Chevron* doctrine to cover any executive interpretation in foreign affairs.[142] The inextricable difficulty of expanding the contours of *Chevron* deference is that the administrative law principles establishing the doctrine are structured to preclude abuse of the broad deference *Chevron* already affords. Precluding such abuse is just as important, if not more so, when one considers the underappreciated legal nature of treaties, formed in large part outside of executive control and often containing important executive-constraining substantive provisions.

d. The Difficulty in Translating Chevron *into Treaty Interpretation.*—The justifications of *Chevron* of exploiting executive expertise and preserving executive flexibility are both compromised under an expansive view of *Chevron* deference. A cornerstone of the *Chevron* doctrine is based on the belief that administrative agencies have (1) been delegated interpretive authority by Congress and (2) possess unique expertise in the subject matter in which they are regulating.[143]

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140. Here *Gonzales v. Oregon*, 546 U.S. 243 (2006) is instructive. In this case, the Court rejected an interpretive position offered by the Attorney General due to lack of medical expertise. *Id.* at 268–75.

141. *See* Christensen v. Harris County, 529 U.S. 576, 588 (2000) (holding that an agency opinion letter was not entitled to *Chevron* deference because it was not subject to notice-and-comment rule making).

142. This is essentially the position of Posner and Sunstein. *Compare* Posner & Sunstein, *supra* note 69, at 1177 n.14 (advocating for the application of *Chevron* deference to foreign-relations doctrines based on theoretical and functional reasons, such as the Executive's "superior expertise in foreign relations"), *with* Bradley, *supra* note 3, at 673, 673–74 (arguing, on largely doctrinal grounds, that applying a "*Chevron* perspective" to foreign-affairs cases would provide a valuable framework for understanding many of the foreign-affairs doctrines and impose legal constraints on the Executive while accounting for executive expertise and authority in foreign affairs).

143. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (explaining that Congress has delegated policy making responsibilities to agencies, in part because those agencies possess "great expertise" in their respective areas).

When viewed through the analytical lens of maximizing administrative flexibility, the *Chevron* model does quite well. It is very uncommon for an agency interpretation to be overturned once it is found to be entitled to *Chevron* deference.[144] The promise of substantial deference also frees the agency to engage in comprehensive regulatory schemes with little concern that its core interpretive holdings will be overturned.

However, many treaty regimes do not fulfill either of these elements of the expertise equation. Unlike administrative law, treaties are not executed with an implicit delegation of interpretive authority from Congress.[145] Similarly, most treaties to which the United States is a party are not amenable to the routine and consistent application by a core group of professionals insulated from the larger political machinations of the Presidency.

Chevron deference is only justified to the extent that Congress has, at least implicitly, delegated lawmaking authority to another body for the purpose of administering specific law.[146] Under *United States v. Mead Corp.*,[147] agency interpretations only receive *Chevron* deference when the congressional intent in delegation was "to carry the force of law."[148] In assessing whether the administrative agency had received the proper delegation, the Court indicated that full and fair process should underlie administrative

144. *See supra* note 135 and accompanying text.

145. Unlike questions as to the content of customary international law, treaties form part of the "supreme Law of the Land" of the United States. U.S. CONST. art. VI. This status embeds treaties as part of the domestic legal landscape alongside the Constitution and statutes of the United States.

146. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 211 (characterizing application of the *Chevron* doctrine as subject to a judicial finding of "indicia of contrary congressional desire" regarding deference to agency authority). Subsequent decisions and academic commentary have mainly divided the potential rationale for deference into three elements. First, administrative agencies possess unique expertise and flexibility in their field of operation. Judicial interpretations rejecting administrative counterparts would hinder administrative operation by requiring a congressional act, or higher judicial action. Such contrary interpretive decisions would be more numerous absent robust deference. Second, the resolution of "gaps or ambiguities" in federal law should be left to an institution politically accountable for its actions. Interpretive acts inherently require policy judgments that the Judicial Branch is least equipped to make. Finally, the complexity of the administrative state and plethora of policy judgments left to Congress has meant that the Legislative Branch intentionally delegates the task of interpretation to the relevant agency. This delegation enables the agency to utilize its institutional benefits of flexibility and expertise clothed with the authority of legitimate power. *See generally, e.g.*, Laborers' Int'l Union v. Foster Wheeler Corp., 26 F.3d 375, 391 n.12 (3d Cir. 1994) (listing two paramount rationales for deference as expertise and congressional intent); Mich. Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C. Cir. 1989) (listing two main rationales for deference as agency expertise and a preference for political branches to make policy decisions), *aff'd by an equally divided Court*, 493 U.S. 38 (1989); Fed. Election Comm'n v. Christian Coal., 52 F. Supp. 2d 45, 82 n.40 (D.D.C. 1999) (listing two leading rationales for deference as agency expertise and a preference for political branches to make policy decisions because of political accountability); Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 19–20 (2006) (listing rationales of expertise, accountability, and congressional intent); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 743–44 (2004) (same).

147. 533 U.S. 218 (2001).

148. *Id.* at 221.

regulations designed to "carry the force of law."[149] Such an implied delegation would be factually difficult to find in the treaty context. Treaties that primarily bestow individual rights infrequently require executive administration.[150]

Similarly, treaties with a quasi-contractual element are unlikely to invoke the type of delegative authority necessary to trigger *Chevron* deference.[151] Delegated authorization is not part of the treaty ratification process. Unlike administrative regulations, the creation of treaties as supreme federal law requires the interaction of Congress through advice and consent.[152] Rather than implicit delegation from the Legislature, issues of treaty interpretation are expressly addressed by the Senate through reservations, understandings, and declarations.[153] These interpretive devices provide a compelling ex ante approach that acts expressly against unilateral executive interpretation and provide the Legislative Branch with an opportunity, at the very moment of ratification, to define the nature of the judicial enforceability of the treaty at issue.[154]

Further, the core content of many U.S. treaties is to constrain executive action, not to embolden it. As noted by Professors Derek Jinks and Neal Katyal, much of international law, including treaties, is designed to act as a constraint on executive power.[155] By expanding the level of deference to executive interpretations in such contexts under *Chevron*, "any practical advantages of [*Chevron*] judicial deference are substantially offset by the costs of assigning robust interpretive authority to the very agency that is regulated by the regime."[156]

The Geneva Conventions serve as a compelling example of this danger. The Conventions create a framework in which the Executive, charged with military operations, must operate. The Conventions have been implemented through Army regulations, which provide, "In the event of conflicts or

149. *See id.* at 230 ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.").

150. *See* Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1300–01 (2002) (describing the questionable foundation for deference where a private right of action provides little opportunity for the administration of executive agencies).

151. *See* Evan Criddle, Comment, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1931 n.23 (2003) ("Treaties' contractual character helps explain why few, if any, treaties provide textual support for an implied delegation of interpretive authority to municipal executive agencies.").

152. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

153. Jinks & Katyal, *supra* note 134, at 1253.

154. *See id.* (discussing how the Senate can limit the discretion of courts by defining the constraints and allowances to the Executive within treaties).

155. *Id.* at 1265.

156. *Id.* at 1244–45.

discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence."[157]

Treaty law differs from administrative law substantively and procedurally. Treaty law, at a fundamental level, is designed to influence and outline appropriate state behavior.[158] As articulated by scholars, much of international law is executive constraining in nature.[159] Increased deference to the Executive's interpretation of executive-constraining law enables the Executive to circumvent regulations previously established. Where the power to interpret law creates the power to evade intended regulation, the power to interpret law constitutes the power to break such law.

2. Institutionally Driven Deference: A Flexible Model.—Courts clearly consider factors outside of those accounted for in theories of total deference, no deference, great weight, and *Chevron*-style deference. Nowhere is this more clearly demonstrated than in *Hamdan*. The majority decision, finding the incorporation of the Geneva Conventions through the Uniform Code of Military Justice and extending Common Article 3 protections to those detained at Guantánamo Bay, conspicuously granted no deference.[160] The Court's explanation, which tersely characterized the government's proposed interpretation of the language "not of an international character" as "erroneous,"[161] indicated that it considered factors other than textual ambiguity or reasonableness. While unarticulated by the Court, clearly the substance of the treaty and the boundaries of executive power were core concerns in the litigation as a whole. Additionally, the Executive's inconsistent application of standards relevant to the treaty and Common Article 3 in particular undermined the credibility of its position, making the Court less likely to defer.[162]

The concerns animating *Hamdan* represent judicial discomfort with making deference determinations without considering all relevant factors. A flexible model of deference facilitates structuring and assessing an examination of the validity of the executive interpretation and potentially countervailing aspects of the proposed interpretation. As demonstrated in *Hamdan*, concerns such as self-interest, specialization, and process already drive the inconsistent application of deference in current jurisprudence.

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157. U.S. Dep'ts of the Army, the Navy, the Air Force, and the Marine Corps, Army Regulation 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-1(4) (1997), *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf.

158. Van Alstine, *supra* note 150, at 1270.

159. *See* Jinks & Katyal, *supra* note 134, at 1234 (defining the "executive-constraining zone" of foreign-relations law).

160. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2789–98 (2006).

161. *Id.* at 2795, 2795–96.

162. *See* Chesney, *supra* note 4, at 1773 (describing *Hamdan* as a case in which the functional justification for judicial deference is undermined because executive-branch entities did not agree among themselves on the correct interpretation of the treaty).

Current doctrine encourages a binary decision between total deference and no deference by the courts that (1) may be more results oriented than principle oriented, and (2) lacks nuance and structure in providing an answer as to why some treaties—and some cases involving those treaties—are treated differently. A principled system of deference that maintains the flexibility to consider factors outside of basic reasonableness and ambiguity can eliminate that deficiency.

a. Adapting Skidmore*'s Flexible Scale to Treaties.*—The "persuasiveness" standard articulated in the Supreme Court's decision in *Skidmore v. Swift & Co.* provides a starting point for developing a flexible model of deference appropriate to treaty interpretation. Under *Skidmore*, an agency's statutory interpretations are "not controlling upon the courts," and the weight accorded an agency interpretation "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[163] *Skidmore* instructs the Judiciary to assess whether the agency's interpretation is made "in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case" as well as whether the agency in question determines governmental policy and is charged with providing guidance for the statute's enforcement.[164]

Skidmore offers a model of deference that recognizes the special status of the Executive and grants deference to the extent that the government's operation within that status—and the substantive law that grants such status—imbue the Executive's interpretation with persuasiveness.

A primary consideration in favoring *Skidmore* over *Chevron* in formulating an intermediate system of deference is based on the particularities of treaties. Treaties are (1) both political and legal instruments; (2) drafted by the Executive Branch; (3) ratified by the Legislature through consent; and (4) typically constrain both foreign and domestic action. The nature of treaties as legal and political devices means that there are compelling justifications for providing deference to executive judgments as to how they operate and should be interpreted. Judicial actions that contravene executive foreign policy can harm national foreign policy and compromise the ability of the Executive to speak with one voice. At the same time, treaties create obligations that are designed to have the force of law with the implicit corresponding responsibility of the Judiciary to provide meaning to that law. Treaties are not unilateral actions by the Executive; rather, they acquire the force of law through legislative review and consent. Unwarranted deference to executive treaty interpretations of instruments purporting to limit executive actions and that are interpreted inconsistently

163. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
164. *Id.* at 139, 139–40.

within the Executive Branch compromises separation-of-powers principles and undermines the institutional advantages the Judiciary confers through judicial review.

Skidmore deference in the administrative realm weighs deference to agency decision on the following factors: (1) validity of reasoning; (2) expertise; (3) the form in which the interpretation was issued; and (4) whether its views were thoroughly considered and consistently applied.[165]

The application of these factors has been consolidated into a general articulation of persuasiveness deference based on the Court's own language that it could consider "in a particular case . . . all those factors which give it power to persuade."[166] The nature of this persuasiveness is often conflated by commentators as to whether the agency interpretation itself is persuasive.[167] In reality, the *Skidmore* factors are assigned the task of assessing the persuasiveness of applying deference to the agency or official making the interpretive decision in question.

One might argue that the availability of such a broad range of factors to the Judiciary would operate essentially as nondeference.[168] It has not played out in the administrative realm in that way and is even less likely to be the case in regards to treaties. *Skidmore* contemplates a more active (and thus less deferential) role for the Judiciary than *Chevron*; however, it does so on measurable planes that enforce accountability for the Judiciary.[169] *Skidmore* enforces judicial deference in that courts are precluded from ignoring agency interpretation, and if ultimately contradicting agency action, they must provide a justification consistent with the factors outlined by *Skidmore* or articulate some new factor that led them to their conclusion.[170] In any event,

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165. *See id.* at 139–40 (discussing, explicitly and implicitly, various factors that courts should consider when weighing the persuasiveness of a particular agency interpretation of a statute); *see also* Thomas W. Merrill & Kristen E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 853–56 (2001) (discussing the differences between *Chevron* deference and *Skidmore* deference and expanding on the factors courts consider when applying *Skidmore* deference). Although the Court in *Skidmore* never lists out a fixed set of factors, these four factors capture the essence of the Court's flexible approach to deference to agency action.

166. *Skidmore*, 323 U.S. at 140.

167. *See, e.g.*, Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1807 (2007); Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 784 (2007).

168. *See* Molly A. Leckey & Stephanie A. Roy, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Administrative Law*, 72 GEO. WASH. L. REV. 946, 954 (2004) (arguing that under *Skidmore*, "the court will simply engage in a *de novo* review of the statute through the use of traditional tools of statutory interpretation, and if by chance, the agency's interpretation matches the court's *de novo* interpretation, only then will the court grant *Skidmore* deference to the agency's construction").

169. At the margins, any system for deference is subject to manipulation. *See* Miles & Sunstein, *supra* note 136, at 847 (showing empirically that independent judicial decisions applying *Chevron* are largely motivated by ideology).

170. *See* Merrill & Hickman, *supra* note 165, at 855 ("*Skidmore* is properly regarded as a deference doctrine because the court cannot ignore the agency interpretation—the court must assess

the prospect of judicial manipulation of articulated standards for ideological ends may be a red herring. As discussed above, contemporary judges interpreting and applying treaties demonstrate no desire to overturn executive interpretations unilaterally.[171]

The factors the *Skidmore* Court articulated as "persuasive" in assessing the proper amount of agency-interpretation deference are of the same variety that create a compelling case for varying degrees of deference in the treaty context: executive self-interest; expertise; the instrument in question; and process and consistency.

Self-interest. The "validity of reasoning" prong outlined by *Skidmore* has been interpreted to encompass agency self-interests that may affect the appropriate level of deference due agency interpretation.[172] The Judiciary should consider the substance of the treaty regime at issue, particularly whether the treaty purports to regulate (and thus constrain) core executive powers.

As discussed above, a key aspect of international law is the regulation of state activity. The underlying concern regarding this inquiry is the degree of self-interest possessed by the Executive in its interpretation. Self-interested interpretation is likely to arise in circumstances in which the relevant treaty question is the very nature of power in the Executive. If the purpose of the treaty regime at issue is to constrain the Executive, it would be a paradox to allow the Executive to reinterpret a treaty to avoid the constraint at issue. That paradox would encourage greater consolidation of presidential power without any concurrent checks on the exercise of that power.

While unarticulated, substance-related concerns likely arise for the Supreme Court regarding the interpretation of the Geneva Conventions offered by the Executive in *Hamdan*. Even though Common Article 3 was logically amenable to more than a single interpretation, the incentive for the Executive to choose the interpretation that enhanced its own power was great.

Obviously, the fact that a treaty's subject matter touches on executive power does not, by itself, require the Judiciary to decrease its deference to an

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that interpretation against multiple factors and determine what weight they should be given. After undertaking this analysis, however, agency interpretations receive various degrees of deference, ranging from none, to slight, to great . . . .").

171. A greater concern arises in their misguided attempts to gauge the effects on foreign relations that their own decisions might incur if they were to decide against the Executive's position. *See* Goldsmith, *supra* note 81, at 1396 (discussing the "foreign relations effects test").

172. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 267 (2004) (noting that unlike *Skidmore*, nowhere under *Chevron* is it "proper for a court to measure the reasonableness of an agency's interpretation against the criterion of the agency's self-interest").

executive interpretation. This is especially true when congressional authorization relevant to the interpretive issue is present.[173]

Expertise. As *Skidmore* recognized, the amount of deference due an executive interpretation should somewhat vary based on the level of expertise possessed by the interpreting agent.

The basis for the Executive's expertise in treaties stems from its position as the drafting agent of the United States. Interpretive questions often turn on the intent of the parties to the treaty, and the Executive possesses some inherent specialized knowledge from that role. Further, treaties vary in the amount of formal record and commentary produced during the drafting and consummation of the agreement. The greater the volume of the official record, the less the Judiciary is reliant on executive assertions as to the meaning, intent, or purpose of the language.

The Executive may also possess special knowledge about treaty application. As the everyday executor of treaty obligations, the Executive is forced to make interpretive decisions consistent with its international obligations as well as corresponding international-relations pressures. The process by which those decisions are made, often in cooperation with treaty partners, can offer additional expertise that would be relevant to a reviewing court.

Instrument. The courts should consider the type of instrument the Executive is interpreting. In addition to Article II treaties, the Executive effectuates international agreements through sole executive agreements and congressional–executive agreements.

At one end of a *Skidmore*-inspired model of deference, sole executive agreements should be given the greatest level of deference. Unlike Article II treaties, executive agreements do not constitute supreme federal law and tend to effectuate political rather than legal ends.[174] More importantly, they are concluded without the involvement of the Legislative Branch of the

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173. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2773 n.23 (2006) (noting that the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding an executive order seizing steel mills unconstitutional because congressional legislation on the subject gave the Executive no such right). This is not to say, however, that there are no limitations on the ability of the political branches to preclude or mandate an interpretive issue to the Judiciary without altering the status of the underlying treaty as supreme federal law. *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006) (stating that if treaties are to be treated as supreme federal law, "determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

174. *See* Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 13 (2003) ("Whatever the appropriate line between sole executive agreements and treaties, the text of the Constitution seems clear that only treaties have the force of domestic law."). One example is the requirement of the dismissal of litigation in order to avoid additional litigation or political turmoil with another nation. *See* Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298 (outlining the agreement between the United States and Germany that litigation relating to the Holocaust be dismissed in favor of a German administrative solution designed to provide restitution for victims of the Holocaust).

government and thus can be exclusively tied to executive action and executive aims for purposes of democratic accountability. The absence of cross-institutional exchange with the Legislature also places the Executive in a special position as to an agreement's meaning.

Article II treaties are made partially outside the Executive Branch and constitute supreme federal law under the Supremacy Clause.[175] The Executive's position as "keeper" of an Article II treaty is thus substantially limited, and the constitutional requirement of "Advice and Consent"[176] is itself a limitation on the ability of the Executive to interpretively act without the endorsement of the Legislative Branch.

As the genre of international agreement that owes its generation to the greatest amount of cross-institutional exchange and, correspondingly, to the least amount of unfettered executive action, congressional–executive agreements would require the least amount of deference.

Process and Consistency. Executive interpretations should be granted greater deference in contexts in which the Executive has demonstrated a consistent interpretive tact or in which Executive policy is reliant on an established interpretation of the treaty at issue.[177]

In addition to serving as a general indicator that the treaty interpretation proffered by the Executive is an act of good faith, consistent interpretations by the Executive may create reliance, any deviation from which may cause the Executive to undertake a substantial burden.

This consistency-and-reliance theme is procedurally enhanced when the Executive is required via treaty to participate in international forums designed to monitor U.S. treaty compliance or for treaty adjudication. This circumstance arises frequently, for instance, in the realm of human rights treaties.[178] In circumstances where the Executive adheres to a consistent interpretation of treaty obligations in such international forums, courts should enhance deference.

This procedural consideration is also relevant in circumstances where the United States engages in compliance supervision of treaty partners through a mechanism within the treaty or as part of a reciprocal agreement.[179]

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175. U.S. CONST. art. VI.

176. *Id.* art. II, § 2, cl. 2.

177. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

178. *See, e.g.*, Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 688 (2004) (describing the monitoring requirements of the six major human rights treaties—to many of which the United States is a party—which include the regular submission of compliance reports to a supervisory organ of the treaty body).

179. *See, e.g.*, Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 82 AM. J. INT'L L. 336, 348 (1988) (listing monitoring by the United States among provisions in an arms-control and disarmament treaty between the United States and the U.S.S.R.); Thomas F. Mullin, Comment, *AIDS, Anthrax, and Compulsory Licensing: Has the United States Learned Anything? A Comment on Recent Decisions on the International Intellectual Property Rights of Pharmaceutical Patents*, 9 ILSA J. INT'L & COMP. L. 185, 196 (2002) (observing

In those circumstances, the reciprocal nature of the treaty obligations at issue and the ability of U.S. treaty partners to engage in judgments of prediction and value are compromised.

b. The Line Between Skidmore *and* Chevron.—*Skidmore* deference effectuates a meaningful difference from the type and source of deference available under *Chevron*, where deference is limited to circumstances in which Congress has delegated lawmaking authority. This crucial dimension in *Chevron* is irrelevant in *Skidmore*, as long as the Executive possesses the requisite expertise in the subject matter being interpreted.

Chevron deference acts as a binary operation. Once the determination is made that the text is ambiguous, the Judiciary is left to determine reasonableness and, if reasonable, adopt the agency interpretation. *Skidmore* deference operates on a sliding scale, enabling the Judiciary to give deference to the agency's interpretation along a spectrum from very little to very strong deference.[180]

While *Chevron*'s reasonableness assessment sweeps in some considerations also relevant under *Skidmore*, the reasonableness determination has focused on rationality, not process. *Skidmore* enables the courts to assess the consistency of the Executive in its interpretations, as well as the relevance of the substantive matters at issue—neither of which considerations are given much weight in the *Chevron*-deference context.[181]

The concerns animating the growth of the *Chevron* doctrine, and particularly the issue of respecting congressional delegation, should not be discarded to incorporate *Skidmore* deference in foreign affairs. The incorporation of *Skidmore* considerations in cases purporting to apply *Chevron* has shown, according to Judge Richard Posner, that recent Supreme Court jurisprudence "suggests a merger between *Chevron* deference and *Skidmore*'s and *Glover*'s approach of varying the deference that agency decisions receive in accordance with the circumstances."[182] Judge Easterbrook, in concurrence, maintained that while he did "not perceive . . . any 'merger'"

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that China's obligations relating to its negotiated accession to the World Trade Organization would be monitored by the United States).

180. *See* Merrill & Hickman, *supra* note 165, at 855 ("*Skidmore* is properly regarded as a deference doctrine because the court cannot ignore the agency interpretation—the court must assess that interpretation against multiple factors and determine what weight they should be given. After undertaking this analysis, however, agency interpretations receive various degrees of deference, ranging from none, to slight, to great, depending on the court's assessment of the strength of the agency interpretation under consideration.").

181. *Id.* at 856; *see, e.g.*, Rust v. Sullivan, 500 U.S. 173, 187, 186–87 (1991) (stating that an agency's interpretation that breaks dramatically from its prior position on a matter will still be afforded deference so long as it is a permissible construction of the statute in question and is justified by a "reasoned analysis" (quoting Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983))).

182. Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002); *see id.* (relying on language from *Barnhart v. Walton*, 535 U.S. 212 (2002) that outlines considerations the Supreme Court has found persuasive in deciding when *Chevron* deference is appropriately applied).

between *Skidmore* and *Chevron*, they were two doctrines that acted alongside each other.[183]

The rejection of fixed-point deference in favor of the adoption of a *Skidmore*sque rule in treaty interpretation does not preclude, but rather embraces, stronger *Chevron*esque deference in circumstances where the Executive has been granted implied delegation from the Legislature and engaged in some type of extensive process, such as notice-and-comment rule making. The incorporation of such quintessential *Chevron* concerns within a larger framework also highlights the attractiveness of a flexible framework to create calibrated deference.

V. Conclusion

The inextricable morass of doctrine in treaty interpretation betrays a doctrine without cogent theory. The challenge for the Judiciary is to articulate a clear and principled theory of deference that respects both the political and legal nature of treaties, and expands and contracts as circumstances require.

As demonstrated above, systems of deference designed to fix the level of deference at no deference or total deference are impractical largely due to their inelasticity. In no-deference systems, political realities that the Executive faces in treaty execution are given no weight, and the courts are left to construe the meaning of the treaty in question within the strict legal confines of the text and history of the instrument.[184] Similarly, total deference undermines the status of treaties as supreme federal law by providing them no weight as legal instruments, despite the fact that the core substance of much of treaty law is specifically designed to constrain the Executive in its actions.

Chevron deference is designed to overcome these objections through its emphasis on ambiguity[185] and reasonableness, thus providing a meaningful judicial role while ceding substantial ground to the Executive's prerogative of discretion and flexibility in foreign affairs. As noted above, the *Chevron* model relies on presumptions of congressional delegation and executive

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183. *Id.* at 882 (Easterbrook, J., concurring) ("I do not perceive in *Walton* any 'merger' . . . between *Chevron* and *Skidmore*, which *Mead* took such pains to distinguish. HUD's interpretation is on the *Skidmore* side of the line.").

184. Further, any such history is frequently, if not usually, sparse and inconsistent.

185. Professors Posner and Sunstein emphasized that any such ambiguity must be genuine before any controversy as to the propriety of executive action should arise. *See* Posner & Sunstein, *supra* note 69, at 1178 (emphasizing that their analysis is restricted to instances of genuine ambiguity in the governing law and would not apply to clear congressional mandates, even with respect to international law created through self-executing treaties or treaties given domestic effect by clear congressional action). Professors Jinks and Katyal, on the other hand, point out the inherent difficulty in determining whether such ambiguity is genuine. *See* Jinks & Katyal, *supra* note 134, at 1269 (arguing that "genuine ambiguity" has no consistently measurable standard as, consciously or unconsciously, ambiguity in the law is often identified in line with latent policy goals).

specialization, which are frequently not at play in treaty interpretation. The result is a system that does not track the core issues at play in treaty-interpretation-deference questions.

The inadequacies of these systems, coupled with the increasing importance of treaties, requires implementing a model of deference that accounts for relevant factors that have caused the Judiciary to engage in such inconsistent application of the great weight doctrine.[186] As demonstrated by the discussion above, different circumstances require varied levels of deference. A model of deference based on the persuasiveness factors outlined in *Skidmore* moves us to a more flexible model of deference that can be tailored to address the dual concerns of the Judiciary and Executive. This calibrated scale, with factors addressing the particularities of treaties, is the only way to effectuate the obligations and rights encompassed within the domestic realm while respecting their role in international relations.

186. *See* Van Alstine, *supra* note 150, at 1300 ("[W]ithout an entrustment of continuing administrative authority to an executive-branch agency, what remains is a sliding-scale deference calibrated to the overall persuasiveness of a proffered executive-branch interpretation of a treaty and to any implications for our nation's foreign affairs.").