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ARTICLE

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AFTER DEFERENCE: FORMALIZING THE JUDICIAL POWER  
FOR FOREIGN RELATIONS LAW

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DEBORAH N. PEARLSTEIN<sup>†</sup>

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### INTRODUCTION

How much deference should courts afford the executive's interpretations of statutes and treaties in foreign relations law? This question that has long engaged foreign relations scholars has found new salience in recent years, as the courts have been called repeatedly to determine the meaning of statutes and treaties bearing on the President's detention and trial powers in combating international terrorism. Among courts noting the confusion on this issue are those now attempting to address whether and to what extent the executive's views are relevant in interpreting the Authorization for Use of Military Force (AUMF), the statute the President invokes to justify continued detention of terrorist suspects at the U.S. Naval Base at Guantanamo Bay.<sup>1</sup> While the Supreme Court has offered some guidance on the scope of the statute,<sup>2</sup> the AUMF itself is silent on the question of detention. As the courts have struggled to choose between two interpretations of the statute—one put forward by the executive, the other advanced by detainees—courts have been notably equivocal on the potentially dispositive issue of judicial deference: “The Court does not accept the government’s position [on the meaning of the statute] in full, then, even given the deference accorded to the Executive in this realm, because it is ultimately the province of the courts to say ‘what the law is’ . . . .”<sup>3</sup>

<sup>1</sup> Authorization for Use of Military Force, 50 U.S.C. § 1541 note (2006).

<sup>2</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-19 (2004) (plurality opinion) (finding that the AUMF permits detention, at a minimum, of individuals who were “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States” there (quoting Brief for Respondent at 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696))).

<sup>3</sup> *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also *id.* (“Although there is some disagreement regarding the extent of the deference owed the Executive in this setting, it is beyond question that some deference is required.”). The court also cites articles reflecting the scholarly debate over deference:

*Compare* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1220 (2007) (arguing that with respect to the AUMF, “the President should be taken to have the authority to interpret ambiguities as he chooses”), *with* Derek Jinks & Neal Katyal, *Disregarding Foreign Relations Law*, 116

Historically, most scholars have accepted with little question the notion that the Court will defer to executive views in core matters of foreign relations, particularly where matters of national security are concerned.<sup>4</sup> Yet on descriptive and normative grounds, the events of the past decade have called the prevailing account into question. In treaty interpretation, the Court has invoked a *Marbury*-based insistence on asserting its own formal interpretive authority. As the Court put it perhaps most dramatically in recent opinions construing the Vienna Convention on Consular Relations: "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,' headed by the 'one supreme Court' established by the Constitution."<sup>5</sup> Likewise, in a series of decisions involving national security, the Court has been anything but deferential to the executive's interpretation of the relevant statute or treaty. In *Rasul v. Bush*,<sup>6</sup> *Hamdi v. Rumsfeld*,<sup>7</sup> *Hamdan v. Rumsfeld*,<sup>8</sup> and *Boumediene v. Bush*,<sup>9</sup> the Court has swept aside vigorous arguments by the executive that it refrain from engagement on abstention or political question grounds. Moreover, the Court has scarcely noted any doctrinal tradition of interpretive "defe-

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YALE L.J. 1230, 1234 (2007) (acknowledging that under existing doctrines deference is warranted in some circumstances, but arguing that "increased judicial deference to the executive in the foreign relations domain is inappropriate").

*Id.* at 69.

<sup>4</sup> See, e.g., *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 162 (2002) (statement of Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard Law School) ("[C]ourts necessarily see but one case at a time and in wartime tend to defer to the executive's greater knowledge and expertise . . ."); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 132 (2d ed. 1996) ("[F]oreign affairs make a difference. Here, the courts are less willing than elsewhere to curb the federal political branches, are even more disposed to presume the constitutional validity of their actions and to accept their interpretations of statutes, and have even developed doctrines of special deference to them."); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 906 & n.14 (2004) (citing various sources).

<sup>5</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-54 (2006) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); see also *Medellín v. Texas*, 552 U.S. 491, 523 (2008) (rejecting the executive's argument that a judgment of the International Court of Justice, although not binding in courts of its own authority, "became the law of the land with precisely that effect pursuant to the President's Memorandum and his power 'to establish binding rules of decision that preempt contrary state law'" (quoting Brief for United States as Amicus Curiae Supporting Petitioner at 5, *Medellín*, 552 U.S. 491 (2008) (No. 06-0984))).

<sup>6</sup> 542 U.S. 466 (2004) (interpreting the federal habeas statute).

<sup>7</sup> 542 U.S. 507 (2004) (interpreting the AUMF and the Geneva Conventions).

<sup>8</sup> 548 U.S. 557 (2006) (interpreting the Detainee Treatment Act, the Uniform Code of Military Justice, and the Geneva Conventions).

<sup>9</sup> 553 U.S. 723 (2008) (interpreting the Military Commissions Act).

rence” on the meaning of the laws. While descriptive claims that the Court invariably defers to the President in foreign relations law interpretation have always been subject to challenge, the Court’s recent behavior has made this account increasingly untenable.<sup>10</sup>

In the wake of such decisions, scholars have turned renewed attention to the task of identifying a doctrine of “deference” in foreign relations law. Cass Sunstein and Eric Posner, among others, have expressed the normative concern that the Court, unduly interested in “saying what the law is” in an area of questionable judicial competence, was no longer taking sufficient account of the executive’s superior expertise and political responsiveness in this realm.<sup>11</sup> Others, while not necessarily lamenting the less deferential judicial role, have focused on the importance of finding some constraining approach that would provide interpretive guidance to the courts.<sup>12</sup> If there is no predictable or sensible way of determining how much attention the Court will pay executive views in construing foreign relations law, rule-of-law interests require, at a minimum, the development of a new understanding of the judicial relationship to the executive on questions of law interpretation. Responding to such concerns, Sunstein and Posner thus joined Curtis Bradley and others in suggesting that courts should defer to the executive in cases with “substantial foreign relations implications,” just as they do under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>13</sup> in the standard administrative law context.<sup>14</sup>

But as this Article contends, *Chevron*’s promise of resolving the deference question in foreign relations law is almost certainly overstated.

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<sup>10</sup> See *infra* Part I.

<sup>11</sup> See Posner & Sunstein, *supra* note 3 (arguing that reasonable interpretations by the executive of ambiguous statutes should “trump” certain judicial doctrines); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005) [hereinafter Sunstein, *Administrative Law Goes to War*] (arguing that presidential action under statutes authorizing the use of military force should receive considerable deference); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006) [hereinafter Sunstein, *Beyond Marbury*] (expressing approval of judicial deference to executive interpretations). But see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 701 (2000) (noting the “substantial deference” courts give the executive branch in matters of foreign affairs).

<sup>12</sup> See Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1772-73 (2007) (proposing a model of deference to executive treaty interpretation that varies based on the circumstances); Jinks & Katyal, *supra* note 3, at 1236-38 (recognizing that while some judicial deference is often appropriate, it is not appropriate when international law seeks to constrain the executive itself).

<sup>13</sup> 467 U.S. 837 (1984).

<sup>14</sup> Posner & Sunstein, *supra* note 3, at 1217.

First, *Chevron* is not nearly as doctrinally stable as its advocates suggest. As a growing set of empirical studies has shown, *Chevron* has exerted anything but a defining hold on Supreme Court treatment of agency interpretation of federal laws. This Article will describe how the contemporary Court has regularly avoided applying traditional *Chevron* deference in what might otherwise have been thought to be circumstances described by the core of that doctrine. Indeed, the Court has ignored *Chevron* as a useful interpretive guide in recent foreign relations cases in which it might most readily be implicated.<sup>15</sup> At the same time, while one of the most important functional rationales for embracing *Chevron* in the foreign relations context is said to be the doctrine's ability to take account of the executive's superior expertise, *Chevron* is, in key respects, a blunt tool for ensuring that expertise is taken into account in law interpretation. An agency administrator in principle enjoys deference under *Chevron* whether or not the administrator has actually included the relevant agency experts in the analysis. If one accepts the view that the executive's key strength is its expertise on certain questions arising in foreign relations, one would presumably wish to insist that the actual experts inside the executive branch be consulted. If expertise matters, there may be more effective ways of ensuring its inclusion than review for generalized "reasonableness" of "executive" interpretation.

Beyond this, the wholesale importation of *Chevron* into foreign relations law poses another problem. As *Chevron*'s critics have emphasized since soon after the decision came down, *Chevron* appears to be in tension with the Court's formal constitutional power under Article III, which has at its core the duty to "say what the law is."<sup>16</sup> When the Court does something less than determine for itself what the law is, the argument goes, it is ceding power that the Framers of the Constitution intended to reserve to the Article III courts.<sup>17</sup> While administrative law scholars have grappled with this problem for decades, it has been surprisingly absent from the contemporary foreign relations law debate. Yet importing *Chevron* into the foreign relations setting without attempting to address the issue only perpetuates the formal dilemma. Particularly because the formal allocation of foreign relations power between the judicial and executive branches—unlike the rather more novel authority of administrative agencies—is an express subject

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<sup>15</sup> See *infra* subsection I.B.2.

<sup>16</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>17</sup> See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 525 (1989) (arguing that *Chevron* poses a challenge to the separation of powers).

of constitutional concern, it seems essential to have some formal theory of how interpretive power may be shared in this realm before designing a deference doctrine that effectively shares it. At what point does a pretermission of the judicial interpretive inquiry—in favor of the executive's meaning—chip away at a formal authority the Constitution otherwise grants to the courts? Once a "case or controversy" is properly before an Article III court, is there a formal floor of judicial power to interpret statutes and treaties, beneath which no functional deference rationale can justify allowing the court to sink? Without some more developed understanding of what is meant by the "judicial power" in foreign relations law, it is premature to settle on a deference regime that may have the court adjusting its approach to law interpretation. This Article begins exploring answers to these questions of formal power.

Part I engages the current debate over judicial deference in foreign relations interpretation. While embracing the need for greater clarity, it argues that importing *Chevron* into foreign relations law is an unsatisfying solution. Part II then takes up the problem of formal judicial power in detail, considering first the two leading accounts of the "judicial power" in statutory interpretation. The first model, still perhaps the dominant understanding of the courts' role in statutory interpretation, known as "faithful agent" theory, sees the relationship between Congress and the courts as that of principal and agent, where the judicial agent's duty is limited to attempting to discern and accurately apply the directions of the legislative principal set forth in statute.<sup>18</sup> Yet as will be discussed, faithful agent theory seems unlikely to fully explain the judicial role in foreign relations law. In statutory interpretation, it is not immediately clear that it leaves room for an executive interpretive role of any sort. For treaty interpretation, faithful agent theory's utility is even more suspect. Treaties, of course, are not concluded by the legislature alone, but are "ma[d]e" by the executive, "by and with the advice and consent of the Senate."<sup>19</sup> Indeed, the U.S. executive and Senate are not the sole lawmakers involved in making treaties; foreign treaty partners help conceive, negotiate, and draft the legal text.<sup>20</sup> In this context,

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<sup>18</sup> See *infra* Section II.A.

<sup>19</sup> U.S. CONST. art. II, § 2.

<sup>20</sup> See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (providing that treaties should be interpreted by looking to the actions and pertinent agreements made by all the parties of the treaty); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 183-85 (1982) (attending to the views of both the United States and Japan in interpreting the terms of a Friendship, Commerce and Navigation Treaty between the parties).

it seems problematic at best to view the U.S. executive as the sole “principal” lawmaker whose intent the Court must discern.

A second model of the judicial power, commonly called “instrumental theory,” is somewhat more promising. It holds that Article III courts were created not to be mere agents of Congress, but rather to employ quintessentially *judicial* canons of interpretation and methods of legal reasoning that will both help to clarify ambiguous texts and influence legislative drafting over time.<sup>21</sup> Yet while instrumental theory adds much value to the question of judicial power in foreign relations law, it too leaves central questions about the relationship between the interpretive power of the courts and the executive unanswered. Instrumental theory’s relative silence on the role of normative canons of statutory construction<sup>22</sup>—for example, an avoidance canon that requires a clear statement before rendering an interpretation that has the effect of delegating power from one branch to another—leaves unsettled one of the central questions in foreign relations law: whether interpretive canons of constitutional stature still apply.<sup>23</sup> Likewise, it seems hard to believe that the judicial power in treaty interpretation hinges on the expectation that interpretive practices pursued by the U.S. judiciary alone are meant to have a clear impact on treaty drafting over time. While the U.S. executive certainly has some incentive to take Supreme Court interpretive expectations into account in negotiating treaty texts, the United States’ system is but one judicial system among many in multilateral treaty interpretation. Foreign courts are hardly bound by the interpretive guidance of the U.S. high court, and our treaty partners may have their own domestic interpretive demands to fulfill. Under the circumstances, it would seem

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<sup>21</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 116-18 (1994) (discussing the belief of the Framers of the Constitution in judicial engagement in interpretation); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 *STAN. L. REV.* 1, 7 (2000) (arguing that judicial influence over legislative behavior is “an important component of the Founders’ constitutional design”).

<sup>22</sup> A number of scholars have discussed the role of so-called normative canons in statutory interpretation. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *VAND. L. REV.* 593, 598 (1992) (“A good many of the substantive canons of statutory construction are directly inspired by the Constitution . . .”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 *COLUM. L. REV.* 2071, 2111 (1990) (“By using these principles, courts decide cases of statutory meaning by reference to something external to legislative desires . . .”).

<sup>23</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *HARV. L. REV.* 2047, 2103-06 (2005) (arguing against a clear statement requirement on delegation grounds in interpreting the AUMF).



surprising if instrumental influence of this sort were the sole, or even primary, expected judicial function in treaty interpretation.

Given these deficiencies, this Article turns in Part III to offer a separate, supplemental understanding of the judicial power in foreign relations law. Here called equilibrium theory, the model this Article explores draws on historic justifications for judicial supremacy over *constitutional* interpretation to propose that part of the judicial role in statutory and treaty interpretation is to aid in maintaining a structural balance of power.<sup>24</sup> As Monaghan has noted, "Marshall's grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation."<sup>25</sup> And while the most sweeping conceptions of judicial power to independently "say what the law is"<sup>26</sup> could not survive the modern administrative state, it is a mistake to understand this transformation as the end of the Court's role in structural power balancing. The Framers' vision of separated branches, as post-*Chevron* critics have suggested, was of a government of shared authority, each branch with enough constitutional power "to resist encroachments of the others."<sup>27</sup> Serving the demands of functional effectiveness by allowing one branch to accrue greater authority over time may be permissible as long as the other branches can respond with equal and opposite constraining force of their own. Delegation could be tolerated, but only because it was possible to maintain an offsetting power through judicial review.<sup>28</sup> In this view, to the extent a doctrine of deference disables the courts from helping to maintain that system of "dynamic equilibrium,"<sup>29</sup> it impermissibly encroaches on the structural mandate of the judicial power.

Such an understanding of the judicial power contributes to our approach to deference in statutory and treaty interpretation in several ways. First, there is nothing in equilibrium theory that would preclude the consideration of an executive branch interpretation of a law, particularly insofar as the executive may enjoy functional advantages in expertise that might clarify legislative meaning, or insofar as the executive

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<sup>24</sup> See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 33 (1983) (describing *Marbury's* understanding of the "judicial power" over interpretation).

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>27</sup> Farina, *supra* note 17, at 496-97 (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961)).

<sup>28</sup> See *id.* at 487 (explaining how judicial review can help check excessive delegations of power).

<sup>29</sup> *Id.* at 497.

has a relevant formal role (i.e., to “make” treaties). There would, however, be an expectation in statutory interpretation that the Court would apply substantive interpretive canons geared toward limiting excessive delegations of power and disfavor interpretations that disable any one branch from continued participation in a deliberative dialogue. And there would be a corresponding expectation in treaty interpretation—an expectation that domestic judicial power would function, at least at the interpretive margins, to push back against the tendency in international law and legal structures to aggrandize power for executives within domestic legal systems.<sup>30</sup> As a result, an equilibrium theory understanding of the limits of judicial deference has direct implications for the interpretation of statutes like the AUMF, a statute whose meaning is informed by international law and so occupies the courts today.<sup>31</sup>

Before proceeding, it may be helpful to say a word about what the field “foreign relations law” is meant here to describe. The term itself may be most commonly read to capture a set of cases involving disputes or other engagements between the United States and other nations. Cases involving treaty interpretation thus seem centrally implicated. At the same time, most scholars in the field recognize that certain questions of statutory interpretation might also fall within the “foreign relations” rubric—particularly statutes implicating special functional strengths of the executive branch and statutes seeming to implicate the executive’s own formal constitutional role.<sup>32</sup> Given both the potential breadth and the uncertain stability of such a category, a deference doctrine intended for the (said) peculiar demands of foreign relations law might easily become the exception that swallows the rule. Be that as it may, it nonetheless seems worthwhile to consider whether it is possible to identify a theory of judicial power that would help inform the Court’s approach to executive views across this admittedly broad range of cases.

The justifications for this approach are multiple. First, the text of Article III setting forth the formal judicial power itself does not distin-

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<sup>30</sup> See generally Kim Lane Scheppele, *The International State of Emergency: Challenges to Constitutionalism after September 11* at 3-5 (Sept. 21, 2006) (unpublished manuscript) (on file with author) (describing how national executives have used a series of U.N. Security Council antiterrorism resolutions to evade structural constitutional constraints domestically).

<sup>31</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004) (plurality opinion) (interpreting the AUMF to authorize the detention of certain individuals as enemy combatants).

<sup>32</sup> See, e.g., Bradley & Goldsmith, *supra* note 23, at 2100 (noting that the AUMF governs a context in which the President “possesses independent constitutional authority under Article II,” so “the authorization need not be as precise as would be required in the absence of concurrent presidential authority”).

guish between statutes and treaties: "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 . . . ."<sup>33</sup> That is, the same judicial power appears to extend to any of the subject instruments. It may be the case that formal power granted to the executive (in foreign relations but not elsewhere) has some effect on what deference the courts owe, and this Article will consider arguments supporting this possibility. But because in the first instance the inquiry here is about the scope of the *judicial* power since *Marbury*, it seems necessary to begin by asking about the judicial power in general.

Second, however unstable the category of "foreign relations law" may be, it is a field that both courts and scholars have long recognized as having some exceptional salience in informing how the Court should behave. By embracing the full breadth of the category—including its extension to both statutes and treaties—we might better understand how exceptional the category really is. If foreign relations law is indeed increasingly indistinguishable from ordinary domestic law—either in its formal attributes (e.g., texts, history, and decisional law) or in the functional skills its application demands (e.g., expertise and political accountability)—that is all the more reason to ensure that any doctrine of "deference" in the field flows from some common understanding of the judicial role.

## I. THE PROBLEM OF INTERPRETATION IN FOREIGN RELATIONS LAW

Scholars have long posited that the courts defer to executive views in interpreting foreign relations law, particularly where matters of national security are concerned.<sup>34</sup> In statutory interpretation, the Court has broadly construed legislative delegations of power to the President.<sup>35</sup> Deference is all the more evident in treaty interpretation, it is argued, where the President's record of prevailing in the Supreme Court is lengthy<sup>36</sup> and where the President's power to

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<sup>33</sup> U.S. CONST. art. III, § 2.

<sup>34</sup> See sources cited *supra* note 4 for examples of scholarly opinion describing deference to executive views.

<sup>35</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 329 (1936) (upholding a congressional delegation of authority to the President to impose an arms embargo under certain circumstances).

<sup>36</sup> See David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1462-66 (1999) (arguing that judicial deference in treaty interpretation increased during the twentieth century); Bradley, *supra* note 11, at 659 ("Since early in the nation's history, courts have been reluctant to contradict the executive branch in its conduct of foreign relations."); Scott M. Sullivan, *Rethinking Treaty*

“make treaties” may give the Court formal reasons to accede to the President’s interpretive wishes.<sup>37</sup> Counternarratives exist, to be sure, but they have had seemingly modest effect in puncturing the prevailing wisdom.<sup>38</sup> Yet on descriptive and normative grounds, the Court’s behavior in the past decade especially has called the prevailing account into question. This Part thus begins by highlighting some of the Court’s recent decisions that have posed the greatest challenge to historical expectations of deference in foreign relations law. It then considers whether recent proposals to address the muddle of deference doctrine in foreign relations law succeed in remedying the problems their proponents hope to address.

#### A. *Foreign Relations Deference in the Modern Court*

The notion that the Court defers regularly to the executive’s views in foreign relations law manifests itself somewhat differently in doctrines of treaty and statutory interpretation. In treaty interpretation, the strongest argument that the Court defers to the executive’s reading comes from a small number of twentieth-century cases in which the Court has noted that the “meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight.”<sup>39</sup> To be clear, this “great

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*Interpretation*, 86 TEX. L. REV. 777, 780 (2008) (positing that twentieth-century courts regularly deferred to executive actions in foreign affairs).

<sup>37</sup> See sources cited *supra* note 36.

<sup>38</sup> Recent historical analysis of the founding-era Court finds no tradition of judicial deference to executive views on the meaning of treaties. See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 502-22 (2007) (surveying the Supreme Court’s historically nondeferential approach to treaty interpretation). In statutory interpretation, scholars have long worked to demonstrate that the political question doctrine, for example, has given the Supreme Court little pause in practice. See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 61 (1992) (arguing that the political question doctrine has played a minimal role in Supreme Court case law and “may be falling into desuetude”).

<sup>39</sup> *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); see also *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.” (citing *Kolovrat*, 366 U.S. at 194)); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) (“[I]n resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight.”); *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921) (“[T]he construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight.”); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) (“A construction of a treaty by the political department of the Government . . . is . . . of much weight.”).

weight" language is invariably qualified immediately before or after by insistence that the executive's views are in no way "conclusive" on questions of interpretation.<sup>40</sup> Indeed, most treaty cases that find the Court commenting at all about its interpretive methodology begin with familiar textualist statements to the effect that "[i]n construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."<sup>41</sup> A fair number of Supreme Court treaty cases say nothing at all about notions of interpretive deference to the executive.<sup>42</sup> Nonetheless, Curtis Bradley, among others, has argued that such language "is not mere window dressing, but rather is a significant factor in treaty interpretation."<sup>43</sup> And while raw outcome statistics tell us little about the role of deference doctrine as a dispositive factor in Supreme Court treaty interpretation, the executive has succeeded in winning far more treaty interpretation cases than it has lost.<sup>44</sup>

In statutory interpretation, strong notions of judicial deference to the executive in foreign relations matters are traced most commonly to *United States v. Curtiss-Wright Export Corp.*, a non-wartime case in which the Court embraced the President's reading of a statute delegating authority to the executive to place an embargo on arms sales to certain countries.<sup>45</sup> Rejecting a nondelegation challenge to the President's exercise of authority, the Court wrote sweepingly of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,"<sup>46</sup> a "vast external realm"<sup>47</sup> in which "the President alone has the power to speak or listen as a representative of the nation."<sup>48</sup> Without making clear the full consequences of this description for statutory interpretation, *Curtiss-Wright* has been understood to suggest that standard canons of interpretation (in particular, construing the text against instituting overly broad delegations of power) are less salient in matters of

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<sup>40</sup> See, e.g., *Sumitomo*, 457 U.S. at 184-85 (cautioning that agency interpretations are "not conclusive").

<sup>41</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992); see also *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 65 (1993) ("Our interpretation must begin, as always, with the text of the Conventions.").

<sup>42</sup> See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644 (2004); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *In re Ross*, 140 U.S. 453 (1891).

<sup>43</sup> Bradley, *supra* note 11, at 701.

<sup>44</sup> See Chesney, *supra* note 12, at 1752-58 (reviewing treaty deference cases and concluding that the executive branch's interpretation "prevails in most instances").

<sup>45</sup> 299 U.S. 304, 320 (1936).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 319.

<sup>48</sup> *Id.*

foreign relations.<sup>49</sup> While *Curtiss-Wright* has been the subject of scathing criticism over the years,<sup>50</sup> it is broadly thought to contemplate exceedingly deferential attention to the President's construction of statutory grants of authority.<sup>51</sup>

Whether or not deference doctrines in treaty and statutory interpretation have ever had much stability or influence,<sup>52</sup> they have been little in evidence in the Court's interpretive methodology in recent years. This Section highlights some of the more important opinions in this regard, concluding that the Court has shown no inclination to pretermitt its own interpretive inquiry so that it might defer to an interpretation advanced by the executive. On the contrary, these cases are most readily understood to embrace the vigorous assertion of the Court's own formal power of interpretation, including the wide-ranging consideration of functional arguments advanced by all sides.

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<sup>49</sup> See Bradley & Goldsmith, *supra* note 23, at 2100-01 (“[T]he same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter.” (quoting *Loving v. United States*, 517 U.S. 748, 772 (1996))).

<sup>50</sup> See, e.g., Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 28-32 (1973) (criticizing the decision and its resulting impact).

<sup>51</sup> See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098-1100 (2008) (describing a continuum of judicial deference regimes, along which *Curtiss-Wright*-type attention to executive views appears at the most deferential end); see also Bradley & Goldsmith, *supra* note 23, at 2101-02 (citing *Curtiss-Wright* in support of broad readings of congressional delegations of power to the executive in foreign affairs).

<sup>52</sup> Eskridge and Baer's survey of 1014 Supreme Court cases since *Chevron* in which an agency interpretation of a statute was at issue classifies only nine of these as foreign affairs and national security matters receiving “super-strong deference”—cases in which “the executive department interpretation prevails not only” when the statute is ambiguous, “but also in cases where Congress has not clearly trumped the agency or presidential construction.” Eskridge & Baer, *supra* note 51, at 1101-02 & n.56. But even in these nine cases, it is debatable whether the executive's position prevailed *because* the Court deferred to an executive interpretation of a statute rather than reaching that result based on its own independent analysis. For example, one of the nine cases, *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005), announced no deference scheme and conducted a thorough *de novo* exercise in statutory interpretation, noting only at the end that a “policy of deference” to the executive in foreign affairs would also lead it to favor the interpretation already given. *Id.* at 348. Another of the nine, *Cheney v. United States District Court*, 542 U.S. 367 (2004), involved the interpretation of the *common law* writ of mandamus and *common law* executive privilege.

## 1. Interpreting Treaties

Perhaps the most instructive set of cases from the modern Court illuminating treaty interpretation has been the series addressing the domestic effect of Article 36 of the Vienna Convention on Consular Relations,<sup>53</sup> which requires authorities to inform a noncitizen arrestee of her right to notify her home consulate of an arrest or pending prosecution in U.S. courts.<sup>54</sup> In *Breard v. Greene*, the Court held that state procedural rules requiring defendants to raise treaty claims at trial or waive those claims on appeal could prevent a defendant from having the claim heard at all in a subsequent federal habeas proceeding.<sup>55</sup> But soon after the *Breard* decision came down, the International Court of Justice (ICJ)—which an optional protocol to the Convention named as having “compulsory jurisdiction” over “[d]ispute[s] arising out of the interpretation or application of the Convention”<sup>56</sup>—ruled to the contrary. According to the ICJ, the application of a state procedural default rule to block habeas consideration of a defendant’s treaty claim violated Article 36 of the Convention because it “had the effect of preventing ‘full effect [from being] given to the purposes for which the rights accorded under this article are intended.’”<sup>57</sup>

The Supreme Court took up the effect of the ICJ ruling in two subsequent opinions—both of which seem most distinguished for their vigorous defense of the power of the Court itself. *Sanchez-Llamas v. Oregon* involved the failure of the Virginia state police to notify Mr. Sanchez-Llamas of his right to consular notification following his ar-

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<sup>53</sup> Vienna Convention on Consular Relations art. 36, *done* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

<sup>54</sup> *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491, 504-06 (2008) (holding that Vienna Convention provisions are non-self-executing); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 358-60 (2006) (rejecting a claim that a judgment of the International Court of Justice requires overriding application of state procedural default rules); *Breard v. Greene*, 523 U.S. 371, 375-77 (1998) (determining that the Vienna Convention did not preclude application of state procedural default rules). The Vienna Convention provides that when the police of a signatory nation arrest a foreign national, the detaining “authorities shall inform” the foreign national “without delay” of his “right[.]” to contact his nation’s consular officers. Vienna Convention on Consular Relations, *supra* note 53, art. 36.

<sup>55</sup> *Breard*, 523 U.S. at 375-76 (holding that state procedural rules can trump a defendant’s collateral assertion of Vienna Convention rights).

<sup>56</sup> Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, *done* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 488 (ratified by the United States in 1969).

<sup>57</sup> *LaGrand Case* (Ger. v. U.S.), 2001 I.C.J. 466, 498 (June 27) (quoting Vienna Convention on Consular Relations, *supra* note 53, art. 36(2)); *see also* *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 43 (Mar. 31) (finding a duty to give a detainee notice of Article 36 rights once there is a strong reason to believe the person is a foreign national).

rest.<sup>58</sup> In rejecting Sanchez-Llamas's argument that suppression of evidence was a proper remedy for an Article 36 violation, the Court made no mention of a canon of interpretive deference.<sup>59</sup> On the contrary, to the extent the Court discussed its interpretive approach, it was with simple reference to the *Restatement* version of treaty construction: "An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose."<sup>60</sup> Likewise rejecting the suggestion that the Court must accept the ICJ's decision as authoritative on the treaty,<sup>61</sup> the Court emphasized that it could not be bound by the judgment of another judicial body.<sup>62</sup> The Court's reasoning on this point did not begin with any discussion of deference (to the executive's views or those of anyone else), but instead with a ringing endorsement of the power of the independent judiciary: "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,' headed by the 'one supreme Court' established by the Constitution."<sup>63</sup> Only after concluding, based on its own reading of the ICJ's enabling statute, that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts," did the Court note in its final paragraph that the interpretations of "the departments of government particularly charged with [treaties'] negotiation and enforcement is given great weight."<sup>64</sup> As it turned out, the Court said, the executive agreed with its judgment that ICJ rulings are not binding on U.S. courts.<sup>65</sup>

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<sup>58</sup> 548 U.S. at 340.

<sup>59</sup> See *id.* at 345-50.

<sup>60</sup> *Id.* at 346 (quoting 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1987)).

<sup>61</sup> *Id.* at 353. Because the Court ruled against habeas petitioners on the remedy question, it concluded it did not need to reach the third question presented in the case: "whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding." *Id.* at 342-43.

<sup>62</sup> *Id.* at 353-55.

<sup>63</sup> *Id.* at 353-54 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (citing *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000) (opinion of Stevens, J.) ("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.")).

<sup>64</sup> *Id.* at 354-55 (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

<sup>65</sup> *Id.* at 355.



Yet even this passing notice of deference to the executive ultimately rang hollow. In 2005, the year before *Sanchez-Llamas*, President Bush issued a memorandum opinion stating that the United States would discharge its international obligations under the ICJ judgment by “having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.”<sup>66</sup> If the *Sanchez-Llamas* Court had been principally interested in giving effect to the President’s desired *outcome* in these cases, one might imagine it would have been at least possible to construe the relevant texts to *require* that state courts give the decision such an effect. Instead, the Court went to great lengths to restate the executive’s more nuanced position on the Court’s own terms. While the executive had “agreed to ‘discharge its international obligations’ in having state courts give effect to the [ICJ’s] decision,” it did not expressly take the position that the ICJ’s interpretation binds U.S. courts.<sup>67</sup>

In this light, the Court’s more recent decision in *Medellín v. Texas*<sup>68</sup> was of a piece with its equivocal response to the executive’s views. Asked to determine whether the ICJ’s judgment itself gave petitioners an enforceable right, the Court began with the same familiar, non-deferential statement of treaty interpretation.<sup>69</sup> While the Court agreed with the executive that the relevant treaties did not render ICJ decisions directly enforceable in U.S. courts, it was only after the Court thoroughly considered and rejected *Medellín*’s argument that it mentioned that “the United States’ interpretation of a treaty ‘is entitled to great weight.’”<sup>70</sup> Of greater significance, in rejecting the notion that the President’s 2005 memorandum telling state courts to give effect to the ICJ decision required those courts to comply, the Court dismissed the executive’s argument that the ICJ judgment “became the law of the land [binding on courts] pursuant to the Presi-

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<sup>66</sup> Memorandum from President George W. Bush for the Attorney General (Feb. 28, 2005), *reprinted in* Brief for United States as Amicus Curiae Supporting Respondents app. at 9a, *Medellín v. Dretke*, 544 U.S. 660 (2004) (No. 04-5928).

<sup>67</sup> *Sanchez-Llamas*, 548 U.S. at 355 (quoting Memorandum from President George W. Bush, *supra* note 66).

<sup>68</sup> 552 U.S. 491 (2008).

<sup>69</sup> *See id.* at 506-07 (“The interpretation of a treaty, like the interpretation of a statute, begins with its text. Because a treaty ratified by the United States is ‘an agreement among sovereign powers,’ we have also considered as ‘aids to its interpretation’ the negotiation and drafting history of the treaty as well as ‘the post-ratification understanding’ of signatory nations.” (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (citation omitted))).

<sup>70</sup> *Id.* at 513 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)).

dent's Memorandum and his power 'to establish binding rules of decision that preempt contrary state law.'<sup>71</sup> Central to the executive's position on this point was that the relevant treaties should be read to "implicitly give the President" the power to implement the United States' "treaty-based obligation" to effect compliance with the ICJ's decision.<sup>72</sup> In essence, the executive was asking the Court to accept its interpretation of the treaty—a reading that would allow it to maintain that the treaty could not be enforced by courts upon the request of an individual asserting a right, but could be (indeed must be) enforced when the executive issued an informal instruction for court-based compliance. This the Court refused to do, insisting that only Congress could convert "a non-self-executing treaty into a self-executing one."<sup>73</sup> If the executive wanted to achieve this effect, it could have ensured that the treaty "contain[ed] language plainly providing for domestic enforceability."<sup>74</sup> As the Court had just concluded that the treaty could not be read that way—as one might have thought a more deferential analysis would require—the executive could not prevail.

The foregoing is hardly meant to argue that the executive's understanding of treaties is irrelevant to judicial interpretation. On the contrary, the Court clearly counts among its interpretive tools positions the executive has taken in negotiating treaties and in implementing them.<sup>75</sup> But drawing on executive views as probative of "legislative" intent (because it is reflective of the negotiating history) or as evidence of post-ratification performance is notably different from attending to the executive's views because of some functional interest in the executive's superior political accountability or expertise, as *Chevron* contemplates.<sup>76</sup> Because they reflect executive behavior and not a particular executive's particular interpretive views, a treaty's negotiating history and post-ratification practice may or may not turn out to support the position of any given executive in any given case. In treaties, as in contracts, performance has been understood to be evidence

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<sup>71</sup> *Id.* at 523 (quoting Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 5, at 5).

<sup>72</sup> *Id.* at 525 (quoting Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 5, at 11).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 526.

<sup>75</sup> See *supra* note 39 (citing cases in which the Court considered executive negotiating history and performance).

<sup>76</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (supporting the practice of judicial deference to executive agencies on grounds of the executive's electoral accountability and expertise).

of the parties' intent in creating the agreement; postcontract performance can inform the meaning of an ambiguous clause.<sup>77</sup> It is thus the behavior of both parties to a treaty that the Court has found probative as a matter of interpretation.<sup>78</sup> To the extent the Court attends to the executive's views, it regularly looks to the views of both negotiating partners as evidence of negotiating intent and of post-ratification performance.<sup>79</sup> As a unanimous Court put it:

Our role is limited to giving effect to the intent of the Treaty [sic] parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.<sup>80</sup>

In this context, the Court's lack of deference to the U.S. executive since September 11, 2001, on the interpretation of the international law of armed conflict (including the Geneva Conventions) should perhaps have been less surprising than it seemed. Consider *Hamdan v. Rumsfeld*,<sup>81</sup> which presented the Court with a challenge to the legality of military-commission trials then underway at Guantanamo Bay. Among other claims, Hamdan argued that the commission regime ran afoul of Common Article 3 of the Geneva Conventions, treaties requiring, inter alia, that trials be held in a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>82</sup> The Court promptly rejected the ex-

<sup>77</sup> See *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921) (stating that treaties should be interpreted in part by reference to principles of contract interpretation).

<sup>78</sup> See *Kolovrat v. Oregon*, 366 U.S. 187, 194-95 (1961) ("We have before us statements, in the form of diplomatic notes exchanged between the responsible agencies of the United States and of Yugoslavia, to the effect that the 1881 Treaty, now and always, has been construed as providing for inheritance by both countries' nationals without regard to the location of the property to be passed or the domiciles of the nationals.").

<sup>79</sup> *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), is especially direct in this regard. There, the Court reviewed evidence of both U.S. and Japanese intent to decide whether female employees' Title VII discrimination claim against an American subsidiary of a Japanese company was effectively precluded by the terms of the Friendship, Commerce and Navigation Treaty between the United States and Japan. See *id.* at 185-89.

<sup>80</sup> *Id.* at 185 (emphasis added). Indeed, it was on this basis that Justice Scalia dissented in a later treaty interpretation case, arguing not that insufficient deference was paid to the United States' position but that "[w]hen we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight.'" *Olympic Airways v. Hussein*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (emphasis added) (quoting *Air France v. Saks*, 470 U.S. 392, 404 (1985)).

<sup>81</sup> 548 U.S. 557 (2006).

<sup>82</sup> *Id.* at 630 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *came into force* Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135).

ecutive's initial argument—that the Court should abstain from deciding the issues in the case at all.<sup>83</sup> Rather, in light of “the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty,” the Court explained, “the public interest require[s] that we consider and decide those questions without any avoidable delay.”<sup>84</sup> The Court was even more direct in rejecting the executive's claim that it should prevail on the merits of its argument that Geneva had no application to Hamdan's case.<sup>85</sup> With no mention of deference and calling the government's treaty interpretation simply “erroneous,” the Court held that Common Article 3 applied to the armed conflict at issue.<sup>86</sup> While the Court recognized that the treaty was ambiguous in some respects, it did not hesitate in concluding that the executive's commissions did not satisfy what requirements there were.<sup>87</sup>

## 2. Interpreting Statutes

To the extent the Court's post-September 11 statutory cases have addressed the question of interpretive deference at all, they likewise show little indication that the Court believes extraordinary deference is due in foreign relations law—and, indeed, often appear to apply a less deferential standard than the Court uses when construing statutory grants of authority to executive agencies in administrative law. Consid-

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<sup>83</sup> See *id.* at 584-85 (addressing the Government's argument that the Court should apply the “judge-made rule that civilian courts should await the final outcome of ongoing military proceedings before entertaining an attack on those proceedings” (quoting Brief for Respondents at 12, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-0184))); see also *id.* at 587-88 (finding that the commission review system “clearly lack[s] the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces, and thus bear[s] insufficient conceptual similarity to state courts to warrant invocation of abstention principles”).

<sup>84</sup> *Id.* at 588 (quoting *Ex parte Quirin*, 317 U.S. 1, 19 (1942)); see also *id.* at 589 (concluding that despite the executive's claims of military necessity, “the Government has identified no other ‘important countervailing interest’ that would permit federal courts to depart from their general ‘duty to exercise the jurisdiction that is conferred upon them by Congress’” (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (Kennedy, J., concurring))).

<sup>85</sup> See *id.* at 625-35 (describing the executive's argument).

<sup>86</sup> *Id.* at 630-32.

<sup>87</sup> See *id.* at 635 (“Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.”).

er *Hamdi v. Rumsfeld*,<sup>88</sup> in which the Court was called to determine whether the President's detention of a U.S. citizen, whom the government alleged the U.S. military seized during operations in Afghanistan, was authorized by the 2001 AUMF.<sup>89</sup> In defending its authority to detain Yaser Hamdi as an "enemy combatant," the executive insisted that the question whether "captured enemy combatants are entitled to POW privileges under the [Third Geneva Convention] is a quintessential matter that the Constitution (not to mention the [Convention]) leaves to the political branches and, in particular, the President."<sup>90</sup>

While recognizing that the AUMF afforded the executive at least some statutory authority to detain Hamdi,<sup>91</sup> the plurality opinion reads as a vigorous endorsement of independent judicial review. As Justice O'Connor explained, the AUMF must be read to authorize Hamdi's detention not because an alternative reading would infringe the President's constitutional power or other separation-of-powers interests, but because, by the Justices' own reading of "longstanding law-of-war principles"<sup>92</sup> and international "agreement and practice,"<sup>93</sup> detention "to prevent a combatant's return to the battlefield is a fundamental incident of waging war."<sup>94</sup> If in *the Court's judgment*, "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding

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<sup>88</sup> 542 U.S. 507 (2004).

<sup>89</sup> See 50 U.S.C. § 1541 note (2006) (authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11, 2001, terrorist attacks).

<sup>90</sup> Brief for Respondents at 24 n.9, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696). To be clear, the executive's claim was not that the Court should defer to a particular determination by the President of a particular detainee's eligibility for POW status on the facts. Rather, this was a generalized conclusion about the relevance of the Convention to a conflict between two state parties to the treaty (the United States and Afghanistan). See *id.* at 12 ("[T]he nature of judicial review available with respect to the military's enemy-combatant determination is limited by the profound separation-of-powers concerns implicated by efforts to second-guess the factual basis for the exercise of the Commander in Chief's authority to detain a captured enemy combatant in wartime.").

<sup>91</sup> The plurality made it clear that it was limiting its reading of the AUMF detention authority to the particular facts of Hamdi's case. See *Hamdi*, 542 U.S. at 516 (plurality opinion) (adopting, "for purposes of this case," the government's definition of an "enemy combatant" as one who was "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there" (quoting Brief for Respondents, *supra* note 90, at 3)).

<sup>92</sup> *Id.* at 521.

<sup>93</sup> *Id.* at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 30 (1942)).

<sup>94</sup> *Id.* at 519.

may unravel.”<sup>95</sup> Indeed, as Justice O’Connor then noted in rejecting the executive’s view that the process provided to Hamdi was sufficient:

While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.<sup>96</sup>

Notably, whatever deference may be due—and it appeared not to be much—it was due not to the President in particular or the executive writ large, but to “the judgments of military authorities” who are functionally expert on the issue.

*Hamdi’s* companion case, *Rasul v. Bush*,<sup>97</sup> tested the Court’s authority more directly. The executive had argued that the federal courts lacked jurisdiction to consider petitions that noncitizen detainees held at Guantanamo Bay brought under the federal habeas statute.<sup>98</sup> Yet in rejecting the government’s jurisdictional argument, the Court was not deterred by the notion that it should defer to the executive’s interpretation of the habeas statute. According to the Court, the presumption against extraterritorial application of federal statutes that the executive invoked had no relevance where U.S. territory was at issue—and the military base at Guantanamo was, effectively, just such a place.<sup>99</sup>

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<sup>95</sup> *Id.* at 521.

<sup>96</sup> *Id.* at 535 (citing *Korematsu v. United States*, 323 U.S. 214, 233-34 (1944) (Murphy, J., dissenting) (“[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.”); *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”)).

<sup>97</sup> 542 U.S. 466 (2004).

<sup>98</sup> *See id.* at 475 (“Respondents’ primary submission is that the answer to the jurisdictional question is controlled by . . . *Eisentrager*.”); *see also* Brief for Respondents at 14-25, *Rasul*, 542 U.S. 466 (2004) (Nos. 03-0334, 03-0343) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), as controlling precedent). Among other arguments, the government contended that the presumption against extraterritorial application of statutes “has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.” *Id.* at 19 (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (Blackmun, J., dissenting)).

<sup>99</sup> *See Rasul*, 542 U.S. at 487 (“From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the ‘implied protection’ of the United States to it.” (quoting *Eisentrager*, 339 U.S. at 777-78)). Because “sovereignty” per se was not the touchstone of jurisdictional authority, the executive’s interpretation of the U.S.-Cuba lease agreement (allowing Cuba to retain “ultimate sovereignty”) in this regard was similarly irrelevant.

In any event, *Hamdan v. Rumsfeld*<sup>100</sup> soon dispelled whatever expectation of unquestioned deference on issues of statutory interpretation remained. In addition to its treaty arguments, the executive argued that the AUMF and the statutory Uniform Code of Military Justice (UCMJ)<sup>101</sup> should be read to extend executive authority to try Hamdan in a military commission. The use of military commissions was a “necessary” part of the “necessary and appropriate force” the AUMF authorized the President to use, and “courts are not competent to second-guess judgments of the political branches regarding the extent of force necessary to prosecute a war.”<sup>102</sup> In addition, the government argued that Article 36 of the UCMJ squarely “authorize[d] the President to establish procedures ‘for cases arising under this chapter triable in . . . military commissions.’”<sup>103</sup> Under that provision, the President was delegated broad authority to establish the rules for commission proceedings, including rules different from those generally recognized in criminal cases, whenever the President “considers” application of those rules to be not “practicable.”<sup>104</sup> Deference was due the President’s judgment on what counts as “practicable” by the terms of the statute itself. Here, the President had already made such a dispositive finding in his executive order, which provided that “the danger to the safety of the United States and the nature of international terrorism” made standard criminal trials impracticable.<sup>105</sup>

On its face, the executive’s argument that it was entitled to some measure of deference in interpreting the AUMF and UCMJ seems squarely within the *Curtiss-Wright* tradition of interpreting delegations of power broadly. Alternatively, the executive might have been accorded *Chevron* deference, with the President in the role of an expert agency—and therefore one whose interpretation should prevail as long as it is reasonable.<sup>106</sup> Yet in an opinion that mentioned neither

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<sup>100</sup> 548 U.S. 557 (2006).

<sup>101</sup> 10 U.S.C. § 836 (2006).

<sup>102</sup> Brief for Respondents at 19, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-0184).

<sup>103</sup> *Id.* at 18 (quoting Uniform Code of Military Justice, 10 U.S.C. § 836 (2006)).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 47 n.22 (quoting Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2009)).

<sup>106</sup> *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (holding that when a statute’s meaning is ambiguous, the Court will defer to the agency’s judgment as long as it is reasonable); *see also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (clarifying the scope of *Chevron* deference to require a delegation by Congress of authority to make regulations “with the force of law.”).

*Curtiss-Wright* nor *Chevron*, the Court rejected the government's arguments in a technical, purely de novo analysis of the relevant UCMJ provisions. In the Court's view, the President's generalized finding about the viability of criminal trials was "insufficient."<sup>107</sup> Statutory language requiring commission and court martial procedures to be "uniform" to the extent "practicable"<sup>108</sup> did not say that uniformity could be waived whenever the President "consider[ed]" it impracticable.<sup>109</sup> This statutory standard required uniformity "*insofar as practicable*"<sup>110</sup>—a seemingly more objective test. And even if it were possible to satisfy the requirement without an "official determination," the Court deemed the impracticability requirement "not satisfied here."<sup>111</sup> Why? "Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case."<sup>112</sup> Even assuming that the President's generalized finding that criminal trials were inadequate was relevant to the impracticability inquiry, and even assuming that such a finding "would be entitled to a measure of deference"<sup>113</sup> under the statute, "the only reason offered in support of that determination is the danger posed by international terrorism."<sup>114</sup> While the Court emphasized that it did not "for one moment underestimat[e] that danger," it found no specific reason in the record for challenging the notion that standard court-martial rules would work.<sup>115</sup>

The Court's most recent cases involving the availability of statutory remedies for military detainees did not substantially alter the notably nondeferential *Hamdan* landscape in this regard. *Boumediene v. Bush* struck down a key provision of the Military Commissions Act of 2006 (MCA)—one attempting to strip the courts of jurisdiction to hear the habeas petitions of Guantanamo detainees—as an unconstitutional suspension of the writ of habeas corpus.<sup>116</sup> Rejecting the executive's proposed construction of the statute that might have rendered alternative statutory procedures a constitutionally adequate substitute for habeas, the Court found the MCA constitutionally deficient despite the availability of both the canon of constitutional avoidance (which

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<sup>107</sup> *Hamdan*, 548 U.S. at 622.

<sup>108</sup> 10 U.S.C. § 836(b) (2006).

<sup>109</sup> *Hamdan*, 548 U.S. at 622.

<sup>110</sup> 10 U.S.C. § 836(b) (emphasis added).

<sup>111</sup> *Hamdan*, 548 U.S. at 623.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 623 n.51.

<sup>114</sup> *Id.* at 623.

<sup>115</sup> *Id.* at 624.

<sup>116</sup> See *Boumediene v. Bush*, 553 U.S. 723, 787-92 (2008).



the Court mentioned explicitly) and the possibility of judicial deference to executive interpretation that might have facilitated a decision finding a constitutionally permissible construction of the MCA.<sup>117</sup> While dicta in the Court's opinion indicated some deference to the judgment of the political branches that *Hamdi*, *Rasul*, and *Hamdan* had entirely ignored, that passing language seemed to do little work in the Court's analysis, and it did not affect the outcome of the case.<sup>118</sup>

*Munaf v. Geren*,<sup>119</sup> in contrast, does appear to rely on the notion of deference to the political branches. There, the Court rejected on the merits habeas petitions filed by U.S. citizens held by U.S.-led multinational forces in Iraq. Petitioners had asked the Court to enjoin their transfer to Iraqi authorities for prosecution, arguing that transfer would violate U.S. treaty and statutory obligations not to send individuals to another country where they were likely to face torture.<sup>120</sup> While

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<sup>117</sup> See *id.* at 789 (concluding there was "no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings"); see also *id.* at 792 ("To hold that the detainees at Guantanamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress's reasons for enacting it, cannot bear this interpretation.").

<sup>118</sup> See *id.* at 796 ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches."). Yet, from his mention of deference, Justice Kennedy drew at most a conclusion of policy, not one of interpretation: "The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security." *Id.* at 797. Beyond that, the opinion is notably obscure on how deference is to be accorded and to whom. One most easily reads Justice Kennedy as understanding the deference obligation to go to Congress and the President—not to the executive alone. Indeed, far from embracing traditional deference-like justifications, such as the danger that court involvement would risk embarrassment of multifarious pronouncements from different branches, Justice Kennedy insisted that the exercise of executive authority is "vindicated, not eroded, when confirmed by" courts. *Id.* Moreover, Justice Scalia categorically rejected the notion that the Court's posture was deferential in any regard. On the contrary, Scalia found Justice Kennedy's approach "a pose of faux deference to Congress and the President. . . . What the Court apparently means is that the political branches can debate, after which the Third Branch will decide." *Id.* at 830 n.1 (Scalia, J., dissenting).

<sup>119</sup> 553 U.S. 674 (2008).

<sup>120</sup> *Id.* at 703 n.6 (citing the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, registered June 26, 1987, S. TREATY DOC. NO. 20 (1988), 1465 U.N.T.S. 85 ("No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.")).

again rejecting the executive's contention that the habeas statute did not authorize federal court jurisdiction in the case, the Court concluded rather broadly that "in the present context [the risk of torture] is to be addressed by the political branches, not the judiciary."<sup>121</sup> Here, the State Department had determined that the Iraqi prisons have "generally met internationally accepted standards for basic prisoner needs,"<sup>122</sup> and according to the Solicitor General, "the United States would object to [the multinational forces'] transfer of [petitioner] to Iraqi custody if it thought that he would likely be tortured."<sup>123</sup> The per curiam opinion embraced the executive's position, noting that the Court was "not suited to second-guess" the government's judgment of "whether there is a serious prospect of torture at the hands of an ally."<sup>124</sup>

Although the Court's attitude toward the executive here feels different, it would be a mistake to conclude that the Court's broad language has any bearing on its view of the significance of executive statutory (or treaty) interpretation. Importantly, the Court declined to reach the full merits of the detainees' statutory claims on the ground that they had not successfully raised them in the courts below. Similarly, the deference the Court appears to be exercising is not to an interpretation by the executive of its own legal authority, but rather to its assessment of the relevant facts—namely, whether the detainees were likely to face torture at the hands of the Iraqis. Deference to an executive's finding of facts carries far less significance for our understanding of judicial power than does deference on questions of law. Appeals courts defer to superior factfinders with regularity—whether juries, trial courts, or administrative judges—with no special significance for the scope of Article III power. With *Munaf* most easily read to embrace this brand of deference, it has fewer implications for the power of the courts "to say what *the law is*."<sup>125</sup>

### B. *The Elusive Promise of Chevron*

In the wake of such decisions, it is not surprising that scholars have turned renewed attention to the task of identifying a doctrine of "deference" in foreign relations law. Whether driven by the norma-

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<sup>121</sup> *Id.* at 700.

<sup>122</sup> Reply Brief for the Federal Parties at 23, *Munaf*, 553 U.S. 674 (Nos. 07-0394 and 06-1666) (quoting Bureau of Democracy, Human Rights, & Labor, *Iraq*, U.S. DEP'T OF STATE (Mar. 11, 2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100596.htm>).

<sup>123</sup> *Id.* at 23.

<sup>124</sup> *Munaf*, 553 U.S. at 702.

<sup>125</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

tive concern that the Court was no longer taking sufficient account of the executive's superior expertise and political responsiveness,<sup>126</sup> or by the rule-of-law interest in providing some interpretive guidance to the Court,<sup>127</sup> the particular challenge of balancing the executive's interpretive power against the Court's has reemerged as a vexing problem. While rejecting the notion that the executive's "primacy in the interpretation of international law" gives him the power to ignore treaty requirements that are otherwise clear, scholars such as Sunstein and Posner have argued that courts should defer to executive interpretations of ambiguous statutes and treaties in this realm in much the same way deference has been given to executive agency interpretations since the Court's watershed opinion in *Chevron*.<sup>128</sup> *Chevron* famously established a two-step inquiry that courts were to follow in ascertaining how to account for executive views when reviewing agency interpretations of statutory authority. Where the Court finds statutory meaning clear in the first instance, no further interpretive inquiry is necessary.<sup>129</sup> But where the meaning of the statute is ambiguous, the Court ceases its usual exercise in determining the law's import and inquires only whether the executive agency's interpretation is a "permissible construction of the statute."<sup>130</sup> If it is, no further judicial inquiry into the meaning of the law is necessary. So too, Sunstein and Posner have suggested that, in foreign relations law, the executive's interpretation of ambiguous laws should prevail as long as its interpretation is reasonable.<sup>131</sup>

In this view, *Chevron* is thought to carry several advantages over a more generalized assumption of judicial deference to the President in the foreign relations setting. *Chevron* is "well-entrenched in the Supreme Court, with all of the nine current justices [at the time of

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<sup>126</sup> See, e.g., Posner & Sunstein, *supra* note 3, at 1176 (arguing that courts should defer to the executive's foreign policy expertise); Sunstein, *Administrative Law Goes to War*, *supra* note 11, at 2671 (arguing for a generous interpretation of presidential powers).

<sup>127</sup> See, e.g., Bradley & Goldsmith, *supra* note 23, at 2084 (proposing to provide "a more systematic account" of the factors "relevant to interpreting the AUMF"); Chesney, *supra* note 12, at 1727 (lamenting that "the deference doctrine appears more unsettled and indeterminate than ever before"); Sullivan, *supra* note 36, at 781 (noting that courts have "failed to provide any clarity in [the] doctrine" for determining what degree of deference is appropriate).

<sup>128</sup> Posner & Sunstein, *supra* note 3, at 1221-22.

<sup>129</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>130</sup> *Id.* at 843.

<sup>131</sup> Posner & Sunstein, *supra* note 3, at 1222.

Bradley's writing] accepting its basic framework."<sup>132</sup> It thus promises a more regularized approach to judicial engagement with executive law interpretation and could help not only cabin judicial discretion, but also clarify the rules of interpretation for Congress, agencies, and lower courts.<sup>133</sup> Moreover, *Chevron* could serve an important set of functional goals:

[*Chevron*] pushes "interpretive lawmaking" to government entities that have more expertise and democratic accountability than courts. In addition, by centralizing this lawmaking in the executive branch rather than in a diffuse court system, the *Chevron* doctrine is designed to promote uniformity in the law. And by allowing for changes in interpretation, it seeks to promote flexibility in regulatory governance.<sup>134</sup>

It is argued that, if anything, the doctrine's functional rationale—grounded in the executive's superior political accountability and expertise—is even stronger in foreign relations than in traditional administrative law. Because the executive bears the primary political burden of failures in foreign relations, the executive attends to those relationships closely and is best positioned both to assess present facts and to predict what future consequences legal interpretations will have.<sup>135</sup> *Chevron* thus offers a useful middle ground between the near-total deference courts were thought to have shown in foreign relations law, and a *Marbury*-based insistence that the Court's approach to statutory and treaty interpretation should be fundamentally independent of executive views.

In exploring methods of guiding judicial engagement with executive views, there can be little doubt that the Court's recent foreign relations cases challenge traditional accounts of judicial deference. Yet the perceived strengths of *Chevron* in particular—in doctrinal clarity and attention to functional concerns—may be more elusive than its advocates suggest. *Chevron*'s doctrinal stability is in fact increasingly precarious, and its flexibility in taking functional interests into account is in key respects quite limited. More than that, *Chevron* carried with it, and still carries, substantial questions about how it may be applied while main-

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<sup>132</sup> Bradley, *supra* note 11, at 673. Note, however, that since Bradley's article was published in 2000, several new Justices have been confirmed to the Court.

<sup>133</sup> See *id.* at 668, 773-75 (discussing disadvantages of a multifactor approach and advantages of *Chevron*). But see Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992) (arguing that the Court continued to rely on multifactor tests despite *Chevron*).

<sup>134</sup> Bradley, *supra* note 11, at 673 (footnotes omitted).

<sup>135</sup> Posner & Sunstein, *supra* note 3, at 1206-07 (noting that the executive is far more politically accountable than the courts in the face of foreign policy crises).

taining the integrity of the formal judicial power. In the years after *Chevron* came down, many scholars saw the decision as a sign that the Court was prepared to abdicate a significant portion of the judicial power identified in *Marbury* "to say what the law is."<sup>156</sup> It was one thing for a court to take executive factfinding and expert analysis into account in understanding the scope of Congress's delegation. It was another thing for the Court to pretermitt its own interpretive inquiry because the executive had a greater claim to democratic legitimacy across the board. If the executive's political bona fides matter in interpreting laws delegating power to an agency, why not cede interpretive power to the executive altogether? While scholars have developed a set of theories attempting to explain how the judicial power may be shared in this regard, as shall be discussed below, the formal dilemma very much persists. For these reasons, as this Section details, *Chevron* seems a less than ideal candidate for resolving how the courts and the executive should share interpretive power in the law of foreign relations.

### 1. The *Chevron* that Survives

It is perhaps more than a little ironic that *Chevron* has gained interest from foreign relations scholars at the same time that scholars of administrative law have been demonstrating with increasing persuasiveness how limited the impact of *Chevron* has been in cases reviewing agency statutory interpretation. One of the most comprehensive empirical studies available finds that, from the time *Chevron* was decided in 1984 through the Court's 2005 Term, *Chevron* "was applied in only 8.3% of Supreme Court cases evaluating agency statutory interpretations."<sup>157</sup> Indeed, to the extent it is possible to tell a unified, qualitative story about the trajectory of the Court's major administrative law cases since 1984, it is mostly a story that sees the Court narrowing the range of agency decisions to which *Chevron* might apply and insisting upon the significant interpretive power the Court retains even within the *Chevron* regime. More, it shows a Court chafing against the some-

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<sup>156</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (describing the assumption that Congress delegates lawmaking power to the executive agency as a "legal fiction"); Sunstein, *Beyond Marbury*, *supra* note 11, at 2589 (describing *Chevron* as "a kind of counter-*Marbury* for the administrative state").

<sup>157</sup> Eskridge & Baer, *supra* note 51, at 1090. In the vast majority of the 1014 cases the Court decided during this period in which an executive agency interpretation of a statute was at issue, the Court applied either less stringent deference than that afforded by *Chevron*, or no apparent deference at all. *Id.* at 1121.

times awkward limits *Chevron* seems to impose on why executive views might matter and when they may be taken into interpretive account.

The story of *Chevron*'s less-than-transformative impact is not inconsistent with the doctrine's origin and history. By the time *Chevron* came down in 1984, the Court had been grappling for decades with how to treat executive agency interpretations of federal statutes.<sup>138</sup> In this effort, the Court had long recognized—as it reiterated in *Chevron*—that executive agency views could help give a “full understanding of the force of the statutory policy” when a given situation “depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations.”<sup>139</sup> Nonetheless, as *Chevron* itself insisted, “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”<sup>140</sup> Judges were to retain significant independent authority to determine whether a statute is clear or ambiguous—often the end of an interpretive inquiry—and to determine whether an agency's interpretation is “reasonable,” also a seemingly broad retention of power.<sup>141</sup>

Nonetheless, *Chevron* was broadly seen as revolutionary in identifying the executive's superior political accountability—and the Court's correspondingly limited credentials in that realm—and in citing that functional strength as a central basis for deferring to an agency interpretation of a statute.<sup>142</sup> As the Court famously explained: “While

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<sup>138</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.”); see also *Negusie v. Holder*, 129 S. Ct. 1159, 1170-71 (2009) (Stevens, J., concurring in part and dissenting in part) (“Judicial deference to agencies' views on statutes they administer was not born in *Chevron* . . . , nor did the ‘singularly judicial role of marking the boundaries of agency choice’ die with that case.” (quoting *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 988 (1986) (Stevens, J. dissenting))).

<sup>139</sup> *Chevron*, 467 U.S. at 844 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)); see also *id.* at 865 (“Judges are not experts in the field . . .”).

<sup>140</sup> *Chevron*, 467 U.S. at 843 n.9.

<sup>141</sup> See Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1243-44 (2002) (detailing the power over interpretation the Court retained even under *Chevron*).

<sup>142</sup> See, e.g., Eskridge & Baer, *supra* note 51, at 1086-87 (“Almost immediately, Reagan Administration officials and appointees proclaimed a ‘*Chevron* Revolution.’”); Merrill, *supra* note 133, at 976 (“Justice Stevens’[s] opinion contained several features that can only be described as ‘revolutionary,’ even if no revolution was intended at the time.” (quoting Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986))); see also Sunstein, *Beyond Marbury*, *supra* note 11, at 2596 (de-

agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices" in interpreting ambiguous statutes.<sup>143</sup> Accordingly, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."<sup>144</sup> Statutory interpretation was, at least at the ambiguous margins, a task that demanded policy judgments of various sorts—judgments best carried out by one or the other political branch. It would thus be assumed that an ambiguous statute was Congress's implicit attempt to leave some interpretive power with the executive agency.

Yet the *Chevron*-revolution understanding quickly bumped up against a series of indications from the Court that the case was perhaps intended as a less dramatic shift than it first appeared. Just two terms later, the Court clarified *Chevron*'s import in this respect. In *INS v. Cardoza-Fonseca*,<sup>145</sup> the Court rejected a statutory interpretation offered by the federal Board of Immigration Appeals (BIA) and emphasized the extent to which the Court retains interpretive primacy.<sup>146</sup> It also made clear the potential frequency with which the Court could decide matters of interpretation at *Chevron*'s first step:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.<sup>147</sup>

If, as in *Cardoza-Fonseca*, the statute's text and ordinary canons of construction persuade the Court that the statute is clear, the agency's view is irrelevant. Justice Scalia wrote separately, insisting that the Court's purported clarification was in fact an "evisceration of *Chevron*."<sup>148</sup> If the Court is able to ignore an agency's statutory interpretation any time the Court thinks it can glean the meaning of the statute on its own, *Chevron* is no more than a "doctrine of desperation."<sup>149</sup> As

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scribing *Chevron* and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), as giving broad discretion to the executive to choose how to interpret statutes).

<sup>143</sup> *Chevron*, 467 U.S. at 865.

<sup>144</sup> *Id.* at 866.

<sup>145</sup> 480 U.S. 421 (1987).

<sup>146</sup> *Id.* at 448 (rejecting the interpretation put forward by the Immigration Judge and BIA).

<sup>147</sup> *Id.* at 447-48 (citations omitted in *Cardoza-Fonseca*) (quoting *Chevron*, 467 U.S. at 843 n.9) (internal quotation marks omitted).

<sup>148</sup> *Id.* at 454 (Scalia, J., concurring).

<sup>149</sup> *Id.*

it turned out, Justice Scalia was hardly alone in assessing the case as a challenge to the revolutionary view of *Chevron*.<sup>150</sup>

The years since *Cardoza-Fonseca* have seen the development of a line of decisions that further limit the range of cases in which *Chevron* guides judicial engagement with agency interpretation.<sup>151</sup> *United States v. Mead Corp.*, for instance, presented the question of whether a tariff classification ruling by the U.S. Customs Service was entitled to *Chevron* deference.<sup>152</sup> The Court held that it was not.<sup>153</sup> In the Court's view, there was no indication in the agency's ruling letter that the agency "ever set out with a lawmaking pretense in mind when it undertook to make classifications like these."<sup>154</sup> *Mead* thus clarified the existence of what scholars have since called *Chevron* step zero.<sup>155</sup> That is, before the Court considers whether a statute is ambiguous, it must determine (not just assume) that Congress intended to delegate the agency the power to issue rules with the force of law and that the agency interpretation to which deference is claimed was in fact promulgated in the exercise of that power.<sup>156</sup> In the absence of such an express delegation of legislative power, *Chevron* does not apply. Instead, the Court would employ the more flexible, pre-*Chevron* doctrine of attention to executive views outlined in *Skidmore v. Swift & Co.*<sup>157</sup>—that agency views are entitled to respect "to the extent that those interpretations have the 'power to persuade.'"<sup>158</sup> As the *Mead* Court put it, "The

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<sup>150</sup> See, e.g., Sunstein, *Beyond Marbury*, *supra* note 11, at 2604 ("Taken on its face, *Cardoza-Fonseca* seems to be an effort to restore the pre-*Chevron* status quo by asserting the primacy of the judiciary on purely legal questions.")

<sup>151</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that *Chevron* deference only applies to statutory interpretation where Congress delegates the agency authority to make rules with "the force of law"); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that interpretations in opinion letters do not warrant *Chevron* deference because, like interpretations in policy statements, manuals, or guidelines, they lack the force of law).

<sup>152</sup> *Mead*, 533 U.S. at 221.

<sup>153</sup> *Id.*

<sup>154</sup> *Mead*, 533 U.S. at 233. The Court supported this conclusion with the observations that "Customs does not generally engage in notice-and-comment practice when issuing [ruling letters], and their treatment by the agency makes it clear that a letter's binding character as a ruling stops short of third parties." *Id.*

<sup>155</sup> See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 873 (2001).

<sup>156</sup> *Id.*

<sup>157</sup> 323 U.S. 134 (1944).

<sup>158</sup> *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140); see also *Skidmore*, 323 U.S. at 140 ("[T]he rulings, interpretations and opinions of the [agency administrator], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and



fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency's position."<sup>159</sup>

At the same time, the Court has also moved to limit *Chevron* deference based on a new theory that seems to turn *Chevron's* political-accountability rationale on its head. Consider *FDA v. Brown & Williamson Tobacco Corp.*,<sup>160</sup> in which tobacco companies challenged the authority of the Food and Drug Administration (FDA) to issue a rule regulating tobacco as a drug (and thereby limiting its marketing to children). Rejecting the FDA's interpretation of its own authority as extending to the regulation of tobacco products, a bare majority of the Court effectively explained its decision not to defer to the agency on the grounds that some issues were *too* political to be left to the more political branch.<sup>161</sup> Foreshadowing *Mead*, the Court explained that where the "history and the breadth of the authority that the FDA has asserted" would give it the power to ban cigarettes entirely, ending a multibillion dollar industry and the manufacture of a product with a "unique political history" in the United States, Congress would have been much clearer than it was in expressing its intent to delegate to the agency such authority in the statute.<sup>162</sup> Given the political stakes, the Court preferred its own, highly contextual construction of the statute (ironically attributing the result to Congress) to that of the FDA—the agency's superior political accountability notwithstanding.<sup>163</sup>

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litigants may properly resort for guidance. The weight of such a judgment 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, if lacking power to control.").

<sup>159</sup> *Mead*, 533 U.S. at 228 (footnotes omitted).

<sup>160</sup> 529 U.S. 120 (2000).

<sup>161</sup> *See id.* at 125-26 (holding, in a 5-4 decision, that the Court would not defer to the FDA on the question of whether Congress meant to delegate the agency the power to regulate tobacco as a drug).

<sup>162</sup> *Id.* at 159-60.

<sup>163</sup> *See id.* at 126-27 (noting that the FDA rulemaking that produced the tobacco regulation followed the FDA's receipt of more than 700,000 public submissions, "more than 'at any other time in its history on any other subject'" (quoting Regulations Restricting the Sale and Distribution of Cigarettes, 61 Fed. Reg. 44,396, 44,418 (Aug. 28, 1996))). The dissent rejected the notion that relative political accountability between an executive agency and Congress made any difference in such a case. *See id.* at 190-91 (Breyer, J., dissenting) ("Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. . . . I do not believe that an administrative agency decision of this magnitude—one that is important, con-

The extraordinary-cases principle seems to cut to the core of what made *Chevron* seem so radical. If the Court's awareness of its limited political accountability were *Chevron*'s primary *raison d'être*, one would assume that it would be precisely in these extraordinary cases that the Court's deference to the judgment of the political branches would be at its height. Yet however counterintuitive its rationale (at least from this perspective), the extraordinary-cases exception has now appeared more than once. Both in refusing to defer to the Attorney General's finding that doctors assisting terminally ill patients to commit suicide pursuant to an Oregon law would be subject to prosecution under the federal Controlled Substances Act,<sup>164</sup> and in rejecting the Environmental Protection Agency's interpretation that it lacked the statutory authority to regulate greenhouse gases,<sup>165</sup> the Court has denied *Chevron* deference on the grounds that Congress could not have intended to delegate interpretive power of such political salience. As the Court put it most memorably, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."<sup>166</sup>

The Court's most recent *Chevron* decisions have reinforced that its formal interpretive power extends even to cases titulary falling under *Chevron*. These cases also appear to embrace the *Skidmore*-type view that what determines the weight accorded the executive's interpretation is not merely that it comes from the executive, but that it comes from a process or with a record that renders the interpretation persuasive on its own terms. In *Negusie v. Holder*, for instance, the Court reviewed the Board of Immigration Affairs's (BIA's) interpretation of a statute that was, by the Court's own assessment, ambiguous.<sup>167</sup> The Court thus noted at the outset that *Chevron* deference would apply: as long as the agency's interpretation was reasonable, the Court would defer to the agency view.<sup>168</sup> Indeed, as Justice Kennedy wrote for the

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spicuous, and controversial—can escape the kind of public scrutiny that is essential in any democracy. And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.”).

<sup>164</sup> See *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (holding that the Attorney General's interpretation was not due *Chevron* deference).

<sup>165</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007) (finding the EPA's refusal to determine whether greenhouse gases cause climate change to be arbitrary and capricious).

<sup>166</sup> *Gonzales*, 546 U.S. at 267 (quoting *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001)).

<sup>167</sup> 129 S. Ct. 1159, 1164 (2009).

<sup>168</sup> *Id.* at 1163-66.

majority: "Judicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"<sup>169</sup> Yet the Court then proceeded to reject the BIA's reading of the relevant statute as a mistake in interpretation, concluding that in its case-by-case application of the statute, the agency had erroneously thought itself bound by an earlier Supreme Court case: "The BIA deemed its interpretation to be mandated by [the Court's earlier decision in] *Fedorenko*, and that error prevented it from a full consideration of the statutory question here presented."<sup>170</sup> The BIA had thus not actually exercised its interpretive authority but simply determined that *Fedorenko* controls.

The Court's reasoning in *Negusie* is a puzzle in several respects. First, it is not at all clear what distance exists between "exercising interpretive authority" and applying law an agency believes to be binding. Applying relevant precedent would seem to be part and parcel of exercising interpretive authority. As long as agency interpretation of precedent is "reasonable," it should receive *Chevron* deference. Perhaps to avoid this dilemma, Justice Kennedy's opinion turned *Chevron* upside down: "Whether [the agency] interpretation would be reasonable, and thus owed *Chevron* deference, is a legitimate question; but it is not now before us."<sup>171</sup> *Chevron*, of course, would have the Court inquire first as to whether the statute was ambiguous—a determination that it had already made in this case. Having decided that the statute was ambiguous, the Court's only remaining inquiry under *Chevron* was to the reasonableness of the BIA's interpretation. The Court did not engage in this inquiry. It therefore seems that the Court was not applying *Chevron* in any direct sense. Instead, the Court emphasized that, statutory ambiguity notwithstanding, the agency had not done enough to justify *Skidmore* deference. In remanding the case to the agency to try again to exercise its "*Chevron* discretion," the Court was expressly prescriptive. It held that the agency must "bring its expertise to bear upon the matter; . . . evaluate the evidence; . . . make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision

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<sup>169</sup> *Id.* at 1163-64 (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)). As Justice Kennedy explained: "The Attorney General's decision to bar an alien who has participated in persecution 'may affect our relations with [the alien's native] country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.'" *Id.* at 1164-65 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

<sup>170</sup> *Id.* at 1166.

<sup>171</sup> *Id.*

exceeds the leeway that the law provides.”<sup>172</sup> In short, the agency view was relevant not per se but only insofar as it could contribute something to the task of interpretation that the Court itself could not.

Regardless whether it is fair to say the Court has replaced *Chevron* with, as Justice Scalia put it, “th’ol’ ‘totality of the circumstances’ test,”<sup>173</sup> it is hard to argue that the *Chevron* doctrine is settled. The Court does not afford agencies deference every time an ambiguous statute is before it. The Court remains interested in, and determined to engage, a variety of functional factors in weighing the relevance and persuasiveness of executive views in a growing range of circumstances: where Congress has not delegated power to issue rules with the force of law, where the political consequences of the interpretive question are too important to leave to the broad discretion of an executive agency, and, as ever, where the Court feels capable of managing the interpretive task on its own. Political accountability matters, but so do subject-matter expertise and a reasoned decisionmaking process that takes that expertise into account. In *Chevron* and thereafter, the Court has asserted a strong, if incompletely theorized, sense of its own formal authority to say what the law is—both within the confines of the doctrine and without. In short, *Chevron* does not seem likely to serve as a panacea for interpretive confusion if imported into the realm of foreign relations law.

## 2. *Chevron*’s Functional Failings

While foreign relations scholars may be overly optimistic about the ability of *Chevron* to bring doctrinal clarity to the allocation of interpretive authority between the Court and the executive, they are right to consider the role of functional interests, such as expertise and accountability, in assessing how the Court should engage executive interpretations of law. To the extent that sharing duties in law interpretation raises separation-of-powers concerns, functional analysis is often unavoidable—and it is sometimes required to understand the structural provisions of the Constitution.<sup>174</sup> Sunstein and Posner may be

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<sup>172</sup> *Id.* at 1167-68 (quoting *Gonzalez v. Thomas*, 547 U.S. 183, 186-87 (2006) (per curiam)). Indeed, Justice Kennedy noted “[t]hese matters may have relevance in determining whether its statutory interpretation is a permissible one.” *Id.*

<sup>173</sup> *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). There are, of course, some cases in which the Court has pursued a more straightforward application of *Chevron*. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 217-22 (2002) (applying the *Chevron* two-step test to determine whether to defer to the Social Security Administration’s interpretation of a statutory definition).

<sup>174</sup> Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1571-86 (2009).

faulted for paying insufficient attention to the protection of individual rights as a functional interest in separation of powers, with an equal or greater claim to structural priority than interests in accountability and expertise.<sup>175</sup> Their claims may also overstate the executive's institutional competence to handle security matters with minimal involvement of the other branches.<sup>176</sup> But Sunstein and Posner are right that functional interests in accountability and expertise are at least as salient in matters of national security and foreign relations as they are in traditional administrative law.<sup>177</sup>

It is worth pausing on this conclusion, for it runs counter to past assumptions that "[t]he propriety of deference may well vary depending on the type of law at issue."<sup>178</sup> Indeed, there are increasingly strong reasons to doubt both the descriptive and normative validity of such subject-matter exceptionalism. The modern national security bureaucracy, like more traditional administrative settings, channels decisionmaking through a set of existing organizations and agencies, each with its own highly elaborated set of professional norms and responsibilities, standard processes, identities and culture.<sup>179</sup> At the

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<sup>175</sup> See, e.g., 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 350 (Jonathan Elliot ed., 1968) ("The true principle of government is this—make the system complete in its structure, give a perfect proportion and balance to its parts, and the powers you give it will never affect your security." (quoting Alexander Hamilton)); THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."); see also *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 549 & n.42 (1998 ed.) (citing John Jay for the proposition that separation of powers could help avoid governmental tyranny). The unsupported assertion in Posner and Sunstein's article that "critics and supporters agree that changes in the global environment justify at least some expansion of executive powers," Posner & Sunstein, *supra* note 3, at 1210, is particularly striking in this regard. See, for example, *infra* note 261 for articles by Kim Scheppele and Martin Flaherty taking the opposite view.

<sup>176</sup> See Pearlstein, *supra* note 174, at 1592 (suggesting that detention regimes, for example, may benefit from multibranch participation).

<sup>177</sup> Posner & Sunstein, *supra* note 3, at 1207.

<sup>178</sup> Bradley, *supra* note 11, at 651.

<sup>179</sup> See Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1274-79 (2006) (describing the American military's "professionalism"—that is, "the institutional acquisition and maintenance of a set of technical skills, norms, and ethics"—as a "defining feature"); Pearlstein, *supra* note 174, at 1608 (stating that organization theorists recognize the

same time, the growing set of societal challenges that are counted as a threat to “security” may swamp traditional distinctions between policy that is “foreign” and “domestic.”<sup>180</sup> On functional grounds alone, it is increasingly difficult to see why the type of law per se—“foreign” or otherwise—should make the executive’s attempts at law interpretation more or less worthy of deference.

But it is this seeming recognition that makes it especially puzzling that scholars such as Sunstein and Posner would embrace *Chevron* as a means of ensuring that the Court attends to the views of relevant experts. As Sunstein and Posner acknowledge, “[A]n agency receives *Chevron* deference even if the Administrator decides on a course of conduct that departs from the views of her informed staff. Courts do not look behind the agency’s process to explore who, exactly, influenced the decision and to what extent.”<sup>181</sup> If one accepts the view that the executive’s key strength is its expertise on certain questions arising in foreign relations law, one would presumably wish to insist that the actual experts inside the executive branch be consulted. It is, as Sunstein and Posner note, the State Department—not, for example, White House Counsel’s office—that most carefully tracks U.S. relations with foreign states.<sup>182</sup> Indeed, it is in part because of *Chevron*’s limitation in this regard that the Court has sometimes declined to apply it, even in the standard administrative law realm. The Court’s decision in *Massachusetts v. EPA*,<sup>183</sup> for instance, reflects this view. Declining to afford *Chevron* deference to the agency’s decision not to regulate greenhouse gas emissions, the Court emphasized the limited persuasiveness of the agency’s reasoning. In particular, according to the Court, the EPA had not consulted with the State Department before taking the position “that regulating greenhouse gases might impair the President’s ability

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significant benefits of “strict bureaucratic control, intense socialization, and a highly developed sense of organizational culture” for government structures tasked with preventing high-consequence risk).

<sup>180</sup> See U.N. SEC’Y-GEN.’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, at 9, U.N. Sales No. E.05.1.5 (2004), available at <http://www.un.org/secureworld/report3.pdf> (finding that the biggest security threats facing the world now include “poverty, infectious disease and environmental degradation”).

<sup>181</sup> Posner & Sunstein, *supra* note 3, at 1214.

<sup>182</sup> See *id.* at 1205 (“[T]he nature of the relationship with the foreign state, the cultural norms of that state, its legal system and other institutions, its politics, and so forth . . . are factors followed and assessed by the Department of State.”).

<sup>183</sup> 549 U.S. 497 (2007).

to negotiate with 'key developing nations' to reduce emissions."<sup>184</sup> So, too, it may have mattered to the *Hamdan* Court that the Judge Advocate General corps of military attorneys inside the Pentagon had not engaged (and did not support) the President's view of the necessity of military commissions.<sup>185</sup> Where expertise matters, the Court seems to recognize that there are more effective ways of ensuring its inclusion than reviewing the general "reasonableness" of "executive" views per se.<sup>186</sup>

The remaining functional reason for preferring *Chevron* in the foreign relations setting would be if one assumed—as *Chevron* originally appeared to<sup>187</sup>—that the functional value of political accountability is more important than any other functional value in allocating interpretive power, including that of expertise. But there is no clear reason to think accountability should be given functional superiority in this sense. Compared to functional interests in protecting individual rights or promoting expertise and effectiveness, political accountability has seemed a marginal concern among those functional interests identified in the Court's separation-of-powers jurisprudence, appearing in dissents more often than in majorities.<sup>188</sup> More to the point,

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<sup>184</sup> *Id.* at 533-34 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003)). The Court went on to reason,

[EPA] has offered a laundry list of reasons not to regulate. . . . Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they . . . [do not] amount to a reasoned justification for declining to form a scientific judgment. . . . In the Global Climate Protection Act of 1987, Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate. EPA has made no showing that it issued the ruling in question here after consultation with the State Department.

*Id.*

<sup>185</sup> See Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 105-06 (2006) (suggesting that the *Hamdan* Court might have appropriately deferred to the executive if the executive could have presented its interpretation "as the product of deliberative and sober bureaucratic decisionmaking").

<sup>186</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (finding that courts have considered, among many factors, the agency's relative expertise and the "persuasiveness" of its position to decide what deference it deserves).

<sup>187</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

<sup>188</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 421-22 (1989) (Scalia, J., dissenting) (arguing that the Court's holding that the United States Sentencing Commission does not upset separation of powers is an "undemocratic precedent" that could lead to further Congressional delegation of lawmaking to commissions that are not accountable to the political process); *Morrison v. Olson*, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting) ("[T]he difference is the difference that the Founders envi-

there is some reason to think that “deference” to the executive in some foreign relations settings will undermine, rather than enhance, political accountability. The notion that the executive is substantially more politically accountable than the courts may be especially questionable in the national security context.<sup>189</sup> Whereas in other realms of administrative law it may be plausible to argue that major agency decisions will enjoy “the kind of public scrutiny that is essential in any democracy,”<sup>190</sup> appropriate government interests in secrecy surrounding certain aspects of national security may make it impossible for political accountability checks to function effectively. “That is, it is precisely *because* security sometimes requires secrecy that the involvement of more than one branch may be required to make popular accountability possible at all.”<sup>191</sup> Taking functional interests seriously, it is thus possible to conclude—as the Court increasingly has in traditional administrative law—that *Chevron* is at times too blunt an instrument for taking those interests into account.

### 3. The Persistent Formal Dilemma

While functional concerns understandably tend to dominate the question of judicial deference in foreign relations law, perhaps the greatest challenge to the successful importation of *Chevron* into foreign relations law is a formal one. *Chevron*’s attempt to negotiate the formal sharing of interpretive power between the courts and the executive remains one of the great unsettled debates of the modern administrative state. Indeed, as *Chevron*’s critics argued, when the Court does something less than determine for itself what the law is, it is ceding interpretive power that the Framers of the Constitution intended

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sioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished.”).

<sup>189</sup> See Jinks & Katyal, *supra* note 3, at 1246 & n.58 (questioning the effectiveness of political accountability in the foreign affairs context); Pearlstein, *supra* note 174, at 1575-79 (noting that the government interest in secrecy surrounding some national security matters may make political checks on the executive that depend on transparency less effective).

<sup>190</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190-91 (2000) (Breyer, J., dissenting); cf. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-32 (2001) (“Presidential administration promotes accountability in two principal and related ways. First, presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”).

<sup>191</sup> Pearlstein, *supra* note 174, at 1578.



to reserve to the Article III courts.<sup>192</sup> A large swath of administrative law scholarship since *Chevron* has thus been occupied with explaining how any sharing of interpretive duties is consistent with the presumed first-order allocation of interpretive authority to the Article III courts.<sup>193</sup> These theories shall be considered in detail in the Part that follows.

Despite this, most scholarship arguing in favor of interpretive deference in the foreign relations context has been little troubled by such formal concerns. This is not to suggest that there has been no acknowledgement of *Marbury v. Madison* and related formal conceptions of the judicial role. To the contrary, as Curtis Bradley has usefully summarized, the “*Marbury* perspective” has been expressed by a number of foreign relations law scholars, typically in objecting to deference on the basis of the executive’s functional claims of superiority in matters of national security.<sup>194</sup> Yet while the passing formal assertion that the judicial role is to “say what the law is”<sup>195</sup> may have been a reasonable—and reasonably stark—reply to the most expansive historical claims of executive power,<sup>196</sup> it seems an insufficient account of the role of the courts in the modern administrative state. Since *Chevron* in particular, the Court has, at least to some extent, shared the job of “saying what the law is,” occasionally deferring to “reasonable” agency interpretations in realms of administrative law hardly limited to foreign relations. Since *Hamdan* especially, there can no longer be a question that the Court intends to assert its formal power in foreign relations law as well. Just as administrative law has had to confront what such deference means for the modern judicial role beyond *Marbury*, foreign relations law must recognize that as long as the courts retain any independent interpretive authority in reviewing statutes and

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<sup>192</sup> See, e.g., Farina, *supra* note 17, at 525 (noting tension between *Chevron*’s deference regime and the judiciary’s authority to determine statutory meaning).

<sup>193</sup> See *infra* Part II.

<sup>194</sup> Bradley, *supra* note 11, at 650 & n.2 (“[C]ommentators [who express the ‘*Marbury* perspective’] typically frame [the issue of deference in foreign affairs cases] as a choice between two extremes: either the courts in foreign affairs cases enforce the ‘rule of law’ against the Executive or they abdicate their judicial function.”) (citing, inter alia, FRANCK, *supra* note 38, at 4-5 (1992), and HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 148 (1990)); see also generally Alex Glashauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25 (2005) (opposing deference to the executive’s interpretation of treaties on formal grounds).

<sup>195</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>196</sup> See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (describing the President as the “sole organ of the federal government in the field of international relations”).

treaties, there must be a theory of the “judicial power”—and an associated doctrine of deference, *vel non*—that explains how the interpretive role may be shared.

While embracing the administrative law model in many respects, and indeed suggesting that the Court extend *Chevron* so that it might defer to the executive’s interpretation in foreign relations cases even when the underlying law is not ambiguous, Sunstein and Posner offer only passing formal defense of their argument. To the extent that they address formal constraints, Sunstein and Posner note that any legislative “grant of authority to the executive in the domain of foreign affairs ought generally to include a power of interpretation.”<sup>197</sup> Presumably, the authors mean that the Court should construe any treaty or foreign relations statute as implicitly delegating interpretive power. Yet such a delegation theory faces several hurdles. For example, it is not at all clear what “interpretive” power Congress has to delegate, as the Court has regularly drawn lines between the constitutional function of lawmaking and law interpreting.<sup>198</sup> Congress surely possesses the former, but not so obviously the latter. Indeed, it is for this reason that the more persuasive formal explanation for *Chevron* has been one that understands Congress as having delegated *lawmaking* power to the agencies (whether that delegation is express or implied).<sup>199</sup> As long as this is the case, executive agencies engaged in the business of statutory construction in the course of implementing Congress’s instructions need not intrude on the *judicial* power at all; they

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<sup>197</sup> Posner & Sunstein, *supra* note 3, at 1198.

<sup>198</sup> See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (“We have often observed, however, that ‘the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.’” (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 348-49 (1963))); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“[S]ubsequent legislative history is a ‘hazardous basis for inferring the intent of an earlier’ Congress.” (quoting *United States v. Price*, 361 U.S. 304, 313 (1960))); see also *Cent. Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 185 (1994) (“[W]e have observed on more than one occasion that the interpretation given by one Congress . . . to an earlier statute is of little assistance in discerning the meaning of that statute.” (quoting *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 168 (1989))); *United States v. Sw. Cable Co.*, 392 U.S. 157, 170 (1968) (“[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have ‘very little, if any, significance.’” (quoting *Rainwater v. United States*, 356 U.S. 590, 593 (1958))).

<sup>199</sup> See Monaghan, *supra* note 24 at 25-26 (“Judicial deference to agency ‘interpretation’ of law is simply one way of recognizing a delegation of law-making authority to an agency.” (emphasis omitted)); see also *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law . . .”).

are acting only as a more detail-oriented extension of Congress itself. The notion that executive agencies post-*Chevron* are carrying out a core judicial function of law interpretation would present a far greater challenge to the formal judicial power than Sunstein and Posner's thesis appears to contemplate. In an era when the delegation doctrine, long thought dead, continues to find judicial support in various forms,<sup>200</sup> the authors' proposed solution risks the criticism that their functional cure will kill the formal patient.

Importing *Chevron* into the foreign relations setting without attempting to address the question of judicial power only perpetuates the formal interpretive debate. Particularly because the formal allocation of foreign relations power between the judicial and executive branches—unlike the more novel authority of administrative agencies—is a subject of express constitutional concern, it seems essential to have a formal theory of how interpretive power may be shared in this realm before designing a deference doctrine that effectively shares it. Once a “case or controversy” is properly before an Article III court, is there a formal floor of judicial power to interpret statutes and treaties, beneath which no functional deference rationale can allow the Court to sink? The remainder of the Article explores answers to this question of formal power in an attempt to shed light on which non-*Chevron* approach is appropriate.

## II. CONSIDERING FORMAL THEORIES OF THE JUDICIAL POWER

The text of Article III of the Constitution is notoriously short on elaboration of what, precisely, is contained in the “judicial power of

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<sup>200</sup> For example, in *Whitman v. American Trucking Ass'ns*, the Court gave voice to delegation concerns in rejecting the notion that an agency could cure an unlawful delegation of legislative power by giving the statute a narrow construction. See 531 U.S. 457, 473 (2001) (“The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.”). Beyond this, there seems broad agreement that nondelegation concerns continue to manifest themselves in interpretive canons against delegation. See *infra* note 238 (discussing the nondelegation canon). There also remain periodic signs elsewhere that the Court has retained an interest in policing formal structural constraints. Since *Chevron*, the Court has continued to produce decisions insisting that formal lines are drawn between and among the branches. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 732-34 (1986) (rejecting a statute through which Congress vested executive powers in an agency official but reserved for itself the power to remove him from office); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (invalidating the so-called legislative veto of executive agency action).

the United States.”<sup>201</sup> Chief Justice John Marshall’s attempt in *Marbury v. Madison*<sup>202</sup> to put flesh on the bare bones of this power made some of its features clear, but arguably obscured others. While *Marbury* famously established that it was “the province and duty of the judicial department to say what the law is,”<sup>203</sup> it also suggested that there were some executive actions that might not be amenable to judicial invalidation.<sup>204</sup> Moreover, while *Marbury* is understood to focus on why it is appropriate for the Court not only to engage in, but also to assert supremacy over, constitutional interpretation,<sup>205</sup> the opinion devotes not a moment to justifying the Court’s power to interpret the acts of Congress also at issue in the case.

In some respects, this relative inattention makes sense. Judicial interpretation of subconstitutional law arguably raises fewer concerns about the legitimacy of the judiciary, as it lacks the finality, and therefore the supremacy, associated with constitutional interpretation. If the regular democratic process has some capacity to fix any judicial mistake in the interpretation of a statute or treaty, then one need not worry as much about finding a democratic justification for judicial power. Yet it is still necessary to define the contours of the judicial power to interpret statutes and treaties to understand when the Court can decline to exercise its power or otherwise share power with another branch to interpret the law in cases properly before it. Largely in response to this need, presented most acutely by the rise of modern administrative law, scholars have explored a series of theories based variously on constitutional text and original meaning, as well as public choice and democratic theory, to explain why and to what extent judges have the power to say what subconstitutional law means.

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<sup>201</sup> U.S. CONST. art. III, § 1.

<sup>202</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>203</sup> *Id.* at 177.

<sup>204</sup> *See id.* at 165-66 (“By the constitution of the United States, the 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. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.”).

<sup>205</sup> *See, e.g.*, KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 2 (2007) (“[*Marbury v. Madison* asserted] a strong claim to judicial authority over the interpretation of constitutional meaning.”).

This Part reviews the two leading accounts of judicial interpretive power: faithful agent theory and what is often called instrumental theory. It concludes that while each account is instructive—and instrumental theory especially useful—neither ultimately seems sufficient for understanding the judicial role in interpreting foreign relations law.

### A. Faithful Agent Theory

Likely still the dominant understanding of the courts' role in statutory interpretation, "faithful agent" theory sees the relationship between Congress and the courts as that of principal and agent, where the agent's duty is limited to discerning and applying the directions of the principal set forth in statute.<sup>206</sup> As a theory of the judicial power, faithful agent theory has obvious attractions. The notion that judges act only as translators for the democratically elected legislature helps to address perennial concerns about the countermajoritarianism of an unelected federal judiciary. Indeed, the historical argument in favor of this view, set forth in detail by John Manning, contends that faithful agent theory is most consistent with the Constitution's structural efforts (driven in part by response to Anti-Federalist concerns) to address the countermajoritarian problem by limiting judicial discretion.<sup>207</sup> Among other structural features, the Constitution's insistence upon bicameralism and presentment made it "difficult to imagine that the Founders designed an elaborate method of legislation, while si-

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<sup>206</sup> See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 116 (1998) ("[L]egislators are the lawgivers . . . [and so] courts deciding statutory cases are bound to follow commands and policies embodied in the enacted text—commands and policies the courts did not create and cannot change."); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986) ("In our system of government the framers of statutes . . . are the superiors of the judges. The framers communicate orders to the judges through legislative texts . . . If the orders are clear, the judges must obey them."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature. . . . The judicial task is to discern and apply a judgment made by others, most notably the legislature."); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1313 (1990) ("Traditional democratic theory suggests that the court interpreting a statute must act as the faithful agent of the legislature's intent.").

<sup>207</sup> See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 85 (2001) (arguing that in debates leading up to the Constitution's ratification, the Federalists invoked the faithful agent notion to counter Anti-Federalist concerns).

multaneously granting judges broad independent authority to alter the results outside that carefully constructed process.”<sup>208</sup>

In Manning’s account, the founding-era Marshall Court recognized the limited nature of the judicial role in this regard: “[I]t has truly been stated to be the duty of the court to effect the intention of the legislature.”<sup>209</sup> This view led the Court away from the common law practice of equitable interpretation—construing otherwise-clear statutory texts to avoid injustice or to remedy textual gaps that seemed inconsistent with legislative policy.<sup>210</sup> Moreover, Manning argues, to the extent the Court ever departed from the import of a plain text—by applying a substantive canon of interpretation, for example—such departures could be understood as necessary to fulfill the legislative intent.<sup>211</sup> The canons of constitutional avoidance or of guarding against excessive delegations of power, for example, may “acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language.”<sup>212</sup>

Yet faithful agent theory in other respects struggles to explain the use or value of such substantive canons—driven by extralegislative values—or the related use of clear statement canons, in which the Court requires a clear statement from Congress before interpreting a statute, for example, to infringe on state sovereignty or delegate excessive authority to another branch. Presumably, the theory could not tolerate the use of such canons to trump a reading of a statute whose textual meaning is otherwise plain. It likewise requires some explanation to understand how faithful agent theory could survive an executive deference doctrine like *Chevron*, which seemingly allows an executive agency to supplant the Court as the interpretive agent of Congress. Indeed, for the faithful agent understanding to work, *Chevron* must be understood not as a doctrine of judicial deference to *executive* authority, but rather as a doctrine of congressional authority alone. That is, when

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<sup>208</sup> *Id.* at 71.

<sup>209</sup> *Id.* at 91 (quoting *Schooner Paulina’s Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812)).

<sup>210</sup> *Id.* at 92.

<sup>211</sup> *Id.* at 95-101.

<sup>212</sup> Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990); see also John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1553 (2008) (“A legislator who votes for . . . a provision . . . does so on the assumption that . . . what the words mean to him is identical to what they will mean to those to whom they are addressed . . . .” (quoting Jeremy Waldron, *Legislators’ Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION 329, 339 (Andrei Marmor ed., 1995))).

the Court defers to an interpretation by an executive agency, it is deferring only because Congress has delegated the agency the authority of an adjunct legislature.<sup>213</sup> In this sense, the Court shows no deference at all to the *executive*, but rather just to the legislature-by-proxy.

Beyond the vigorous criticism to which faithful agent theory has been subject on historical and other grounds,<sup>214</sup> the theory for this reason seems particularly ill-suited to illuminate the judicial task of statutory interpretation in foreign relations law. Indeed, it is not clear that the theory leaves room for an executive interpretive role of any sort. Consider the faithful agent understanding of *Chevron* deference—an understanding that depends on an assessment of the executive's superior political accountability as Congress's delegated lawmaker. Yet political accountability (whether the agency is understood to be either a legislative delegate or part of an appropriately political executive administration) has only been part of the rationale for doctrines like *Chevron*. The other part—one central to the foreign relations context—is the notion that the executive possesses expertise that the Court may be wise to take into account, whether or not the legislature believes that it should. In this regard, it seems especially difficult to reconcile a view of the Court as a faithful agent to Congress with the expectation in foreign relations law that the executive's views have at least some functional relevance to the task of law interpretation, whether or not Congress thinks they should.<sup>215</sup>

Using faithful agent theory to explain the judicial power in treaty interpretation is even more suspect. In the Manning vision, limiting the Court's role to that of faithful agent is necessary to preserve the integrity of the Framers' scheme that laws would be made only with bicameral approval and after presentment to the executive. Treaties, of course,

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<sup>213</sup> See Monaghan, *supra* note 24, at 26 ("Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency." (emphasis omitted)).

<sup>214</sup> See William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 997 (2001) ("[T]he original materials surrounding Article III's judicial power assume an eclectic approach to statutory interpretation, open to understanding the letter of a statute in pursuance of the spirit of the law and in light of fundamental values."); Molot, *supra* note 21, at 73 (suggesting that *Chevron* deference renders "[statutory] interpretation a political process").

<sup>215</sup> Faithful agent theory may be subject to attack on formal grounds as well, at least from those who conceive of the "executive power" in the foreign relations realm as carrying significant interpretive authority of its own. See, e.g., Sunstein, *Beyond Marbury*, *supra* note 11, at 2595 (suggesting that interpreting unclear terms in a foreign relations context may require deference to executive interpretation). This Article returns to such claims in Part III.

emerge from a formally different place, with the treaty-making power residing in the executive, but only “by and with the Advice and Consent of the Senate.”<sup>216</sup> At a minimum, the constitutional text would seem to give the executive some claim to a shared, but nonetheless formal, role in “making” the treaty law. Indeed, excluding all evidence of executive views in treaty making seems likely to diminish the accuracy of any judicial interpretation. Moreover, even if the Senate and executive were the sole lawmakers involved in treaty making, the absence of House participation in treaty ratification weakens the argument that faithful agent theory helps preserve bicameral or democratic decisionmaking in any pure sense. In any case, the executive and Senate are not the sole lawmakers involved in making treaties; foreign treaty partners help conceive, negotiate, and draft the legal text. In this context, it is a mistake to view the U.S. government or any of its branches as the sole “principal” lawmaker whose intent the Court must discern.<sup>217</sup>

Perhaps more significantly, a faithful agent view of treaty interpretation is inconsistent with an important theme in the Court’s historical approach to treaty interpretation, one that understands the judicial task as in part akin to contract interpretation, in which the intent that must be discerned is that of the treaty parties.<sup>218</sup> In this regard, the claim that the Court regularly defers to executive views on the meaning of treaties obscures more than it clarifies.<sup>219</sup> It is true that the Court has on occasion invoked rhetoric that the views of “the departments of government particularly charged with [treaty] negotiation and enforcement” are due “great weight.”<sup>220</sup> Yet, as the Court noted in the case first invoking the “great weight” standard and since, the weight may be accorded not only to the views of the executive but to those of *all* the parties that negotiated the treaty.<sup>221</sup> To the extent that the Court has attended to the executive’s views, it is more regularly to the views of both negotiating partners as evidence of negotiating intent and of post-ratification performance. In this context, understanding the Court to be an “agent” of the parties seems jarring at best.

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<sup>216</sup> U.S. CONST. art. II, § 2.

<sup>217</sup> See *supra* notes 79-80 and accompanying text (discussing the Court’s focus on the interpretations of foreign treaty parties, in addition to those of the United States).

<sup>218</sup> See *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921) (“Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals . . .”).

<sup>219</sup> See *supra* Section I.A (citing scholars advancing this view).

<sup>220</sup> *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

<sup>221</sup> See *supra* note 78 and accompanying text.



### B. Instrumental Interpretation

A second model of the judicial power, sometimes called instrumental theory, holds that Article III courts were not created to be mere agents of Congress. Rather, the courts were meant to employ quintessentially *judicial* canons of interpretation and methods of legal reasoning that would help both to clarify ambiguous texts and to influence legislative drafting over time.<sup>222</sup> One of the most thorough recent accounts of this view comes from Jonathan Molot. He contends that the Framers understood judicial reasoning to be at least moderately constrained on its own terms by judicial principles such as *stare decisis* and by interpretive canons that drove courts to avoid absurd or unjust results.<sup>223</sup> In this view, courts bring to bear institutional and professional norms to help serve rule-of-law interests in consistency, fairness, justice, and rationality across the law—in order to “induce legislators to internalize these judicial values when enacting statutes in the first place.”<sup>224</sup> Such interests were less likely to be reflected in legislation if the law’s content was left only to the pull of political constituencies, driven by their own specific and immediate needs.<sup>225</sup> Moreover, independent judicial interpretation of statutes could prompt further public engagement with gaps in statutory meaning, whether the gap results from legislative inadvertence or a failure of political compromise.<sup>226</sup> In this

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<sup>222</sup> See, e.g., ESKRIDGE, *supra* note 21, at 117-18 (noting that the Framers expected judges both to “interpret statutes equitably” and to interpret statutes contrary to the legislature’s expectations, thereby requiring the legislature to examine the full impact of its enactments); Molot, *supra* note 21, at 3 & n.2 (describing the “instrumentalist” approach and citing scholarly analyses).

<sup>223</sup> See Molot, *supra* note 21, at 34-38 (discussing the interpretive tools that the Framers believed were available to the judiciary to discern legislative intent).

<sup>224</sup> *Id.* at 42.

<sup>225</sup> According to Molot,

the prospect of judicial interpretation could provide just the ammunition that a legislator might need to defeat an unjust or irrational political compromise. A legislator might speak in opposition to a proposal that benefits one group at the expense of another, for example, not simply because the provision is unjust or irrational, but also because judges would likely construe the proposed provision more strictly than they would an alternative version that benefits both groups. Regardless of the individual legislator’s true motive, the judicial perspective would be wielded in favor of fairness and consistency in the legislative process.

*Id.* at 48 (footnote omitted). See also Molot, *supra* note 141, at 1301 (“[J]udges nonetheless strive for stability and consistency over time in a way that political officials do not.”).

<sup>226</sup> Molot describes the judiciary’s role as follows:

When the judiciary draws boundaries between legislative enactments and executive leeway, it provides a benchmark for deliberation in the political

sense, courts' transparent exercise of the interpretive function could also serve a democracy-forcing function, helping to clarify the law (and thereby to promote the rule of law) over time.

Much in an instrumentalist theory of judicial power seems salient in foreign relations law. On formal grounds, there is the promise that judicial involvement could help reinforce a structural constitutional scheme that contemplates Congress and the executive sharing power in foreign relations.<sup>227</sup> Although the Constitution grants Congress any number of broad textual powers that seem to contemplate its engagement in and regulation of U.S. foreign affairs,<sup>228</sup> scholars have long lamented Congress's cession of power to the executive on many questions of foreign relations. This phenomenon may derive from political dynamics that tend to give the executive disproportionate political credit for engagement in foreign relations successes, while ensuring that both political branches are blamed for foreign relations failures.<sup>229</sup> But whether Congress's reticence is driven by constitutional conviction or political fear (or some other institutional failing), it

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process. It tells legislators what they must do to bind administrators and tells citizens what they must do to comply with legislative instructions. By providing such a backdrop for public officials and private citizens, judicial interpretation tends to reinforce legislative authority and the rule of law.

Molot, *supra* note 141, at 1317.

<sup>227</sup> See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY* 54-56 (1993) (suggesting that the courts should induce Congress to check a presidential decision to go to war); KOH, *supra* note 194, at 123-32 (discussing congressional acquiescence to the executive's foreign policy initiatives in the wake of Cold War conflicts); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 58-60 (1973) (chronicling the early erosion of the legislative check on executive war powers).

<sup>228</sup> See U.S. CONST. art. I, § 8 (giving Congress the power, inter alia, to declare war, define and punish offenses against the law of nations, and raise and support armies).

<sup>229</sup> See THEODORE J. LOWI & BENJAMIN GINSBERG, *AMERICAN GOVERNMENT: FREEDOM AND POWER* 289-93 (1990) (describing the effects of executive action vis-à-vis foreign policy on presidential approval ratings); THEODORE J. LOWI, *THE END OF LIBERALISM* 146 (2d ed. 1979) ("If the president can revive his major resource, his public following, with almost any international act with which he can clearly associate himself, then he must always be under some pressure to prefer such actions."). As Justice Jackson put it with characteristic eloquence:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

may be prompted into action by judicial insistence that Congress reengage in matters of foreign relations.

Indeed, Congress has demonstrated its capacity to respond when it dislikes the interpretive efforts of the Court.<sup>230</sup> The question about the legality of executive-made military commissions as a forum for war crimes trials in *Hamdan* is only a more recent example. The issue in *Hamdan* revolved around the President's authorization of the use of military commissions in late 2001.<sup>231</sup> For five years thereafter, Congress remained silent while the executive branch made repeated efforts to refine the commission structure in the face of vigorous objections. The Court's 2006 decision in *Hamdan*—holding, inter alia, that the President lacked the authority to convene such commissions without express congressional authorization<sup>232</sup>—compelled the executive to seek engagement by Congress. Congress thus entered a heated public debate on the question and ultimately passed a detailed statute authorizing the use of military commissions.<sup>233</sup> While the resulting Military Commissions Act of 2006 may be criticized on various levels, there is little question that it was the Court's engagement that forced serious legislative consideration of the parameters of commission trials. In this regard, judicial involvement promoted the structural value of political accountability: the Court's action forced a transparent debate in Congress, rather than leaving the resolution of core questions of meaning to far less transparent executive branch processes, where secrecy may readily disable accountability checks.

There is also much to be said about the utility of judicial pressure on the political branches to clarify foreign relations law and legal texts over time. Consider recent judicial efforts to interpret the AUMF, which Congress enacted in the wake of the attacks of September 11, 2001.<sup>234</sup> Given the relatively sparse legislative history and other stan-

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<sup>230</sup> See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 339 & n.115 (2000) (noting that Congress will legislate in response to judicial decisions); see also William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (discussing the phenomenon).

<sup>231</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 594-95 (2006) (stating that the Court's task was to determine whether presidential authorization of military commissions was justified).

<sup>232</sup> See *id.* at 612-13 ("These simply are not the circumstances in which . . . a military commission established by Executive Order . . . may lawfully try a person and subject him to punishment.").

<sup>233</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10, 18, 28 and 42 U.S.C.).

<sup>234</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

dard interpretive sources that usually help courts discern the meaning of statutes, some scholars have suggested that historical executive branch practice should be explored to shed light on statutory meaning.<sup>235</sup> If the President has interpreted force-authorization language one way in the past—and especially if Congress has acquiesced in that interpretation over time—then a later Congress could employ the same language comfortable in the knowledge that executive implementation would accurately reflect its intent.<sup>236</sup>

Yet, as the Court itself has recognized, reliance on acquiescence to past practice is fraught with problems that range from functional concerns about interpreting legislative silence to formal problems of according the same authority to congressional silences as to congressional legislation that has satisfied the important hurdles of bicameral debate and presentment to the executive.<sup>237</sup> In the foreign relations context, it may be especially unclear whether a particular executive action is taken pursuant to an executive understanding of statutory delegation, or based on the executive's view of its own constitutional authority. And particularly if one believes modern security threats are categorically different from past dangers, it is not at all evident that past executive practice offers clarification in this realm. In contrast, a legislature acting in the shadow of clearer judicial expectations—or any guidance—in drafting statutes might facilitate legislative use-of-force debates, crystallizing differences in circumstances when prompt resolution may be important.

While adopting an instrumental theory of judicial power in foreign relations law may thus have considerable advantages, a purely instrumental view of structural judicial power leaves open some important questions for deference doctrine in foreign relations. A first set of questions goes to the permissibility of deference of any kind to executive views in statutory interpretation. The instrumentalist court's duty to ensure that legislative drafting is informed by rule-of-law values would seem to preclude much attention to executive views at any stage. Limiting judicial engagement in the interpretation of legal questions properly before the courts would curtail the infusion into

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<sup>235</sup> See Bradley & Goldsmith, *supra* note 23, at 2085-88 (noting that “[c]ourts often rely on past Executive Branch practice to inform the meaning of a federal statute”).

<sup>236</sup> See *id.* at 2085.

<sup>237</sup> See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 91 (1988) (“For every case where the Court rhapsodizes about deliberative inaction, there is a counter-case subjecting such inferences to scathing critique. ‘To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities’ . . . .” (quoting *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940))).

lawmaking of judicial values that instrumentalists would maintain the Framers expected the courts to promote. Instrumental theory might well tolerate judicial consideration of executive views (short of legal deference) for functional reasons—a *Skidmore*-like attention to the formal process, relative expertise, and persuasiveness of the executive's position. But it is difficult to see instrumental theory as readily reconcilable with even *Chevron*—much less *Curtiss-Wright*—deference to executive views. If instrumental theory as such is right, superdeference regimes are likely wrong.

Perhaps more importantly, instrumental theory leaves central questions about the relationship between the interpretive power of the courts and the executive unanswered. In particular, it does little to resolve the role of substantive canons of statutory construction, which faithful agent theory at least explains as fair inferences of legislative intent.<sup>238</sup> Would instrumental theory tolerate, require, or forbid an avoidance canon that requires a clear legislative statement before rendering an interpretation that has the effect of delegating power from one branch to another?<sup>239</sup> The instrumentalist court fulfills its duty, it seems, by promoting clarity in the law to serve general interests in fairness and the rule of law. In this regard, any weight executive views may carry could sway judicial decisionmaking, even if the executive's interpretation ran afoul of one of these substantive canons. Particularly in foreign relations law, where it has been argued that nondelegation canons, for example, may have less salience in the face of the executive's formal constitutional authority,<sup>240</sup> it seems important to understand whether part of the judicial power requires the Court to police substantive commitments, as well as interpretive ones.

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<sup>238</sup> The nondelegation canon disfavors interpretations that would transfer significant swaths of discretionary power from one branch to another. Likewise, the canon of constitutional avoidance instructs the Court to disfavor readings that would threaten rights protected by the Constitution. Often invoked in the form of a clear statement requirement, such canons provide that the Court shall not construe a statute to infringe on constitutional rights or delegate significant power without a clear statement to that effect in the legal text. These canons may prove dispositive in resolving the meaning of a subconstitutional text. See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L. J. 64, 79-80 (2008) (arguing that these canons allow courts to constrain congressional action).

<sup>239</sup> A number of scholars have discussed the role of so-called normative canons in statutory interpretation. See, e.g., Eskridge & Frickey, *supra* note 22, at 598 (“A good many of the substantive canons of statutory construction are directly inspired by the Constitution . . . .”); Sunstein, *supra* note 22, at 2111 (“By using these principles, courts decide cases of statutory meaning by reference to something external to legislative desires . . .”).

<sup>240</sup> See Bradley & Goldsmith, *supra* note 23, at 2103-06 (arguing against a clear statement requirement on delegation grounds in interpreting the AUMF).

Instrumental theory, likewise, seems a partial description at best of the Court's role in treaty interpretation. It is hard to believe that the judicial power in treaty interpretation hinges on the expectation that interpretive values pursued by the U.S. judiciary alone are meant to have a clear impact on treaty drafting over time. After all, Congress does not hold the treaty-drafting pen, or it holds it only in an indirect way. While the executive certainly has some incentive to take Supreme Court interpretive expectations into account in negotiating treaty texts, in multilateral treaty negotiations, the United States is but one judicial system among many. Foreign courts are hardly bound by the interpretive guidance of the U.S. Supreme Court, and treaty partners have their own domestic interpretive demands to fulfill.<sup>241</sup> Under the circumstances, it would be surprising if instrumental influences of this sort were the primary expected judicial function in treaty interpretation.

The Supreme Court has a long history of vigorous engagement in treaty interpretation, beginning aggressively in the era of the founding of the United States.<sup>242</sup> But if not as faithful agent, and if not with purely instrumental goals in mind, what is the Court's understanding of its role in interpreting treaties? Put differently, what is the nature of the judicial power such that it extends to foreign relations law at all?

### III. EXPLORING A FORMAL THEORY OF JUDICIAL POWER FOR FOREIGN RELATIONS LAW

Given the seeming inadequacies of primary theories of the judicial interpretive power to address the standard challenges of foreign relations law, the final part of this Article begins to explore theoretical frameworks that might avoid the failures of faithful agent theory in

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<sup>241</sup> The 1969 Vienna Convention on the Law of Treaties, setting forth detailed rules for the interpretation of treaties, has been ratified by 110 nations. See Vienna Convention on the Law of Treaties, *supra* note 20. The United States has signed but not ratified the treaty. *Id.* Nonetheless, the U.S. Department of State has on occasion acknowledged the Vienna Convention as "the authoritative guide to current treaty law and practice." RICHARD K. GARDINER, TREATY INTERPRETATION 134 (2008) (quoting *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000)). The U.S. Supreme Court has not seemed much interested in the Vienna approach since the treaty entered into force in 1980. See *id.* at 133-38 (analyzing whether the Supreme Court's treaty-interpretation practice diverges from the Vienna rules).

<sup>242</sup> See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 498-99 (2007) (noting that the U.S. government won less than twenty percent of cases between 1789 and 1838 in which a treaty was the basis of a claim or defense); see also *supra* subsection I.A.1 (reviewing multiple cases in which the Court asserted independent authority to interpret treaty obligations).

this realm and fill in the gaps left by purely instrumental approaches. Here called equilibrium theory, this emerging model draws both on traditional justifications for judicial supremacy in constitutional interpretation and on scholars' attempts to reconcile formal notions of the separation of powers with the advent of the administrative state. In brief, the claim is that part of the judicial power is to promote the separation of powers. This Part first introduces the basic idea. It then considers the principal objection to the approach: in particular, the formal claim that the executive has its own interpretive power that must be taken into account in any understanding of shared interpretive authority. Throughout, this Part considers what such a view of the judicial duty would contribute to our understanding of deference in current dilemmas in statutory and treaty interpretation.

#### A. *Equilibrium Theory*

It is hardly new to suggest that the Supreme Court has a role to play in preventing the accrual of excessive power in any one branch of the federal government. Such a duty has been understood to emerge from a range of constitutional sources, from general principles of the separation of powers to specific guarantees of individual rights in the text.<sup>243</sup> Indeed, the argument that it is a core judicial function to police structural boundaries to constrain power is a central justification of *Marbury* itself:

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation com-

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<sup>243</sup> See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) ("The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer."); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *Duncan v. Kahana-moku*, 327 U.S. 304, 322 (1946) ("Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued.").

mitted to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.<sup>244</sup>

Of significance here, *Marbury's* message in this regard is not limited to *constitutional* interpretation but extends to statutory and treaty interpretation as well.<sup>245</sup> This understanding should be unremarkable. The text of Article III makes it clear that the “judicial power” extends without distinction to the Constitution, statutes, and treaties.<sup>246</sup> It is not immediately apparent why that power, to the extent it includes any interpretive authority, would not be exercised in largely the same way from one instrument to the next.

To the extent modern scholars have challenged *Marbury's* conception of judicial power in this regard—and challenged it they have—their concerns have focused principally on the particular dilemma of *constitutional* interpretation. The contemporary constitutional theory commonly labeled “departmentalism,” for instance, holds that “each branch, or department, of government has an equal authority to interpret the Constitution in the context of conducting its duties” and “is supreme within its own interpretive sphere.”<sup>247</sup> Drawing on textual, structural, and historical claims to shared interpretive authority, departmentalists have advanced a range of reasons the political branches should be understood to have at least some power to interpret for themselves the meaning of the Constitution, including its structural grants of authority.<sup>248</sup> For these scholars, the principal objection to

<sup>244</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803); see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (“The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure . . .”), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

<sup>245</sup> See Monaghan, *supra* note 24, at 2 (“Marshall’s grand conception of judicial autonomy in law declaration was not in terms or in logic limited to constitutional interpretation . . .”).

<sup>246</sup> See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases . . . arising under this Constitution, laws of the United States, and Treaties made . . .”).

<sup>247</sup> Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 782-83 (2002).

<sup>248</sup> See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 105-10 (2004) (noting that departmentalism squares with founding-era ideas about “popular constitutionalism”); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6-32 (1999) (arguing against judicial supremacy in constitutional interpretation); WHITTINGTON, *su-*



*Marbury's* assumption of judicial supremacy is the countermajoritarian one: of all branches, why should the nondemocratic Court have the power to say what our democratic Constitution means, particularly as it is so difficult to amend the Constitution democratically (as the Constitution itself provides)? Why should the Court be allowed effectively to end the debate on constitutional meaning?

For reasons that should be apparent, judicial interpretation of statutes and treaties poses less troubling democratic concerns. If Congress does not like the Court's interpretation of a statute, whether based on a substantive canon of interpretation or on some other reason, it can pass another one. If Congress does not like the Court's interpretation of a treaty, it can pass a subsequent statute, effectively overturning whatever interpretation the Court has given the treaty.<sup>249</sup> Indeed, as instrumental theories of judicial power suggest, judicial interpretation of statutes and treaties can serve an eminently democratic function, not only by compelling the lawmaker to clarify meaning through a public and deliberative process, but also by infusing laws with judicial values of stability and consistency.<sup>250</sup> Such a function is likely to be particularly valuable in certain foreign relations contexts, where executive branch secrecy can challenge the effectiveness of congressional oversight.

For statutes and treaties, then, the more significant challenge to the *Marbury* view of interpretive authority—a view that assumes some judicial role in limiting government power—is less a question of which single branch should play the role of interbranch enforcer. Instead, it is the challenge of identifying what those formal authorities are, or could be, in the modern administrative state. If executive agencies are to carry out both quasi-legislative and quasi-adjudicative functions, then an interpretation of *Marbury* (or anything else) that would contemplate the enforcement by any branch of a strictly formal division of

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*pra* note 205, at 30 (noting that Presidents Jefferson, Jackson, Lincoln, Roosevelt, and Reagan articulated departmentalist views); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 223 (1994) (arguing that the veto, pardon, and appointment powers, among others, reflect the executive's broad mandate to interpret the Constitution); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 687 (2005) (“[T]he Constitution’s grant of executive power, together with the duty faithfully to execute the laws, means that the executive and Congress acting in their own spheres must interpret and apply the Constitution.”); Whittington, *supra* note 247, at 783 n.42 (noting that the concept of departmentalism arose in debates among the Founders).

<sup>249</sup> See HENKIN, *supra* note 4, at 209 & nn.129-31 (describing the ability of legislation to supersede treaty provisions).

<sup>250</sup> See *supra* Section II.B (discussing instrumental interpretation in further detail).

powers—executive power to the executive, legislative power to Congress, and so forth—cannot survive.

Yet the notion that federal power may be effectively limited only by, for example, preventing the executive from issuing any kind of legal rule (lest it be accused of legislating) was not necessarily the separation-of-powers concept the Framers had in mind or the limit *Marbury* itself necessarily contemplated. Rather, as Cynthia Farina noted in the wake of *Chevron*, the Madisonian vision of separated powers was of a government of shared authority, with each branch possessing enough constitutional power “to resist encroachments of the others.”<sup>251</sup> Allowing one branch to accrue functional authority over time in the service of effective governance was thus permissible as long as the other branches could respond with equal and opposite constraining forces of their own. Delegation of legislative power to the executive could be tolerated under this scheme, as long as it remained possible to maintain an offsetting power through independent judicial interpretation.<sup>252</sup> In this respect, the problem with *Chevron* was that it disabled that system of “dynamic equilibrium,” depriving the courts of their full power of interpretation just when the need to preserve equilibrium was greatest.<sup>253</sup>

If this view of the modern consequences of *Marbury* is correct—that is, the view that part of the judicial role is to help maintain inter-branch equilibrium—it holds several implications for statutory and treaty interpretation that make it a useful supplement to an instrumental approach. First, like instrumental theory, the equilibrium view does not bar judicial consideration of an executive branch interpretation of a law, particularly insofar as the executive may enjoy expertise that might clarify legislative meaning. But unlike instrumental theory, the equilibrium model carries clear implications for the relative weight due to substantive canons of interpretation—like the nondelegation canon—as compared with claims of executive deference. Contemporary writings on whether the executive’s view or a judicial canon should trump in cases of statutory ambiguity commonly see the canons as flowing from some combination of functional interests in judicial prudence, institutional minimalism, and administrative utili-

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<sup>251</sup> Farina, *supra* note 17, at 497 (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961)).

<sup>252</sup> See *id.* at 487 (“[T]he Court’s vision of separation of powers evolved . . . to the more flexible . . . proposition that power may be transferred *so long as* it will be adequately controlled.”).

<sup>253</sup> *Id.* at 497-98.

ty.<sup>254</sup> And if nondelegation canons are driven principally by functional concerns, then competing functional demands might trump the canons themselves—for example, the demand of deferring to executive expertise in foreign relations matters.<sup>255</sup> If, however, nondelegation canons are a necessary adjunct to the formal judicial power to interpret the law, then one might expect the Court to require at least a clear statement before it interprets a statute or treaty to effect the transfer or accretion of significant discretionary power.<sup>256</sup> An equilibrium theory approach would embrace the latter view. That is, when faced with ambiguity, the Court would give priority to interpretive canons that reduce the likelihood that any one branch would be barred from, or could shirk, continued participation in interbranch debate. To extend the example from above, a court considering the scope of detention authority provided by the 2001 AUMF would adhere to the substantive canon against delegation before simply deferring to executive views on grounds of expertise.<sup>257</sup>

Second, when a purely instrumental understanding of the judicial power seems an inadequate and therefore unlikely explanation for the Court's active role in treaty interpretation, equilibrium theory

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<sup>254</sup> See, e.g., Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 76 (2008) (“[S]hould statutory ambiguity be resolved by courts applying normative canons, as it was previous to *Chevron*? Or are these the kind of normative questions that should . . . be assigned to agency judgment?”); see also, e.g., Sunstein, *supra* note 230, at 315-16 (arguing that to the extent nondelegation doctrine remains of constitutional salience, it is enforced through the deployment of the interpretive canons). As noted previously, such canons have also been explained as a reasonable outgrowth of the faithful agent view of judicial power. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) (“[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.” (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))).

<sup>255</sup> See Bradley & Goldsmith, *supra* note 23, at 2102-06 (arguing that the Supreme Court has “made clear that delegation concerns are less significant when statutes concern foreign affairs than when they concern domestic affairs”).

<sup>256</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (“The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.”).

<sup>257</sup> Note that Bradley and Goldsmith reach the opposite conclusion on the relevance of the nondelegation canon to AUMF interpretation. See Bradley & Goldsmith, *supra* note 23, at 2102-06.

would provide more meaningful guidance—leading the Court to disfavor constructions that disrupt interbranch equilibrium or otherwise enable the accretion of federal power through international law. In this respect the *Medellín* Court, for example, might be understood to have acted appropriately to reinforce equilibrium by rejecting the executive’s argument that the ICJ’s judgment, although not binding in courts of its own authority, “became the law of the land with precisely that effect pursuant to the President’s Memorandum and his power ‘to establish binding rules of decision that preempt contrary state law.’”<sup>258</sup> Recall that the executive’s argument in *Medellín* was that the relevant treaties should be read to “implicitly” give the President the power to implement the United States’ “treaty-based obligation” to effect compliance with the ICJ’s decision.<sup>259</sup> Rejecting the executive’s proposed reading, the Court demanded a clearer statement—in the treaty or, perhaps more sensibly, from Congress itself—that this was indeed the desired effect. Absent such a statement, the Court would not permit the executive to claim a power, by treaty, to “convert[] a non-self-executing treaty into a self-executing one.”<sup>260</sup>

Equilibrium theory could also counter trends in international law and legal structures that may tend to increase the relative power of domestic executives within domestic legal structures.<sup>261</sup> Here, the Court’s per curiam decision in *Munaf v. Geren*<sup>262</sup> should stand as a cautionary tale. In *Munaf*, the Court was reluctant to “second-guess” the executive’s determination, based on close coordination between the U.S. State Department and the Iraqi Ministry of Justice, of the likelihood that two U.S. citizens would face torture if transferred to Iraqi custody.<sup>263</sup> The executive argued that such second-guessing “would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this

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<sup>258</sup> *Medellín v. Texas*, 552 U.S. 491, 523 (2008) (quoting Brief for United States as Amicus Curiae, *supra* note 5, at 5); *see also supra* subsection I.A.1 (discussing *Medellín* and related cases).

<sup>259</sup> *Medellín*, 552 U.S. at 525 (quoting Brief for United States as Amicus Curiae, *supra* note 5, at 11) (emphasis omitted).

<sup>260</sup> *Id.*

<sup>261</sup> *See, e.g.*, Martin S. Flaherty, *Globalization and Executive Power* 28 (Apr. 4, 2008) (unpublished manuscript) (on file with author) (“[G]lobalization generally has resulted in a net gain in power not for judiciaries, but for the “political” branches—and above all for executives—within domestic legal systems.”); Scheppele, *supra* note 30, at 3-5 (describing how national executives have used a series of UN Security Council antiterrorism resolutions to expand executive power domestically).

<sup>262</sup> 553 U.S. 674 (2008); *see also supra* subsection I.A.2 (discussing *Munaf*).

<sup>263</sup> *Munaf*, 553 U.S. at 702.

area."<sup>264</sup> While the Court ultimately declined to reach directly the statutory and treaty interpretation questions that underpinned the habeas petitioners' request for relief,<sup>265</sup> a view that it is part of the judicial duty to promote interbranch equilibrium would likely require the Court to take a more active interpretive role.

### B. *Considering Formal Objections*

As noted above, a view of the judicial power that affords the Court a formal role in promoting interbranch equilibrium would tend to trump the functional considerations of expertise on which most theories of executive deference are based.<sup>266</sup> For this reason, the most powerful arguments against an equilibrium theory of judicial power in foreign relations law are based not on the executive's functional expertise, but rather on formal claims about its Article II power. Article II offers the executive several fonts of authority, including the Commander-in-Chief Clause and the Treaty Clause, that may afford the President interpretive power in foreign relations matters that is not otherwise implicated in standard administrative law.<sup>267</sup> Yet while there is a good case to be made that the executive must have some inherent power to interpret statutes and treaties, it is far from clear that this power entitles the President to any more deference than federal agencies enjoy under *Skidmore*.<sup>268</sup> Because an equilibrium theory understanding of judicial power poses no bar to the consideration of executive branch interpretations to this extent, recognizing some formal interpretive power in the executive may be broadly compatible with the judicial role described here.

Scholars have regularly argued that judicial deference to executive interpretations of foreign relations-related statutes and treaties is necessitated in part by the President's own formal constitutional authori-

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<sup>264</sup> *Id.*

<sup>265</sup> *See id.* (finding that habeas petitioners had not successfully raised the claims in the lower courts). Petitioners had argued that transfer would violate their rights under a federal statute and treaty prohibiting the "return" of someone to another state when there is a substantial likelihood he will be tortured. *Id.* (citing Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822, and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 120).

<sup>266</sup> *See* Pearlstein, *supra* note 174, at 1572 (arguing that while functional considerations may be relevant in separation-of-powers disputes, clear formal constraints remain important).

<sup>267</sup> U.S. CONST. art. II, §§ 1-3.

<sup>268</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

ty. In the statutory context, for example, Professors Bradley and Goldsmith have maintained that the executive should have fairly broad power to construe its “necessary and appropriate” authority under the 2001 AUMF, a statute that, as noted above, is now the subject of much judicial debate.<sup>269</sup> In addition to suggesting various reasons that the executive might be entitled to judicial deference, Bradley and Goldsmith contend that the executive’s formal constitutional authority over foreign relations renders interpretive canons disfavoring broad delegations of power less salient.<sup>270</sup> Citing cases such as *Loving v. United States*, in which the Court upheld the President’s authority under the UCMJ to prescribe aggravating factors for death penalty sentencing in courts-martial, the authors posit that “[t]he delegated duty . . . is *interlinked with* duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter.”<sup>271</sup> Further, and more to the point, the authors contend, because the nondelegation *doctrine* is itself less of a concern, so too should be the nondelegation *interpretive canon* requiring a clear statement before assuming Congress intended to authorize a broad delegation of power.<sup>272</sup> Thus, while a statute delegating general power to the President to take certain action whenever it is “necessary and appropriate” might ordinarily pose delegation concerns, in this view such delegation concerns in the foreign relations context neither render the statute invalid nor even require that Congress clarify its intention before a court may interpret the statute’s scope as broadly as the executive demands.<sup>273</sup>

One need not reject entirely the belief that the President has some formal authority to interpret and apply statutes to identify several reasons to doubt the ultimate persuasiveness of this claim. For one, the Court’s reluctance to embrace nondelegation-doctrine challenges to executive actions pursuant to statutory authority may be less significant to the scope of formal executive authority in foreign relations than Bradley and Goldsmith assume. The modern Court’s lack of receptivity to substantive nondelegation challenges is hardly limited to

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<sup>269</sup> See Bradley & Goldsmith, *supra* note 23, at 2084 & n.150 (suggesting, *inter alia*, that the executive might be entitled to *Chevron* deference).

<sup>270</sup> *Id.* at 2100-06.

<sup>271</sup> *Id.* at 2100-01 (emphasis added) (quoting *Loving v. United States*, 517 U.S. 748, 772 (1996)).

<sup>272</sup> *Id.* at 2103-04.

<sup>273</sup> *Id.*

the foreign relations context. As the *Loving* Court noted, "Though in 1935 we struck down two delegations for lack of an intelligible principle, we have since upheld, without exception, delegations under standards phrased in sweeping terms."<sup>274</sup> While cases such as *Loving* and *Curtiss-Wright* may have once seemed notable and foreign relations-specific exceptions to an otherwise broadly applicable rule against recognizing broad delegations of legislative power, it should by now seem clearer that these cases are only a few examples of a far broader rejection of nondelegation challenges, entirely independent of questions of formal executive power in foreign relations.

Beyond this, in many of the cases Bradley and Goldsmith cite in support of their claim that the courts recognize that the executive's formal powers in foreign relations may flip standard canons of statutory interpretation, the Court has focused on the executive's relative *functional* superiority, not its formal authority. The 1965 passport-regulation dispute, *Zemel v. Rusk*,<sup>275</sup> is a case in point. There, the Court was called to consider a nondelegation challenge to a statute authorizing the Secretary of State to issue passports under rules prescribed by the President; the Secretary had interpreted the statute to authorize the restriction of travel to Cuba.<sup>276</sup> Paying modest attention (by *Chevron* standards) to the executive's views—noting only that "[t]he interpretation expressly placed on a statute by those charged with its administration must be given weight"<sup>277</sup>—the Court rejected the nondelegation challenge. Notably, its rejection was not couched in language evincing any concern for (or recognition of) some inherent formal authority of the executive but rather on the grounds that

because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.<sup>278</sup>

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<sup>274</sup> *Loving*, 517 U.S. at 771 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327-29 (1936) (upholding the President's delegated authority to impose an arms embargo).

<sup>275</sup> 381 U.S. 1 (1965).

<sup>276</sup> *Id.* at 4.

<sup>277</sup> *Id.* at 11.

<sup>278</sup> *Id.* at 17.

While there can be no question that the Court has taken such functional considerations into account in construing statutory delegations of power to the executive and in resolving separation-of-powers questions more broadly, a recognition that such considerations may matter is a far cry from the position that the Court is compelled to take them into account by the executive's authority under Article II.<sup>279</sup>

Perhaps more importantly, it is a significant—and unwarranted—conceptual leap to move from the (arguable) proposition that delegation doctrine is broadly less salient when construing foreign relations statutes<sup>280</sup> to the proposition that the *interpretive canon* against broad delegations should not apply, or the even broader proposition that

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<sup>279</sup> The other cases in the “passport trilogy,” relied on heavily by Bradley and Goldsmith, are likewise unhelpful in advancing the claim that the President’s independent constitutional authority has some particular bearing on the Court’s role in interpreting foreign relations statutes. In *Kent v. Dulles*, the Court held that statutes providing that passports may be issued under “such rules as President shall . . . prescribe” *did not* afford the executive the authority it claimed—namely, the power to deny passports to citizens who appeared to support the Communist Party. 357 U.S. 116, 123, 129 (1958); *see also* Bradley & Goldsmith, *supra* note 23, at 2101 (noting that the *Kent* Court declined to address whether a different analysis would be appropriate if the case had arisen during a war emergency). To the extent one might discern anything about what difference wartime (and therefore “war powers”) might have made in the Court’s reasoning, it was a difference regarding the treatment of individual rights, not the relative scope of Congress’s power to delegate authority or the executive’s power to exercise it. *See Kent*, 357 U.S. at 128 (distinguishing the instant case from the Court’s wartime holding in *Korematsu v. United States*, 323 U.S. 214 (1944), on the grounds that “[n]o such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here”). In contrast, in *Haig v. Agee*, 453 U.S. 280, 306 (1981), the Court did uphold the President’s delegated authority to revoke a passport on the ground that the holder’s activities abroad were causing serious harm to U.S. foreign policy. But there, the Court squarely foreclosed the possibility that its delegation analysis was based on an assessment of the President’s Article II powers. *See Haig*, 453 U.S. at 289 n.17 (“[W]e have no occasion in this case to determine the scope of ‘the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.’” (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936))). Rather, the Court’s decision was based on a finding that Congress was aware of and, by taking no action over time, implicitly authorized a consistent executive branch practice of denying passports on such grounds. *Haig*, 453 U.S. at 302-03.

<sup>280</sup> *Loving v. United States*, 517 U.S. 748 (1996), the key case Bradley and Goldsmith cite for this proposition, did not purport to establish a principle of delegation in foreign relations law in general. Rather, the case was narrowly limited to the Court’s understanding of the Commander-in-Chief function as including the particular responsibility to take “action to superintend the military . . . ‘a specialized community governed by a separate discipline from that of the civilian.’” *Id.* at 772-73 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).



the Court's role in interpretation may be appropriately ceded to the executive in this realm. Indeed, even as the substantive nondelegation doctrine has shriveled in importance in the modern administrative state, the Court has paid sustained attention to the nondelegation interpretive canon.<sup>281</sup> That the Court should prefer the interpretive canon as an approach to serving nondelegation interests in fact makes good sense. The substantive doctrine and interpretive canon serve different purposes and have different effects. A holding that Congress violates the separation of powers in overbroad delegations of authority to the President conclusively limits the government's options. The interpretive canon allows Congress and the President the opportunity to pursue an arrangement of broadly delegated powers, but only if the effect of the arrangement is made clear through democratic deliberation and clear legislative commitment. Although the Court has largely declined to attach strong constitutional prohibitions to delegated-power arrangements, that does not mean it has lost interest in pursuing separation-of-powers goals through less constitutionally "nuclear" means. Any reluctance the Court feels in applying the substantive doctrine in the foreign relations context may not—and need not—carry over to its application of the interpretive canon.

Given the limitations of such doctrinal arguments, the stronger claim that formal executive power may preclude adherence to equilibrium theory in the interpretation of statutes and treaties may come by extension from the departmentalists, who maintain that the executive has at least some interpretive authority over the meaning of the constitutional law.<sup>282</sup> Recall that departmentalism holds that "each branch, or department, of government has an equal authority to interpret the Constitution in the context of conducting its duties" and "is supreme within its own interpretive sphere."<sup>283</sup> Based on textual, structural, and historical claims to shared interpretive authority,<sup>284</sup> as well as on various strands of political theory including notions of popular constitutionalism,<sup>285</sup> the general idea may be succinctly summarized:

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<sup>281</sup> See Sunstein, *supra* note 230, at 315-16 (arguing that nondelegation doctrine is "alive and well" in the form of substantive interpretive canons against delegation).

<sup>282</sup> See sources cited *supra* note 230.

<sup>283</sup> Whittington, *supra* note 247, at 782-83.

<sup>284</sup> See generally Paulsen, *supra* note 248 (surveying such arguments in favor of the President's interpretive authority).

<sup>285</sup> KRAMER, *supra* note 248, at 31 (noting that communities once had a "credible interpretive voice when it came to the constitution").

Just as, under *Marbury v. Madison*, the obligation to decide cases consistently with the Constitution gives the Court the power and obligation of judicial review, so, too, the Constitution's grant of executive power, together with the duty faithfully to execute the laws, means that the executive and Congress *acting in their own spheres* must interpret and apply the Constitution.<sup>286</sup>

While it is certainly true that aspects of the departmentalist rationale are strongly tied to the unique task of constitutional interpretation<sup>287</sup> and therefore are not necessarily instructive on the question of statutory and treaty interpretation at issue here, not all of the text-based arguments for departmentalism are limited to the interpretation of the Constitution.<sup>288</sup> Indeed, departmentalist reliance on the separation-of-powers idea that the power of interpretation is too important to be held exclusively by one branch cannot obviously be limited to constitutional interpretation per se.<sup>289</sup> It thus should not be surprising that some departmentalist scholars have suggested that their view of the executive's formal interpretive authority extends to statutes and treaties as well.<sup>290</sup> The "judicial power,"<sup>291</sup> a term understood to en-

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<sup>286</sup> Pillard, *supra* note 248, at 687 (emphasis added) (footnote omitted).

<sup>287</sup> Some departmentalists have pointed to the presidential oath of office, for example, as a textual basis for understanding the President as having some independent constitutional responsibility to explain (in service of upholding) the Constitution. That Clause imposes upon the President the duty to "preserve, protect and defend the Constitution of the United States," not the Constitution, laws, and treaties of the United States. U.S. CONST. art. II, § 1 (emphasis added); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 266-67 (3d ed. 2000) (recognizing the importance of the Oath Clause in the departmentalist argument). Other scholars have likewise made arguments grounded in political theory that are tied specifically to the task of constitutional interpretation. See, e.g., KRAMER, *supra* note 248, at 106-10 (discussing how the three branches of government should reach compromise when their interpretations differ); TUSHNET, *supra* note 248, at 6-32 (raising various arguments against judicial supremacy in constitutional interpretation).

<sup>288</sup> While the Oath Clause may make executive interpretive authority over the Constitution of special significance, the Take Care Clause makes no such textual distinction between different sources of federal law. See U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . .").

<sup>289</sup> See Paulsen, *supra* note 248, at 222 ("The framers believed that liberty is best preserved where governmental power is diffused . . .").

<sup>290</sup> See, e.g., *id.* at 221 ("The Supreme Court's interpretations of treaties, federal statutes, or the Constitution do not bind the President any more than the President's or Congress's interpretations bind the courts."); see also Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, *LAW & CONTEMP. PROBS.*, Summer 2004, at 105, 113 ("[A]ll three branches share the responsibility to uphold the Constitution.").

<sup>291</sup> U.S. CONST. art. III, § 2 ("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 . . .").

compass an interpretive function, extends equally to the Constitution, statutes and treaties. Why would the "executive power," if understood to encompass any interpretive function, be construed differently?

A weak version of the claim that the executive has some independent authority to interpret statutes and treaties is not especially objectionable. The executive must have at least some power to interpret the law, if only enough to "take care" that the law is implemented in the (frequent) absence of a controlling judicial opinion.<sup>292</sup> Whether the courts fail to resolve all interpretive questions because of structural limitations<sup>293</sup> or because of more prudential concerns,<sup>294</sup> it is clear that not all statutes and treaties needing enforcement will be subject to judicial construction. Indeed, this view seems unassailable in formal terms, as one might readily imagine the constitutional requirement for the executive to ensure that the laws are faithfully executed includes the power to do what is practically necessary to execute the laws, including determining the law's meaning. At the same time, this kind of interpretive authority does not generally threaten the "judicial power," a power limited by the express recognition that the federal courts will decide only those disputes concrete enough to constitute a case or controversy.<sup>295</sup> Accepting that the executive has some interpretive power of this sort does not imply an answer to the question of whether this power in foreign relations matters should preclude the Supreme Court from exercising a duty to apply its own interpretive power to preserve interbranch equilibrium.

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<sup>292</sup> U.S. CONST. art. II, § 3; see also, e.g., W. Michael Reisman, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 YALE J. INT'L L. 316, 325-28 (1990) (arguing that the executive must inevitably make judgments about what the law requires); Eugene V. Rostow, *The Reinterpretation Debate and Constitutional Law*, 137 U. PA. L. REV. 1451, 1455 (1989) ("[T]he President necessarily interprets and reinterprets every statute and treaty . . .").

<sup>293</sup> See U.S. CONST. art. III (establishing the structure and jurisdiction of the federal courts).

<sup>294</sup> Walter Dellinger and H. Jefferson Powell give an example of this concern:

In 1800, Congressman Marshall explained to the House of Representatives that the Constitution does not vest in the federal courts the exclusive authority to decide issues arising under the Constitution, laws and treaties; while such issues are by definition questions of law, some of them are "questions of *political* law," and must be answered by one (or both) of the political branches of the government."

Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367, 367 (1999) (quoting the Honorable John Marshall, Speech on the Resolutions of the Honorable Edward Livingston, Delivered in the House of Representatives (Mar. 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 82, 103 (Charles T. Cullen & Leslie Tobias eds., 1984)).

<sup>295</sup> U.S. CONST. art. III, § 2.

A stronger version of the departmentalist idea, however, challenges not only judicial *exclusivity* in interpretation, but also judicial *supremacy*: the assumption that the Court necessarily wins the interpretive battle of the branches. In this view, where a particular power is textually committed to the executive alone, such as the power to issue pardons or veto legislation, the executive should enjoy supremacy in determining how to interpret these powers.<sup>296</sup> Some departmentalists contend that the President must thus have the authority to decline to enforce statutes he believes are unconstitutional.<sup>297</sup> An even broader view suggests that the President's interpretive authority entitles him to refuse to comply with orders of the courts.<sup>298</sup> While such claims remain a minority view,<sup>299</sup> it is not difficult to imagine the implications of such a view for statutory and treaty interpretation: if the executive can fully ignore laws he thinks tread on a matter within his exclusive constitutional power, then his interpretation of those laws should have some primacy even if only to avoid such a dramatic step. Indeed, it is precisely this argument that John Yoo, among others, has advanced with respect to treaty interpretation—specifically, that the Constitution grants the President *exclusive* control over treaty interpretation by vesting the executive power in the President and by granting the President power to make treaties.<sup>300</sup>

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<sup>296</sup> See WHITTINGTON, *supra* note 205, at 14 (describing a theory of “fixed departmentalism” that holds that “allocation of interpretive authority varies by topic or constitutional provision” (quoting Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 384 (1997))).

<sup>297</sup> See Johnsen, *supra* note 290, at 112 (noting that a few departmentalists argue that the President should choose not to enforce laws if he finds them “constitutionally objectionable”).

<sup>298</sup> See Paulsen, *supra* note 248, at 222 (arguing that the President “may refuse to execute (or, where directed specifically to him, refuse to obey) judicial decrees that he concludes are contrary to law”).

<sup>299</sup> See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (challenging the idea that the courts' interpretations of the Constitution do not bind nonjudicial authorities).

<sup>300</sup> See John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 869-70 (2001) (book review) (contending that the Constitution imparts full control over treaty interpretation to the President). Although Yoo's position is set forth in the context of treaty interpretation specifically, his textual reading of Article II's Vesting Clause would appear to have implications for statutory interpretation as well. See also Bradley, *supra* note 11, at 699 (arguing that because the executive has broad constitutional authority of its own with regard to foreign affairs law, there should be little concern that shared authority—even shared interpretive authority—runs afoul of formal constitutional limits).

Yoo's account is plagued by several flaws,<sup>301</sup> not the least of which is that it is difficult or impossible to establish which, if any, of the executive's foreign relations powers are exclusive. The executive's power to make treaties is coupled with the Senate's power to ratify them.<sup>302</sup> The Constitution equally defines the "judicial Power" as extending to "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made."<sup>303</sup> And the courts certainly have a long history of behaving as though treaty interpretation is a power shared with the judicial branch.<sup>304</sup> With respect to the Commander-in-Chief power—arguably the most relevant formal duty "interlinked with" the statutory power contained in the AUMF—scholars have recently shown, in exhaustive detail, that Congress has historically been "an active participant in setting the terms of battle (and the conduct and organization of the armed forces . . .)," an assertion of shared power that the executive has most often accepted as within Congress's authority.<sup>305</sup> Departmentalism may give the executive strong claims to formal interpretive authority where it is clear his is the only source of constitutional power, but wherever power is shared, as in the realm of foreign relations, the task of maintaining equilibrium seems relevant.

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<sup>301</sup> For example, Martin Flaherty highlights the historical deficiencies of Yoo's argument:

[T]he framers were virtually of one mind when it came to giving treaties the status of law. . . . The imperative need to make treaties legally binding on both the states and their citizens was widely recognized by 1787. The major consequence of this perception was the ready adoption of the supremacy clause, which gave treaties the status of law and made them judicially enforceable through the federal courts.

Martin S. Flaherty, Response, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2120 (1999) (quoting Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 PERSP. AM. HIST. 233, 264 (1984)); see also Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 194-95 (2004) (noting that Yoo's contention that treaty interpretation is solely within the executive realm is flawed, as the Constitution distributes power among all three branches); Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263, 1276-77 (2002) (arguing, inter alia, that in light of the Framers' understanding of the separation of powers, committing the power to "make" treaties to the executive would preclude vesting the power to interpret them in the same branch).

<sup>302</sup> See U.S. CONST. art. II, § 2 ("He shall have Power . . . to make Treaties, provided two thirds of the Senators present concur . . .").

<sup>303</sup> *Id.* art. III, § 2 (emphasis added).

<sup>304</sup> See *supra* subsection I.A.1 (reviewing treaty-interpretation cases).

<sup>305</sup> David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 947 (2008).

## CONCLUSION

In many respects, the tendency of scholars and courts to view treaties and foreign relations statutes as a separate species of law is unfortunate. While it may have once been possible to draw a bright line between the tasks of governing that were purely domestic and those that arose uniquely in the realm of foreign relations, transformations in areas from international trade and communications to biology and warfare to international law and legal structures render the easy distinction between foreign and domestic power increasingly quaint. The Supreme Court's active engagement with resolving foreign relations-related legal disputes in recent years may be seen as one manifestation of this broader trend. At the same time, considering foreign relations as a quasi-distinct body of law may continue to offer heuristic benefits. Among these benefits is the opportunity to evaluate dominant models of the judicial power against a particular set of examples that these models were not necessarily conceived to address. This Article has suggested that one lesson of this evaluation is to require the development of some additional understanding of the role of the courts in law interpretation.

Beyond such theoretical considerations, the question this Article addresses is one of intense practical concern over a novel question faced by contemporary courts: in construing a statute authorizing the President to use "necessary and appropriate force" to battle international terrorism, whose view of the meaning of "necessary and appropriate" controls? By arguing for an equilibrium-promoting concept of judicial power, the intent here has not been to discount the many reasons why the courts may wish to, and should, attend closely to the executive's views. The executive's functional strengths—its access to bodies of experts across the U.S. government and its experience in both applying the law on the ground day-to-day and applying its understanding of its own duties and political demands—make its views indisputably worth consideration. Rather, the point of this Article is to argue that it is possible for the courts to take such insights into account without premitting their own interpretive exercise in categorical deference to any position the executive might take. Indeed, this Article has contended that such categorical deference is not formally required (as a matter of executive power) and may be formally prohibited (as a matter of judicial power).

Given the practical concerns driving this inquiry, it is fair, in the end, to wonder whether such a conclusion—effectively leaving the courts to determine the extent to which the executive's interpretation

has “the power to persuade”—is bound to leave the courts more confused and less constrained than they already are. It is an intriguing question for empirical study. But the outcome is far from obvious. The courts are consistently in the business of conducting multifactor analyses in the style of *Skidmore* to determine whether a search was reasonable, whether a defendant was afforded all process due, and a host of other inquiries. The *Skidmore* factors that contribute to persuasiveness are themselves a finite set. And in the end, the most meaningful constraints on the judicial power are most likely to come from the same powers that hold the executive and Congress in check: the dynamic and ongoing struggle among the branches.