August, 2007

Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations

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ABSTRACT: When confronted with ambiguous treaty language, do judges defer to the interpretation preferred by the executive branch? Should they do so? The descriptive and normative issues associated with judicial deference to executive-branch treaty interpretations are pressing, particularly in light of the impact U.S. treaty obligations might have on policies associated with the war on terrorism. Unfortunately, the doctrine of deference to the executive branch that the Supreme Court has produced over the course of the past century is indeterminate, to say the least, reflecting the fact that the Court has never attempted to provide a theoretical explanation for the practice of deference in this context. In this Article, I aim to reduce this uncertainty by providing a thorough descriptive account of the deference doctrine, such as it is, as well as a normative account designed to shift that doctrine onto firmer theoretical grounds.

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I. INTRODUCTION

A treaty,[1] like any other written instrument, may contain ambiguities that must be resolved in the course of its application to real-world events. Of necessity, it is the executive branch, operating through its various departments and officials, that performs this interpretive task on a day-to-day basis. But not all executive treaty interpretations are equal. While many, if not most, are mundane, some are controversial—perhaps deeply so. In such cases, executive power to interpret could—if entirely unchecked—shade into the power to amend, without resort to the restraining formalities of the treatymaking or lawmaking processes.[2]

The interpretive authority of the executive branch with respect to the execution of any form of law (treaty, statute, or otherwise) generally is thought to be checked by, among other things, the judiciary's claim of final authority "to say what the law is."[3] And yet, despite this maxim, there are contexts in which executive interpretations of law are not so easily trumped. The most famous of these involves the *Chevron* doctrine, pursuant to which a court must defer entirely to the appropriate administrative agency's reasonable interpretation of ambiguous statutory language in at least some circumstances.[4] The fact that something similar may have been taking place for over a century with respect to executive treaty interpretations is not nearly so widely recognized.

It does not appear that courts deferred to executive-branch treaty interpretations in the early years of the United States.[5] Signs of change

1. This Article focuses on treaty interpretation, to the exclusion of the parallel issues that might arise with respect to other forms of international agreement, largely because the courts have addressed the deference issue thus far only in the treaty context. Whether and to what extent judges do, or should, defer to executive-branch interpretations in other contexts is an important question but one beyond the scope of this Article. *Cf.* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1243 (2007) (presuming that "the executive retains substantial capacity to interpret and even abandon executive-made law" as in the case of sole executive agreements).

2. *Cf.* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 180 (2004) (observing that a treaty will bind the executive only in a formal but not a practical sense if courts refrain from reviewing executive interpretations out of a sense of deference or any of several other doctrines of restraint).

3. Marbury v. Madison, 5 U.S. 137, 177 (1803).

4. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). The Court in *Chevron* did not perceive itself as ceding any of its interpretive authority to the executive branch but rather indulged the assumption that Congress, in enacting ambiguous language, implicitly intended to delegate authority to resolve the ambiguity to the agency responsible for implementing the statutory scheme. On this theory, deferring under *Chevron* is itself an act of statutory interpretation. For an insightful discussion, see generally Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

5. *See* David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations*, 62 N.Y.U. ANN. SURV. AM. L. 497, 505–23 (2007) (surveying treaty-interpretation cases in which the United

appeared in the late nineteenth century, however, and by the twentieth century the Supreme Court was repeatedly articulating a deference doctrine.[6] By the 1990s, some scholars had concluded that, for better or worse, executive treaty interpretations, as a practical matter, were dispositive in most cases.[7] Moreover, during this same period, the potential impact of the doctrine in terms of the separation of powers has grown in both quantitative and qualitative terms. Quantitatively, the ongoing proliferation of treaties during the twentieth century has meant a coinciding increase in opportunities for the deference doctrine to come into play. Qualitatively, the emergence of international agreements focused on the relationship of states to individuals has produced treaty disputes in a range of politically sensitive contexts, including a number of post-September-11 antiterrorism policies.

A decision by the D.C. Circuit Court in the summer of 2005 bore out the potential significance of the deference doctrine in light of these trends. In *Hamdan v. Rumsfeld*, the court faced an array of issues arising out of a habeas corpus petition brought on behalf of Salim Hamdan, an alleged Al Qaeda member held at Guantánamo Bay who had been designated for trial before a military commission.[8] Among other things, the court had to determine whether Hamdan had been detained in connection with an armed conflict falling within the scope of Common Article 3 of the Geneva Conventions—a question that the President previously had answered in the negative with respect to Al Qaeda detainees by adopting a narrow construction of the treaty language.[9] Ultimately, the D.C. Circuit concluded by a two-to-one margin (with future Chief Justice John Roberts in the majority) that "the President's reasonable view of the provision *must* . . . prevail."[10] To be sure, the panel made clear that it agreed with the President's interpretation on the merits, but the court's endorsement of a robust deference obligation in this sensitive context nevertheless suggested the potential impact of the doctrine.

States was a party from 1789 through 1838 and concluding that courts in that era did not defer at all to executive interpretations).

6. *See infra* Part III.C (reviewing the cases in which the Court articulated the doctrine). The Restatement (Third) of the Foreign Relations Law of the United States recognizes the deference doctrine. Section 326(2) asserts that courts have "final authority to interpret an international agreement for purposes of applying it as law in the United States" but acknowledges that courts nonetheless "will give great weight to an interpretation made by the Executive Branch." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (1987).

7. *See, e.g.*, David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953, 960–63 (1994).

8. Hamdan v. Rumsfeld, 415 F.3d 33, 35–36 (D.C. Cir. 2005).

9. *See id.* at 41.

10. *Id.* at 42 (emphasis added).

The story of *Hamdan* did not end there, however. The Supreme Court reversed the D.C. Circuit in June 2006,[11] rejecting the President's interpretation of Common Article 3 without even a mention of the deference doctrine by the majority. This omission sparked a vigorous objection from Justice Thomas in dissent and was all the more notable for having occurred just one day after the Court in *Sanchez-Llamas v. Oregon* had repeated the maxim that the judiciary must give "great weight" to at least some executive treaty interpretations.[12] In the aftermath, the deference doctrine appears more unsettled and indeterminate than ever before.

As noted above, my aim in this Article is to address this confusion by providing a thorough descriptive account of the origins and evolution of the doctrine and also by suggesting reforms designed to link the practice of deference to a defensible theoretical foundation. Part II begins by framing the issues with a detailed discussion of the deference dispute in *Hamdan*. Against that backdrop, Part III addresses a pair of descriptive questions. First, what is the precise nature of the deference doctrine? To answer that question, I provide a historical survey of the origins and evolution of the Supreme Court's treaty-deference cases. I do not do so in a vacuum, however, but instead contextualize this discussion with reference to two factors. The first factor involves the general methodology of treaty interpretation that is characteristic in U.S. courts, with an emphasis on the use of post-ratification practice under a treaty as evidence of the parties' intentions in entering into the treaty. Though not itself a form of deference, strictly speaking, the use of post-ratification practice as evidence of intent has played a significant role in the evolution of the deference doctrine. The second factor involves the contemporaneous emergence in the early twentieth century of a number of other, more widely recognized foreign-relations-law doctrines embodying a general trend toward executive discretion in foreign affairs.[13] Edward White has described the trend as the transformation of the constitutional regime of foreign relations,[14] and I argue below that the emergence of the treaty-deference doctrine is an important aspect of that transformation.[15]

The second descriptive question that Part III addresses asks whether the deference doctrine has any practical impact. Conventional wisdom holds

11. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2796–98 (2006).

12. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2685 (2006).

13. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 33–93 (2000) (documenting upheaval in an array of constitutional doctrines relating to foreign affairs); *see generally* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999) (same).

14. White, *supra* note 13.

15. David Sloss recently observed that the judicial branch became more deferential to the executive in foreign affairs cases in conjunction with the "rise of executive dominance in foreign affairs" that accompanied the growth of American power. Sloss, *supra* note 5, at 523 & n.143.

that it does, on the ground that the government's view largely, if not always, prevails in treaty-interpretation cases as a result of deference.[16] On the other hand, at least one scholar has argued that the doctrine has not actually played a significant role in any of the Supreme Court cases in which it has appeared, even if it so happens that the government typically prevails in them.[17] The former proposition (that the doctrine has a practical impact) suggests that the doctrine matters a great deal in that it largely negates the judicial checking function in treaty-interpretation cases, while the latter suggests that it matters only in rhetorical terms. To test these claims, I survey the results in the set of published opinions explicitly addressing the doctrine at all levels of the federal judiciary during the Rehnquist Era (1984–2005). One must always be cautious in drawing conclusions from surveys limited to the published record, of course, in light of the biases introduced by such an approach to data collection.[18] Even so, the survey's results do provide evidence against the claim that the executive branch's views are dispositive; whether the results also undermine the claim that the doctrine is mere window dressing is much less certain.

In Part IV, I turn to normative issues. Perhaps in reaction to the Supreme Court's failure to explain in any detail the grounds for its recognition of a deference obligation, scholars in recent years have developed a variety of theoretical models in order to justify, enhance, or undermine the practice. At bottom, this variety reflects underlying disagreement regarding the primacy of conflicting functionalist and separation-of-powers considerations, as well as the significance and content of originalist arguments. These seemingly inconsistent positions can be reconciled to some extent, however, by disaggregating the deference doctrine.

Some applications of the doctrine, for example, could be understood as examples of the use of clear and consistent post-ratification practice as evidence of the treaty parties' original intentions, rather than as simple obedience to current executive preferences. The practical result in such a case would be to sidestep the functionalist-versus-separation-of-powers debate by accepting that the judge alone is doing the interpretive work. A consistent post-ratification practice, however, will not always clearly support the executive's preferred interpretation. In such circumstances, the most defensible and desirable approach is an intermediate one that seeks to reconcile the virtues of the executive's functional advantages with the desirability of ensuring a judicial check.

16. Bederman, *supra* note 7.

17. *See* Martin Flaherty, Globalization and Executive Power 5–20 (unpublished manuscript, on file with the Iowa Law Review).

18. *See, e.g.*, Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 U.M.K.C. L. REV. 171, 173–74 (2006) (discussing the selection bias inherent in reliance on datasets compiled from published judicial opinions).

Drawing on the work of a number of scholars who have addressed this issue, I conclude that the balance might best be struck by calibrating the degree of deference in a particular case with reference to considerations including (1) the nature of the process employed by the executive branch to generate the interpretation and (2) the subject-matter of the agreement itself. This approach accommodates the legitimate interests of both the executive and the judiciary, while also maintaining consistency with broader principles of treaty-interpretation methodology.

II. *HAMDAN* AND THE SIGNIFICANCE OF DEFERENCE

Salim Hamdan was in his mid-twenties when he traveled from his native Yemen to Afghanistan in 1996.[19] According to some accounts, he was in the company of approximately thirty-five men who sought to join an Islamist insurgency then underway in Tajikistan, Afghanistan's neighbor to the northeast. After an arduous journey into the Hindu Kush, however, the group was rebuffed at the border. At this point, someone in the group made a fateful suggestion: perhaps they could turn to Osama bin Ladin, a well-known veteran of the *jihad* against the Soviets in Afghanistan who was now living near Jalalabad and was said to be recruiting volunteers. And so it was that Hamdan came to be in bin Ladin's service, working in his motor pool and living in close proximity to him for the better part of the next five years.

In November 2001, Operation Enduring Freedom brought an end to the period of Al Qaeda's open operations in Afghanistan. As it became apparent that the United States and its allies would prevail militarily, large numbers of Al Qaeda- and Taliban-affiliated individuals fled for Pakistan and the relative safe haven of its border region. Hamdan was part of this general exodus, but he was captured shy of the border. Eventually, the U.S. military transferred him to Camp Delta in Guantánamo Bay, Cuba, and later designated him for trial before a military commission.

Like many other Guantánamo Bay detainees, Hamdan eventually filed a petition for habeas corpus challenging the legality of the government's actions. Among other things, Hamdan argued that the military-commission system established by the Bush Administration violated Common Article 3 of the Geneva Conventions. That provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by a civilized people."[20] The government responded with a range of arguments, including the assertion that the

19. The following account of Hamdan's actions is based on the lengthy profile provided by Jonathan Mahler in *The Bush Administration v. Salim Hamdan*, N.Y. TIMES MAG., Jan. 8, 2006, at 44.

20. Hamdan v. Rumsfeld, 415 F.3d 33, 41 (D.C. Cir. 2005) (quoting Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), art. 3(1)(d), Aug. 12, 1949, 75 U.N.T.S. 135).

commissions system complied with the Common Article 3 standard. More significantly for present purposes, however, the government also denied that it had detained Hamdan in connection with a Common Article 3 conflict in the first place.[21]

Common Article 3, by its own terms, applies only to armed conflicts that are "not of an international character."[22] On February 7, 2002, President Bush issued an order in which he expressly interpreted that standard so as not to apply in Afghanistan:

> I also accept the legal conclusion of the Department of Justice and determine that [C]ommon Article 3 of Geneva does not apply to either Al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and [C]ommon Article 3 applies only to "armed conflict not of an international character."[23]

The President did not provide the underlying analysis for his conclusion in this order, but that analysis does appear in a January 22, 2002, memorandum from the Department of Justice to the White House and the Defense Department.[24] In sum, that memorandum concluded that the best interpretation of Common Article 3's "not of an international character" standard is that it applies only to civil-war scenarios, not to conflicts between a state and a private transnational organization occurring on the territory of multiple states.[25]

Hamdan's invocation of Common Article 3 thus raised a significant question of international law regarding the proper interpretation of the scope of that provision. But in light of the President's determination, Hamdan's petition also raised an important threshold question of domestic constitutional law: the extent to which a reviewing court should defer to the executive branch in the treaty-interpretation context.

In 2005, a partially divided panel of the D.C. Circuit reached both of these issues in *Hamdan v. Rumsfeld*.[26] Judge Randolph, joined by future Chief Justice John Roberts, cited a string of Supreme Court cases stating that the

21. *Hamdan*, 415 F.3d at 41.

22. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135.

23. President George W. Bush, to the Vice President, et al., on Humane Treatment of Al Qaeda and Taliban Detainees, (Feb. 7, 2002) at ¶ 2.c, *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter TORTURE PAPERS].

24. *See* Memorandum from Jay Bybee, Legal Counsel to White House, on Treaties and Laws to Al Qaeda and Taliban Detainees to Alberto Gonzales, Legal Counsel to White House, and William J. Haynes, Defense Department General Counsel (Jan. 22, 2002), *reprinted in* TORTURE PAPERS, *supra* note 23, at 85–89.

25. *See id.*

26. *Hamdan*, 415 F.3d at 33.

President's "construction and application of treaty provisions is entitled to 'great weight.'"[27] Such deference, the majority explained, was a product of the President's "'independent authority to act' in foreign affairs."[28] "To the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members," the majority concluded, "the President's reasonable view of the provision *must* therefore prevail."[29] The D.C. Circuit's opinion in *Hamdan* thus endorsed a particularly robust form of deference obligation in a context directly impacting detainee policy in the war on terrorism.

The Supreme Court reversed.[30] Justice Stevens, writing for the majority, began by describing the President's rationale for adopting a narrow construction of Common Article 3's "not of an international character" trigger.[31] The conflict between the United States and Al Qaeda, on this account, was beyond the scope of Common Article 3 because it had an international dimension rather than being confined to a single state.[32] "That reasoning is erroneous," Stevens wrote.[33] The proper construction of Common Article 3's jurisdictional language, he concluded, was that it applies to any armed conflict that is not between two states.[34] This followed from the literal meaning of Common Article 3's language,[35] from a contextual analysis of its relationship to Common Article 2, [36] and from the

27. *Id.* at 41 (citing United States v. Stuart, 489 U.S. 353, 369 (1989); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)).

28. *Id.* (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003)). The majority also stated that "the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him." *Id.* at 41–42 (citing Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)). That is not a question of treaty interpretation, however; the Geneva Conventions do not address the question of whether and how to distinguish among simultaneous conflicts. Thus, while it may be correct to say that the President's decision to distinguish between these conflicts is unreviewable—for lack of judicially manageable standards, among other reasons—it does not follow that executive treaty interpretations are unreviewable as well.

29. *Id.* at 42 (emphasis added).

30. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). Notably, the Court reached the Common Article 3 issue not because the Geneva Conventions were deemed to be directly enforceable via habeas, but rather because the Court construed the Uniform Code of Military Justice to incorporate Common Article 3 by reference with respect to the issue of military commissions. *See id.* at 2786.

31. *Id.* at 2795.

32. *Id.*

33. *Id.*

34. *See id.* at 2796.

35. *See Hamdan*, 126 S. Ct. at 2796.

36. The Bush Administration took the position that the armed conflict between the United States and al Qaeda was beyond the scope of Common Article 2 of the Geneva Conventions because the conflict was not between two parties to the Conventions. *Id.* at 2795. Taken in combination, these arguments posit the existence of a gap between the jurisdiction of Common Articles 2 and 3. The Court's holding in *Hamdan* forecloses the possibility of such a

interpretations Jean Pictet offered in his commentaries on the Conventions, drafted after their creation in 1949.[37] Justice Stevens wrote nothing of any deference obligation, let alone one that might bind the judiciary to the President's interpretation, and instead approached the interpretive issue de novo.

Justice Thomas, joined in dissent by Justice Scalia, seized on this omission.[38] "Under this Court's precedents," Thomas wrote, "'the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.'"[39] The majority, he emphasized,

> does not dispute the President's judgments respecting the nature of our conflict with al Qaeda, nor does it suggest that the President's interpretation of Common Article 3 is implausible or foreclosed by the text of the treaty. . . . Instead, the Court, without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision . . . is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.[40]

That "duty to defer," Thomas added, was "only heightened by the fact that [the President was] acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict."[41]

Taken together, the various opinions at both levels in *Hamdan* suggest that there is considerable confusion with respect to the obligation to give at least some deference to executive treaty interpretations. The fact that the Court had expressly invoked the deference doctrine just one day before it issued *Hamdan*, in *Sanchez-Llamas v. Oregon*, reinforces that impression.[42]

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gap, however, by construing the jurisdictional element of Common Article 3 broadly so as to apply in all non-Common Article 2 contexts. *See id.* at 2795–96.

37. *See id.* at 2796 & n.63.

38. *See id.* at 2846 (Thomas, J., dissenting). Interestingly, Justice Alito joined other aspects of the Thomas dissent, but not this one. *Id.* Presumably Chief Justice Roberts would have joined had he not recused himself in light of his participation in the opinion below.

39. *Id.* (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982)).

40. *Hamdan*, 126 S. Ct. at 2846. One might argue that the majority's approach could be explained by assuming that the majority had reached the unspoken conclusion that the language of Common Article 3 was not ambiguous and that it did, in fact, foreclose the President's interpretation, notwithstanding any obligation to defer that might otherwise have arisen. If the majority had taken this view, however, it is difficult to see why it would not have said so expressly.

41. *Id.*

42. *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2685 (2006) (invoking the deference doctrine to interpret a treaty).

Sanchez-Llamas primarily concerned the related question of whether the Court should defer to the treaty interpretation endorsed by the International Court of Justice.[43] En route to rejecting that contention, the majority expressly stated that courts owe substantial deference to executive-branch interpretations.[44] By failing even to mention the deference doctrine the next day in *Hamdan*, the Court ensured that questions would arise as to the doctrine's scope and significance.

At the same time, *Hamdan* also serves as a reminder of the potential significance of the doctrine. For those who are concerned with the scope of executive-branch authority and who wish to see executive discretion cabined, the deference obligation as articulated by the D.C. Circuit majority and by Justice Thomas's dissent would be troubling at the very least. On the other hand, those who are concerned that the executive branch has already been unduly constrained—particularly with respect to international law—would be uncomfortable with the implications of the Supreme Court majority's approach. This combination of doctrinal instability and potential impact suggests that there is a pressing need for a better understanding of the deference issue. When precisely does the deference obligation arise? To what extent must judges defer when it does arise? Do the answers to these questions vary in certain contexts? And does any of this actually matter in terms of practical outcomes in treaty-interpretation cases? I address these descriptive questions in the next Section to the extent that the sparse case law permits.

III. A DESCRIPTIVE ACCOUNT OF THE DEFERENCE DOCTRINE

There is no question that a deference doctrine of some kind currently exists with respect to executive-branch treaty interpretations. But the precise nature of that doctrine, its triggering conditions, and the obligations it imposes on judges are far from clear. I hope to remedy that uncertainty by means of a case-by-case survey tracing the evolution of the Supreme Court's approach to the doctrine from its late-nineteenth-century origin to *Hamdan*. I then turn my attention to a survey of the outcomes in treaty-deference cases at all levels of the federal judiciary during the Rehnquist Era (1984–2005) in an effort to shed light on the related question of whether the doctrine has any practical impact on case outcomes, whatever its rhetorical content.

A. BACKGROUND CONSIDERATIONS

Sparse as it is, the Supreme Court's case law with respect to the deference obligation in the treaty context sheds considerable light on the

43. *Id.*

44. *See id.* In *Sanchez-Llamas*, the executive branch's preferred interpretation was consistent with the Court's conclusion and contrary to that of the International Court of Justice. *See id.*

nature and scope of the deference doctrine. In order to fully appreciate the lessons that can be gleaned from a survey of these cases, however, one must consider them in conjunction with two sets of background considerations. The first set concerns the broader context of treaty-interpretation methodology. I argue below in the course of disaggregating the concept of deference that at least some aspects of the doctrine do not truly involve deference at all.[45] Instead, the doctrine reflects, in part, a relatively traditional method of interpretation whereby a judge uses consistent post-ratification practice under a treaty as evidence of a state's intentions with respect to ambiguous treaty provisions. To appreciate the distinction, however, one must grasp the role that this method plays in the hierarchy of treaty-interpretation techniques typically employed by U.S. courts.

The second background consideration concerns what Edward White has described as the transformation of the constitutional regime of foreign relations.[46] As Professor White and others have documented, a remarkable shift in favor of executive discretion with respect to several foreign-relations-law doctrines occurred during the early twentieth century.[47] The issue of judicial deference to executive-branch treaty interpretations is best understood as still another manifestation of this broader trend. Accordingly, before I present my survey of the Supreme Court's treaty-deference cases, I digress to provide necessary background on the topics of both interpretive methodology and the transformation era.

1. Treaty-Interpretation Methodology and Post-Ratification Practice as Evidence of Intent

The issue of treaty deference is at bottom a constitutional question concerning the separation of powers. It does not arise in a vacuum, however, but instead functions as one part of the overarching methodology of treaty interpretation employed in the domestic U.S. legal system. That methodology involves a variety of other considerations, including at least one inquiry that might easily be misunderstood as also involving deference to the executive branch: post-ratification practice as evidence of intent. To avoid this misunderstanding, a careful review is in order before proceeding to a discussion of the Supreme Court's deference jurisprudence.

Do courts in the United States actually follow an agreed-upon methodology for treaty interpretation? The short answer is yes, though the details of the methodology are not entirely certain, and there is considerable

45. *See infra* Part III.A.1 (discussing methodological context).

46. *See infra* Part III.A.2 (discussing the transformation of foreign-relations law in the twentieth century).

47. *See infra* Part III.A.2 (discussing the transformation of foreign-relations law in the twentieth century).

room for debate regarding the extent to which courts are obliged to or consistently do follow it.[48]

In any discussion of treaty-interpretation methodology, it is helpful to frame the issues with reference to the Vienna Convention on the Law of Treaties ("VCLT").[49] Article 31(1) of the VCLT sets forth a textually focused rule of construction as the first step in the interpretive process: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose."[50] As used here, "context" refers merely to the universe of agreements entered into by all of the parties in connection with the treaty in issue, as well as to other instruments accepted by all parties as being related to the treaty.[51] In addition to considering the text in light of context, however, Article 31(3) directs interpreters to take a number of other considerations into account—most notably, the actual practice of the parties pursuant to the treaty, insofar as that practice reflects agreement regarding the meaning of the treaty.[52] Under the VCLT, however, the interpreter is not to take into account other extrinsic sources (such as the *travaux preparatoires*) unless doing so is necessary either to resolve ambiguity in the text or to avoid a manifestly absurd or unreasonable result.[53]

Though the United States has not ratified the VCLT, the interpretive method generally associated with U.S. courts nonetheless shares much in common with the VCLT framework.[54] The U.S. model departs from the VCLT approach, however, in its willingness to resort to extrinsic sources to determine the parties' intentions without first making a determination that the plain meaning of the text is ambiguous or would produce an absurd result.[55] The Supreme Court has stated: "'The clear import of treaty

48. For a recent discussion of the unsettled state of treaty-interpretation methodology in U.S. courts, see Curtis J. Mahoney, Note, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 827–28 (2007) (describing the methodology as "undertheorized").

49. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; *id.* art. 31(4).

50. *Id.* art. 31(1).

51. *Id.* art. 31(2).

52. *Id.* art. 31(3)(b). The VLCT adds that terms shall be given a "special meaning" if that was the intent of the parties. *Id.* art. 31(4).

53. *Id.* art. 32.

54. *See, e.g.*, Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982) ("Our role is limited to giving effect to the intent of the Treaty parties."). For a thorough discussion of the drafting and ratification histories of the VCLT, see Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 437–44 (2004). *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 145 (1987) (treating the VCLT framework as customary international law).

55. See United States v. Stuart, 489 U.S. 353, 366 (1989) (referring to "a treaty's ratification history and its subsequent operation" as sources "that often assist us in 'giving effect to the intent of the Treaty parties'" (internal citations omitted)).

language controls *unless* "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."'"[56] In light of that emphasis on the parties' intent, U.S. courts do resort to evidence from negotiation and ratification histories.[57]

Most significantly for present purposes, U.S. courts also look to post-ratification practice under the treaty as proof of original intentions, a practice sanctioned under the VCLT as well.[58] Understood in this way, a judge who relies on the post-ratification practice of the United States in order to interpret treaty language is not engaging in deference to the executive branch—at least not in the sense of submitting to the executive's view of the language in issue, irrespective of what appears to be the parties' intentions. On the contrary, the judge would best be understood as retaining full authority to ascertain the intent of the parties (and, thus, the proper interpretation), while simply using post-ratification practice as evidence of those earlier intentions. Put another way, the judge in this scenario is not acknowledging that the executive branch has interpretive authority of some kind, let alone that the executive branch has exclusive authority to resolve treaty ambiguities. Rather, the court is giving some weight to the executive's post-ratification conduct, among other factors, in the course of reaching an independent conclusion about what the United States and its treaty partners intended in entering into the treaty.

This "evidentiary" use of post-ratification practice, it should be noted, has significant limits inherent in its underlying justification. For example, it may make little sense to treat an executive interpretation as evidence of the treaty parties' original intentions unless that interpretation (1) is embodied in the government's practical implementation of the treaty provision in issue, as opposed to being stated merely for litigation purposes (on the theory that the government is relatively free to adopt an advantageous litigation position divorced from actual practice); (2) is maintained consistently over time, as opposed to being inconsistent with earlier interpretations (on the theory that conflicting practices would cancel one

56. *Id.* at 365–66 (emphasis added) (internal citations omitted).

57. *See id.* Insofar as an executive interpretation occurs or is manifested contemporaneous with the negotiation or ratification processes, its consideration furthers the general goal of ascertaining the intent of the parties (or at least the intent of the United States). But the more interesting question is what to make of interpretations that are articulated post-ratification. Because post-ratification interpretations are not contemporaneous with the negotiating and ratifying processes, there is greater reason to question whether they do in fact reflect the treaty parties' intent.

58. Post-ratification practice arguably is inferior to negotiation and ratification history as evidence of the parties' intent in entering into the treaty, given that the latter are contemporaneous sources. In any event, the VCLT's approach more explicitly concerns *mutual* post-ratification interpretations. U.S. courts have not always been insistent upon mutuality with respect to evidence derived from post-ratification practice.

another out); and (3) does not generate contemporaneous objections or inconsistent practice from the other treaty partners (developments which would undermine the logic of treating U.S. practice as proof of intent). The evidence-of-intent model also treats the executive interpretation as merely one consideration in a court's independent judgment as to the treaty parties' original intentions, not as a dispositive consideration.

Notwithstanding these limits, the evidence-of-intent model has played an important role in the development of the Supreme Court's deference doctrine. Unfortunately, the distinction between outright deference and the mere use of post-ratification practice as evidence of intent has, at times, been lost. One goal of the case-law survey below, then, is to restore a firm grasp of that distinction as an aid to better understanding of when and to what extent courts truly do or should defer. Before turning to that task, however, it is necessary to contextualize the emergence of the Court's deference doctrine with respect to a set of contemporaneous developments under the heading of foreign-relations law.

2. The Early-Twentieth-Century Transformation of Foreign-Relations Law and the Growth of Executive Discretion

In 1999, G. Edward White wrote an article contending that "a major shift in the boundaries of the constitutional regime of foreign relations took place in the period between the two World Wars."[59] White explained that in the 1800s, the conventional constitutional understanding held that government powers relating to foreign affairs were distributed among the federal branches, as well as among the federal and state governments to some extent, "in accordance with a traditional, formal structure of constitutionally delegated and reserved powers."[60] This understanding began to give way during the early decades of the twentieth century, however, with the gradual centralization of a considerable amount of foreign-affairs authority within the executive branch. It was a transformation that White described as "the triumph of 'executive discretion' in the constitutional regime of foreign relations."[61]

According to this account, a set of three fundamental assumptions characterized the orthodox regime of foreign-relations law as it had developed by the late nineteenth century: (1) that "exercise of foreign relations powers [was] a constitutional exercise, one controlled by the

59. White, *supra* note 13, at 3. White's transformation narrative also appears at full length in WHITE, *supra* note 13. References below are to White's article rather than his book, unless otherwise indicated. For a brief but consistent restatement of this perspective, see 12 WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–53, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 368 (2006).

60. White, *supra* note 13.

61. *Id.* at 77–146.

enumerated and reserved powers parceled out in the Constitution's text";[62] (2) "that the principal mechanism for entering into international obligations was the treatymaking process";[63] and (3) that "the exercise of [] foreign relations powers by the federal government [had] to respect the reserved powers of the states under the structure of sovereignty created by the Constitution."[64] Taken together, these principles reflected a view in which the federal government's foreign-affairs powers were derived from, and thus constrained by, the Constitution, and in which the executive branch played an important but by no means exclusive role.[65]

In White's account, this framework began to erode as early as the late nineteenth century.[66] One particularly significant contributing factor was the growing reliance on executive agreements in lieu of treaties,[67] the former not being subject to Senate ratification and hence constituting, quite literally, a vehicle for the exercise of executive discretion in foreign affairs. Notably, the rise of executive agreements as a rival to treaties in this era coincided with the emergence of the United States as a significant player in international affairs, particularly in the aftermath of the Spanish-American War, the resulting acquisition of far-flung territories, the expansion of the U.S. Navy, and the projection of U.S. military power as far as China in connection with the Boxer Rebellion.[68] Another contributing factor White identified involved the series of Supreme Court decisions in the period between 1884 and 1900 known as the *Chinese Exclusion Cases*, which recognized a federal power to regulate the admission of aliens to the country; that power was not enumerated, but the Court instead found it to inhere in the sovereignty of the U.S. government.[69] Similarly, in the *Insular Cases*, the Court found that Congress's rule-making power over newly acquired territories was not necessarily subject to constitutional restraints.[70] By the 1920s, commentators had concluded from these and other developments that the foreign-relations power of the United States had distinct constitutional and international dimensions—a conclusion that "accentuate[d] a growing perception, related to the United States's increased involvement in world affairs during the twentieth century, that the regimes of foreign relations and domestic policymaking were distinct

62. *Id.* at 8.

63. *Id.*

64. *Id.* at 9.

65. *See* White, *supra* note 13, at 8–9.

66. *See id.* at 11–20.

67. *See id.* at 18–20.

68. *See id.*

69. *See id.* at 28 (discussing, inter alia, Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889)).

70. *See* White, *supra* note 13, at 29–30 & n.91.

entities and that constitutional principles governing the latter realm might not invariably be appropriate to the former."[71]

Contemporaneous with these early developments, future Supreme Court Justice George Sutherland was developing the theory that "the foreign relations power of the federal government was 'inherent' in the sovereignty of the nation and thus 'extraconstitutional' but not unconstitutional."[72] Ultimately, Justice Sutherland would deploy this theory in *United States v. Curtiss-Wright Export Corp.*, endorsing broad discretion in foreign affairs not simply for the federal government as a whole, but for the executive branch in particular.[73] In the early 1920s, however, it remained only a theory. Only "in the face of an altered international context and altered confidence about the national executive's capacity to respond to international conflict," according to White, did this final stage of transformation of the constitutional law of foreign relations take place.[74]

White's transformation narrative describes the 1930s—an era of rapidly increasing international tension and turmoil—as the key period for the final shift toward executive discretion in the realm of foreign-affairs law.[75] Most famously, Justice Sutherland enshrined his theory of extraconstitutional foreign-affairs authority in the executive branch in *Curtiss-Wright*.[76] Just six months later, moreover, Justice Sutherland in *United States v. Belmont*[77] reinforced the notion of executive discretion in foreign affairs when he suggested that the 1933 Litvinov Agreement—an executive agreement by which the United States recognized the Soviet Union and in which the two governments came to an agreement regarding the disposition of a variety of economic claims—would have much the same preemptive effect as a treaty would have had with respect to certain conflicting state policies and rules.[78] Taken together, *Curtiss-Wright* and *Belmont* implied "virtual carte blanche for the Executive to establish plenary control of foreign relations on its own

71. *Id.* at 32.

72. *Id.* at 53.

73. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 333 (1936).

74. WHITE, *supra* note 13, at 61. This book contains much of the content of White's 1999 article, elaborating on the transformation theme with respect to foreign-relations law in its initial chapters.

75. For a comparable discussion of the continuing impact of geopolitical context in the Cold War era, see generally Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998). *See also* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1408–09 (1999) (explaining the evolution in the 1960s of a trio of foreign-relations-law doctrines at least partially in terms of the prevailing geopolitical climate).

76. White, *supra* note 13, at 104–11. White was careful to note that "Sutherland's arguments for the proposition that the Executive was the primary repository of foreign relations power were extremely attenuated." *Id.* at 105.

77. United States v. Belmont, 301 U.S. 324 (1937).

78. *Id.* at 330–32.

accord."[79] Subsequent developments rounding out White's executive-discretion transformational narrative included (1) the 1942 decision written by Justice Douglas in *United States v. Pink*,[80] clearly endorsing *Belmont*'s suggestion regarding the supremacy of executive agreements,[81] and (2) a series of decisions in the 1940s shifting responsibility for ascertaining the applicability of foreign sovereign immunity from the judiciary to the State Department.[82]

The notion of unilateral executive discretion to act in the foreign-affairs realm remains exceedingly controversial to this day, at least in some contexts.[83] But the significance of White's narrative does not depend on the normative desirability of the transformation that he documents. Rather, the important point—particularly for purposes of this Article—is that he demonstrates that there was a qualitative shift in favor of executive discretion in foreign affairs during a half-century period that coincided first with the emergence of the United States onto the international stage and then later with the involvement of the United States in industrialized armed conflict on a global scale.[84] As I will describe, the doctrine of judicial

79. White, *supra* note 13, at 115. The legal literature of this era met these decisions with some skepticism. *See id.* at 120–22. However, with war underway in Europe and Asia, the decisions also received support on functionalist grounds, with at least one commentator emphasizing what White described as "the innate advantages of flexibility, circumspection, and administrative efficiency that were associated with executive decisionmaking in foreign affairs." *Id.* at 123 (citing Harry W. Jones, *The President, Congress, and Foreign Relations*, 29 CAL. L. REV. 565, 567–73 (1941)).

80. United States v. Pink, 315 U.S. 203 (1942).

81. *Id.* at 222.

82. *See* White, *supra* note 13, at 134–45 (discussing, inter alia, Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Peru, 318 U.S. 578 (1943)).

83. For a small sampling of the extensive literature, see generally THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 83–158 (David G. Adler & Larry N. George eds., 1996); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 3–34 (1990); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 31–62 (2d ed. 1996); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION (1990); H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION (2002); JOHN YOO, THE POWERS OF WAR AND PEACE (2005); Curtis A. Bradley & Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Saikrishna Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY. L. REV. 379 (2000) (critiquing *Curtiss-Wright*); LOUIS FISHER, THE LAW LIBRARY OF CONGRESS STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS (2006), *available at* http://www.fas.org/sgp/eprint/fisher.pdf.

84. Subsequent geopolitical developments—particularly the Vietnam War—produced a degree of backlash against executive discretion in foreign affairs in the 1970s, as seen in the enactment of the War Powers Resolution. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 278–330 (1973) (discussing the rise of executive discretion in foreign affairs and the impact of Vietnam). One might have expected the events of September 11 to swing the pendulum quite far in the direction of executive discretion, but more recent developments,

deference to executive-branch treaty interpretations emerged in precisely this same period, and it should, therefore, be understood as yet another manifestation of the transformation thesis.

B. THE NATURE OF THE DEFERENCE DOCTRINE: THE ORIGINS AND EVOLUTION OF THE DEFERENCE DOCTRINE AT THE SUPREME COURT

The deference doctrine has not always been with us. As David Sloss has documented, no mention of a deference obligation appears in the case law from America's first century under the Constitution; in fact, it appears to have been common for courts to reject the executive's preferred interpretation of treaties during that period.[85] The first glimmer of change appeared toward the end of the nineteenth century at much the same time that the transformation narrative described above began.

1. Two Distinct Doctrinal Threads

The earliest link in the chain of cases giving rise to the Supreme Court's deference doctrine appears to be the 1891 decision *In re Ross*.[86] In that case, Justice Field rejected a challenge by a sailor named John Martin Ross to the legality of his murder conviction before a U.S. consular court in Japan (for

especially the ongoing problems associated with the war in Iraq, quite possibly will have the opposite effect. Whether decisions such as *Hamdan* reflect judicial skepticism about the desirability of executive discretion in foreign affairs in light of such events is not easily known.

85. According to a survey conducted by Professor Sloss, the Supreme Court rejected the executive branch's preferred interpretation on fourteen out of nineteen occasions during the period between 1789 and 1838. *See* Sloss, *supra* note 5. Sloss included in his set all published Supreme Court opinions during this period in which (1) the U.S. was a party, (2) a party relied on a treaty to support a claim or defense, and (3) the Court reached the merits of that claim or defense. *See id.* at 498–99.

86. *In re* Ross, 140 U.S. 453 (1891). There is an earlier federal case—*Castro v. de Uriarte*, 16 F. 93 (S.D.N.Y. 1883)—in which a federal judge discusses the weight to give an executive treaty interpretation. *Castro*, 16 F. at 95–99. The opinion in *Castro* concerned a false-imprisonment and malicious-prosecution suit against the consul-general of Spain, apparently occasioned by an unsuccessful attempt to obtain the plaintiff's extradition. *Id.* at 94. The case considered whether an extradition treaty between the United States and Spain required certain procedures to be followed; as to that issue, the Secretary of State, in post-ratification diplomatic correspondence with the Spanish minister, had adopted the view that the procedures in question were not required. *Id.* at 98. Citing this fact, the court observed (without citation) that

> [w]hile the construction which may be placed by the executive department upon laws or treaties is not necessarily binding upon the judiciary, yet where its construction is not repugnant either to their letter or obvious intent, and, as in this case, is sustained by such manifest considerations of convenience and expediency, it should be adopted without hesitation.

Id. Castro thus appears to have rested on a moderate version of the separation-of-powers account, comparable to that advocated by Mr. Criddle in Part IV.A.3, *infra*. *Cf.* HENKIN, *supra* note 83, at 482 n.118 (citing a much earlier case—*Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829)—as an early indication of a binding deference doctrine. *Foster*, however, dealt with an interpretation by the political departments acting together (as expressed in legislation) rather than the executive alone). *Foster*, 27 U.S. at 303.

the murder of a shipmate on board a U.S. vessel then anchored in Yokohama).[87] Ross contended that the provision in an 1857 treaty between the United States and Japan authorizing such proceedings had not survived enactment of a subsequent convention in 1858.[88] In the course of rejecting this contention, Justice Field appeared to find persuasive the fact that both the "[P]resident and the [State] [D]epartment have always construed the treaty of 1858 as carrying with it and incorporating therein the [relevant provision] of the convention of 1857."[89] As evidence of this executive interpretation, the Court quoted extensively from a letter written by the U.S. consul in Japan to the Secretary of State, offering this interpretation with respect to Ross's case.[90] Justice Field never expressly stated that he was deferring to the executive's construction, and he certainly did not assign specific weight to the executive's viewpoint. But the fact remains that the Court accomplished the bulk of the interpretive work here simply by referring to the executive's understanding, as expressed both in post-ratification practice and in statements produced in connection with the litigation at hand.

Some twenty years passed before the Supreme Court had an occasion to expressly state what was implied in its *Ross* decision. In its 1913 decision, *Charlton v. Kelly*,[91] the Court considered a habeas petition by Porter Charlton, a U.S. citizen resisting extradition from the United States to Italy in connection with a murder charge. Charlton failed to persuade the Court that it should read the treaty at issue to exclude from its coverage a state's own citizens.[92] Among other reasons, the Court emphasized that the consistent practice of the U.S. government under the treaty—including in Charlton's own case—reflected an executive interpretation of the treaty permitting parties to extradite their own nationals.[93] This counted, the Court said, because "[a] construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight."[94] The Court gave no authority for this proposition, which seems to have originated as an express formulation in this case, but with it the Court clearly articulated a deference obligation for the first time.

Not long thereafter, in 1921, the Supreme Court relied on *Charlton* in *Sullivan v. Kidd*, a case arising out of a Kansas law denying rights of

87. *Ross*, 140 U.S. at 457–58.
88. *Id.* at 467.
89. *Id.* at 468.
90. *See id.* at 467–68.
91. Charlton v. Kelly, 229 U.S. 447 (1913).
92. *Id.* at 465.
93. *Id.* at 468.
94. *Id.*

inheritance to noncitizens.[95] Jane Kidd, a British subject and potential heir to the estate in question, noted that an 1899 treaty between Britain and the United States precluded operation of such alien disinheritance laws as to British subjects, but her status as a resident of Canada raised an issue as to whether she came within this provision's scope.[96] After the first oral argument, the Court requested the views of the U. S. government on the interpretive issue, and the Solicitor General responded with a statement from the Secretary of State offering a narrow interpretation excluding Canadian residents.[97] In the course of adopting this interpretation, the Court cited a number of grounds other than the executive's interpretation.[98] But the Court did round out its analysis, citing *Charlton*, by stating that "the 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."[99] *Kidd*, like *Charlton*, uses language suggesting that the impact of deference, though not conclusive, is quite substantial. But unlike *Charlton*, *Kidd* suggests that consistency of practice may be a consideration in deciding whether to afford such deference.

The next significant development in the Supreme Court's evolving approach to the deference issue did not build on *Charlton* and *Kidd* so much as their 1891 predecessor, *Ross*.[100] *Nielsen v. Johnson*,[101] a 1929 decision by Justice Stone, resembled *Kidd* in that it dealt with a state statute that discriminated against noncitizen heirs—in this instance, an Iowa law imposing certain taxes on the passage of a decedent's estate to an alien.[102] The question arose whether a treaty between the United States and Denmark exempted a Danish devisee from the tax.[103] In resolving this dispute, Justice Stone did not speak expressly in terms of a need to defer to the executive's interpretation of the treaty. He did, however, cite *Ross* for the proposition that in the event of ambiguity, it is proper for a court to consider not only the negotiating history of the instrument but also any diplomatic correspondence reflecting the parties' "practical construction."[104]

95. Sullivan v. Kidd, 254 U.S. 433 (1920).

96. *Id.* at 435–36.

97. *Id.* at 438–39.

98. *Id.* at 440–42.

99. *Id.* at 442 (citing Charlton v. Kelly, 229 U.S. 447, 468 (1913); Castro v. De Uriarte, 16 F. 92, 98 (S.D.N.Y. 1883)).

100. *In re* Ross, 140 U.S. 453 (1891).

101. Nielsen v. Johnson, 279 U.S. 47 (1929).

102. *Id.* at 49–50.

103. *Id.* at 50–51.

104. *Id.* at 52 (citing *Ross*, 140 U.S. at 467). Justice Stone also cited to three other decisions: *Terrace v. Thompson*, 263 U.S. 197 (1923), *United States v. Texas*, 162 U.S. 1 (1896), and *Kinkead v. United States*, 150 U.S. 486 (1893). But of these, only one had a bearing of any kind on the executive-interpretation issue. In *Texas*, Justice Harlan had relied in part on evidence of the

Although the opinion did not actually cite to any such correspondence, Justice Stone did claim that correspondence both "preceding and subsequent to the execution of the Treaty" supported the Court's interpretation.[105]

By this stage, two closely related lines of precedent had emerged. The *Ross–Nielsen* line did not speak expressly in terms of judicial deference but, instead, stood for the proposition that courts can consider the government's post-ratification practice under ambiguous treaty provisions in order to help construe their meaning. In that respect, the cases in the *Ross–Nielsen* line are best understood not as examples of deference as such, but as examples of the use of post-ratification practice as evidence of the treaty parties' intent in entering into the treaty. The *Charlton–Kidd* line, in contrast, did make express use of the language of deference, counseling courts to give considerable weight to the executive viewpoint, at least where the executive's interpretation had been consistent over time. Thus, executive statements unsupported by actual practice might have triggered the *Charlton–Kidd* rule of deference, while actual practice was the entire point of the *Ross–Nielsen* rule of construction.[106] The net effect under either rubric was to give the executive branch a significant post-ratification role in resolving treaty ambiguities, but only the *Charlton–Kidd* line implicated separation-of-powers concerns.

2. Emergence of the Modern Deference Doctrine

The next Supreme Court case on the topic was 1933's *Factor v. Laubenheimer*.[107] The decision brought the two lines together, articulating the deference doctrine in its modern form just a few years before the Court's decisions in *Curtiss-Wright*[108] and *Belmont*.[109] *Factor* was an extradition case in which the primary issue was whether the treaty in question included a dual-

course of actual conduct of both the U.S. and Texas governments during the second half of the nineteenth century in determining the proper construction of a treaty between the United States and Spain with respect to certain boundary issues. *See Texas*, 162 U.S. at 38–41 (describing official acts by both governments in interpretation of the treaty).

105. *Nielsen*, 279 U.S. at 97. The bulk of the analysis consisted of a review of the diplomatic correspondence between American and Danish officials in the course of negotiating the treaty. *See id.* at 52–56.

106. This may explain why the Court periodically will rely on the course of actual practice under a treaty as an aid to interpretation without giving any indication that the practice is a form of deference to executive interpretations. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 260 (1984) (holding that the "conduct of the contracting parties in implementing [the Warsaw Convention] in the first 50 years of its operation cannot be ignored"); Pearcy v. Stranahan, 205 U.S. 257, 272 (1907) (construing a 1898 peace treaty between the United States and Spain not to pass sovereignty over Cuba or the Isle of Pines to the United States, based in part on consistent U.S. practice).

107. Factor v. Laubenheimer, 290 U.S. 276 (1933).

108. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

109. United States v. Belmont, 301 U.S. 324 (1937).

criminality requirement.[110] This question gave Justice Stone the occasion to recite a rather long list of canons of treaty construction, all of which supported his ultimate conclusion that the treaty did not contain a dual-criminality requirement.[111] From that perspective, the role that the deference doctrine might have played in the case necessarily was minimal. Nonetheless, *Factor* matters in that Justice Stone took the opportunity to blend the *Nielsen* and *Charlton* lines into what appeared to be a single, undifferentiated rule. Citing both cases without elaboration, Justice Stone asserted that "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."[112]

The *Factor* Court's unequivocal endorsement of a deference obligation was very much in the spirit of the larger shift toward enhanced executive discretion in foreign affairs taking place at that time. A significant component of that transformational project involved executive agreements, which bypassed the checking function of the Senate by giving the President a unilateral, alternative mechanism for international agreements. *Factor*, its predecessors, and its progeny had a similar, if less dramatic, effect with respect to treaties insofar as the deference rule increased the post-ratification power of the executive to control the substantive content of U.S. treaty obligations.

One must be careful not to overstate the significance of the emerging deference line, however, as the freedom it afforded the executive branch manifestly had its limits. The Court's 1939 decision in *Perkins v. Elg* demonstrated this fact and in doing so suggested that deference may not be appropriate if the interpretation was not advanced by the relevant executive agency, or if the executive interpretation was not consistent over time.[113] *Perkins* dealt with an attempt to establish U.S. citizenship by a woman who had been born of Swedish parents in the United States and then taken back to Sweden as a minor.[114] Upon reaching the age of majority, Elg returned to the United States but was later determined to be an illegal alien subject to deportation.[115] En route to the conclusion that Elg had never lost her citizenship, the Court considered and rejected a wide array of arguments asserted by the Roosevelt Administration, including the claim that under the terms of a U.S.–Sweden naturalization treaty, Elg had lost her citizenship

110. *Factor*, 290 U.S. at 286.

111. *Id.* at 293–301.

112. *Id.* at 295. It appears that here, as in *Kidd*, the Supreme Court had actually ordered reargument of the case with specific direction to review the State Department's records for evidence of the government's post-ratification construction. *See id.* at 295 & n.5.

113. Perkins v. Elg, 307 U.S. 325 (1939).

114. *See id.* at 327.

115. *See id.* at 328.

after living in Sweden for five consecutive years.[116] The Court rejected the Administration's interpretation of that treaty, construing it instead to require an element of voluntariness that a minor such as Elg could not have supplied.[117]

While it is tempting to characterize *Perkins* as the first Supreme Court case in the modern era to reject an executive interpretation, a closer review suggests a more complicated scenario. The Court's basis for rejecting the government's interpretation of the naturalization treaty consisted of extensive evidence that the State Department in the past had consistently adopted a *contrary* (rather than consistent) reading of it.[118] *Perkins* thus should be understood as affirming the limits of the deference doctrine rather than rejecting the doctrine altogether. Under *Perkins*, a court should not defer where the executive's interpretation has changed for litigation purposes, particularly where the executive entity offering the new interpretation is not the one ordinarily charged with interpretive responsibility under the treaty in issue. Viewed in that light, the deference doctrine was limited but still significant.

After *Factor* and *Perkins,* the Supreme Court did not re-engage the deference issue until deciding *Kolovrat v. Oregon* in 1961.[119] Justice Black's opinion in that case, which dealt with yet another clash between a treaty and a state inheritance law discriminating against noncitizen heirs, reinforced the proposition that judicial deference to the executive's interpretation is linked to the identity of the executive agency providing the interpretation: "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."[120] Here, the rule of deference did come into play because the executive interpretation at issue consisted of a construction consistently advanced by the State Department.[121]

At this stage, the factors that would trigger the deference obligation had become relatively clear: courts deferred when presented with evidence that a relevant executive department had consistently construed a treaty in a particular way. On the other hand, the underlying justification for the doctrine had become quite murky. Was the doctrine a mechanism for sharing interpretive authority with the executive branch in the spirit of the executive-discretion model that had become prominent in the 1930s? Was it instead a misleading shorthand for the relatively uncontroversial process of referring to consistent post-ratification practice under a treaty as evidence of

116. *See id.* at 336–37.

117. *See id.* at 337–42.

118. *See Perkins*, 307 U.S. at 337–42.

119. Kolovrat v. Oregon, 366 U.S. 187 (1961).

120. *Id.* at 194.

121. *See id.* at 194–95.

the parties' intent? Was it both? The Court's next deference decision would muddy these waters still further.

Chief Justice Burger's 1982 opinion in *Sumitomo Shoji America, Inc. v. Avagliano* arguably expanded the range of circumstances in which courts would defer to executive-branch interpretations and, in doing so, made the evidence-of-intent justification for deference notably less plausible.[122] The case required the Court to determine whether a treaty between the United States and Japan exempted Sumitomo's American-incorporated subsidiary from compliance with American laws relating to employment discrimination.[123] In answering that question in the negative, the Court took two interesting steps. First, it took into account the interpretations offered by both the United States and Japanese governments to support its conclusion, notwithstanding having determined that the treaty's plain language already compelled this reading.[124] As Justice Scalia would later argue in another context, the majority's willingness to do this in *Sumitomo* implied the possibility of relying on post hoc constructions to adopt an interpretation at odds with the plain meaning of the text.[125] Put another way, *Sumitomo* suggested that ambiguity was not a prerequisite to application of the deference doctrine.

Second, the Court cited *Kolovrat* for the proposition that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[126] In this instance, the executive branch, appearing as amicus, had provided the Court with a letter from the State Department's Deputy Legal Adviser to the Equal Employment Opportunity Commission ("EEOC") clearly stating its interpretation that a locally incorporated subsidiary would not come within the scope of the treaty.[127] Most notably, however, the Court found it irrelevant that another Deputy Legal Adviser had asserted an apparently contrary interpretation in a similar letter to the EEOC just eleven months earlier.[128] Chief Justice Burger explained that "neither of these letters is

122. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982).

123. *See id.* at 177–78.

124. *See id.* at 182–83.

125. *See* United States v. Stuart, 489 U.S. 353, 371–72 (1989) (Scalia, J., concurring).

126. *Sumitomo*, 457 U.S. at 184–85 (internal citation omitted).

127. *See id.* at 184 n.10 (citing Letter from James R. Atwood, Deputy Legal Adviser, U.S. Dep't of State, to Lutz Alexander Prager, Assistant Gen. Counsel, EEOC (Sept. 11, 1979)).

128. *See id.* (citing Letter from Lee R. Marks, Deputy Legal Advisor, U.S. Dep't of State, to Abner W. Sibal, Gen. Counsel, EEOC (Oct. 17, 1978)). It is unclear whether the reversal of the State Department's position was made with the *Sumitomo* litigation in mind. Whether it would have mattered even if that were so is an open question. One factor that ought to be relevant in that scenario (where the executive's position is changed with an eye toward litigation) is whether the executive asserts the new position solely in the context of the litigation (for example, in the form of an assertion contained in an amicus brief) or also does so externally (for example, borrowing from *Sumitomo*, through a letter from the State Department to another

indicative of the state of mind of the Treaty negotiators; they are merely evidence of the later interpretation of the State Department as the agency of the United States charged with interpreting and enforcing the Treaty."[129] Characterizing the prior letter as "ambiguous," Chief Justice Burger concluded that what mattered was that "it is certainly beyond dispute that the Department now interprets the Treaty in conformity with its plain language."[130]

Unfortunately, the Court has done little since *Sumitomo* to clarify the matter. Chief Justice Burger's language strongly suggested that the evidence-of-intent account for the deference doctrine, traceable back to the *Ross–Nielsen* cases, no longer played any role in explaining the doctrine. Without that foundation, the doctrine appeared to rest entirely on unarticulated notions of executive discretion. To be sure, the Court's 1989 decision in *United States v. Stuart* was thoroughly engaging for its debate between Justices Brennan and Scalia regarding the propriety of turning to extrinsic sources for evidence of the parties' intent where the Court has concluded that the text is not ambiguous.[131] That case did not involve a pattern of inconsistent executive interpretations, however, nor an attempt at interpretation by an agency or department other than the one charged with the treaty's implementation.[132] Extending deference in that context did not require any endorsement of *Sumitomo*.

government agency setting forth the new position). In both instances, the executive presumably would be able to reverse course again, if desired, after the litigation. But the costs of doing so presumably would be relatively higher in the latter than in the former case, which suggests that courts should be more skeptical of new interpretations that appear solely in the briefs. Such an approach would be consistent with an analogy to the administrative-law context, where statutory interpretations adopted by the executive for litigation purposes do not receive *Chevron* deference if "wholly unsupported by regulations, rulings, or administrative practice." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988). *Cf.* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 105 (2003) (raising this issue); *id.* at 97–102 (reprinting United States v. Lombera-Camorlinga, 206 F.3d 882, 891 (9th Cir. 2000) (accepting the State Department's construction of the Vienna Convention on Consular Rights ("VCCR"))) (noting that the dissenters in *Lombera-Camorlinga* questioned the wisdom of relying on an executive treaty interpretation developed for litigation purposes).

129. *Sumitomo*, 457 U.S. at 185 n.10.

130. *Id.* Chief Justice Burger also went on to observe that the government of Japan had endorsed the new State Department position and stated that in such circumstances the courts "must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Id.* at 185.

131. *Compare* United States v. Stuart, 489 U.S. 353, 366–70 (1989) (finding the text to be clear but expressly defending the practice of also considering the drafting history and, to a lesser extent, post-ratification practice and understandings), *with id.* at 371–72 (Scalia, J., concurring) (decrying this approach on the ground that extrinsic sources cannot trump unambiguous text).

132. *See id.* at 369 (majority opinion) (implying consistency from the IRS).

3. Signs of Retrenchment

In retrospect, *Sumitomo* appears to constitute the high-water mark for the deference doctrine in its formal aspect. An initial sign of retrenchment came shortly after *Stuart*, in *Chan v. Korean Air Lines, Ltd.*[133] *Chan*, which was authored by Justice Scalia, concerned the ability of Korean Air Lines ("KAL") to obtain the benefit of the Warsaw Convention's damage caps for personal-injury or wrongful-death claims after the tragic incident in 1983 in which a Soviet jet shot down a KAL passenger jet over the Sea of Japan.[134] Justice Scalia concluded that the relevant treaty text was unambiguous in its support for KAL's position, and on that basis, he expressly declined to take into account the contrary interpretation advanced by the United States (appearing as amicus), which derived from an inquiry into drafting history.[135]

Stuart and *Chan* were decisions issued at the tail end of the Cold War. The next time the Supreme Court invoked the deference doctrine,[136] the geopolitical environment had changed dramatically. The Supreme Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*[137] appeared in 1999, in the midst of that heady interregnum between the Cold War and post-September-11 eras in which the United States's status as the world's sole superpower was taken as a given. In keeping with the transformation narrative discussed above, which suggested that the preference for executive discretion in foreign affairs had emerged in tandem with deepening but precarious American involvement in international affairs, one might expect that in the relatively relaxed international environment of the 1990s, judges might prove more willing to assert their prerogatives vis-à-vis the executive.[138] Arguably, the *El Al* decision presents a subtle example of just that: a quiet

133. Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989) (holding that KAL could claim the benefit of damage caps contained in the Warsaw Convention despite the failure to provide notice of said limit in the form of language appearing in ten-point type or larger on passenger tickets).

134. *See id.* at 123.

135. *See id.* at 133–35. The *KAL* decision is included in the set, but it is not discussed in the recitation of the Supreme Court's deference precedent in the preceding section because the deference issue appears only in a concurring opinion by Justice Brennan (with reference to the *Sumitomo* standard). *See id.* at 151 n.15.

136. In 1986, the Court did cite *Sumitomo* for the proposition that the executive's past practice under a U.S.–Panama treaty with respect to a tax matter is entitled to "great weight." O'Connor v. United States, 479 U.S. 27, 32–33 (1986). *O'Connor* arguably is best seen as an example of the use of post-ratification practice as evidence of the treaty parties' intent, as opposed to an example of pure deference.

137. El Al Israel Airlines, Ltd., v. Tseng, 525 U.S. 155 (1999) (considering the views of the executive concerning interpretation of the Warsaw Convention, as expressed in an amicus brief).

138. *But see* Goldsmith, *supra* note 75, at 1424–25 (describing post-1991 developments in several foreign-relations-law doctrines that tend to restrain the potential for judicial interference in foreign affairs).

attempt by the Court to reduce the quantum of deference that judges afford to executive treaty interpretations.

Rather than invoke the traditional formulations of "great weight" and "substantial deference," Justice Ginsburg's opinion for the majority in *El Al* seems to go out of its way to describe the deference rule in limited terms: "Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."[139] It is possible, of course, that the Court did not intended to send any particular signal via the shift in descriptive terminology.[140] But the more plausible reading is that Justice Ginsburg chose these words purposefully, aware that "respect" connotes lesser deference than "great weight" or "substantial deference" and that use of the word "ordinarily" would serve to emphasize that there may be contexts in which the executive view would not be entitled even to "respect."[141] *El Al*, in this respect, struck a much different tone than had *Sumitomo*.

If courts truly do defer more to the executive branch during times of national-security concern, of course, one would expect to see a firm embrace of deference in the post-September-11 environment—particularly with respect to matters impacting military operations. And, indeed, one does see particularly robust examples of deference at both the district- and circuit-court levels in national-security-related cases during this period.[142] But contrary to some expectations, the Supreme Court in its *Hamdan* decision did not hesitate to break ranks with the President regarding a fundamental interpretive issue relating to the Geneva Conventions. In this respect, *Hamdan* suggests that considerations of geopolitical context no longer provide a reliable guide to the calibration of the deference doctrine, however large a role they may have played in the doctrine's emergence.

Hamdan also raises difficult questions in light of its close proximity to *Sanchez-Llamas*. As noted above, the Court expressly restated the deference obligation in *Sanchez-Llamas* just one day prior to *Hamdan*.[143] Are the two decisions inconsistent in this regard, explainable only by reference to their

139. *El Al Israel Airlines*, 525 U.S. at 168.

140. *Cf.* BRADLEY & GOLDSMITH, *supra* note 128, at 103 (questioning whether Ginsburg's "respect" formulation entails a meaningful difference in the degree of deference).

141. Justice Ginsburg arguably sought to accomplish something comparable in *United States v. Virginia*, a 1996 gender-discrimination case involving the Virginia Military Institute. *See* United States v. Virginia, 518 U.S. 515, 515 (1996). There, Justice Ginsburg described the analytical framework for equal-protection arguments involving gender discrimination in a manner that may have indicated a more robust level of review than that normally associated with "intermediate scrutiny," but she did not expressly call for heightened review. *See, e.g.*, *id.* at 532–33.

142. *See, e.g.*, Hamdan v. Rumsfeld, 415 F.3d 33, 37–38 (D.C. Cir. 2005) (asserting a binding deference obligation); United States v. Lindh, 212 F. Supp. 2d 541, 554–57 (E.D. Va. 2002) (asserting judicial independence, but also describing the deference obligation in strong terms).

143. *See supra* note 12 and accompanying text.

differing majorities? One could argue that the majority in *Hamdan* declined to discuss the deference obligation out of an unspoken conviction that the plain text of Common Article 3 was so clear as to the issue at hand that it would not have been appropriate to consider any contrary evidence or arguments. However, it is difficult to see why the Court would not say as much if that were the case. *Hamdan* and *Sanchez-Llamas* are better understood as being at least somewhat inconsistent with respect to the deference issue, underlining the precarious state of the doctrine.

4. The Unsettled Status Quo

Plainly, significant obstacles impede any effort to extrapolate from these cases a coherent doctrine capable of consistent application. The decisions are brief in their analysis with respect to the deference obligation—vanishingly so in some instances. By and large, they are bereft of any serious discussion of the theoretical assumptions justifying deference. And yet, when read in context with the methodological and historical considerations described above, some answers do become apparent.

The deference doctrine originally rested on twin foundations: courts allowed consistent executive interpretations to influence their interpretations both because such post-ratification practice is generally accepted as evidence of the treaty parties' intentions and because the trend in the early- to mid-twentieth century favored recognition of executive discretion in foreign-affairs cases. Over time, however, the Court seemed to set aside the already tenuous distinction between reliance on post-ratification practice as evidence of parties' intent and deference to executive-branch preferences. The conflation of the two doctrinal strands culminated in *Sumitomo*, which explicitly rejected any requirement that the executive view be consistent over time. But one could expect a Court growing more concerned about its institutional prerogatives and the consequences of executive discretion in foreign affairs eventually to recalibrate the doctrine in a less deferential direction. *El Al* hinted that something of that sort might have been underway by the late 1990s—a period of relative international calm from the United States's perspective, notwithstanding military action in the Balkans and episodic engagement with the problem of terrorism. The events of September 11 and the onset of the war on terrorism undoubtedly pointed temporarily in the direction of a more deferential posture, but political blowback associated with a variety of post-September-11 policies, combined with the ongoing problems arising out of the war in Iraq, ensured a markedly different climate by the time of the *Hamdan* decision. That the majority in *Hamdan* declined even to discuss the deference doctrine—notwithstanding Justice Thomas's sharp dissent stressing the doctrine's apparent applicability and the particularly sensitive national-security context—was remarkable.

What then is the analytical framework associated with the deference doctrine today, in light of these decisions? It seems fair to say that there is no longer a clearly correct answer to that question, if ever there was. But before moving on to consider normative responses to the unsettled nature of the doctrine, there is a final descriptive issue to consider: Does the doctrine ever actually matter in terms of case outcomes?

C. EXAMINING THE PRACTICAL IMPACT OF THE DEFERENCE DOCTRINE

Notably, just one day prior to *Hamdan*, a different majority of the Court expressly invoked the doctrine in relatively traditional terms to resolve a treaty-interpretation dispute relating to the Vienna Conventional on Consular Relations in *Sanchez-Llamas*. The seemingly inconsistent use of the doctrine in such closely grouped decisions is awkward, and it tempts one to conclude that the Court simply invokes the doctrine as a rhetorical flourish—an empty gesture of inter-branch comity—when possible in cases that truly turn on other considerations. Certainly none of the other cases discussed above suggest that the Court would have reached a different result but for the doctrine. Thus, at least one commentator has argued that the deference doctrine lacks any practical significance, except insofar as it lies about as a veritable loaded weapon that might be taken up for serious purposes in the future.[144] On the other hand, some commentators have argued precisely the opposite position, suggesting that the ambivalent framing of the deference doctrine masks a practical reality in which the courts have effectively ceded their interpretive responsibility with respect to treaties.

Is either view correct? One cannot always say with certainty what factors truly influence a court's decision, and so the question of the deference doctrine's practical impact in any given case is, to a certain extent, unknowable. With that caveat in mind, however, it still seems worthwhile to consider the pattern of results in treaty-deference cases to glean whatever information they may reveal. I report the results of such a survey in the pages that follow, finding that the executive branch's interpretation is in fact rejected from time to time, though it does prevail in most instances. This finding undermines the claim that the doctrine is dispositive in actual practice, though it does not necessarily shed light on the alternative claim that the doctrine is of mere rhetorical significance.

1. Conflicting Perceptions of the Doctrine's Impact

Conventional wisdom prior to September 11 held that the executive branch's interpretation prevailed in almost every instance, with some observers concluding that the doctrine was flexible in name but entirely

144. *See* Flaherty, *supra* note 17.

binding in practice. Professor David Bederman's work is significant here.[145] Bederman acknowledges that, as a formal matter, the Supreme Court "has refused to accept the government's position that its interpretations of treaties are privileged and beyond judicial review."[146] But Bederman argues that the pattern of decisions in Supreme Court cases suggests that the "deference afforded to the government, whether as cast in the position of litigant before the Court or as amicus curiae appearing in support of one party, is extraordinary."[147] Indeed, in his view, the doctrine described above is mainly just window-dressing; deference to executive treaty interpretations as a practical matter is near-absolute, no matter what the Justices claim in their opinions.[148] Although the Court "plays out a dance in which it reaches the interpretive merits of a treaty case," Bederman concludes that the court will "comply invariably with the executive branch's wishes."[149]

In support of his descriptive claim, Bederman reviewed a set of twenty-three treaty-interpretation cases in the Supreme Court during the Warren, Burger, and Rehnquist eras (in the latter group, the cut-off date was 1993).[150] In contrast to the string of opinions I surveyed in the preceding section—all of which expressly engaged the doctrinal details of deference—the cases examined by Bederman for the most part lack such discussions and instead were selected (not unreasonably) on the ground that they nonetheless required the Court to accept or reject a treaty interpretation attributable to the executive. In nineteen of the twenty-three cases in Bederman's sample (including nine out of ten from the Rehnquist Court), the executive's express construction was "wholly and unambiguously embraced by the Court."[151] The Court rejected the executive position in only four.[152]

These results raise several issues. While this pattern certainly suggests that the executive interpretation does tend to prevail, it also shows that the executive's view is not always dispositive. Indeed, this pattern arguably is

145. *See* Bederman, *supra* note 7. *See also* David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1440–41 (1999) (critiquing the deference afforded to the executive branch with respect to treaty interpretation).

146. Bederman, *supra* note 7, at 1016.

147. *Id.* at 1015–16.

148. *See id.* at 1016.

149. *Id.* For a similar perspective, see Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT'L L. & POL. 559, 583 (1996) (arguing that "the Court shows such great deference to executive interpretation of both statute and treaty, that effective judicial review is all but illusory").

150. *See* Bederman, *supra* note 7, at 975 n.108 (listing ten decisions from the Rehnquist era); *id.* at 1015 n.422 (listing seven Warren Court decisions and six Burger Court cases).

151. *Id.* at 1015–16 n.422 (reaching this conclusion as to five out of seven Warren Court cases, five of six Burger Court cases, and nine out of ten Rehnquist Court cases).

152. *Id.*

precisely what one would expect to find under an interpretive regime in which the executive's view is weighty but not binding. On the other hand, it also might be the case that what is true of the Supreme Court may not be true for lower federal courts; because the latter may be less willing to buck the executive viewpoint, deference may shade into obeisance at the district and circuit levels. Another consideration is the possibility that patterns of judicial behavior in the executive-treaty-interpretation context may have shifted in the years since Professor Bederman's inquiry, particularly in light of the effort by Justice Ginsburg in her 1999 *El Al* decision to tone down the language of the deference doctrine and the failure of the majority in *Hamdan* to invoke the doctrine at all.

At the same time, another school of thought portrays the doctrine as a paper tiger, albeit one with the potential for growth. Professor Martin Flaherty, for example, points out that a close review of the Supreme Court's deference cases does not reveal any instance in which the doctrine appears to have led a judge to adopt an interpretation that the judge would not have reached in any event based on other interpretive techniques.[153] Flaherty concludes that "[m]uch like a blimp, the doctrine appears ponderous but in reality has no weight."[154]

The tension between these viewpoints suggests a need for additional and deeper inquiry into the actual practice of judicial deference to executive treaty interpretations, extending the analysis both chronologically (by examining post-1993 developments) and vertically (by accounting for decisions at the district and circuit levels as well). In the pages that follow, I report the results of a survey of treaty-deference decisions at all levels of the federal judiciary during what I term the "Rehnquist Era."

2. Deference Decisions During the Rehnquist Era

From the beginning of 1984 through the end of 2005 (a period roughly corresponding to the tenure of William Rehnquist as Chief Justice) there were sixty-seven published opinions in treaty-interpretation cases at the district, circuit, and Supreme Court levels in which the courts engaged, more or less directly, the deference doctrine.[155] As an initial matter, the data

153. *See* Flaherty, *supra* note 17.

154. *Id.*

155. All of the information reported in this Part derives from the master table set forth in the Appendix to this Article, *infra* Part VI. In reviewing that table, the reader may notice that the set includes a few instances of opinions from both a lower court and a reviewing court in the same case. I elected to include all such opinions in the set, rather than just that of the reviewing court, on the theory that the goal of the survey is to capture a sense of how judges have been applying the deference doctrine in practice, not to determine the ultimate outcome in these lawsuits. The next desirable step in the data-collection process is to expand the inquiry beyond cases that expressly invoke the deference doctrine to those in which the deference rule goes unmentioned but where there nonetheless is reason to believe that the court was aware of, or presented with, the executive branch's preferred interpretation. Professor Bederman's study,

demonstrates that courts at every level are willing—in at least some circumstances—to rebuff the executive branch despite invoking the deference doctrine. That said, the executive viewpoint does prevail in most instances, in line with Bederman's earlier observations. Indeed, nearly half of the cases that rejected the executive's interpretation were later reversed on appeal.

As described in Table 1 below, the executive's preferred interpretation prevailed in fifty-three out of sixty-seven opinions in the set. Courts rejected the executive interpretation in ten instances. Four decisions were inconclusive in the sense that the court did not clearly accept or reject the executive branch's preferred interpretation, despite referencing or otherwise invoking the deference doctrine.

Table 1. Outcome for the Executive Interpretation in All Cases

RESULT	NUMBER
ACCEPTED	**53**
REJECTED	**10**
INCONCLUSIVE	**4**

Notably, four of the ten decisions that rejected the executive's interpretation later were reversed on appeal, although none of the reversals expressly concluded that the lower court had misapplied the deference doctrine.[156] That complication aside, these ten cases include five district-court opinions, four circuit-court cases, and one decision by the Supreme Court. In at least three of these cases, the courts' decisions stemmed at least in part from a strong commitment to textualism, in the sense that the courts' perception of the plain meaning of the treaties' text simply required a contrary outcome.

Judge Marrero's decision in *Tachiona v. Mugabe*[157] is the best available example of a judge rejecting the executive's view despite expressly embracing the obligation to give it "great weight" or "substantial deference." The opinion—which was reversed on appeal, though not on grounds expressly related to the deference issue[158]—provides a robust defense of judicial independence in the executive-treaty-interpretation context.

much to its credit, took that broader approach. Once one expands beyond the relatively limited universe of Supreme Court opinions, however, the task of identifying cases that fall into this broader category becomes considerably more difficult.

156. The reversed decisions are: *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1353 (2d Cir. 1992); *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1344 (9th Cir. 1991); *Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 387 (S.D.N.Y. 2002); and *McNamara v. Korean Air Lines*, No. 82-5085, 1987 WL 19606, at *6 (E.D. Pa. Nov. 9, 1987).

157. Tachiona v. Mugabe, 186 F. Supp. 2d 383.

158. *Id.*, *rev'd sub nom.*, Tachiona v. United States, 386 F.3d 205, 210–24 (2d Cir. 2004), *cert. denied*, 74 U.S.L.W. 3640 (U.S. May 15, 2006).

Tachiona involved the question of whether service of process on President Robert Mugabe and Foreign Minister Stan Mudenge of Zimbabwe sufficed to establish personal jurisdiction over the Zimbabwean political organization of which the two men were senior officials, in light of certain provisions in the Vienna Convention on Diplomatic Relations ("VCDR").[159] The United States, appearing by way of a "Suggestion of Immunity" filed in the case,[160] provided the court with the State Department's understanding that the VCDR would apply to these circumstances.[161] Judge Marrero disagreed, however, concluding that the State Department's interpretation "does not derive from or follow clear treaty language" and that the court is not obliged to "defer to the State Department's construction of a treaty that on its face does not apply to the particular circumstances before the Court."[162]

Upon the government's motion for reconsideration, Judge Marrero vigorously disputed the suggestion that he had failed to comply with his deference obligations:

> Implicit in the Government's posture is that its concept of "great weight" necessarily must yield concurrence, . . . that upon being handed the Government's proffered reading of an international agreement, the Court is obliged, at the risk of otherwise causing indignity and affront, to give binding effect to what the Government says the treaty means . . . . [T]he Government equates deference to submission, and would conflate "great weight" with surrendered judicial independence . . . . Were this notion to prevail, the Court's constitutional role and discretion in treaty interpretation effectively would be reduced to that of a mere echo of the Government's perspective . . . . Even in articulation the theory makes a mockery of constitutional separation of powers.[163]

Decisions such as *Tachiona*, though relatively rare compared to decisions that invoke the doctrine en route to adopting the government's preferred interpretation, confirm that the doctrine is not binding in actual practice. On the other hand, there is no case in the set that necessarily disproves the alternative claim that the doctrine may have only rhetorical force; that is, there is no example of a court stating that it would have reached a contrary interpretation but for the obligation to defer to the executive branch.

What of the impact of the *El Al* decision in 1999? If one could show an increased willingness of lower courts to reject executive interpretations in

159. *See Tachiona*, 186 F. Supp. 2d at 384–85.

160. *Id.* at 384.

161. *See id.* at 385–86.

162. *Id.* at 390.

163. *Id.* at 393.

spite of the deference doctrine following the Supreme Court's loosening of the deference language in *El Al*, this would go some way toward proving that the doctrine has at least some actual impact (albeit a declining one). The pattern of decisions, however, at best provides lukewarm support for that hypothesis.

Thirty-five of the sixty-seven decisions in the set arose during the sixteen-year period predating *El Al*, while thirty-one came from the subsequent seven years.[164] Table 2 reports the results in these cases in terms of whether the court ultimately accepted the executive's interpretation, rejected it, or produced an inconclusive result.

Table 2. Case Outcomes Before and After *El Al* (1999)

	Pre-*El Al* (n = 35)	**Post-*El Al* (n = 31)**
Accepted	29	23
Rejected	5	5
Inconclusive	1	3

One must be cautious in considering these results, of course, since there is no particular reason to believe that the pre- and post-*El Al* sets of cases were comparable to one another in terms of all other relevant factors. But, at the least, the results provide relatively little support for the proposition that *El Al* produced a greater willingness on the part of judges to buck the executive's preferences. On the other hand, there also is no basis here for accepting or rejecting the critique that the deference doctrine is merely rhetorical.

Setting aside the outcomes in these cases, did *El Al* at least impact the degree of deference lower courts *described* themselves as owing to executive treaty interpretations? I reviewed the cases in the set (1) in terms of whether the opinion itself describes the deference obligation in traditionally robust terms; (2) in terms that suggest a weakened form of deference, in keeping with *El Al*; or (3) in terms that are simply inconclusive. Of the thirty-five pre-*El Al* decisions, twenty-seven framed the doctrine in relatively strong terms, two framed it in relatively weak terms, and six were unclear. Of the thirty-one post-*El Al* decisions, twenty-four adopted relatively strong formulations, four were relatively weak, and three were inconclusive.

In the absence of contrary evidence, then, one cannot dismiss the possibility that the deference doctrine, as a practical matter, does little or no actual work in treaty-interpretation cases—a possibility reinforced at least to

164. This may suggest that treaty-interpretation cases in general have become more common in recent years, that litigants and judges have become more familiar with the existence of the deference rule, or perhaps both. It may also be a function of the rather large number of cases that have arisen in the past five years in connection with the consular notification provision of the VCCR, an issue that has had a very high profile and that is currently pending before the Supreme Court. *See* Appendix, *infra* Part VI (listing cases involving VCCR).

some degree by the nontreatment of the deference issue by the majority in *Hamdan*.

D. SUMMARIZING THE DESCRIPTIVE ACCOUNT

In summary, the current state of the deference doctrine is unsettled. The doctrine evolved in the late nineteenth and early twentieth centuries both as a result of the larger trend toward executive discretion in foreign affairs and as a manifestation of the relatively uncontroversial practice of referring to post-ratification practice as evidence of the treaty parties' intent. Over time, the Supreme Court has unmoored the doctrine from the evidence-of-intent rationale, paving the way for its use even in circumstances involving inconsistent or litigation-specific interpretations. This development suggested the possibility that the doctrine would expand, and indeed, conventional wisdom came to view it as having done just that. The practical reality, however, is more complex and uncertain. Yes, the executive view usually prevails, but courts do reject it from time to time. Further complicating matters, the Supreme Court's most recent decisions involving treaty interpretation have muddied the doctrinal framework considerably. In actual practice, it simply is not clear how much bite, if any, the doctrine has. In light of this assessment, there is a manifest need for reform in this area.

IV. DEFERENCE FROM A NORMATIVE PERSPECTIVE

In response to the Supreme Court's failure to fully articulate the grounds for the existence of the deference doctrine (particularly in recent decades), a number of scholars have developed normative arguments contending variously for the expansion, stabilization, reduction, or elimination of the practice of deference. The variation among these accounts largely reflects their authors' contrasting views regarding both the salience and the relative priority in this context of several competing constitutional values. Above all, disagreement stems from the perceived tension between what I refer to as the functional account (favoring foreign affairs deference to the executive branch on efficiency grounds) and the balancing account (favoring robust judicial independence in order to cabin the scope of executive power in keeping with separation-of-powers concerns).

These values—functional and balancing—need not be seen as mutually exclusive in the deference context, at least not entirely so. In the pages that follow, I contend for a nuanced conception of deference that addresses both concerns to some degree, integrating them with a reformed doctrinal framework that is both more specific and defensible than the unsettled status quo.

My argument rests in significant part on the insight—drawn from the historical survey above—that some aspects of the doctrine are better understood as the use of post-ratification practice as evidence of intent.

Where courts can identify reasonably consistent post-ratification practice in connection with ambiguous treaty language, courts should interpret the treaty in accord with that practice unless there is substantial contrary evidence of the parties' intentions. Conceptualized in this way, the court does not abdicate its interpretive authority at all; rather, the court simply makes use of an evidentiary source that is compatible with broader notions of treaty-interpretation methodology. But where there is no such consistent practice or where there is a substantial showing of contrary evidence, then the deference question genuinely arises. In that context, the tension between the functional and balancing accounts calls for a fine-grained approach that calibrates deference with respect both to the procedures used by the executive branch in generating the opinion and to the subject matter of the agreement itself.

A. COMPETING THEORETICAL MODELS

The subject of judicial deference to executive treaty interpretations is a relative late-comer within the broader legal literature on treaty interpretation (itself constituting part of a larger, general literature on interpretive methodologies).[165] The topic first emerged as the focus of sustained scholarly debate in the late 1980s, thanks largely to the politically charged controversy associated with the Reagan Administration's efforts to circumvent Anti-Ballistic Missile ("ABM") treaty restraints impinging on the Strategic Defense Initiative ("SDI") program.[166] Since that time, however, scholars have provided a wide range of normative and descriptive models of

165. *See, e.g.*, Bederman, *supra* note 7, at 960–63 (discussing the history of and competing arguments about judicial deference to executive interpretation). For discussions in the political-science literature on the general topic of judicial deference to the executive branch during wartime or in cases involving foreign policy or military concerns, see generally Craig R. Ducat & Robert L. Dudley, *Federal District Judges and Presidential Power During the Postwar Era*, 51 J. POL. 98 (1989) (examining district-court rulings in "presidential power" cases and concluding that presidents fare better in foreign- and military-policy cases than they do in other contexts); Jeff Yates & Andrew Whitford, *Presidential Power and the United States Supreme Court*, 51 POL. RES. Q. 539 (1998) (same, with respect to Supreme Court voting patterns). *See also* Tom S. Clark, *Judicial Decision Making During Wartime*, 3 J. EMP. LEG. STUDIES 397, 401–02, 414 (2006) (examining court-of-appeals voting patterns in wartime and finding no evidence of increased deference).

166. For a sampling of this debate, see generally Joseph R. Biden, Jr. & John B. Ritch III, *The Treaty Power: A Constitutional Partnership*, 137 U. PA. L. REV. 1529 (1989); Lawrence J. Block et al., *The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PA. L. REV. 1481 (1989); Abram Chayes & Antonia H. Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986); Harold Hongju Koh, *The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?*, 15 YALE J. INT'L L. 331 (1990); David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353 (1989); Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986); Phillip R. Trimble, *The Constitutional Common Law of Treaty Interpretation: A Reply to the Formalists*, 137 U. PA. L. REV. 1461 (1989).

judicial deference (or nondeference, as the case may be) to executive treaty interpretations, running the gamut from endorsements of total deference to calls for completely independent judicial assessments.[167]

1. Total-Deference Models

At one end of the deference spectrum lie models that call for courts to give binding deference to the preferred treaty interpretations of the executive branch. The work of Professor John Yoo on this subject provides a prominent example, endorsing total deference on the basis of a combination of textual, historical, structural, and functionalist arguments.[168]

In 2001, Yoo took the occasion of a review of a new book concerning the Reagan Administration's SDI program to argue that the "President enjoys the final constitutional authority on the interpretation of treaties."[169] In support, Yoo presented a variety of constitutional claims. First, he contended that a textual analysis of the allocation of treaty-related powers suggests that the treaty power as a whole—including the power to interpret—is "executive in nature," rather than an aspect of the judicial power granted by Article III.[170] Acknowledging that the text of the Constitution does not expressly dispose of the treaty-*interpretation* power, however, Yoo also articulated functional and structural arguments in support of lodging interpretive power within Article II. In his view, the executive branch's unique capacity to gather information, develop expertise, and act with unity and dispatch in the international context provides a functional ground for consolidating authorities associated with international relations—including the power to interpret treaty provisions—in that branch.[171] The practical reality of incremental interpretations performed on a daily basis by executive departments and officials in the routine

167. Must only one of these models prevail as the preferred normative account? Notably, Professor Roger Alford has identified a comparable array of deference models in connection with a similar issue: When and to what extent should judges defer to the decision of international tribunals? *See generally* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003). *See also* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on* Lawrence v. Texas, 44 VA. J. INT'L L. 913 (2004). Because international tribunals vary widely with respect to the considerations that cut for or against affording their decisions deference in domestic courts, Professor Alford was able to disaggregate the normative inquiry and endorse application of particular levels of deference to particular types of tribunal. In contrast, the sources of executive treaty interpretations are not nearly as diverse. This relative uniformity makes it more difficult to adopt an approach that calls for the degree of deference to vary by context, though not impossible, as I argue below. *See infra* Part IV.B.

168. *See* YOO, *supra* note 83, at 190–214; John Yoo, *Politics as Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 864–82 (2001) (arguing for deference to presidential interpretation).

169. Yoo, *supra* note 168, at 914.

170. *Id.* at 869–70.

171. *See id.* at 870–77.

performance of their jobs, moreover, suggests, as a structural matter, that interpretive authority necessarily lies with the executive.[172] Characteristically, Yoo also relied on historical materials relating to the actual practice of treaty interpretation in the Founding-era executive branch.[173] The Framers, he concluded, "understood the treaty power to be an executive power" and expected the President to be "the primary actor in the interpretation of treaties."[174]

As befits a work inspired by the clash between the Reagan Administration and the Senate over the ABM Treaty, Yoo ultimately aimed his separation-of-powers arguments in that book review at establishing the primacy of the President over the Senate with respect to treaty interpretation;[175] the arguments did not as directly engage the question of *judicial* deference, which presents a distinct separation-of-powers concern. The thrust of his conclusions left little room for doubt, however, regarding his sense that the judicial role should be limited in this context. In any event, he erased any doubt that might otherwise have arisen in a subsequently published rejoinder to criticisms of his review essay.

In *Treaty Interpretation and the False Sirens of Delegation*, Yoo drew on the framework described in his earlier essay to advance the argument that "the separation of powers requires that the public lawmaking system treat statutes and treaties differently."[176] Flipping the conventional view of the interpretive dispute, Yoo contended that judicial rejection of an executive treaty interpretation would amount, in practical terms, to an improper delegation to the judiciary of the executive's Article II interpretive power:[177] "The

172. *See id.* at 874–76.

173. *See id.* at 882–901 (discussing conceptions of executive power with respect to foreign relations in the writings of Locke, Montesquiue, and Blackstone; the evolution of executive-power ideas relating to treaty authority during the constitutional drafting and ratification debates; and debates and actions undertaken during the early Republic with respect to treaty disputes).

174. Yoo, *supra* note 168, at 883.

175. It is not that Congress is powerless to respond to the President's interpretative move, in Yoo's view, but that it cannot do so on the same terms. Its recourse instead is to invoke its own powers—particularly the spending power—to check the President. *See id.* at 914. In this respect, Yoo's review essay is consistent with his other work relating to separation-of-powers issues in the context of foreign affairs, a major theme of which is that the Framers intended for interbranch disputes to be worked out by the elected branches in the political sphere rather than by the judiciary operating as umpire between them in the legal sphere. *See* YOO, *supra* note 83, at 190–204; *see also* Trimble, *supra* note 166, at 1461–63 (presenting a similar separation-of-powers account in the midst of the controversies between the executive and the Senate regarding the Reagan Administration's ABM Treaty reinterpretation).

176. John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1305 (2002) (a rejoinder to Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1266 (2002) (criticizing Yoo, *supra* note 168)).

177. Yoo, *supra* note 176, at 1308. At least some of the disagreement between Professors Yoo and Van Alstine concerns the controversy over non-self-execution. *See, e.g.*, *id.* at 1312–14.

President could no more delegate his treaty [interpretation] power outside the executive branch than he could delegate his power to negotiate treaties to Congress or his power as commander in chief to the courts."[178]

More recently, Professor Yoo has focused in particular on what he describes as the "functional case" for deference to the executive branch in the realm of foreign affairs. In one article, Yoo and Professor Julian Ku argue that "the design and operation of the judiciary gives it a comparatively weak institutional vantage point from which to make decisions in the area of foreign affairs" in comparison to the executive branch.[179] Courts are undesirable interpreters on this view because they have only "limited information in foreign affairs cases and are unable to take into account the broader factual context underlying the application of laws in such areas."[180] The executive branch, in contrast, possesses "large bureaucracies solely focused on designing and implementing foreign policy" and is, in any event, "the more politically responsive institution."[181]

In summary, the total-deference model relies on not one but several methodological approaches. Textual, originalist, structural, and functional theories all have been adduced in its support. But that model has not gone unchallenged.

2. Non-Deference Models

At the opposite end of the spectrum from the total-deference model lie accounts that reject the proposition that courts should defer in any

This is an important topic to be sure, but it is one that is conceptually distinct in many respects from the issue of judicial deference.

178. *Id.* at 1333. It should be noted that *Treaty Interpretation* is no ordinary product of the ivory tower. On the contrary, Yoo appears to have written it in the spring of 2002, while on leave from Boalt Hall to serve as Deputy Assistant Attorney General in the Office of Legal Counsel. *See id.* at 1305 (author's footnote). Lest there be any uncertainty about the implications of his theory for treaty issues arising out of the war on terrorism, Yoo concludes his essay with a brief discussion of how his views would apply in the context of a judicial challenge to the President's determination in 2002 that members of al Qaeda or the Taliban could not assert status as prisoners-of-war under the GPW. *See id.* at 1341–42. After reciting the particulars of the President's interpretation, Yoo describes the President's interpretive power as "unilateral," a matter that "should rest solely in [his] discretion." *Id.* at 1342.

179. Julian Ku & John Yoo, Hamdan v. Rumsfeld, *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 199 (2006) [hereinafter Ku & Yoo, *The Case for Deference*]. Ku and Yoo also acknowledge a "formal basis" for deference rooted in what they describe as "the President's unique constitutional power as the maker of treaties under Article II." *Id.* at 196–97. But in its prioritization of functional arguments, this article echoes Ku and Yoo's prior work directed at the controversy surrounding the Alien Tort Statute. *See generally* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (2004) (contending that competing formalist arguments relating to the text, statutory purpose, and history of the statute had resulted in a stalemate, and endorsing functionalism as a preferred approach, at least in that context).

180. Ku & Yoo, *The Case for Deference*, *supra* note 179, at 199.

181. *Id.* at 202.

meaningful way to the executive branch's preferred interpretation. Far from endorsing the special capacities and interests of the executive branch as justifications for deference, these models instead emphasize the desirability of empowering the courts to serve a checking function, cabining the scope of executive discretion in the name of separation of powers.

The work of Professors Alex Glashausser, David Sloss, and Martin Flaherty are notable examples of this approach. Glashausser's article *Difference and Deference in Treaty Interpretation*, for example, raises the question whether the "distinct institutional role of the judiciary [might] encourage dissent" from rather than deference toward executive treaty interpretations.[182] Whether Glashausser means to reject even limited degrees of deference, or just the total-deference model, is not entirely clear. On the whole, however, the tenor of his article is in keeping with what Professor Curtis Bradley has described as the "*Marbury* perspective" in foreign-affairs law more generally, which tends to frame deference issues in terms of "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."[183] In this sense, Glashausser's is a rule-of-law model.

Glashausser takes Yoo's work as a point of departure but comes to quite different conclusions.[184] From his perspective, deference to executive interpretations threatens the separation of powers at least as much as it preserves it, insofar as judicial independence is concerned. "Federal courts' primary obligation, whether one labels it legal or moral, is to render opinions in the cases before them, not to abnegate that role in the name of unity."[185] Deference, in this view, is inconsistent with the judiciary's critical role as a check on the power of the executive branch. "If courts defer to executive interpretations," Glashausser writes, "then such a treaty becomes akin to a statute that means only what the President wants it to mean."[186] From time to time, he notes, non-deference will result in situations in which the President asserts one interpretation of a treaty on the international plane while the courts insist upon a contrary view in the domestic sphere.[187]

182. Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 27 (2005) [hereinafter Glashausser, *Difference and Deference*]. This article, which focuses on the merits of deference to the executive as a mode of treaty interpretation, is a companion to a larger piece dealing with interpretive methodologies more generally. *See generally* Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243 (2005).

183. Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650 (2000).

184. *See* Glashausser, *Difference and Deference, supra* note 182, at 38.

185. *Id.* at 42.

186. *Id.* at 43–44. *Cf.* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power* (Univ. of Chicago Law Sch. Pub. Law and Legal Theory Working Paper Series, Paper No. 133, 2006), *available at* http://www.law.uchicago.academics/publiclaw (discussing the President's power to decline to execute unconstitutional legislation).

187. *See* Glashausser, *Difference and Deference, supra* note 182, at 45–46.

This, he concludes, is a reasonable price to pay to promote judicial independence and to restrain the executive branch.[188]

In short, the model endorsed by Professor Glashausser prioritizes the checking function inherent in judicial review of executive treaty interpretations, finding that value to outweigh competing considerations such as the functional and structural accounts outlined above. But what of Professor Yoo's claim that deference also is consistent with original understanding and historical practice?

Professor David Sloss has responded to that argument with his work exploring the extent to which judges deferred to the executive in actual practice during the first fifty years of the Republic.[189] As noted above, Sloss finds no evidence of treaty deference in judicial practice during those early years—consistent with my claim that deference emerged in this context during the late nineteenth and early twentieth centuries within the broader trend toward executive discretion that Edward White describes as the transformation of foreign-relations law. In Sloss's view, the question of whether to give any deference at all to the executive's interpretation is merely one of comity at the discretion of the courts, "not a matter of constitutional law."[190]

In the view of Professor Flaherty, critics of treaty deference do not go far enough in that they rely merely on the propositions that treaties are the supreme law of the land and that, per *Marbury*, courts are the final interpreters of the law.[191] This line of argument "fails to engage with the larger, functional separation of powers assumptions that its defenders put forward, above all the argument from executive expertise and efficiency."[192] A more effective response is to draw attention to higher-priority values under the separation-of-powers banner: the value of dividing power among the branches in order to prevent the undue accumulation and abuse of power and of enhancing democratic accountability for the exercise of power.[193] These values find many institutional expressions in our system, but for Flaherty, the most important manifestation of them in this context is the "traditional role" of the courts in "preserving balance among the branches to insure that individual excesses do not become systemic."[194]

188. *See id.*

189. Sloss, *supra* note 5.

190. *Id.* at 522.

191. *See* Flaherty, *supra* note 17. Flaherty argues that the phenomenon of globalization has proved particularly beneficial to executive-branch actors, suggesting an enhanced need for the judiciary to assert its capacity to check executive discretion.

192. *Id.*

193. *See id.*

194. *Id.*

3. Varieties of Intermediate Deference

Between the poles of the total-deference and non-deference models, one finds a range of intermediate approaches. A particularly influential account is that in Professor Curtis Bradley's article *Chevron Deference and Foreign Affairs*.[195] As the name suggests, *Chevron Deference* takes the familiar framework for judicial review of statutory interpretations by administrative agencies, set forth by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[196] and considers the extent to which this framework has descriptive power with respect to judicial assessments of executive treaty interpretations (among other things).[197] Under *Chevron*, an agency's construction of a statute does not bind a court where the plain meaning of statutory terms disposes of the issue at hand.[198] Where the terms of the statute are ambiguous, however, the court must defer to the agency's interpretation if it is a reasonable construction of the statute and Congress has charged the agency with implementation of the statutory scheme.[199]

The *Chevron* framework, Bradley writes, "fits well" as a description of how courts actually make use of executive treaty interpretations in the course of adjudicating treaty issues.[200] Courts have refused to accept executive interpretations in the absence of ambiguity;[201] courts assert that

195. *See* Bradley, *supra* note 183.

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

197. *See* Bradley, *supra* note 183, at 663. Bradley's article distinguishes judicial deference to the executive in this context from several related dynamics, such as "deference" in the form of application of the political-question doctrine or "deference" to an executive determination that a factual predicate to a treaty-interpretation issue does or does not exist. *See id.* at 660–62.

198. *See Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

199. *Id.* at 843–45. For an overview of the significance of *Chevron* deference in the context of the September 18, 2001, Congressional Authorization for Use of Military Force, see generally Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005). Sunstein observes that countercanons of construction—such as the rule against construing an ambiguous statute so as to raise serious constitutional concerns—nonetheless may trump an agency interpretation that otherwise qualifies for *Chevron* deference; although it might be better to conceptualize that scenario as precluding the conclusion that the agency's interpretation was reasonable in the first place. *See id.* at 2668. *But see* Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429, 431 (2006) (commenting on the use of *Chevron* to trump stare decisis).

200. Bradley, *supra* note 183, at 703; Jinks & Sloss, *supra* note 2, at 196 n.523 (observing that Bradley's model "does a reasonably good job of describing the courts' approach to treaty interpretation"). It may be more accurate to say that the model fits well as a description of how courts *describe* themselves as making use of such interpretations, which might turn out to be distinct from what they actually are doing in some instances.

201. *See* Bradley, *supra* note 183, at 703 (citing Perkins v. Elg, 307 U.S. 325, 335–42, 344–49 (1939)). *But cf.* United States v. Stuart, 489 U.S. 353, 366–69 (1989) (consulting extrinsic sources—including a reference to agency interpretations of the relevant treaty—to reinforce the majority's treaty interpretation, despite the conclusion that the plain language compels the conclusion); *see also id.* at 371, 371–73 (Scalia, J., concurring) (criticizing the majority for going

executive interpretations that are "unreasonable" should not be accepted;[202] courts suggest that executive interpretations from an agency must come from the agency actually responsible for treaty implementation;[203] courts do not object to shifts in the executive interpretation over time;[204] and courts have declined to employ deference with respect to interpretations that range into certain areas such as whether to give validity to a treaty reservation.[205]

At first blush, this approach appears to have considerable affinity with the total-deference model insofar as it calls for reasonable executive interpretations to bind courts in the context of ambiguous text.[206] But by leaving it to the courts to make threshold determinations as to whether the treaty text actually is ambiguous and whether the executive interpretation actually is reasonable, the *Chevron* framework preserves a relatively meaningful degree of judicial independence.[207]

The *Chevron* analogy is advanced in more directly normative terms by Professors Eric A. Posner and Cass R. Sunstein in their recent article,[208] albeit with only brief reference to the issue of treaty deference in particular.[209] In *Chevronizing Foreign Relations Law*, Posner and Sunstein present an extended functionalist defense of *Chevron*-style deference to the executive across a broad range of foreign-relations-law doctrines, concluding

beyond unambiguous text). *Stuart* illustrates the connection between a court's understanding of the deference issue and its larger views concerning the hierarchy of methods used for construing a treaty.

202. Bradley, *supra* note 183, at 703 (citing generally El Al Israel Airlines v. Tseng, 525 U.S. 155 (1999)).

203. *See id.* (citing Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 184–85 (1982)).

204. *See id.* (citing Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 68–69 (1993)).

205. *See id.* at 703–04 & n.236.

206. Insofar as the law of executive treaty interpretations is linked to analogous administrative-law concepts, shifts in the terrain of the latter may impact the former. In that light, it is worth noting the account of *Chevron* recently articulated by Justice Stephen Breyer. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 103–08 (2005). Breyer asserts that it remains unclear whether *Chevron* deference must always be applied when a responsible agency interprets an ambiguous statute or, if instead, *Chevron* deference is merely a rule of thumb—a presumption, perhaps. *See id.* at 103–04. Reasoning that some ambiguities are of sufficient import that a reasonable legislator would not have intended to delegate their resolution to the executive, Breyer ultimately concludes that such circumstances justify a court in declining to apply the *Chevron* framework and thus permitting rejection of the agency's interpretation. *See id.* at 106–08. *Cf.* Christensen v. Harris County, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting) (arguing for denial of *Chevron* deference in connection with relatively informal administrative expressions at least "where one has doubt that Congress intended to delegate interpretive authority to the agency").

207. *See, e.g.*, Jinks & Sloss, *supra* note 2, at 194–200 (distinguishing Bradley's *Chevron* approach from Yoo's model of total deference and contending that the President's construction of the certain Geneva Convention provisions is unreasonable and, thus, undeserving of deference even under *Chevron*-style analysis).

208. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).

209. *Id.* at 1201–02.

that deference is justified in those contexts because "resolving ambiguities requires judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments."[210] In their view, the *Chevron* analytical framework is more justifiable in the foreign-relations-law context than elsewhere in light of the executive branch's various structural advantages in that realm.[211]

In response to Posner and Sunstein's argument, Professors Derek Jinks and Neal Katyal argue in a forthcoming article that "*Chevron*-style deference of the sort [Posner and Sunstein] propose would radically expand the authority of the executive to interpret and, in effect, to break foreign relations law."[212] Jinks and Katyal accept that "some deference is almost certainly often warranted" in this realm, but they warn that "too much deference risks precluding effective regulation of executive action."[213] In particular, Jinks and Katyal object to the notion of according binding or *Chevron* deference to executive interpretations of any form of foreign-relations law that (1) constitutes the supreme law of the land (at least including self-executing treaties), (2) is made at least in part "outside the executive" (in the sense that the law was created at least in part by an institution other than the President), and (3) in practical terms, imposes constraints on executive discretion.[214] In that context, they contend, neither of the twin rationales underlying *Chevron* deference—administrative expertise and democratic accountability—are sufficiently implicated.[215] As to democratic accountability, Jinks and Katyal point out that "many key foreign-policy decisions are made in secret" and, in any event, may be detrimental only to foreigners who do not vote—considerations that are contrary to the presumptions associated with domestic administrative law.[216] With respect to expertise, they note that in *Chevron* analysis, the inquiry into the reasonableness of the agency's interpretation often boils down into a review of the process or method by which the agency developed its interpretation.[217] Jinks and Katyal acknowledge that some foreign-relations-law interpretations by the President may well be the product of processes

210. *Id.* 1176.

211. *Id.* at 1204–07 (listing institutional advantages over the judiciary, including, in particular, the executive branch's superior ability to assess the likely repercussions of various litigation outcomes).

212. Jinks & Katyal, *supra* note 1, at 1233.

213. *Id.* at 1232.

214. *Id.* at 1243 (arguing that the actual practice of courts with respect to deference to executive treaty interpretations is "decidedly more modest than *Chevron* deference").

215. *See id.* at 1245.

216. *Id.* at 1246.

217. *See* Jinks & Katyal, *supra* note 1, at 1246–47.

that reasonably draw upon agency or departmental expertise, but they point out that this is not necessarily the case in each instance.[218]

Jinks and Katyal also respond to the functionalist argument for robust deference to executive interpretations. Summarizing that argument in terms of the virtues of "[e]xecutive flexibility," they argue that "this flexibility is only one of several values protected by our structure of government."[219] Echoing the arguments raised by Glashausser, Sloss, and Flaherty, they conclude that the "Constitution's chief value lies in its division of powers among the branches" and that "[t]his division is skewed considerably when Presidents are given the type of deference Posner and Sunstein seek."[220]

Others have suggested frameworks that lie still further from the total-deference end of the spectrum. One example, advanced by Evan Criddle, accepts the analogy to administrative law but rejects the conclusion that the *Chevron* rule follows from this; in this model, the proper rule is *Skidmore*, rather than *Chevron*, deference.[221] As the Supreme Court emphasized in *United States v. Mead Corp.*, administrative-agency interpretations are entitled to *Chevron* deference only when the court determines that Congress intended for the actions of the agency in question "to carry the force of law"[222]—an intent that may be express or implicit.[223] Failing that, the court should instead apply the less-deferential framework set forth in *Skidmore v. Swift & Co.*[224] Under that framework, the agency's interpretation is treated as persuasive (but not binding) to a degree commensurate with a variety of factors, including the agency's particular expertise in an area, the extent of reliance on the interpretation, and the interpretation's capacity to promote uniformity of construction.[225] Applied in the treaty context, *Skidmore* deference resembles what Professor Bradley describes as "persuasiveness deference"—i.e., "the general respect given by courts to the executive

218. *See id.*; *see also id.* at 1279 (arguing that "a precondition for deference should be the use of internal executive processes that permit balanced decision-making"). In this respect, the Jinks-Katyal position builds on Katyal's work with respect to intrabranch separation of powers. *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319 (2006).

219. Jinks & Katyal, *supra* note 1, at 1262–63.

220. *Id.* at 1263.

221. Evan Criddle, Comment, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1928–34 (2003). For more on the *Chevron*-versus-*Skidmore* distinction, see generally Sunstein, *supra* note 199, at 2665 (citing Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006)) (describing the threshold inquiry as "*Chevron* Step Zero").

222. United States v. Mead Corp., 533 U.S. 218, 221 (2001).

223. *Id.* at 229.

224. *See* Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

225. *Mead*, 533 U.S. at 234.

branch's views based upon its status as an able and knowledgeable representative of United States interests."[226]

Professor Michael Van Alstine proposes another significant alternative in his article, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*.[227] Van Alstine, invoking with approval Justice Ginsburg's formulation in *El Al*, contends that the "proper approach . . . is merely judicial respect for the reasonable views of the executive branch."[228] But in his view, the precise degree of respect owed will not be uniform across all cases. Rather, courts should afford "calibrated deference" that "should vary according to the degree to which an issue affects foreign affairs and whether the continuing administration of the treaty at issue is expressly entrusted to a specific executive branch agency."[229] In support, Van Alstine draws on the Supreme Court's opinion in *Banco Nacional de Cuba v. Sabbatino*,[230] in which the Court recognized that "some aspects of international law touch more sharply on national nerves than others" and, thus, that separation-of-powers concerns raised by judicial review will vary in accordance with the significance the issue involved may have "for our foreign relations."[231] For these reasons, he concludes:

> [T]he value of executive branch views may be greatest for bilateral treaties that regulate the international conduct of the treaty partners as sovereign entities (treaties of diplomacy, for example). In contrast, for the increasingly common multilateral treaties that address solely the relations between private parties, there should typically be little reason to give serious deference to the interpretive views of executive branch officials.[232]

The critical insight in Van Alstine's model is his recognition that treaties vary in the extent to which they actually implicate the executive's special competency, responsibility, and institutional advantages in foreign affairs.[233] Van Alstine clearly is correct that not all treaties implicate foreign-affairs concerns to the same degree.[234] Some, such as peace treaties resolving

226. Bradley, *supra* note 183, at 662.

227. *See* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1942–43 (2005); *see also* Van Alstine, *supra* note 176.

228. Van Alstine, *supra* note 227, at 1943–44 (citing El Al Israel Airlines v. Tseng, 525 U.S. 155, 168 (1999)).

229. *See id.*

230. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

231. *Id.* at 428.

232. Van Alstine, *supra* note 227, at 1944 (internal citations omitted).

233. *See* Van Alstine, *supra* note 176, at 1294–95, 1297–98.

234. *See id.* at 1298, 1300 (accepting that "[f]or diplomatic and national defense treaties, the deference due executive agencies properly may be substantial," but cautioning that "as the degree to which a treaty implicates foreign affairs concerns decreases, so too should the degree of deference to executive views about the meaning of its provisions").

armed conflicts, clearly implicate the structural advantages and functional realities cited by Yoo in support of his total-deference model.[235] Others do so only tangentially. The result for Van Alstine is a sliding scale,[236] rooted within a framework in which the ultimate question is better understood in terms of mere respect rather than binding deference.

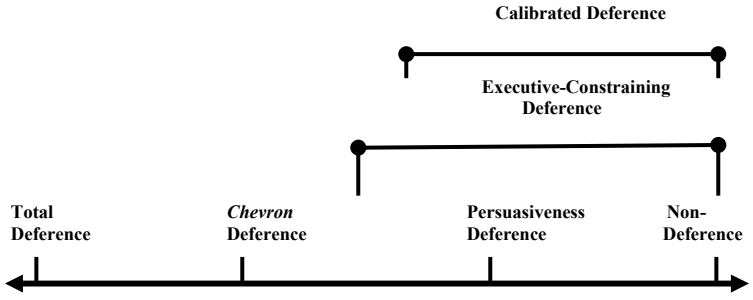
4. Summarizing the Competing Normative Models

The foregoing literature review demonstrates a considerable diversity of opinion with respect to the most desirable model for judicial deference to executive treaty interpretations. At a simplified level, the proposals can be related to one another graphically as follows:

Figure 1. Spectrum of Deference Doctrines

Not all of the models described above occupy a single point along the spectrum, however. At least two of them—the executive-constraining model supported by Professors Jinks and Katyal, and the subject-matter-focused model advanced by Professor Van Alstine—call for a calibration of deference based on individualized considerations in particular cases. These dynamic deference models may be represented graphically in relation to the others as follows:

Figure 2. Dynamic Deference Models



235. *Id.* at 1298.

236. *See id.* (describing the appropriate approach as one of valid deference).

The variation among these models reflects sharp disagreement concerning the underlying constitutional values that the treaty-deference question implicates.[237] The models calling for at least some application of binding deference depend in large part upon a combination of structural and functional arguments that emphasize executive capacities to assess the impact a particular treaty interpretation may have on U.S. foreign relations. These models also rely to some extent on textualist and historical accounts that provide support for lodging interpretive authority with the executive branch, though to a much lesser degree. Opponents of strong deference do not necessarily contest the functional advantages of the executive branch, though some do object to that claim in at least some circumstances. Rather, the reduced or non-deference position depends primarily upon the conclusion that a higher priority trumps whatever functional advantage the executive may have: the separation-of-powers goal of ensuring that all government power is checked adequately, which in this context calls for the judiciary to have the final say in interpreting treaty obligations. In short, the scholarly debate appears to be at an impasse.

B. AN INTEGRATED MODEL OF CALIBRATED DEFERENCE

The tension between the functional and balancing accounts is genuine, but it is not entirely irresolvable. These accounts reflect core constitutional values—the prevention of undue concentrations of power and the facilitation of effective and consistent foreign policy—that courts should service as far as possible. These values clash, of course, when stated in extreme terms. An executive branch empowered to interpret treaties entirely at its discretion is unchecked in some important respects; a judiciary empowered to ignore executive treaty interpretations in all contexts may imperil or at least unsettle U.S. foreign relations. But as the diversity of models in the intermediate range described above suggests, there are numerous ways of framing the deference issue so as to avoid such extremes.

The key to reconciling the functional and balancing accounts is to embrace the nuances of the deference issue as it arises in actual practice, and, in particular, to restore appreciation for the distinction between true deference and the use of post-ratification practice merely as evidence of the intended meaning of ambiguous treaty language. Recall the discussion of the doctrine's evolution over time in the Supreme Court. The doctrine as it stands today has its roots in two distinct doctrinal strands. One of these involves genuine deference, in the sense that a court adopts—or at least considers adopting—the executive branch's preferred interpretation of

237. This is not surprising given the lack of consensus characterizing the larger debate regarding the general nature and scope of executive authority in the realm of foreign affairs. The literature on this topic is vast. *See supra* note 83 (addressing the debate surrounding unilateral executive discretion).

ambiguous treaty language. The other is quite different, calling for consideration of post-ratification practice as evidence of original intent without respect to the identity of the body tasked with interpreting the treaty. The end result in the evidence-of-intent scenario may resemble true deference in terms of practical outcomes, but the rationale is entirely distinct and, more to the point, entirely compatible with the view that courts retain the ultimate authority to interpret legal materials of any kind.

As described in Part III.D above, this distinction gradually was lost over the life of the deference doctrine. The Court's 1982 decision in *Sumitomo* was the capstone of that process; Chief Justice Burger's express rejection of a consistency requirement as a precondition to deference strongly implied that the evidence-of-intent model no longer served as a theoretical foundation for the doctrine. That model can and should be restored, however, in order to shift the doctrine onto firmer and more defensible grounds.

To achieve this restoration, the deference doctrine must be disaggregated. As an initial matter, courts should recognize that in limited circumstances, it is entirely proper to resort to post-ratification executive practice under a treaty in order to construe its meaning. In other words, where the court determines that a treaty's text is ambiguous,[238] the court should first search for evidence of the parties' original intentions in selecting that language. Evidence of those intentions by way of a consistent and reasonably clear pattern of implementation by the relevant agency should then be entirely dispositive of the issue, at least in the absence of evidence that treaty partners expressed contrary original intentions or other evidence sufficient to rebut a presumption that the practical implementation reflects the parties' original intentions.

There will not always be such a consistent and clear pattern of implementation, of course. And even where there is, there may be circumstances in which treaty partners have objected contemporaneously to that implementation. Such circumstances undermine the rationale of treating the pattern of practical construction as evidence of the parties' original intentions with respect to the treaty. Thus, when these conditions arise, a reviewing court must abandon the evidence-of-intent model and move on to the question of genuine deference.

A nuanced approach provides the best way of reconciling the tension between the competing constitutional values present in this scenario. As a

238. Note that in most, if not all, deference models, courts remain capable of asserting their independence and performing their checking function where the executive interpretation in issue runs contrary to the plain meaning of treaty text. This is true even if, as described in *supra* Part III.A.1, the prevailing methodology does not foreclose a court from resorting to other sources, even where that court has found that the text is not ambiguous. That a court *may* resort to extrinsic sources in such a context does not mean that the court should reject the plain meaning of the text as a result.

threshold matter, wholly binding deference along the lines of *Chevron* should be reserved for the exceptional circumstance in which the executive treaty interpretation is reasonable and emerges from a notice-and-comment rulemaking process comparable to that which triggers *Chevron* deference in the statutory context. The rigors of such a process—particularly its public aspects—would go far toward alleviating the checking considerations that underlie the separation-of-powers argument against deference. Of course, few if any treaty interpretations currently derive from such a process.

Absent *Chevron*-style rulemaking, the deference afforded to an executive treaty interpretation should vary from minimal to substantial depending on the origins and circumstances of the interpretation. Deference should not be given where the interpretation is unsupported by any formal legal opinion generated by a relevant department or agency (but instead constitutes nothing more than an argument made by the Justice Department in the course of litigation). That scenario fails to implicate strongly the functional considerations that tend to justify deference, leaving separation-of-powers concerns relatively unopposed.

In contrast, deference should be robust (though not binding) where the interpretation (1) reflects the considered legal opinion of the department or agency responsible for the treaty's implementation and (2) there is no conflicting opinion from other departments or agencies also having a significant stake in the issue. Satisfaction of these criteria suggests a relatively strong commitment of the relevant expertise of the executive branch, thus placing the functional argument on its strongest footing. In that context, judges should reject the executive's view only on the basis of substantial evidence that a contrary interpretation better reflects the treaty parties' intentions. This level of deference might be described as "great weight" and "substantial deference"—formulations frequently articulated in Supreme Court deference cases prior to *Hamdan* and *El Al*.

Finally, in the rare case in which the interpretation does reflect a considered legal opinion from a department or agency, but it is possible to identify a dissenting view from another such entity, the functional justification for deference is undermined to some degree (particularly if the losing view is the one held by the department or agency primarily responsible for actual implementation of the treaty). In cases involving such interdepartmental dissent—cases such as *Hamdan*—a court should give some weight to the interpretation that the executive branch ultimately advances in litigation, but not as much weight as would otherwise have been the case. The existence of such contemporaneous disagreement tends to undermine the functional case for robust deference, leaving separation-of-powers concerns in a relatively stronger position.

Disaggregating deference in this manner strikes a reasonable balance among the competing constitutional values that have long unsettled the deference debate. This approach has the additional virtue of reconnecting

the analytical framework of deference to its doctrinal roots while also providing a sensible account of its relationship to treaty-interpretation methodology more broadly understood.[239] It is not without its flaws; the scenario calling for binding deference will not satisfy all advocates of the balancing account, just as the scenarios calling for merely persuasive deference will not satisfy all advocates of the functional account. At a time when the doctrine in actual practice has become markedly unstable, however, compromise-based approaches may be particularly desirable.

V. CONCLUSION

Our treaty obligations are multiplying both in number and in significance, and through them, international law is becoming an ever-more important component of domestic law. It is critical, in light of these trends, that we take care to ensure that the checks and balances that traditionally have lent stability to our legal system translate well into this emerging environment. Treaties are not entirely like statutes. They operate simultaneously both on the international and domestic legal planes, and their interpretation has an impact on the relations of the United States with other members of the international community. In some contexts, that impact is relatively inconsequential, but in others, it can be of the highest magnitude. Treaty interpretation thus can implicate executive-branch interests and responsibilities in a manner quite unlike the typical statute. At the same time, the expansion of the domain of treaty law would be an unsettling prospect indeed, were the judiciary to reduce its role in treaty cases to policing for the occasional unreasonable executive interpretation. The deference doctrine should be a device for reconciling this tension; the calibrated, disaggregated approach advocated here provides the best account for reforming the doctrine.

239. It may also have the virtue of increasing the incentive to resort to treatymaking rather than the executive-agreement model, all other considerations being equal. A relatively robust deference doctrine applicable to treaty interpretation presumably makes treaties more palatable than would otherwise be the case.

VI. APPENDIX

Case	**Cite**	**Treaty**	**Role of United States**	**Description of Deference**	**Outcome**
Wickes v. Olympic Airways	745 F.2d 363 (6th Cir. 1984)	FCN (Greece)	Amicus	Great weight	Exec. Int. prevails
Hyosung, Inc. v. Japan Air Lines Co.	624 F. Supp. 727 (S.D.N.Y. 1985)	Warsaw	None	Some weight	Inconclusive
Demjanjuk v. Petrovsky	776 F.2d 571 (6th Cir. 1985)	Extradition (Israel)	Litigant	Great weight	Exec. Int. prevails
In re La Salvia	No. 84 Cr. Misc. 1, 1986 WL 1436, at *1 (S.D.N.Y. Jan. 31, 1986)	Extradition (Argentina)	Litigant	Great weight	Exec. Int. prevails
In re Extradition of Rabelbauer	638 F. Supp. 1085 (S.D.N.Y. 1986)	Extradition (Israel)	Litigant	Great weight	Exec. Int. prevails
Japan Air Lines Co. v. Dole	801 F.2d 483 (D.C. Cir. 1986)	Air Services	Litigant	Great weight	Exec. Int. prevails
S & S Screw Mach. Co. v. Cosa Corp.	647 F. Supp. 600 (M.D. Tenn. 1986)	Hague Evidence Convention	None	Great weight	Exec. Int. prevails
O'Connor v. United States	479 U.S. 27 (1986)	Panama Canal Treaty	Litigant	Great weight	Exec. Int. prevails
Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court S.D. Iowa	482 U.S. 522 (1987)	Hague Evidence Convention	Amicus	Great weight	Exec. Int. prevails
MacNamara v.	Civ. A. No.	FCN (Korea)	Amicus	None	Rejected

Korean Air Lines	82-5085, 1987 WL 19606, at *1 (E.D. Pa. Nov. 9, 1987)	[Treaty of Friendship, Commerce and Navigation]			
United States v. Cent. Corp. of Ill.	No. 87 C 5072, 1987 WL 20129, at *1 (N.D. Ill. Nov. 13, 1987)	FCN (Iran) [Treaty of Amity, Economics Relations, and Consular Rights Between the United States and Iran]	Litigant	Great weight	Exec. Int. prevails
Air Canada v. U.S. Dep't of Transp.	843 F.2d 1483 (D.C. Cir. 1988)	Air Carrier MOU [Memorandum of Understanding]	Litigant	Some weight	Exec. Int. prevails
United States v. Guinand	688 F. Supp. 774 (D.D.C. 1988)	VCDR [Vienna Convention on Diplomatic Relations]	Litigant	Great weight	Exec. Int. prevails
United States v. Palestinian Liberation Org.	695 F. Supp. 1456 (S.D.N.Y. 1988)	UN HQ	Litigant	Great weight	Exec. Int. prevails
El Paso County Water Improvement Dist. No. 1 v. Int'l Boundary & Water Comm'n. U.S. Section	701 F. Supp. 121 (W.D. Tex. 1988)	Rio Grande	Litigant	Great weight	Exec. Int. prevails
MacNamara v. Korean Air Lines	863 F.2d 1135 (3rd Cir. 1988)	FCN (Korea)	Amicus	Great weight	Exec. Int. prevails
United States v. Stuart	489 U.S. 353 (1989)	1942 Convention Between the United States	Litigant	Great weight	Exec. Int. prevails

		and Canada Respecting Double Taxation			
Chan v. Korean Air Lines, Ltd.	490 U.S. 122 (1989)	Warsaw	Amicus	None	Rejected
United States v. Cole	717 F. Supp. 309 (E.D. Pa. 1989)	Consular (Yugoslavia)	Litigant	Great weight	Exec. Int. prevails
Ahmad v. Wigen	726 F. Supp. 389 (E.D.N.Y. 1989)	Extradition (Israel)	Litigant	Great weight	Exec. Int. prevails
Sohappy v. Hodel	911 F.2d 1312 (9th Cir. 1990)	Yakima Indian	Litigant	None	Rejected
Ahmad v. Wigen	910 F.2d 1063 (2nd Cir. 1990)	Extradition (Israel)	Litigant	Great weight	Exec. Int. prevails
Heilbronn v. Kendall	775 F. Supp. 1020 (W.D. Mich. 1991)	Extradition (Israel)	Litigant	Great weight	Exec. Int. prevails
United States v. Verdugo-Urquidez	939 F.2d 1341 (9th Cir. 1991)	Extradition (Mexico)	Litigant	None	Rejected
Gov't of Jamaica v. United States	770 F. Supp. 627 (M.D. Fla. 1991)	Extradition (Israel)	Litigant	Great weight	Exec. Int. prevails
Haitian Cntrs. Council, Inc. v. McNary	969 F.2d 1350 (2nd Cir. 1992)	Refugee	Litigant	None	Rejected
Itel Containers Int'l Corp. v. Huddleston	507 U.S. 60 (1993)	Cargo [Customs Convention on Containers, May 18, 1956; Customs Convention on Containers, Dec. 2, 1972]	Amicus	Unclear	Exec. Int. prevails

767 Third Ave. Assocs. v. Permanent Mission of Zaire to the United Nations	988 F.2d 295 (2d Cir. 1993)	VCDR	Amicus	Great weight	Exec. Int. prevails
Barquero v. United States	No. MISC. B-92-13, 1993 WL 328030, at *1 (S.D. Tex. June 15, 1993)	Tax Assistance [Exchange of Information with Respect to Taxes (TIEA)]	Litigant	Great weight	Exec. Int. prevails
Tabion v. Mufti	877 F. Supp. 285 (E.D. Va. 1995)	VCDR	Amicus	Great weight	Exec. Int. prevails
Tabion v. Mufti	73 F.3d 535 (4th Cir. 1996)	VCDR	Amicus	Great weight	Exec. Int. prevails
In re Extradition of Pineda Lara	No. 97 Cr. Misc., 1998 WL 67656 at *1 (S.D.N.Y. Feb. 18, 1998)	Extradition (Czech.)	Litigant	Great weight	Exec. Int. prevails
Int'l Bank for Reconstruction & Dev. v. Dist. of Columbia	996 F. Supp. 31 (D.D.C. 1998)	World Bank Articles of Agreement	Amicus	Great weight	Exec. Int. prevails
Eli Lilly & Co. v. Roussel Corp.	23 F. Supp. 2d 460 (D.N.J. 1998)	Hague Service	None	Great weight	Exec. Int. prevails
In re Extradition of Neto	No. 98 Cr.Misc., 1998 WL 898328, at *1 (S.D.N.Y. Dec. 22, 1998)	Extradition (France)	Litigant	Great weight	Exec. Int. prevails
El Al Israel Airlines, Ltd. v.	525 U.S. 155 (1999)	Warsaw	Amicus	Some weight	Exec. Int. prevails

Tseng					
United States v. Chaparro-Alcantara	37 F. Supp. 2d 1122 (C.D. Ill. 1999)	VCCR [Vienna Convention on Consular Relations]	Litigant	None	Rejected
United States v. Alvarado-Torres	45 F. Supp. 2d 986 (S.D. Cal. 1999)	VCCR	Litigant	Great weight	Exec. Int. prevails
United States v. Torres-Del Muro	58 F. Supp. 2d 931 (C.D. Ill. 1999)	VCCR	Litigant	None	Rejected
Iwanowa v. Ford Motor Co.	67 F. Supp. 2d 424 (D.N.J. 1999)	US–Japan Peace [1951 Treaty of Peace US–Japan Allied Powers]	None	Great weight	Exec. Int. prevails
Mayaguezanos por la Salud y el Ambiente v. United States	198 F.3d 297 (1st Cir. 1999)	US–Euratom Waste Shipping	Litigant	Great weight	Exec. Int. prevails
Iceland S.S. Co. v. U.S. Dep't of the Army	201 F.3d 451 (D.C. Cir. 2000)	US–Iceland MOU [Memorandum of Understanding]	Litigant	Some weight	Exec. Int. prevails
Elcock v. United States	80 F. Supp. 2d 70 (E.D.N.Y. 2000)	Extradition (Germany)	Litigant	Great weight	Exec. Int. prevails
United States v. Li	206 F.3d 56 (1st Cir. 2000)	VCCR; US–China CCR [United States—People's Republic of China Bilateral Convention on Consular Relations]	Litigant and Amicus	Great weight	Inconclusive
United States v. Lombera-	206 F.3d 882 (9th	VCCR	Litigant	Some weight	Inconclusive

Camorlinga	Cir. 2000)				
Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels	221 F.3d 634 (4th Cir. 2000)	1763 Peace	None	Great weight	Exec. Int. prevails
In re World War II Era Japanese Forced Labor Litig.	114 F. Supp. 2d 939 (N.D. Cal. 2000)	US–Japan Peace	Amicus	Great weight	Exec. Int. prevails
United States v. Page	232 F.3d 536 (6th Cir. 2000)	VCCR	Litigant	Great weight	Exec. Int. prevails
United States v. Moreno	122 F. Supp. 2d 679 (E.D. Va. 2000)	VCCR	Litigant	Great weight	Exec. Int. prevails
Blondin v. Dubois	238 F.3d 153 (2nd Cir. 2001)	Hague Child [Hague Convention on the Civil Aspects of International Child Abduction]	None	Great weight	Exec. Int. prevails
United States v. Minjares-Alvarez	264 F.3d 980 (10th Cir. 2001)	VCCR	Litigant	Great weight	Exec. Int. prevails
United States v. Emuegbunam	268 F.3d 377 (6th Cir. 2001)	VCCR	Litigant	Great weight	Exec. Int. prevails
United States v. De La Pava	268 F.3d 157 (2nd Cir. 2001)	VCCR	Litigant	Great weight	Exec. Int. prevails
Tachiona v. Mugabe	186 F. Supp. 2d 383 (S.D.N.Y. 2002)	VCCR	Amicus	Great weight	Rejected
United States v. Lindh	212 F. Supp. 2d 541 (E.D. Va. 2002)	Geneva [Geneva Convention Relative to the Protection of	Litigant	Great weight	Exec. Int. prevails

		Civilian Persons in Time of War and Geneva Convention Relative to the Treatment of Prisoners of War]			
In re Commr's Subpoenas	325 F.3d 1287 (11th Cir. 2003)	MLAT (Canada) [Treaty Between the United States and Canada on Mutual Legal Assistance in Criminal Matters]	Litigant	Great weight	Exec. Int. prevails
Reyes-Sanchez v. Ashcroft	261 F. Supp. 2d 276 (S.D.N.Y. 2003)	CAT [Convention Against Torture]	Litigant	Great weight	Exec. Int. prevails
Hwang Geum Joo v. Japan	332 F.3d 679 (D.C. Cir. 2003)	US–Japan Peace	Amicus	Great weight	Exec. Int. prevails
O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft	342 F.3d 1170 (10th Cir. 2003)	UN Psychotropic [United Nations Convention on Psychotropic Substances]	Litigant	None	Rejected
Collins v. Nat'l Transp. Safety Bd.	351 F.3d 1246 (D.C. Cir. 2003)	CollRegs [International Regulations for Preventing Collisions at Sea]	Litigant	Some weight	Inconclusive
United States v. Al-Hamdi	356 F.3d 564 (4th Cir. 2004)	VCDR	Litigant	Great weight	Exec. Int. prevails
Ehrlich v. Am. Airlines, Inc.	360 F.3d 366 (2d Cir. 2004)	Warsaw	Amicus	Great weight	Exec. Int. prevails
Tachiona v.	386 F.3d	VCDR	Litigant	Great	Exec. Int.

United States	205 (2d Cir. 2004)			weight	prevails
Fund for Animals v. Norton	365 F. Supp. 2d 394 (S.D.N.Y. 2005)	Migratory Birds	Litigant	Great weight	Exec. Int. prevails
Hamdan v. Rumsfeld	415 F.3d 33 (D.C. Cir. 2005)	Geneva	Litigant	Great weight	Exec. Int. prevails
Baxter v. Baxter	423 F.3d 363 (3rd Cir. 2005)	Hague Child	None	Great weight	Exec. Int. prevails
ACLU v. Dep't of Defense	389 F. Supp. 2d 547 (S.D.N.Y. 2005)	Geneva	Litigant	Some weight	Rejected