ESSAY

Defining Executive Deference in Treaty Interpretation Cases

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INTRODUCTION

From establishing partnerships to setting international norms, treaties have always played an important role in managing U.S. relations abroad.[1] Unsurprisingly, questions about who has interpretive power over treaties are not new. Beyond a vague notion that the Executive's treaty interpretations receive *some* deference, however, a coherent framework for evaluating executive treaty interpretations has yet to emerge.

A number of scholars have proposed utilizing administrative law doctrines to address executive deference in treaty interpretation,[2] though none of the proposals is entirely satisfactory. This Essay pro-

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1 *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50–52 (6th ed. 2009); THE FEDERALIST NO. 64, at 353 (John Jay) (E. H. Scott ed.,1898) ("The power of making treaties is an important one, especially as it relates to war, peace, and commerce . . . ."). The United States concluded 1501 treaties between 1789 and 1989. CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 39 (2001) [hereinafter CRS TREATY REPORT].

2 *See infra* Part II.C.

poses a new test for evaluating executive treaty interpretations: an executive treaty interpretation should receive deference if the interpretation is consistent with the treaty text as well as available evidence of the treaty's intended meaning (including its drafting history, the practices of other parties and the Senate's reservations, understandings, and declarations), and if the Executive's reasoning in reaching that interpretation is neither arbitrary nor capricious.[3] This test would grant the Executive substantial interpretive leeway while ensuring that any proposed interpretation is tethered to the terms of the treaty and is subject to meaningful review.

This Essay proceeds in three parts. Part I discusses the Supreme Court's muddled treaty interpretation caselaw as well as administrative law doctrines relevant to treaty interpretation. Part II analyzes the spectrum of modern proposals for executive treaty deference, with particular attention paid to those that borrow from administrative law. Part III proposes an alternative approach to the question of deference that distills existing administrative law tests in order to achieve an optimal balance between executive deference and judicial review. Part III also considers objections to the proposal offered here.

I. THE SUPREME COURT'S CONTEMPORARY APPROACH TO TREATY INTERPRETATION AND EXECUTIVE DEFERENCE

Although treaties are uniquely situated in the U.S. legal system,[4] caselaw dealing with treaty interpretation bears a distinct resemblance to administrative law doctrines. Both feature frequent deference to the executive branch, and both justify deference for similar reasons. For instance, both areas of law tend toward executive deference because of the Executive's expertise in making sensitive policy determinations.[5] This Part discusses the Supreme Court's inconsistent treatment of treaty interpretation and provides an overview of administrative law doctrines relevant to treaty interpretation.

A. Treaty Interpretations and the "Great Weight" Standard

The Supreme Court's treatment of treaty interpretation has changed significantly since the country's founding. For over a century,

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3 This Essay is only concerned with treaties. Although the analysis contained here is likely also relevant to congressional-executive agreements and solely executive agreements, *see* CRS TREATY REPORT, *supra* note 1, at 4–5, both topics are outside the scope of this Essay.

4 *See infra* notes 61–63 and accompanying text.

5 *See infra* notes 32, 40 and accompanying text.

the Court rarely deferred to the Executive's treaty interpretations.[6] "The reasoning behind the early American Court's decisions betrays a view of the interpretation of treaties as a conclusively judicial function. . . . Founding Era courts did not provide deference to the Executive even in questions directly implicating national security issues."[7] Since at least the middle of the twentieth century, however, treaty interpretations offered by the executive branch have received much greater deference.[8] Although the Court has never explained its shift, executive treaty interpretations are now generally accorded "great weight."[9]

The Court first articulated its contemporary treaty interpretation doctrine in *Charlton v. Kelly*,[10] when it heard a habeas petition by a U.S. citizen resisting extradition to Italy for murder. In that case, the Court held that the Executive's interpretation of the treaty in question carried "much weight."[11] Curiously, however, the Court cited no authority for this proposition.[12] The "great weight" standard has since arisen in a number of treaty interpretation cases and has become a canon the Court frequently consults when grappling with treaty interpretations.[13] Nonetheless, the Court's invocation and application of this standard has been erratic.

For instance, in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*,[14] while citing to the "great weight" standard, the Court held that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."[15] Beyond the arguably significant substitution of "respect" for "great weight," the Court seems to also suggest that such respect is "ordinarily due,"

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6 Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 788 (2008) (discussing how, in nineteen cases dealing with treaty interpretation in the early 1800s, the Court agreed with the Executive's interpretation only three times).

7 *Id.* at 789.

8 *See* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

9 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (1987); *see also, e.g.*, *infra* note 13.

10 Charlton v. Kelly, 229 U.S. 447 (1913).

11 *Id.* at 468.

12 *See id.*; *see also* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1742 (2007).

13 *See, e.g.*, Sanchez-Llamas v. Oregon, 548 U.S. 331, 355 (2006); El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999); United States v. Stuart, 489 U.S. 353, 369 (1989); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982); *Kolovrat*, 366 U.S. at 194.

14 El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999).

15 *Id.* at 168.

but only to the Executive's "reasonable views."[16] More recently, in *Hamdan v. Rumsfeld*,[17] the Court summarily dismissed the Executive's proffered interpretation of the phrase "conflict not of an international character" as "erroneous" without even mentioning the "great weight" standard.[18] To further complicate matters, the Court issued the *Hamdan* decision one day after issuing its opinion in *Sanchez-Llamas v. Oregon*,[19] where the Court relied on the "great weight" standard to hold that certain interpretations by the International Court of Justice do not bind domestic courts.[20] Differences in context could account for the omission in *Hamdan*: whereas *Hamdan* focused on debate over a particular treaty term,[21] *Sanchez-Llamas* involved a general interpretation regarding the legal effect of a treaty.[22] Regardless, the conspicuous absence of the "great weight" standard in the *Hamdan* opinion remains indicative of the Court's overtly inconsistent approach to treaty interpretation. The Court often applies the "great weight" standard, "[b]ut the precise nature of that doctrine, its triggering conditions, and the obligations it imposes on judges are far from clear."[23] As one scholar described it, "[t]he inextricable morass of doctrine in treaty interpretation betrays a doctrine without cogent theory."[24]

Whatever its standard, the Court in fact frequently defers to the Executive. Deference to the Executive is "the single best predictor of interpretive outcomes in American treaty cases."[25] Professor Robert Chesney studied sixty-seven treaty interpretation cases and found that the Executive's interpretation prevailed fifty-three times.[26] In another study, Professor David Bederman found that the Executive's interpretation won in nineteen of twenty-three cases.[27] Clearly, the Executive's interpretation frequently prevails.

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16 *See id.*; *see also* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1906 (2005).

17 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

18 *Id.* at 630. The dissenting Justices did notice, however, the omission of the "great weight" standard. *Id.* at 718 (Thomas, J., dissenting).

19 Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

20 *Id.* at 355.

21 *Hamdan*, 548 U.S. at 630.

22 *Sanchez-Llamas*, 548 U.S. at 355.

23 Chesney, *supra* note 12, at 1733.

24 Sullivan, *supra* note 6, at 816.

25 David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1015 (1994).

26 Chesney, *supra* note 12, at 1755.

27 Bederman, *supra* note 25, at 1015 n.422.

Many justifications, both practical and institutional, have been offered in support of deferring to the Executive's treaty interpretations. These include the Executive's control of foreign affairs,[28] the need for flexibility,[29] the Executive's political accountability,[30] and the Executive's expertise in making foreign policy judgments.[31] The justifications for deferring to treaty interpretations resemble the reasons undergirding executive deference in administrative law, although important differences exist between interpretations in the administrative law and treaty interpretation contexts. For instance, the Executive has undisputed authority over U.S. foreign relations, and foreign policy itself is generally regarded as a field that is sensitive to judicial encroachment.[32] Additionally, treaties are subject to an enactment process that is very different from that for statutes,[33] and interpretations are infrequently accompanied by the sort of robust record generated by administrative actions.[34] In fact, contested interpretations frequently manifest for the first time in litigation, either because the United States is a party or because the United States has filed an amicus curiae brief expounding the Executive's position.[35]

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28 *See* Sullivan, *supra* note 6, at 792.

29 *Id.* at 793.

30 Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 591 (2007).

31 *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring))); *see also* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1205–07 (2007).

32 Massachusetts v. EPA, 549 U.S. 497, 534 (2007) (noting that "the President has broad authority in foreign affairs"); Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005) (highlighting the Supreme Court's "customary policy of deference to the President in matters of foreign affairs"); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) (describing the President's "unique responsibility" in matters of foreign and military affairs); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (explaining that "the very nature of executive decisions as to foreign policy is political, not judicial").

33 *See infra* notes 60–63 and accompanying text.

34 *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 cmt. c (1987) (noting that courts will sometimes request that the Department of Justice file an amicus curiae brief to present the government's views regarding the interpretation of a treaty).

35 *E.g.*, Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010) (amicus); Medellin v. Texas, 552 U.S. 491, 513 (2008) (amicus); Hamdan v. Rumsfeld, 548 U.S. 557, 557 (2006) (party); El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) (amicus); United States v. Stuart, 489 U.S. 353, 353 (1989) (party).

B. *Administrative Deference:* Chevron *and* Skidmore

Although important differences exist between statutes and treaties, including the Executive's role in each, the justifications offered in support of deference in each context overlap. Executive agencies tasked with implementing legislation often face the prospect of interpreting vague statutory terms. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[36] When agencies offer interpretations of vague statutory terms, their interpretations are generally accorded some degree of deference commensurate with the amount of authority delegated to the agencies by Congress.[37] This deference is grounded in the political accountability of agencies through the Executive,[38] the need for administrative flexibility,[39] and the expertise of agencies in grappling with policy judgments.[40] Administrative law thus provides a useful starting point for formulating a cohesive approach to executive treaty interpretations.

When evaluating statutory interpretations in administrative law, the Supreme Court utilizes a dualistic approach that confers varying degrees of deference depending on whether Congress intended, either explicitly or implicitly, to give the agency power to issue legally binding rules and statutory interpretations.[41] When the requisite intent is found, the Court uses the highly deferential *Chevron* test, and if no such intent is found, the Court uses the ostensibly less deferential *Skidmore* balancing test.[42] Regardless of which test the Court uses, however, Congress can always define the limits of agencies' interpretive license. Congress can limit agency leeway by carefully choosing statutory language, because agencies may only act within the parameters of congressional enactments, and reviewing courts defer to the unambiguously expressed intent of Congress.[43]

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36 Morton v. Ruiz, 415 U.S. 199, 231 (1974).

37 United States v. Mead Corp., 533 U.S. 218, 226–29 (2001).

38 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518.

39 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005); Smiley v. Citibank (S.D.), N. A., 517 U.S. 735, 742 (1996).

40 *Chevron*, 467 U.S. at 865–66; Scalia, *supra* note 38, at 514–15.

41 *Mead*, 533 U.S. at 227–29; *Chevron*, 467 U.S. at 865–66; Scalia, *supra* note 38, at 514–15.

42 *Mead*, 533 U.S. at 226–29.

43 *See infra* text accompanying note 47. By contrast, treaties are drafted principally by the Executive and are not subject to approval by both houses of Congress. *See* U.S. CONST. art. II, § 2, cl. 2.

The *Chevron* test is derived from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[44] a case concerning the Environmental Protection Agency's interpretation of the term "stationary source" in the Clean Air Act.[45] In *Chevron*, the Supreme Court created a binary test for evaluating executive interpretations of law.[46] First, under *Chevron* Step One, the court evaluating an agency's interpretation of a statute must determine whether Congress has decided the issue at hand; if the contested term is unambiguous, then the inquiry ends because courts and agencies "must give effect to the unambiguously expressed intent of Congress."[47] If the statutory term is ambiguous, however, then the court proceeds to *Chevron* Step Two, and must determine "whether the agency's answer is based on a permissible construction of the statute."[48] Although *Chevron*'s broad discretionary approach has its detractors,[49] the Court's exposition of the test "is a candid recognition that assessments of policy are sometimes indispensable to statutory interpretation—a point with particular importance in the context of relations with other nations."[50]

When congressional intent that an agency's actions carry the force of law is not evident, courts apply the flexible balancing test originally articulated in *Skidmore v. Swift & Co*.[51] The *Skidmore* test acknowledges that agencies that do not have the power to act with legal force still have useful, relevant expertise.[52] Thus, in evaluating an agency interpretation under *Skidmore*, a court's deference inquiry weighs "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[53] Studies of contemporary *Skidmore* cases suggest that *Skidmore* operates as a sliding scale of deference, whereas *Chevron* operates in a binary fashion.[54]

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

45 *Id.* at 865.

46 *Id.* at 842.

47 *Id.* at 842–43.

48 *Id.* at 843.

49 Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 673 (2000).

50 Posner & Sunstein, *supra* note 31, at 1194.

51 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

52 *See id.* at 140.

53 *Id.*

54 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS 644–45 (2010).

Despite the differences in the articulation of the two tests, a growing body of evidence[55] suggests that, in practice, reviewing courts' choice of doctrine has little effect on the outcome of a case. One study examined 1014 Supreme Court opinions issued from 1984 to 2005 and found that the Court affirmed 76.2% of agency actions under *Chevron* and 73.5% of agency actions under *Skidmore*.[56] Thus, courts evaluating agency interpretations under either test are affirmed at similar rates. However, a separate study of cases applying *Chevron* from 1989 to 2005 found an affirmance rate of only 67% at the Supreme Court and 64% among circuit courts,[57] suggesting an overall decline in the rate of affirmance under *Chevron*.[58]

It is possible that these affirmance rates reflect a tendency among agencies to act more or less conservatively depending on which doctrine an agency anticipates a reviewing court will apply. For example, if *Chevron* indeed provides greater deference to agencies, then an agency may purposely offer a more radical interpretation when it anticipates that a reviewing court will utilize *Chevron* over *Skidmore*. If true, such a tendency could explain the similarities in affirmance rates. This tendency is not readily amenable to proof, however, because testing the hypothesis would require internal decisionmaking information. Moreover, jurisprudential developments since *Chevron* have further muddied the *Chevron-Skidmore* dialectic such that agencies may not be able to reliably forecast which doctrine a reviewing court will use.[59]

Additionally, the nature of the data discussed here differs in important respects from treaty interpretation cases, which could impact affirmance rates were either test applied in the treaty interpretation context. That is, administrative law cases generally involve interpretations offered by agencies rather than by the Executive and concern areas of policy less sensitive than foreign relations. As a result, importing either *Chevron* or *Skidmore* into the treaty interpretation con-

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55 *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464–66 (2005); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 84–88 (2011); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 173–75 (2010).

56 William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1089–90, 1142 (2008).

57 Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825, 849 (2006).

58 Pierce, *supra* note 55, at 83–84.

59 *See* Bressman, *supra* note 55, at 1457–69; Ann Graham, *Searching for* Chevron *in Muddy* Watters*: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 236 (2008).

text could produce different affirmance rates than empirical studies in the administrative law context have found. This point notwithstanding, the data suggests that the *Chevron* and *Skidmore* tests share common tenets.

II. Treaty Interpretation Proposals

Although the justifications for deference in treaty law and administrative law overlap, the manner in which statutes arise differs considerably from the process of treaty formation and ratification. *Chevron* and *Skidmore* deference apply to agency interpretations of statutes duly enacted by Congress.[60] By contrast, treaties are negotiated by the Executive and are subject to advice and consent by two-thirds of the Senate, with no role for the House of Representatives to play.[61] Additionally, treaties have a dual nature: they create international obligations[62] while simultaneously enjoying domestic status as "supreme Law of the Land."[63] Because of the divergent legal environments within which statutes and treaties occur, proposals for evaluating executive treaty interpretation diverge on the appropriate amount of deference to give the Executive. Broadly speaking, there are three approaches that reviewing courts may adopt: no deference, total deference, or partial deference.[64] This Part considers each in turn.

A. No-Deference Proposals

Under an approach favoring no deference, treaty interpretation is exclusively the province of courts; the Executive does not receive any deference from courts undertaking the task of interpreting treaty text. This theory is generally grounded in a conception of treaty interpretation as a quintessentially judicial function with no room for input from

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60 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

61 U.S. Const. art. II, § 2, cl. 2; *see also* INS v. Chadha, 462 U.S. 919, 955 (1983) (noting that the Senate's treaty power is one of only four constitutional provisions that allow one house of Congress to "act alone with the unreviewable force of law, not subject to the President's veto"); CRS Treaty Report, *supra* note 1, at 6–7.

62 *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (stating that treaties constitute binding obligations between treaty partners); Restatement (Third) of Foreign Relations Law of the United States § 321 (1987) ("Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.").

63 U.S. Const. art. VI. The extent to which treaties carry domestic force depends on whether a treaty is considered self-executing. *See* Restatement (Third) of Foreign Relations Law of the United States § 111(3)–(4) (1987). The topic of self-execution is beyond the scope of this Essay.

64 *See* Chesney, *supra* note 12, at 1760–70; Sullivan, *supra* note 6, at 793.

the Executive. "Proponents of this model generally decry any movement away from de novo review of interpretive questions as an abdication of the *Marbury* prerogative of the Judiciary to 'say what the law is.'"[65]

This position finds some support in the Constitution because treaties are listed among the subjects to which "[t]he judicial Power" of Article III extends.[66] Article III does not settle the matter, however, insofar as complete judicial authority over treaties conflicts with the Executive's power over foreign affairs.[67] Excluding the Executive from treaty interpretation, a practice for which his unique experience and insight in foreign affairs makes him well suited, would substantially impede treaty implementation. Furthermore, the no-deference approach fails to comport with much of the Court's treaty interpretation caselaw.[68] For these reasons, advocates of no deference are few and far between.[69] Instead, some amount of deference is due by virtue of the Executive's role in, and experience with, foreign affairs.

B. Total-Deference Proposals

Total deference, by contrast, would grant executive treaty interpretations dispositive weight. That is, when the Executive offers his interpretation of treaty terms to a court considering the issue, the court should in all instances defer to the Executive's interpretation. "Proponents of total deference highlight the political nature of treaties as a part of international relations as well as the flexibility and democratic accountability of the Executive."[70] The Executive is a politically accountable actor, and managing international political relationships requires flexibility. Moreover, the Executive already has independent power to enforce treaties and to manage U.S. foreign relations.[71] "[I]n treaty cases there is commonly a different basis for deference that cannot be ignored: the President's independent power

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65 Sullivan, *supra* note 6, at 799 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also* Samuel R. Feldman, Note, *Not-So-Great Weight: Treaty Deference and the Article 10(a) Controversy*, 51 B.C. L. REV. 797, 810 (2010).

66 U.S. CONST. art. III, § 2.

67 *See supra* note 32 and accompanying text.

68 *See, e.g.*, Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010); Medellin v. Texas, 552 U.S. 491, 513 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331, 355 (2006); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85, 184 n.10 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

69 *See* Sullivan, *supra* note 6, at 799 n.100.

70 *Id.* at 800.

71 *See supra* note 32 and accompanying text.

not only to enforce treaties, but also to set the foreign policy of the United States."[72]

The total-deference theory also has attendant flaws, however. Most notably, total deference creates unchecked executive power because of the Executive's almost exclusive role in drafting treaty text. As a result, total deference could lead to manipulation and bad faith interpretation of U.S. treaty obligations. These risks are disconcerting in their own right, but they carry additional importance because persistent bad-faith treaty conduct would undermine the legitimacy of U.S. treaties and produce retaliatory interpretations abroad.[73]

The potential for self-dealing resulting from unfettered deference is particularly worrisome in the treaty interpretation context because the Executive is almost exclusively responsible for negotiating treaty text.[74] Unchecked interpretive power over self-drafted terms would create a sphere of unrestrained executive power because the Executive would have plenary interpretive authority without the prospect of any meaningful checks or balances,[75] an anomalous outcome in our constitutional system.[76] Similarly, total deference to the Executive creates separation of powers concerns because total discretion would rob the judiciary of its role in treaty interpretation.[77] For these reasons, total deference has also received scant support.[78] A suitable treaty interpretation framework must maintain a role for courts to play.

C. Partial-Deference Proposals

Unsurprisingly, most proposals for deference in treaty interpretation afford the Executive partial deference, whereby the Executive's proposed interpretation holds sway, but is not determinative.[79] The majority of partial-deference tests originate in administrative law because there is an acknowledged "fit" between administrative deference and treaty deference: both treaty interpretation and statutory in-

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72 Wu, *supra* note 30, at 592.

73 *See* Sullivan, *supra* note 6, at 801 n.112.

74 *See* CRS TREATY REPORT, *supra* note 1, at 6.

75 *See infra* notes 92–94 and accompanying text.

76 *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 639 (1996).

77 *See* U.S. CONST. art. III, § 2; Sanchez-Llamas v. Oregon, 548 U.S. 331, 334 (2006) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

78 *See* Sullivan, *supra* note 6, at 802.

79 *See, e.g.*, Bradley, *supra* note 49, at 726; Posner & Sunstein, *supra* note 31, at 1195; Sullivan, *supra* note 6, at 816–17.

terpretation in administrative law contexts rely on similar practical and theoretical rationales.[80] "[T]he argument for executive authority should be familiar, for courts regularly defer to executive interpretations of ambiguous statutory provisions [in administrative law]."[81] Within the broader set of partial-deference doctrines, proposals advocating the use of the *Chevron* and *Skidmore* tests have predominated, and "*Chevron*-style deference is the current academic darling."[82]

1. Partial Deference Based on Chevron

Under a *Chevron*-style approach to treaty interpretation, courts would import the *Chevron* test when deciding the meaning of treaty terms. That is, courts would defer to any reasonable reading of ambiguous treaty terms. For example, in *Hamdan*, if the Court had applied this test and found the phrase "conflict not of an international character"[83] ambiguous, then the Court would have deferred to the Executive's interpretation so long as it was a permissible construction of the term.

Advocates of *Chevron*-style deference to executive treaty interpretations argue that the justifications underlying *Chevron* deference match those that counsel in favor of broad deference to the Executive's treaty interpretations.[84] In the treaty interpretation context, the *Chevron* test would acknowledge the Executive's unique role in managing foreign relations and the Executive's overall political accountability.[85] Additionally, as in the administrative law context, "courts should generally defer to the executive on the ground that 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."[86] In response to concerns regarding excessive deference,[87] proponents highlight that the *Chevron* doctrine contains integrated limitations on deference, particularly insofar as unambiguous language or an unreasonable interpretation results in courts affording the Executive no deference.[88]

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80 *See* Posner & Sunstein, *supra* note 31, at 1193–94; *see also* Bradley, *supra* note 49, at 703–04; Chesney, *supra* note 12, at 1765–66.

81 Posner & Sunstein, *supra* note 31, at 1193.

82 Sullivan, *supra* note 6, at 794.

83 Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).

84 *See, e.g.*, Bradley, *supra* note 49, at 679–80, 682–83; Posner & Sunstein, *supra* note 31, at 1207; *see also id.* at 1177 n.14 (distinguishing the two proposals).

85 Sullivan, *supra* note 6, at 804.

86 Posner & Sunstein, *supra* note 31, at 1176.

87 *See, e.g.*, *supra* Part II.B.

88 Bradley, *supra* note 49, at 674, 703.

Applying the *Chevron* approach to treaty interpretation is fairly problematic, however, due to its strict bipartite operation. *Chevron* is inflexible, which can produce both insufficient and excessive deference in a variety of circumstances. First, use of *Chevron* in treaty interpretation cases could lead to insufficient deference because, under *Chevron*, interpretations that are not legally binding do not receive deference.[89] As a result, a number of executive treaty interpretations would receive no deference because the government frequently offers treaty interpretation for the first time in court briefs, either as a party or as amicus curiae.[90] Likewise, "the Executive may be engaged in regularized diplomatic efforts that require reliance on a particular interpretation of the treaty in order to gain corresponding political advantages abroad."[91] Deference may well be appropriate in such a situation, but a court might refuse deference based on the terms of the treaty because *Chevron*'s rigid dictates only afford deference when the term at issue is ambiguous and the proposed interpretation is permissible. *Chevron* would leave insufficient room for realpolitik considerations.

Second, use of *Chevron* in the treaty interpretation context would provide too much deference in other ways, giving the Executive vexing unchecked power. In the traditional *Chevron* scenario, "[i]f the reviewing court is effectively bound by the agency's interpretation of the statute, separation remains between the relevant lawmaker (Congress) and at least one entity (the agency) with independent authority to interpret the applicable legal text."[92] By contrast, because the Executive has almost exclusive power over treaty drafting,[93] "there is no independent interpreter; the [Executive] lawmaker has effective control of the exposition of the legal text that it has created."[94] Ultimately, although the *Chevron* approach affords the Executive substantial interpretive flexibility, the test operates too rigidly to prove useful in treaty interpretation, an especially sensitive context given the implications treaty interpretations can have for U.S. international relations.

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89 *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

90 *See supra* notes 34–35.

91 Sullivan, *supra* note 6, at 806.

92 Manning, *supra* note 76, at 639.

93 CRS TREATY REPORT, *supra* note 1, at 6.

94 Manning, *supra* note 76, at 639.

2. *Partial Deference Based on* Skidmore

Others have argued for deference to executive treaty interpretations in the style of *Skidmore*.[95] Under this approach to interpretive deference, courts would afford deference by balancing various factors, including how thoroughly the Executive considered his interpretation, the validity of his reasoning, the interpretation's temporal consistency, and "all those factors which give it power to persuade, if lacking power to control."[96]

Advocates of the *Skidmore* approach to treaty interpretation highlight the broad, flexible inquiry involved, which gives courts the ability to evaluate the Executive's interpretation in light of a variety of countervailing considerations.[97] This approach acknowledges that the Executive warrants some degree of deference because treaties implicate U.S. foreign relations.[98] At the same time, by maintaining a role for courts to play, a *Skidmore* approach to treaty interpretation would also respect the judiciary's role in explicating legal text given that treaties carry the force of law.[99] These competing concerns weigh in favor of an approach that allocates interpretive authority to the Executive while still tethering interpretations to more substantive judicial review than that offered under total deference or *Chevron* deference.

Despite its appeal, the *Skidmore* approach to treaty interpretation also has significant weaknesses. First, the extent to which *Skidmore* accounts for unambiguous text is unclear.[100] Any framework for evaluating treaty interpretations must account for the unambiguous intent of the Senate, because reservations, understandings, and declarations attached to treaties have conclusive legal effect.[101] Additionally, resorting to *Skidmore* in treaty interpretation creates the possibility that *Skidmore*'s vague, multifactored test will result "in a great deal of uncertainty and inconsistency concerning the degree of deference given to [executive] interpretations."[102] The concern is that *Skidmore*'s ill-defined contours will produce applications as opaque or

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95 *See, e.g.*, Sullivan, *supra* note 6, at 779; Feldman, *supra* note 65, at 827.

96 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

97 *See, e.g.*, Sullivan, *supra* note 6, at 810.

98 *Id.*

99 U.S. CONST. art. VI, § 1, cl. 2; Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

100 Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1280 (2007).

101 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. b (1987).

102 Bradley, *supra* note 49, at 668.

inconsistent as contemporary treaty doctrine. Indeed, in the administrative law context, this fear has borne fruit. Studies examining the application of *Skidmore* reveal that courts have "disparate approaches to which factors should be applied first, how the factors relate to each other, and what each factor means."[103] Courts generally "lack a coherent conception of how *Skidmore*'s sliding scale should function."[104]

Importing this "haphazard"[105] approach to the treaty interpretation context would do little to improve treaty interpretation jurisprudence because the status quo is already plagued by incoherence and confusion. Although it is possible that *Skidmore*'s enumerated factors would offer some improvement over the Court's nebulous contemporary approach to treaties, any improvement is likely to be marginal because of *Skidmore*'s open-ended invitation to "all those factors which give [the interpretation] power to persuade, if lacking power to control."[106] Instead, deference in treaty interpretation requires a more circumscribed inquiry.

Skidmore opponents also allege that the test risks eliminating executive flexibility, thereby ossifying policy because the *Skidmore* test considers the consistency of proffered interpretations over time.[107] This argument suggests that the Executive would have great difficulty abandoning a predecessor's interpretation of treaty terms because changing interpretations counsels against granting deference under *Skidmore*.[108] This objection, however, is largely unfounded. In the administrative law context, the Court has explicitly held that a change of course by the Executive does *not* subject him "to more searching review."[109] The Court allows the Executive to adopt new interpretations so long as he acknowledges that a change has occurred and provides an independently permissible reason for the new interpretation.[110]

This response, however, gives rise to two further, related concerns. First, requiring the Executive to acknowledge a change in interpretation could embarrass him when changes are the result of uncomfortable facts. For instance, the change may be prompted by the government's inability to comply with a treaty under the original

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103 Hickman & Krueger, *supra* note 100, at 1281.

104 *Id.* at 1291.

105 *Id.* at 1293.

106 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

107 United States v. Mead Corp., 533 U.S. 218, 247–50 (Scalia, J., dissenting).

108 *Id.*

109 FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009).

110 *Id.* at 1810–11.

interpretation, or the change may be in response to conduct of another party to the treaty. Second, the potential for embarrassment resulting from an acknowledged change could encourage the Executive to issue vague, equivocal interpretations to avoid the need to acknowledge or explain subsequent changes. This would rob the public generally, and U.S. treaty partners in particular, of important information, impeding the administration and management of treaties. Thus, although *Skidmore* provides more meaningful judicial review than *Chevron*, the test remains too difficult to reliably apply and risks damaging U.S. foreign relations.

Ultimately, none of the previously discussed approaches to interpretive deference is entirely satisfactory in the treaty interpretation context. Rather than rely on no deference, total deference, *Chevron*, or *Skidmore*, the Court should adopt a new framework for treaty interpretation that combines elements of existing administrative law doctrines with academic insights to create a meaningfully different standard that would avoid the risks discussed above and improve the legitimacy of treaty interpretation caselaw.

III. A New Balancing Test for Deference to Treaty Interpretations

Although both *Chevron* and *Skidmore* have appeal, each has serious drawbacks.[111] Moreover, the tests seem to produce similar affirmance rates despite their apparent differences.[112] A coherent, workable test for interpretive deference must afford the Executive flexibility, based on the Executive's political accountability and role in foreign affairs, while maintaining a meaningful role for courts to play. Moreover, any such framework should clearly enumerate discrete considerations in a way that is neither excessively nor insufficiently deferential. This Part details a new test for evaluating executive treaty interpretations and addresses potential objections.

The Court should supplant the extant doctrinal morass with a variation of the reasonableness framework initially proposed by Professor David Zaring and further expounded by Professor Richard Pierce.[113] They propose that an agency's interpretation should warrant deference if it is consistent with the relevant statute and the avail-

111 *See supra* Part II.C.

112 *See supra* notes 55–58 and accompanying text.

113 Zaring, *supra* note 55, at 135. Professor Zaring advocates replacing existing administrative law doctrines with a blanket reasonableness standard. *Id.* at 138–39; *see also* Pierce, *supra* note 55, at 95–96.

able evidence, and if the agency has provided an adequate explanation of how it reasoned from the relevant statute and available evidence to reach its conclusions.[114] This framework is incorporated here with modifications to account for features unique to the treaty interpretation context.

Courts evaluating executive treaty interpretations should determine the extent to which deference is warranted by weighing the following factors: (1) fidelity of the Executive's interpretation to the treaty text; (2) congruity between the executive interpretation and other available evidence, e.g., the treaty's drafting history, the practices of other parties, and the Senate's reservations, understandings, and declarations; and (3) capriciousness of the considerations that led to the interpretation. This proposal simplifies treaty deference in a way that balances executive discretion and judicial review while mitigating the shortcomings of *Chevron* and *Skidmore*.

The first consideration—the degree to which the Executive's interpretation tracks the text of the relevant treaty—ensures that the Executive is bound by the text, which includes reservations, understandings, and declarations attached to the treaty that unilaterally indicate interpretive intent.[115] This prong subsumes *Chevron* Step One[116] and obviates concerns that *Skidmore* inadequately accounts for unambiguous text.[117] Additionally, under *Chevron*, the notoriously open-ended question of determining whether text is ambiguous[118] has caused concern that judges' independent opinions seep into determinations of ambiguity and politicize outcomes, a point confirmed by surveys of cases.[119] By including fidelity to treaty text as part of an overall balancing approach rather than as a dispositive factor, the risk of judicial overreach is mitigated, though not completely eliminated. The Senate's reservations, understandings, and declarations are included here because attaching indications of interpretive intent to a treaty impacts the treaty's legal effect.[120] That is, a unilateral state-

114 Pierce, *supra* note 55, at 95.

115 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. b (1987).

116 *See supra* note 47 and accompanying text.

117 *See* Hickman & Krueger, *supra* note 100, at 1280.

118 *See* HICKMAN & PIERCE, *supra* note 54, at 567.

119 "[T]he application of the *Chevron* framework is greatly affected by the judges' own [political] convictions." Miles & Sunstein, *supra* note 57, at 825. It is possible "that the deference afforded by judges utilizing *Chevron* in the treaty interpretation context would be based on internal assessment of the foreign effects of their decisions . . . ." Sullivan, *supra* note 6, at 805.

120 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. b (1987).

ment of understanding attached to a treaty is binding. "Since the President can make a treaty only with the advice and consent of the Senate, [the President] must give effect to conditions imposed by the Senate on its consent."[121]

Second, courts should consider the relation between the Executive's interpretation and other available evidence, which encompasses a number of interpretive aids. Available evidence would include, but is not necessarily limited to, the treaty's drafting history, its overall purpose and structure, and the circumstances of negotiation—including interpretations agreed upon during negotiations, changes in relevant circumstances, and interpretations evinced by other parties to the treaty.[122] Domestic courts already utilize many of these interpretive tools when evaluating treaties.[123] Nonetheless, collecting these interpretive tools as part of a determinate test would reduce the ambiguity that has become a hallmark of contemporary treaty interpretation caselaw. This prong is also clearer than both *Chevron* and *Skidmore*. In *Chevron*, one of the primary concerns is whether a term is ambiguous, but the interpretive tools available for that determination are ill defined.[124] By contrast, *Skidmore* utilizes an amalgam of overlapping, vague factors, and the Court has never explained how *Skidmore* should operate.[125]

Third, courts should review the Executive's reasoning for arbitrariness. Agency actions—including statutory interpretations—are always subject to review for arbitrariness under the Administrative Procedure Act.[126] Executive interpretations of treaties should be subjected to the same analysis. Under this prong, courts "must consider

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121 *Id.*

122 This Essay avoids discussing whether the domestic legislative history of a treaty or its implementing legislation should play a role in treaty interpretation cases. Although such legislative history could prove useful, it also faces meaningful objections. For a brief discussion of the Court's vacillation on this point, see Bederman, *supra* note 25, at 997–1002.

123 *See, e.g.*, El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999); Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 466–67 (1995); Air Fr. v. Saks, 470 U.S. 392, 399 (1985); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185–88 (1982); Pierre v. Attorney Gen., 528 F.3d 180, 187 (3d Cir. 2008); Auguste v. Ridge, 395 F.3d 123, 142 (3d Cir. 2005).

124 HICKMAN & PIERCE, *supra* note 54, at 567–70.

125 Hickman & Krueger, *supra* note 100, at 1257–59.

126 5 U.S.C. § 706(2)(A) (2006). The Court articulated its arbitrary and capricious test in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). There, the Court stated that an agency's interpretation

> would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the

whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[127] Unlike administrative interpretations, however, treaty interpretations infrequently manifest themselves prior to litigation and rarely include an extensive record detailing the reasoning process.[128] Furthermore, executive treaty interpretations may be based on classified information. Discerning and evaluating the reasoning process is thus intrinsically more difficult in the context of treaty interpretations. As such, the algorithm for examining the Executive's reasoning with respect to the meaning of a treaty should closely resemble that for determining whether an agency's action is arbitrary or capricious. That is, an executive treaty interpretation should not receive deference if found to be arbitrary, capricious, or an abuse of discretion.[129] The Executive should not receive deference if he "entirely failed to consider an important aspect of the problem, offered an explanation for [his interpretation] that runs counter to the evidence . . . or is so implausible that it could not be ascribed to a difference in view or the product of [executive] expertise."[130] This prong of the test explicitly ensures that executive interpretations are not arbitrary, capricious, or made in bad faith—something that *Chevron* arguably does not do, as scholars and judges alike have pointed out.[131] Moreover, this prong articulates clearer factors than those utilized under *Skidmore*'s "power to persuade, if lacking power to control" standard.[132]

Judicial analysis under the third prong is likely to depend on the content of briefs filed by the United States either as a party to litigation or as amicus curiae because treaty interpretations frequently emerge in the context of legal challenges.[133] At the same time, this test must account for situations where the Executive adopts a treaty interpretation based on considerations that cannot be publically disclosed, such as sensitive political arrangements or secret information. Simply stating in a brief that an interpretation is based on confidential

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> evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.

127 *Motor Vehicle Mfrs.*, 463 U.S. at 43 (internal quotation marks omitted).

128 *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 cmt. c, § 326 note 2 (1987) (noting that there is occasional doubt as to executive interpretation of treaties, but suggesting that courts frequently seek amici briefs from the executive branch).

129 *See Motor Vehicle Mfrs.*, 463 U.S. at 41 (quoting 5 U.S.C. § 706(2)(A)).

130 *Id.* at 43.

131 *See* Pierce, *supra* note 55, at 79–80; Zaring, *supra* note 55, at 162–64.

132 *See supra* Part I.B.

133 *See supra* note 34.

information likely would not satisfy judicial scrutiny under this prong due to the risk that the Executive would use claimed secrecy as an end run around judicial review. In camera filings provide a palatable solution to this problem. In camera filings put private parties at a disadvantage to the extent that individuals cannot respond to undisclosed claims, and the Court has expressed some doubts about in camera filings in cases touching on foreign affairs.[134] However, courts have used in camera filings in national security contexts,[135] and in camera filings maintain secrecy while facilitating judicial review.

Overall, by refining and combining aspects of multiple administrative law doctrines, the test proposed here is both simpler and more robust than either *Chevron* or *Skidmore* alone because the test enumerates a discrete framework aimed at allocating interpretive authority between both the Executive and the courts. Moreover, this test anchors the Executive to unambiguous terms and unilateral expressions of intent while providing an analytical framework with enough flexibility to avoid the risks inherent in *Chevron*'s binary approach, and enough clarity to avoid the problem of *Skidmore*'s haphazard application. Additionally, this test respects both the Executive's role in the formation, interpretation, and implementation of treaties and the judiciary's role in explicating legal meaning.

The test proposed here is subject to one of the central objections facing other administrative law approaches to treaty interpretation: administrative deference is premised on congressional delegation,[136] but treaties do not readily admit of inquiry into legislative delegation. Treaties are resistant to this sort of analysis for two reasons. First, treaties are primarily drafted by the Executive and do not require full congressional approval.[137] Because administrative deference relies on delegation by both houses of Congress,[138] executive claims to interpretive authority over treaties are less convincing due to the reduced role of the House of Representatives. Second, treaties implicate the intentions and anticipated interpretations of foreign sovereigns and thus

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134 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 582–83 (2004) (Thomas, J., dissenting) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)); United States v. Nixon, 418 U.S. 683, 706 (1974); *Chi. & S. Air Lines, Inc.*, 333 U.S. at 111. Despite these reservations, the Court's reluctance has not impeded the use of in camera review in sensitive contexts.

135 In *Hamdi*, the lower court "ordered the Government to turn over numerous materials for *in camera* review," including highly sensitive information. *Hamdi*, 542 U.S. at 513–14.

136 *See* United States v. Mead Corp., 533 U.S. 218, 226–29 (2001); Scalia, *supra* note 38, at 516.

137 *See* U.S. CONST. art. II, § 2.

138 *See Mead*, 533 U.S. at 226–29; Scalia, *supra* note 38, at 516.

rarely provide guidance regarding interpretive power.[139] "[E]xplicit delegations or other evidence of intent, such as speeches and treaty-drafting history, only rarely appear in treaties. Treaties, after all, are written to bind two or more governments and therefore do not usually give precise instructions to domestic actors."[140]

The search for delegation in the treaty interpretation context is not nearly as problematic as it may seem, however. "[W]hen a treaty is ambiguous, some institution—either the executive or the judiciary—has to interpret it, and hence some kind of presumed delegation is unavoidable."[141] Some amount of "presumed delegation to the executive seems both more natural and better than a delegation to the federal courts"[142] considering the role that the Executive already plays in drafting treaty text, enforcing treaties, and setting the foreign policy of the United States.[143] A presumed delegation to the executive does not end the matter, however, because the Senate maintains the power to reject treaties and to attach binding reservations, understandings, and declarations to them.

Conclusion

The Supreme Court's caselaw on treaty interpretation has remained consistently murky for decades. Put simply, "[t]he current judicial doctrine of deference to executive treaty interpretations is entirely unhelpful."[144] The Court's perplexing jurisprudence produces uncertainty and inconsistency in an area of law critical to the ability of the United States to manage international relations effectively. This Essay proposes a new approach to treaty interpretation that requires the court to consider the fidelity of the Executive's interpretation to the treaty text, the congruity between the executive interpretation and other available evidence, and the capriciousness of the considerations that led to the interpretation. This approach seeks to capitalize on the advantages offered by other administrative law tests while mitigating their individual shortcomings. By adopting the test proposed here, the Court can bring an end to decades of uncertainty, thereby improving the legitimacy of treaty interpretation decisions.

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139 *See* Wu, *supra* note 30, at 592.

140 *Id.*

141 Posner & Sunstein, *supra* note 31, at 1201 n.100.

142 *Id.*

143 Wu, *supra* note 30, at 592; *see supra* note 93 and accompanying text.

144 Sullivan, *supra* note 6, at 786; *see also* Bederman, *supra* note 25, at 954 ("Treaty interpretation is bankrupt because of unbridled deference.").