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*Chevron*izing Foreign Relations Law

ABSTRACT. A number of judge-made doctrines attempt to promote international comity by reducing possible tensions between the United States and foreign sovereigns. For example, courts usually interpret ambiguous statutes to conform to international law and understand them not to apply outside of the nation's territorial boundaries. The international comity doctrines are best understood as a product of a judicial judgment that in particular contexts the costs of deference to foreign interests are lower than the benefits to American interests. Sometimes Congress balances these considerations and incorporates its judgment in a statute, but usually it does not. In such cases, executive interpretations should be permitted to trump the comity doctrines, as long as those interpretations are reasonable. This conclusion is supported both by considerations of institutional competence and by the distinctive position of the President in the domain of foreign affairs. It follows that if the executive wants to interpret ambiguous statutes to conflict with international law or to apply extraterritorially, it should be permitted to do so. The analysis of the interpretive power of the executive can be justified by reference to the *Chevron* doctrine in administrative law, which similarly calls for deference to executive interpretation of statutory ambiguities. Sometimes the *Chevron* doctrine literally applies to executive interpretations; sometimes it operates as a valuable analogy. At the same time, the *Chevron* principle is qualified by doctrines requiring a clear congressional statement, especially when constitutionally sensitive rights are involved. These claims have many implications for legal issues raised by the war on terror, including those explored in the *Hamdi* and *Hamdan* cases.

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INTRODUCTION

Federal law contains a range of international comity doctrines, developed by judges to reduce tensions between the United States and other nations. These doctrines instruct courts to interpret American law in a way that avoids conflict with, or offense to, foreign sovereigns. The international comity doctrines are a subset of what we shall call international relations doctrines – doctrines that control how courts decide cases that influence foreign relations but that do not always require courts to defer to the interests of foreign sovereigns. Our modest goal here is to offer a sympathetic reconstruction of the underpinnings of these doctrines. Our more ambitious goal is to suggest that courts should generally draw on established principles of administrative law to permit executive interpretations of ambiguous statutory terms to overcome the international relations doctrines. This approach would greatly simplify current law; it would also allocate authority to the executive, which is in the best position to balance the competing interests.

To understand the operation of the international relations doctrines, consider the following problems:

> (1) The Civil Rights Act of 1964 forbids discrimination on the basis of sex.[1] American businesses operating in Saudi Arabia discriminate against female workers, some of whom are also Americans. The workers bring suit, contending that the statute has been violated. Under the presumption against extraterritoriality, ambiguous statutes are not applied to conduct that occurs on foreign territory.[2] It follows that unless Congress has clearly said otherwise, the prohibition on sex discrimination applies only within the physical boundaries of the United States.[3] The usual rationale would be to prevent offense to Saudi Arabia. But does Saudi Arabia really care about sex discrimination by American businesses practiced against American employees? Even if it does, does it care enough that the discriminatory practice should be tolerated? The executive branch, which has the best

1. 42 U.S.C. § 2000e-2 (2000).

2. *See* Small v. United States, 544 U.S. 385, 388-89 (2005).

3. *Cf.* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (involving similar facts), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e(f)). The actual case involved discrimination on the basis of race, religion, and national origin.

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information about relations with Saudi Arabia, says no.[4] Should courts defer to the executive?

(2) The Immigration and Nationality Act authorizes Immigration and Customs Enforcement (ICE) to detain dangerous aliens who cannot be repatriated because their home countries will not accept them.[5] ICE interprets this authorization as permitting it to hold an alien convicted of manslaughter for an indefinite period. The alien brings suit, arguing that ICE has violated the statute, which does not speak to this particular question. Under the *Charming Betsy* doctrine,[6] which requires courts to construe ambiguous statutes so as not to violate international law, the immigration statute should be interpreted to forbid "prolonged and arbitrary" detention in violation of non-self-executing treaties or customary international human rights law.[7] The executive branch, which has better information about the consequences of violating international law, argues against application of the *Charming Betsy* doctrine. If we suppose that Congress has not incorporated the relevant aspects of international law into domestic law, should courts defer to the executive?

(3) The Foreign Sovereign Immunities Act (FSIA) generally forbids lawsuits against foreign sovereigns in American courts, but it contains a number of exceptions, one of which permits suits when the sovereign has expropriated property in violation of international law.[8] A plaintiff sues Austria, arguing that it expropriated artworks that belonged to her family during and after World War II. Prior to enactment of the FSIA in 1976, the judge-made foreign sovereign immunity doctrine did not contain an exception for illegal expropriations. The executive branch argues that the FSIA should not apply retroactively, fearing that litigation would upset delicate international arrangements to provide

4. *Cf.* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005) (involving an amicus brief by the executive in favor of applying the Americans with Disabilities Act to foreign-flagged ships).

5. 8 U.S.C. § 1231(a)(6) (2000).

6. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

7. Ma v. Reno, 208 F.3d 815 (9th Cir. 2000), *vacated*, Zadvydas v. Davis, 533 U.S. 678 (2001).

8. 28 U.S.C. § 1605(a)(3) (2000).

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compensation to victims of Nazi atrocities. Should the court accept the interpretation of the executive branch?[9]

Each of these examples raises two questions. The first involves the operation of the international relations doctrines. Why, exactly, should courts interpret statutes to avoid extraterritorial application (as in the first example) or the violation of international law (as in the second example)? The conventional explanation is that otherwise foreign sovereigns would be offended, but neither of our first two examples provides a strong case for such a view.[10] We argue that the international relations doctrines are best understood by an account that emphasizes the costs of deferring to foreign interests, which may be substantial, as well as the benefits. As we show, important American interests may justify giving offense to foreign

9. *Cf.* Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) (presenting these facts). For an argument in favor of deference to the executive's interpretation of the FSIA, with a suggestion in favor of general deference to executive interpretations in the domain of foreign affairs and national security, see Oren Eisner, Note, *Extending* Chevron *Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411 (2001). The argument in this note is highly compatible with ours, but its focus is far narrower than our own. We also offer a consequentialist theory of the foreign affairs doctrines and an emphasis on the limits of the deference principle.

10. The literature on the international comity doctrines is too large to cite here and is overwhelmingly doctrinal and historical, not theoretical. On comity itself, see, for example, Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991), which argues that the discretionary use of comity is a means by which courts balance domestic and foreign interests; and Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893 (1998), which explores the uses and limits of comity principles. On the *Charming Betsy* canon, see, for example, Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998), which argues that the canon should be used by courts to determine the intent of the political branches. On extraterritoriality, see, for example, Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, which objects that the Supreme Court's broad interpretation of the presumption against extraterritoriality is outdated. On the act of state doctrine, see, for example, Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992), which notes the difference in application of the doctrine to liberal and nonliberal states and finds that liberal states sometimes are subject to more stringent evaluation; and Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1 (1998), which argues that courts have unnecessarily applied the doctrine broadly to investment contracts with foreign governments. On the FSIA, see, for example, JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 323-468 (2d ed. 2003).

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sovereigns—including, for example, the interests in vindicating laws forbidding discrimination and protecting the environment.[11]

The second question involves the role of the executive. When the executive advances an interpretation of a statute that violates international comity doctrines (the first two examples) or otherwise places a strain on the ordinary meaning of a statute (the third example), should the executive's interpretation be entitled to respect? This question has not yet been answered squarely by the courts. Drawing an analogy to the administrative law doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[12] and arguing that *Chevron* often applies directly, we contend that 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. The exceptions here are the standard exceptions to *Chevron* itself: most importantly, those that require the national legislature to speak clearly if it seeks to raise serious constitutional doubts. The avoidance canon is the most prominent example of a limitation on implicit delegations of authority to the executive.

The importance of the international relations doctrines has been growing over time—a consequence of the increasing frequency of cross-border activity and the corresponding efforts of the U.S. government to regulate that activity. Of course, the war on terror is a factor here, but the change is far more general. Antitrust law can be used against foreign businesses to ensure that they do not engage in anticompetitive practices that injure Americans.[13] To say the least, American citizens have a strong interest in freedom from sex discrimination, but application of American law to actions in, say, Saudi Arabia might well cause international tensions. Americans also care about whether foreign sovereigns adequately investigate and prosecute international terrorists who

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11. *See, e.g.*, Envtl. Def. Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993) (interpreting the National Environmental Policy Act (NEPA) to apply extraterritorially, at least to Antarctica, even in the face of a claim that doing so would violate the Protocol on Environmental Protection to the Antarctic Treaty); Natural Res. Def. Council, Inc. v. Dep't of the Navy, No. CV-01-07781, 2002 U.S. Dist. LEXIS 26360 (C.D. Cal. Sept. 17, 2002) (accepting a regulation applying the Endangered Species Act (ESA) to the high seas, even outside of the United States). *But see* Born Free USA v. Norton, 278 F. Supp. 2d 5 (D.D.C. 2003) (refusing to apply NEPA extraterritorially to protect wild elephants in Swaziland).

12. 467 U.S. 837 (1984).

13. U.S. antitrust litigation against foreign firms doing business on foreign soil has been a significant source of international tension, as have American discovery practices. *See* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 916-18 (3d ed. 2006).

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plot on their soil but conduct operations in the United States. All of these activities are potentially governed by the international relations doctrines.

As we shall see, the doctrines have plausible justifications. Courts are alert to the risks of creating international tensions, and in many cases they seem to be making a presumptive judgment that deferring to the interests of foreign sovereigns produces benefits for Americans that outweigh the costs. For this reason, courts have concluded that Congress must explicitly authorize extraterritorial application of domestic law, or a violation of international law, or any other decision that threatens international comity. But there are strong reasons, rooted in constitutional understandings and institutional competence, to allow the executive branch to resolve issues of international comity, at least when the underlying statute is unclear.[14] The executive branch can claim a constitutional warrant for making the underlying judgments in the face of congressional silence or ambiguity, and it is in an exceedingly good position to balance the relevant interests.

This simple argument fits with the logic of some recent decisions,[15] but it also has radical implications, some of which are likely to be controversial. The most obvious is that courts should play a smaller role than they currently do in interpreting statutes that touch on foreign relations. Another is that the executive branch should be given greater power than it currently has to decide whether the United States will violate international law. Our argument also implies greater deference to the executive when it intervenes in private litigation. Under our approach, the expressed will of Congress would still

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14. We have been influenced by Curtis Bradley's valuable treatment of closely related questions, his emphasis on the role of *Chevron*, and his argument that the *Charming Betsy* doctrine and the presumption against extraterritoriality—two of the doctrines we discuss—should not prevail over *Chevron* deference. *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 679 (2000). We also believe that Bradley correctly emphasized the executive's superior expertise in foreign relations. But his argument and ours are different. Our emphasis is theoretical and functional, albeit influenced by constitutional constraints; his was predominantly doctrinal, focused on the source of law. Thus, unlike us, he argued that *Chevron* deference is not appropriately applied to, for example, the act of state doctrine—a doctrine of federal common law—"because there is no basis for presuming a delegation of lawmaking power to the executive branch, and (unlike head-of-state immunity, for example) these doctrines are not based on the executive branch's independent lawmaking powers." *Id.* at 716. Bradley also did not try to advance a theory of the international comity doctrines, as we do. Of course he was unable to explore either the post-9/11 developments in this domain or the many recent developments in the law governing judicial review of agency interpretations of law, traced below; some of these developments complicate his argument for the use of *Chevron*.

15. *See, e.g.*, Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005) (noting the courts' "customary policy of deference to the President in matters of foreign affairs").

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control, and the international relations doctrines would continue to resolve cases in which the executive has not taken a position. In such cases, the default assumption would follow the established doctrines; an affirmative statement by the executive would be necessary to overcome that assumption. But if an affirmative statement by the executive were forthcoming and its position were reasonable, the courts would defer to the executive on whether to promote or reject comity.

An additional implication, and an especially controversial one, is that comity-related ambiguities in any grant of power to the President, including an authorization to use force, should be settled by the executive, even if international law is inconsistent with the executive's view. This claim offers several lessons for the proper analysis of the Court's initial encounters with the war on terror, above all in *Hamdi v. Rumsfeld*[16] and *Hamdan v. Rumsfeld*.[17] As we shall see, the Court neglected the analogy to *Chevron*—a puzzling and important omission—and an understanding of the analogy helps to provide a significant reconstruction of the prevailing analysis in both cases.

Let us offer an important clarification before we begin. The domain of our analysis is restricted to genuine ambiguities in governing law. If the law is clear, the executive is bound by it, and this point holds for international law that is the result of self-executing treaties or that has been given domestic effect by congressional action. Nothing in our argument suggests that the executive may violate the law as enacted by Congress. It is because statutes are often unclear that our argument, no less than *Chevron* itself, should have broad implications.

I. INTERNATIONAL RELATIONS DOCTRINES

Over a period of many years, courts have adopted numerous rules for litigation that touch on the interests of foreign sovereigns or their citizens. These rules apply only in the absence of congressional guidance; the national legislature is permitted to settle the underlying questions as it chooses. While most of these doctrines are specifically designed to promote comity, others must be justified in different terms because they promote American interests at the expense of comity.

16. 542 U.S. 507 (2004).

17. 126 S. Ct. 2749 (2006).

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A. Comity Doctrines

The Charming Betsy *canon.* This canon provides that an ambiguous statute will be interpreted to avoid conflicts with international law. Return to one of the cases with which we began: an ambiguous law that permits ICE to detain an alien who cannot be repatriated will not be interpreted as permitting indefinite detention, because such detention would violate the prohibition of "prolonged and arbitrary" detention in international law.[18] Note that the *Charming Betsy* canon does not apply to statutes that are clear; if a statute unambiguously conflicts with international law, international law is superseded and deprived of domestic effect. And if international law is incorporated in domestic law, there is no need for the *Charming Betsy* canon; domestic law, by hypothesis, already includes international law.

Extraterritoriality. The presumption against extraterritoriality provides that an ambiguous statute will be interpreted not to apply to conduct outside the United States. The Civil Rights Act of 1964 did not explicitly state whether it applies abroad or not; it was therefore interpreted not to apply to discriminatory behavior of American businesses located in Saudi Arabia.[19]

Act of state doctrine. The act of state doctrine provides that a court may not evaluate the act of another state that takes place within its own territory. Shortly after the Cuban revolution, the Cuban government expropriated sugar that belonged to an American company. Another firm entered a contract with Cuba for the sugar but refused to pay for it after the sugar was delivered, fearing that it might be liable to the victim of expropriation. Cuba sued the buyer in an American court, and the buyer defended itself by arguing that Cuba did not have clear title to the sugar because the expropriation was illegal. Under the act of state doctrine, the court could not accept this argument

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18. Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001). The canon gets its name from *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), which interpreted a statute prohibiting trade with France as inapplicable to a citizen of a neutral state in order to avoid violating the international law of neutrality.

19. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248-49 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e(f) (2000)). We note below some complexities in this decision and the surrounding doctrine. NEPA, which is silent on the question of extraterritorial application, has similarly been held not to apply abroad and hence not, for example, to require an environmental impact statement for U.S. military installations in Japan. *See* NEPA Coal. of Japan v. Aspin, 837 F. Supp. 466, 467 (D.D.C. 1993).

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because it would have involved an evaluation of Cuba's conduct; it had to assume that Cuba's title was valid.[20]

Foreign sovereign immunity. In the nineteenth century, the Supreme Court developed the doctrine of foreign sovereign immunity, which grants foreign sovereigns immunity from liability for violating the law.[21] The rule was relaxed in the twentieth century, mainly in cases involving a commercial defendant owned by a foreign sovereign.[22] In 1976, the doctrine was codified in the FSIA.[23] The statute contains some new exceptions—for example, it denies immunity to state sponsors of terrorism.[24] A related doctrine provides immunity to heads of state.[25]

Comity in general. Case law equivocates between calling international comity a value and a rule. As a value, it reflects the sense that cases affecting foreign interests should be decided in a manner that accounts for these interests in some way—hence our reference to "international comity doctrines" in general. Courts also sometimes cite international comity as an explanation for outcomes that are not explicitly driven by the doctrines we have discussed, and here comity is sometimes treated as a rule. For example, the Supreme Court cited international comity in explaining why courts should defer to the judgments of international arbitrators employed to resolve international contractual disputes.[26] In a recent case, Justice Breyer cited concerns about international comity to explain his uneasiness with applying the Alien Tort Statute to litigation in which both parties were aliens and the tortious conduct took place on foreign territory.[27] Courts also appeal to international comity to justify staying litigation in the United States when parallel litigation is ongoing in foreign countries.[28]

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20. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431-32 (1964), *superseded by statute*, Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301, 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2000)).

21. *See* The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

22. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486-89 (1983).

23. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602-1611 (2000)).

24. 28 U.S.C. § 1605(a)(7).

25. *See* Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004).

26. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-29 (1985) (holding that antitrust claims were properly arbitrated under the Federal Arbitration Act).

27. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 761 (2004) (Breyer, J., concurring in part and concurring in the judgment).

28. *See, e.g.*, Nat'l Union Fire Ins. Co. v. Kozeny, 115 F. Supp. 2d 1243, 1250 (D. Colo. 2000) (granting a stay of proceedings while litigation proceeded in London).

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Taken as a whole, this body of doctrines implies that courts should take seriously the interests of foreign sovereigns as offering interpretive guidance when domestic statutes are silent or ambiguous on the issues and even sometimes when domestic statutes are fairly clear. An American court might offend foreign sovereigns by violating international law that reflects their interests, by interfering with their regulation of activities on their territory, by taking cases in the resolution of which they have a strong interest, by evaluating their activities, or by issuing judgments against them.

B. Anti-Comity Doctrines

Some international relations doctrines do not promote comity at all. On the contrary, they advance American interests at the expense of foreign interests. We call these the "anti-comity doctrines."

The revenue rule. The revenue rule provides that an American court will not enforce a tax judgment of another nation.[29] Suppose that a Canadian or American citizen fails to pay taxes in Canada. The taxpayer flees to the United States, and the Canadian government brings suit in an American court, asking the court to enforce the Canadian tax law or a judgment based on it. The revenue rule prohibits the American court from enforcing the Canadian tax law or judgment. Note that the revenue rule is rooted in state rather than federal law; it has not been overridden at the national level and in that sense has received national acquiescence over time.

The penal rule. Under the penal rule, an American court may not enforce a foreign criminal judgment.[30] By contrast, an American court is generally supposed to enforce other types of judgments—for example, those resulting from breach of contract or tort—unless there are public policy reasons not to do so.[31] It should be clear that the revenue and penal rules do not show much respect for the interests of a foreign state. The penal rule, like the revenue rule, is rooted in state rather than federal law.[32]

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29. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1987) ("Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.").

30. *See id.*

31. *See id.* §§ 481-482.

32. The revenue and penal rules are sometimes said to be examples of a more general "public law taboo" against enforcing foreign public law or foreign judgments based on foreign public law in domestic courts. *See, e.g.*, William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161 (2002); Philip J. McConnaughay, *Reviving the "Public Law Taboo" in Internal Conflict of Laws*, 35 STAN. J. INT'L L. 255 (1999). Public law includes antitrust law,

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Public policy exceptions to enforcement of foreign law and judgments. Standard choice of law rules also contain a significant exception for judgments and laws that violate American public policy. American courts refuse to enforce judgments of countries that have corrupt or ineffective legal systems.[33] They have also refused to enforce foreign laws that offend American values or sensibilities—most notably British libel law, which is less protective of expression than the First Amendment would require.[34] It follows that American courts will not uphold judgments against defendants under British libel law, even if ordinary conflicts principles would otherwise call for deference.

These anti-comity doctrines assert American interests in the context of international relations, potentially or actually at the expense of the interests of other countries. These doctrines are, to be sure, rules of state law, while the comity doctrines are rules of federal law; nonetheless, the anti-comity doctrines do determine legal outcomes, and they are applied by federal courts in diversity cases and in federal question cases involving state law predicates. As we shall now see, the existence of doctrines that jeopardize comity casts the international relations doctrines in a distinctive light.

II. BEHIND THE DOCTRINES

What underlies these various doctrines? To answer this question, we take the comity and anti-comity doctrines together because both are designed to sort out the relationship between international relations and domestic law.

It is tempting to suggest that the doctrines track Congress's own intentions, on the theory that Congress ordinarily expects and hopes that the law will be interpreted in the way indicated by the doctrines. But this explanation seems highly artificial. Congress frequently enacts statutes that violate international law, apply extraterritorially, or otherwise ignore notions of

securities law, and so forth, not just tax and criminal law. The public law taboo has been breaking down but still remains strong. *See* McConnaughay, *supra*, at 256-57.

33. *See, e.g.*, Bridgeway Corp. v. Citibank, 201 F.3d 134, 141-42 (2d Cir. 2000) (noting "chaos" in Liberian courts); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1412 (9th Cir. 1995) (noting that strong anti-American bias, politicization, and secrecy in Iranian courts precluded the possibility of a fair and impartial tribunal); Choi v. Kim, 50 F.3d 244, 248-50 (3d Cir. 1995) (holding that lack of notice of a South Korean property order violated due process).

34. *See* Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 664 (Sup. Ct. 1992) (holding that enforcement of a judgment under British libel law violated U.S. public policy because of the conflict with First Amendment protections).

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comity.[35] Perhaps Congress's failure to take these steps explicitly signals its acceptance of the outcomes produced by the comity doctrines. But when a statute is silent about these issues, Congress is most unlikely to have had any intentions or even to have thought about the question at all.

On an alternative view, the doctrines track congressional intentions only in the sense that they provide the background against which Congress legislates.[36] To the extent that some of the doctrines are clear and firm—consider the presumption against extraterritoriality—Congress might be assumed to want them to apply unless it directs otherwise. In a sense, the doctrines are incorporated by reference. As with the canon against retroactivity,[37] so too with the comity doctrines: they are part of the fabric of existing law, and Congress is best taken to endorse them unless it expressly displaces them.

In our view, this position also suffers from a lack of realism. It is true that the doctrines are part of the "background" in the sense that they are invoked by courts in the face of congressional silence. But is it plausible to say that Congress, as such, should be charged with endorsing them, or even with knowing what they are? Perhaps particular legislators and members of relevant interest groups are aware of the doctrines. But there is a large distance between acknowledging this possibility and suggesting that Congress should be understood to have endorsed the doctrines as part of the background against which it does its work. The real basis for the international relations doctrines must be normative; it must be that they *ought* to be taken as part of the legislative background, not that Congress does so take them.

A common explanation for international comity doctrines is that they avoid unnecessary entanglements with foreign states.[38] We now evaluate this

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35. *E.g.*, Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301, 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2000)) (establishing that the act of state doctrine shall not be used to decline jurisdiction over property confiscations violating international law after January 1, 1959); Helms-Burton Act, Pub. L. No. 104-114, 110 Stat. 785 (codified as amended at 22 U.S.C. §§ 6021-6091 (2000)) (penalizing foreign firms that do business with Cuba).

36. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e(f) (2000)); NEPA Coal. of Japan v. Aspin, 837 F. Supp. 466, 467 (D.D.C. 1993) (assuming that Congress legislates with awareness of the presumption against extraterritoriality).

37. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

38. *See* Duncan Hollis, Spector v. Norwegian Cruise Line Ltd., 99 AM. J. INT'L L. 881, 885 (2005) (citing Justice Scalia's interpretation of comity as a means of preventing foreign conflict); Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Trans-National Discovery and* Breard *Scenarios*, 50 CATH. U. L.

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conventional wisdom, which we call the "entanglement theory." We argue that it is inferior to a broader theory, which we call the "consequentialist theory" because it identifies other important consequences in addition to that of entanglement.[39] This theory, we suggest, helps explain those principles that require a clear congressional statement.[40] Offering a justification for the international relations doctrines is one of our central goals, but as we shall see the argument for deference to executive interpretations follows on either account.

A. Entanglement

The entanglement theory suggests that international comity doctrines reduce the risk that courts will inadvertently cause foreign policy tensions or crises by offending other nations. The act of state doctrine prevents courts from angering foreign sovereigns by expressing disapproval of their sovereign acts.[41] The FSIA similarly prevents courts from declaring that a foreign sovereign has violated an American law, an action that the foreign government might regard as an insult to its sovereignty. The presumption against extraterritoriality prevents courts from interfering with the ability of foreign governments to regulate activity on their own soil.[42] The common theme is

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REV. 591 (2001) (arguing that comity helps to minimize conflicts with foreign courts); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982) (suggesting that courts invoke comity to preserve international relations and to encourage efficiency in the resolution of disputes through discretionary cooperation).

39. It is of course possible to imagine other theories, especially for particular doctrines. The presumption against extraterritoriality, for example, might be defended on the specific ground that nations should have exclusive authority over conduct that occurs within their territories. We explore the entanglement theory and the consequentialist alternative not because they exhaust the field but because the former is widely held and the latter seems capacious enough to capture the relevant considerations.

40. Some doctrines may reflect other considerations as well. For example, the presumption against extraterritoriality may reflect a judgment that the costs of enforcement overseas are very high. We bracket these considerations.

41. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 415 n.17 (1964), *superseded by statute*, Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301, 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2000)).

42. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164-65 (2004) ("This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of

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that a court might inadvertently increase international tensions or, in the extreme case, even provoke an international crisis by offending or injuring a foreign nation. That nation might then retaliate against the United States, for example, by withdrawing its participation in a vital area of international cooperation or directing its own courts to commit similar offenses against the United States.

To be sure, the comity doctrines are default rules only; courts will not interfere with a legislative determination that America's interests are advanced despite (or because of) the international conflict. But because, all else equal, foreign conflict is undesirable, courts will assume that it does not serve America's interests unless Congress explicitly says otherwise.

In our view, the theory is superficially attractive but ultimately unpersuasive. The problem with the theory is that it identifies the *benefits* of deferring to foreign sovereigns (avoiding offense, retaliation, and conflict), but it does not account for the *costs* of deferring to foreign sovereigns (preventing the United States from advancing its interests, including protecting American citizens from discrimination or preventing the loss of endangered species or some other kind of serious environmental harm).

In addition, the entanglement explanation for comity rules cannot be reconciled with the existence of anti-comity rules, which ignore foreign interests. For example, the public policy exception to choice of law rules permits a court to refuse to enforce a foreign judgment or foreign law if doing so would violate American public policy. In order to apply this rule, the court must evaluate the sovereign act of a foreign country against American policies. The *Charming Betsy* canon requires courts to determine what international law is, and such a determination will often require a court to evaluate the acts of foreign states—for example, whether or not they have really acted consistently with a norm of customary international law.

None of this means that the avoidance of foreign entanglements plays no role in existing doctrine. As we have noted, a foreign entanglement—more accurately, causing offense to a foreign state—is a real cost. Gratuitous tensions with other nations should certainly be avoided. But sometimes tensions are not gratuitous, and the use of the comity principles can inflict harm on legitimate American interests as well. The failure to apply antitrust laws, antidiscrimination laws, or environmental laws overseas may mean injury to American citizens. Perhaps some of the doctrines represent a categorical judgment that the risk of international tension outweighs that injury, at least

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1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e(f) (2000)).

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enough to require a clear statement from Congress. But an analysis of this sort leads in directions that the entanglement theory, standing by itself, cannot explain.

In sum, the problems with the entanglement theory are that entanglements are not always bad; that the theory provides no basis for distinguishing good or tolerable entanglements from bad entanglements; and, most importantly, that the theory says nothing about the benefits for American interests that might outweigh the cost of entanglements. A better theory would explain why courts sometimes defer to foreign interests because of the risk of entanglement and sometimes refuse to defer to such interests despite the risk of entanglement.

B. Consequences and Reciprocity

A more complete explanation is that courts defer to foreign sovereigns after a rough assessment of the consequences. Deference occurs when courts believe that the benefits exceed the costs. With this formulation, we do not mean a formal cost-benefit analysis; rather, the doctrines are best understood as rooted in an all-things-considered assessment of consequences, which importantly include the legitimacy and strength of the American interests.

1. Consequences in General

The most obvious costs of deference include the loss of American control over activities the regulation of which would promote American interests—not simply those of the United States as sovereign but also those of American citizens. The benefits include reciprocal gains from foreign states' deference to American regulation, as well as the reduced likelihood of causing international tensions that could ultimately hurt American interests. For some of the international relations principles, there might be other benefits, including, in the context of the *Charming Betsy* canon, a general strengthening of the system of international law. If respect for international law promotes cooperation and preserves long-term commitments, it might be best to assume that ambiguous statutes fit with international law. Thus, courts should consider at least three factors when resolving cases with foreign relations implications: (1) an empirical determination or conjecture (a) that the foreign state is likely to reciprocate or (b) that it would otherwise retaliate in some way if the court ignored its interests; (2) a judgment that the benefits of reciprocation or nonretaliation by foreign states exceed the costs of deference to the foreign interests; and (3) an additional judgment about whether deference has systemic or rule of law benefits or disadvantages for the United States. In our

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view, intuitive judgments with respect to (1), (2), and (3) help to explain the operation of the international relations doctrines and some incongruities as well. Our goal in this Subsection is to defend this claim, both as a way of understanding the doctrines and as a general preface to the inquiry into executive authority to displace them. We believe that all of the doctrines could be plausibly supported in this way; we offer several examples by way of illustration.

Consider first the penal rule. The cost of deference to a foreign criminal judgment is that the American court may end up imposing a sanction on a person on account of a crime that the United States does not recognize as serious or on account of a criminal conviction that emerged from procedures that the United States does not recognize as just. If the defendant is not an American citizen, that cost might not be deemed especially large, but surely the United States is interested in avoiding the use of its courts to collaborate in injustice. If the defendant is an American citizen, then the cost will be that much larger. The benefit of deference is that if foreign states reciprocate, people convicted in American courts who flee to foreign jurisdictions will be forced to pay the American penalty; thus American criminal enforcement is strengthened. The penal rule is best understood as reflecting American uneasiness with foreign criminal procedures, in which traditional American criminal protections against unjust convictions, including the jury, are often absent.[43] To avoid enforcing foreign convictions, the United States is willing to give up enforcement of American convictions abroad. Other nations appear to hold similar views.[44] Indeed, extraterritorial enforcement of criminal law occurs mainly through elaborate extradition treaties, which usually ensure that the acts in question are criminal in both states and which contain numerous other protections.[45]

Now consider the choice of law rules. In this context, the consequentialist analysis plausibly yields a different outcome. Enforcing foreign civil judgments does not greatly offend American notions of justice because we have lower standards for civil procedure than for criminal procedure and our standards are not that different from those of other major liberal democracies. Enforcing such judgments also promotes trade and investment, especially if foreign sovereigns enforce American judgments as well. But when the civil laws of

43. This point is made explicitly in *Small v. United States*, 544 U.S. 385, 388-89 (2005).

44. *See* Dodge, *supra* note 32, at 193-208 (discussing U.S. and foreign law and treaties).

45. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 475 (1987).

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other countries do offend American public policy, the laws and judgments are not enforced.

The act of state doctrine requires U.S. courts to treat the acts of foreign sovereigns within their own territory as valid.[46] Putting the public policy doctrine and the act of state doctrine together, we can see that American courts implicitly presume that foreign states have a greater interest in regulating activity that takes place within their territory and a weaker interest in regulating activity on American territory. This presumption seems entirely reasonable. As long as other states behave similarly, the American courts ensure that the United States obtains the reciprocal benefit of control over its own territory in return for deference to foreign regulation of activities on foreign territory.

This fundamental idea—that states regulate activities on their own territories and thus have little or no power over the activities that occur in foreign states—plainly underlies the presumption against extraterritoriality. The United States gains from this rule insofar as it avoids interference with its domestic regulation but loses from this rule insofar as it is prevented from regulating activities, such as race and sex discrimination, on foreign soil. All in all, the rule plausibly creates a net benefit. The United States generally has little interest in what occurs on foreign soil, and other states have little interest in what occurs on American soil. As we have noted, there are significant exceptions, but the overall assessment is fairly clear. Hence the presumption applies, subject to congressional override.[47]

Finally, the *Charming Betsy* canon reflects the consequentialist calculus in a particularly straightforward way. For the most part, states join international treaties and consent to customary international law when it is in their interest to do so.[48] Thus, international law already reflects the outcome of a

46. *See Sabbatino*, 376 U.S. at 398, *superseded by statute*, Foreign Assistance Act of 1964.

47. For an argument in favor of extraterritorial application of antitrust and securities laws, on the grounds that judges are bad at balancing and that it is preferable for the government to negotiate treaties with foreign states that object to the laws, see Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992). For a somewhat related argument, see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998). As we note below, we favor rules if decision costs are high; whether the rule should be in favor of extraterritorial application or against it depends on the costs and benefits, which are best assessed by the executive in the face of legislative silence or ambiguity.

48. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 23-43 (2005) (discussing the literature). There are some narrow, controversial exceptions to this general proposition, such as *jus cogens* norms.

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consequentialist calculus. A particular rule benefits the United States by constraining the activity of other states but hurts the United States by constraining it; nonetheless, the political branches believe on balance that the rule provides a net benefit for the United States. If Congress then passes a statute that violates international law, states protected by that law may retaliate against the U.S. government. It is reasonable to assume that the cost of potential retaliation exceeds the benefit of the new legislation, given that the U.S. government would only consent to a treaty in the first place because it believed that the benefits from international cooperation would exceed the costs, including the cost of refraining from future legislation inconsistent with the treaty. There is also a possibility that the United States may obtain a variety of long-term benefits from complying with international law. Of course, in any given case, the costs and benefits may have changed; that is why Congress is permitted to pass laws that violate international law as long as its enactments are sufficiently clear.[49]

On the other side, the revenue rule provides a potential counterexample to our thesis. It seems doubtful at first sight that enforcement of foreign tax judgments would routinely violate important constitutional and common law norms in the way that enforcement of foreign criminal judgments would. Thus, the case for the revenue rule is weaker than the case for the penal rule. Indeed, one might argue that the revenue rule should be folded into the standard choice of law analysis, under which foreign judgments are evaluated on a case-by-case basis and rejected only if the judgment, or the legal system that produced the judgment, violates American public policy.[50]

This argument was addressed in recent years by the Second Circuit in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*[51] While the court recognized the force of the criticisms of the revenue rule, it ended up strongly endorsing the rule. The court's most interesting reason was that, as a matter of historical fact, the U.S. government and nearly every foreign government have strong reservations about enforcing the tax judgments of foreign nations. In the court's view, the bright-line revenue rule *does* reflect a balancing of costs and benefits. The costs of enforcing foreign tax judgments are high because these judgments are often harsh and unfair. The benefits are

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49. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115(1)(a).

50. Many scholars have taken this position. *See, e.g.*, William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265, 277-78 (2000).

51. 268 F.3d 103 (2d Cir. 2001).

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zero if, as the court hinted, other states are not willing to enforce American tax judgments.[52]

2. *Rules and Standards*

There is an interesting question why courts are willing to take a case-by-case approach to foreign contract and tort judgments and not to foreign tax judgments. It is not clear that any post hoc account adequately explains the current situation. Perhaps the best answer is that while nations tend to enforce contracts and punish torts in roughly the same way, they take widely varying approaches to taxation; thus, courts have more confidence in evaluating the first type of case than the second. As recognized by *R.J. Reynolds*, the political branches appear to have concluded that objectionable foreign tax judgments are common enough, and the likelihood of foreign enforcement of American tax judgments is small enough, that case-by-case evaluation is not necessary. When decision costs are high, rules are better than standards. The benefits of the revenue rule exceed the costs, and the courts defer to the political branches' judgment.[53]

This discussion of the revenue rule should make clear that the rule/standard dimension is orthogonal to the question of the best account of the international relations rules. Many of the current doctrines are general

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52. *Id.* at 115 (noting that enforcement of tax judgments is usually a matter of treaty). Moreover, to the extent that U.S. taxes are lower than foreign taxes, the U.S. treasury loses less from nonenforcement of American tax judgments against foreign persons than Americans would lose from enforcement of foreign tax judgments against them. We suspect that this kind of imbalance may explain the inability of states to enter strict tax treaties – one state's taxes will always be lower than another state's – but we have not found evidence for this view.

    We should add that the idea that the revenue and penal rules – and more broadly the "public law taboo" – are based on the idea of reciprocity is an old one. In particular, there is a longstanding view that if American judges enforced foreign public law, this would deprive the American government of bargaining power as it tried to persuade other governments to enforce American judgments by treaty. *See* F.A. Mann, *The International Enforcement of Public Rights*, 19 N.Y.U. J. INT'L L. & POL. 603, 608-09 (1987). For a recent argument to this effect, see Dodge, *supra* note 32, at 224-26. However, we disagree with William Dodge's additional argument in favor of an exception for private plaintiffs: "Fairness demands that the interests of private parties seeking to enforce foreign law not be held hostage to the government's interest in promoting reciprocity . . . ." *Id.* at 230. The problem with this argument is that fairness cuts both ways; legitimate individual interests are on both sides. By the logic of Dodge's own argument, the only way to prevent unfairness to *American* plaintiffs in *foreign* courts is to deprive foreign plaintiffs of judgments in American courts, so that the U.S. government has leverage for effecting change by treaty.

53. The *R.J. Reynolds* court did, to be sure, cite the entanglement theory as well. 268 F.3d at 111-13.

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rules, reflecting aggregate judgments. The penal and revenue rules are "rules," as are the provisions of the FSIA. Other doctrines operate more clearly as standards. Consider the public policy exception to the choice of law rules. Operating case by case, courts evaluate foreign law and then respect or reject it by asking whether it is consistent with American public policy. For example, when American courts decide whether to enforce foreign civil judgments, they make an overall evaluation of the quality of the foreign state's judicial system.[54] The implicit assumption appears to be that decision costs are lower when courts evaluate foreign civil legal systems than when they evaluate foreign criminal law or tax systems. The choice between rules and standards reflects some assessment of decision costs and error costs, and we take no position on whether existing international relations doctrines are insufficiently or excessively rule-like.[55]

Putting aside the rules/standards issue, we propose that the consequentialist theory supplies the most plausible and general account of the international relations doctrines. The doctrines operate in a way that seems to fit with the theory, and the theory helps explain the fact that courts are sometimes willing to endanger comity. Of course it is possible to question whether the consequentialist assessment has been properly made, in general or in particular cases. Behind the rhetoric, many of the existing disputes are about exactly that question.

C. Questions and Doubts

Notwithstanding the plausibility of the consequentialist understanding, its fragility should be immediately apparent. The first objection is that most of the time, courts lack good tools to make the relevant judgments. Recall that it is important for judges to make a variety of judgments, involving, for example, the risk of retaliation and the benefits of reciprocation. Perhaps some cases are

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54. *Compare* Soc'y of Lloyd's v. Reinhart, 402 F.3d 982 (10th Cir. 2005) (noting that English and American court procedures are substantially similar and that the English system is fair), *with* Choi v. Kim, 50 F.3d 244, 250 (3d Cir. 1995) (holding that lack of notice of a South Korean property order violated due process).

55. Jack Goldsmith has argued in favor of rules, on the ground that standards provide courts with too much discretion to affect foreign relations. *See* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999). The argument implicitly assumes that the decision costs in foreign relations cases are high, which is plausible, but does not address the question of the content of the rules. For example, should they generally direct courts to avoid offending foreign sovereigns (like sovereign immunity) or to advance American interests (like the penal rule)? In any case, the executive, as we shall see, is in the best position to decide between rules and standards.

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easy, but many are difficult. It may well be that in the face of statutory ambiguity, courts have no choice but to rely on presumptions. To the extent that statutes are in equipoise, the international relations doctrines may well be a sensible way to proceed. The doctrines are harder to defend if they operate not merely as presumptions but as clear statement principles, defeating the more likely interpretation of the statute.

A second objection to the consequentialist theory is that courts do not insist as much on reciprocity as the theory might suggest. The evidence here is mixed. In many cases, courts mention and appear to place weight on the fact that the foreign nation in question defers in the same manner that the courts are urged to do.[56] But in other cases, courts do not discuss the actions of the foreign state and even reject the notion that reciprocity matters.[57] Perhaps the threat of some other kind of retaliation is a significant motivation. The problem may be that courts simply have no way to determine whether the foreign state will reciprocate or retaliate, and thus they fall back on crude presumptions that respect comity in some cases (e.g., extraterritorial application of statutes) and not in others (e.g., enforcement of penal judgments).

Whatever the truth, we have trouble seeing a normative justification for many applications of the doctrines when the other state does not reciprocate and when the risk of retaliation is trivial. For example, it is unclear why the United States should not apply its law to acts of sex discrimination by an American company against American workers abroad if foreign states are indifferent. To be sure, often larger international law values may be at stake; we do not mean to suggest that possible damage to these values should be ignored. Our claim is only that this possible damage should be taken into account in the consequentialist balancing.

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56. *See* Banque Libanaise pour le Commerce v. Khreich, 915 F.2d 1000, 1004-06 (5th Cir. 1990) (exercising discretion not to recognize an Emirati judgment because of a lack of reciprocity); Atl. Ship Supply, Inc. v. M/V Lucy, 392 F. Supp. 179, 183 (M.D. Fla. 1975) (giving full faith and credit to the decree of a Costa Rican court because Costa Rican courts give full faith and credit to the decrees of foreign courts), *aff'd*, 553 F.2d 1009 (5th Cir. 1977). More generally, see *Hilton v. Guyot*, 159 U.S. 113, 166 (1895), a seminal Supreme Court case on international comity, which required reciprocity.

57. *See* Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 691 n.7 (7th Cir. 1987) (observing that a state statute rejected the requirement of reciprocity); *see also* UNIF. FOREIGN JUDGMENTS ACT §§ 2-3, 13 U.L.A. 160, 163-234 (2002) (providing for the enforcement of foreign judgments without requiring reciprocity); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481, reporters' note 1 (1987) (discussing cases on both sides, but concluding that reciprocity is not required); Paul, *supra* note 10, at 49 (arguing that courts do not determine whether the foreign sovereign reciprocates).

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A more general question, signaled by these various questions, involves the position of the executive.

III. EXECUTIVE POWER

In our view, the executive should usually be permitted to interpret statutory ambiguities so as to defeat the international relations principles. It would follow, for example, that the executive should be permitted to construe the civil rights statutes or the National Environmental Policy Act to apply extraterritorially. Moreover, the constitutional position of the President in the domain of foreign affairs strongly supports this conclusion. But to understand these claims, one must back up a bit.

A. The Chevron *Doctrine*

1. Two Steps

Outside of the context of foreign affairs, the argument for executive authority should be familiar, for courts regularly defer to executive interpretations of ambiguous statutory provisions. The central idea is most famously associated with *Chevron*, in which the Supreme Court created a two-step inquiry for assessing executive interpretations of law. The first inquiry is whether Congress has directly decided the precise question at issue.[58] If not, the second inquiry is whether the agency's decision is "permissible" in the sense that it is reasonable.[59]

In defending this approach, the Court referred to two points about institutional competence: as compared with executive agencies, judges lack expertise and are not politically accountable. Technical specialization was relevant to the interpretation of the Clean Air Act, and there the executive had conspicuous advantages over courts.[60] Moreover, in interpreting law, the agency could "properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is . . . ."[61] In the Court's view, it would be appropriate for agencies, rather than judges, to assess "competing interests

58. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

59. *Id.*

60. *See id.* at 865.

61. *Id.*

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which Congress itself either inadvertently did not resolve, or intentionally left to be resolved . . . in light of everyday realities."[62]

What is most striking about this passage, and most relevant for present purposes, is the suggestion that resolution of statutory ambiguities requires a judgment about how to assess "competing interests." This 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. Of course we can imagine cases in which courts resolve ambiguities through the standard sources—for example, by using dictionaries, consulting statutory structure, deploying canons of construction, or relying on legislative history. Under *Chevron* Step One, the executive will lose if the standard sources show that it is wrong.[63] But sometimes those sources will leave gaps; *Chevron* itself is such a case, and there are many others. If the Court's analysis is accepted on this point, its deference principle seems readily understandable; we shall shortly investigate its relationship to the international relations doctrines.

It is an understatement to say that the foundations of the *Chevron* approach have been disputed.[64] But the Supreme Court has settled on a specific understanding of those foundations: courts defer to agency interpretations of law when and because Congress has told them to do so.[65] On this view, the deference principle is a reading of legislative instructions; hence, Congress has ultimate control over the deference question. The problem is that Congress hardly ever states its instructions on the deference question with clarity, and thus *Chevron* cannot be grounded on an explicit or implicit legislative instruction on that question. It follows that *Chevron* rests on a legal fiction,[66] to the effect that a grant of the authority to make rules and conduct adjudications, and perhaps other authority as well,[67] also carries with it interpretive power.

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62. *Id.* at 865-66.

63. *See, e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994). To the extent that the international relations canons operate as part of Step One, they trump executive power under *Chevron*—a proposition on which we shall cast some doubt. *See infra* Section III.C.

64. *See, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277-78 (1988).

65. *See* Barnhart v. Walton, 535 U.S. 212, 217-18 (2002); United States v. Mead Corp., 533 U.S. 218, 227 (2001).

66. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511.

67. *See Barnhart*, 535 U.S. at 222.

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2. *Limits on Deference*

Chevron grants a great deal of power to the executive. Nonetheless, the deference principle is not unlimited. For our purposes, three limitations have particular importance.

a. *Delegated Power of Interpretation?*

It is possible that the executive will not receive *Chevron* deference if the agency has not exercised delegated power to make rules or to undertake adjudications.[68] It follows that if Congress has not given the relevant agency rulemaking or adjudicatory power, or if the agency, while delegated that power, has not exercised it in interpreting the law, the ordinary level of deference may be unavailable.[69]

In this way, administrative law principles make it important to distinguish the various procedures that precede executive interpretation. At one end of the spectrum is the rulemaking or adjudicative procedure that produces an interpretation of an ambiguous statute. Interpretations produced by rulemaking or adjudication receive *Chevron* deference.[70] Agency interpretations that emerge from policy statements or interpretive rules are often not entitled to *Chevron* deference, but they do receive a measure of respect under *United States v. Mead Corp.*[71] and *Skidmore v. Swift & Co.*[72]

By contrast, litigation positions—whereby the executive asserts a particular interpretation for the first time in litigation in which the executive is a party or an amicus—receive no deference at all, apparently on the theory that Congress would not want courts to defer to positions that may be opportunistic and that are not preceded by any kind of check on possible arbitrariness.[73] The refusal to

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68. *See Mead*, 533 U.S. at 226-27.

69. We use the word "may" because the doctrine is complicated. *See, e.g.*, *Barnhart*, 535 U.S. at 222 (holding that longstanding agency interpretations can be entitled to deference even if they were not promulgated through notice-and-comment rulemaking).

70. *See, e.g.*, Michigan v. EPA, 213 F.3d 663, 682 (D.C. Cir. 2000).

71. 533 U.S. at 227-28.

72. 323 U.S. 134, 140 (1944).

73. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257-58 (1991) (holding that the EEOC's litigation position contradicted its earlier stance, was not supported by adequate evidence, and therefore was not entitled to deference), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e(f) (2000)); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (giving no deference to a litigation position). As we suggest *infra* text accompanying note 111, litigation positions

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defer to litigation positions is plausible in general. But it may well be inapplicable in the foreign relations setting because the pressure of events may prevent the executive branch from setting policy through formal procedures or in advance. We return to this point below.[74]

b. Nondelegation Canons?

Courts have sometimes denied the executive law-interpreting authority on the ground that key decisions must be explicitly made by the national lawmaker. The most important principle, of evident relevance to our argument here, is the avoidance canon, captured in the claim that the executive is not permitted to construe statutes so as to raise serious constitutional doubts.[75]

Why does the avoidance canon overcome the executive's power of interpretation? The reason is that we are speaking of a kind of *nondelegation canon*—one that attempts to require Congress to make its instructions exceedingly clear and that does not permit the executive to make constitutionally sensitive decisions on its own.[76] The idea of avoidance affects the executive branch in particular because it forbids that branch to construe ambiguous statutes so as to raise serious constitutional problems; Congress, by contrast, is permitted to create constitutionally sensitive policy by law if it explicitly chooses. The avoidance canon requires the national legislature, and it alone, to raise hard constitutional questions.

Other interpretive principles, such as the canon against retroactivity,[77] also serve as nondelegation canons that deny deference and trump *Chevron*.[78] The canon against retroactivity, for example, ensures that the executive will not be taken to have been delegated the power to apply statutes retroactively. Congress alone must make that decision. In areas ranging from broadcasting to

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receive no deference, but some decisions suggest that *Chevron* deference may still be available when the interpretation is not a product of rulemaking or adjudication. The word "may" is crucial. *See supra* note 69.

74. *See infra* Subsection III.E.3.

75. *See, e.g.*, Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159, 172-73 (2001); DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

76. One of us discusses this idea more generally in Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

77. *See Bowen*, 488 U.S. at 208.

78. *See, e.g.*, Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992).

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the war on terror,[79] the nondelegation canons constrain the interpretive discretion of the executive.

c. Organic Statutes and Others

Under administrative law principles, it is also important to distinguish among categories of statutes. The first category includes statutes that authorize agency action (sometimes called "organic" statutes). Agencies are entitled to deference at least insofar as they are interpreting a statute that grants them rulemaking and adjudicatory power. The second category includes more general statutes, such as the Freedom of Information Act (FOIA)[80] and the Administrative Procedure Act (APA),[81] which merely regulate agency behavior. According to standard principles, agencies are not entitled to deference in the interpretation of such statutes.[82]

It is not entirely clear how to adapt this distinction to the domain of international relations, but it seems to make sense to distinguish between two categories of statutes. The first category includes statutes that give the executive the authority to implement policy through rulemaking or adjudication. Such statutes seem to fall comfortably within the basic framework of *Chevron*. Arguable examples include the statute that provides the President with authority to regulate immigration[83] and the Authorization for Use of Military Force (AUMF).[84] It is less clear how to approach statutes that apply regardless of the cause of action or type of enforcement, even to common law litigation. Such laws include the FSIA and the Uniform Foreign Money-Judgments Recognition Act.[85] Laws of this kind are indeed general, and it would be possible to see them as akin to FOIA and the APA. Yet these laws also delegate authority to the executive, and perhaps they should not be treated the same as those statutes that generally limit executive authority.

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79. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (exploring the role of international law and canons of construction in the interpretation of the Authorization for Use of Military Force).

80. 5 U.S.C. § 552 (2000).

81. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

82. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 208-09 (2006).

83. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999) (applying *Chevron* deference to an immigration statute).

84. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. 2002)).

85. 13 U.L.A. 149 (1986).

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The Uniform Code of Military Justice (UCMJ),[86] which played an important role in *Hamdan*,[87] might well be classed with FOIA and the APA as a general provision that regulates the executive branch, rather than as a statute that the executive is charged with implementing. The War Powers Resolution,[88] which limits the President's power to use military force, is a more straightforward example; it would be difficult to argue that the executive is entrusted with the power to interpret its textual ambiguities. Reasonable people can disagree about the proper categorization of the Foreign Intelligence Surveillance Act (FISA).[89] Perhaps it is best seen as akin to the War Powers Resolution in controlling the executive, which therefore lacks the power of interpretation. At the same time, FISA is a statute that the executive implements, and perhaps it is best treated as such.

B. The Executive and International Comity

The executive plays an important role in litigation that affects foreign sovereigns, even when the executive is not a party. Deference to the executive is an established element of many international relations doctrines, but the law has—peculiarly—not settled on a general principle of deference when an executive agency advances an interpretation of a statute that has foreign relations implications.

The argument in this Section has a degree of complexity, and it may be useful to set out the basic argument in advance. In many cases, the executive should be entitled to *Chevron* deference under the terms of existing doctrine because it will be acting pursuant to formal procedures or other channels that trigger *Chevron*. Even if no such mechanisms are involved, we believe that a grant of authority to the executive in the domain of foreign affairs ought generally to include a power of interpretation, so that *Chevron* deference is appropriate. The international relations doctrines should not operate as constraints on the executive under *Chevron* Step One. If the executive's interpretation is unreasonable, of course, it will be invalid under Step Two, but Step Two invalidations are rare in the domestic sphere,[90] and they should be

86. 10 U.S.C. §§ 801-946 (2000).

87. *See infra* Section IV.C.

88. 50 U.S.C. §§ 1541-1548.

89. 50 U.S.C. §§ 1801-1862 (2000).

90. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 838 n.26 (2006) (finding that a very small percentage of cases, both in the Supreme Court and in the lower courts, invalidate agency

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rare here as well. If there is no interpretation of a statutory term but simply a policy judgment by the executive, the courts should defer as well, using *Chevron* as an analogy. The avoidance canon provides an important exception, and there are others. But the international relations doctrines do not belong in the same category as that canon or other such exceptions.

It is possible to fear, as Derek Jinks and Neal Katyal do, that our approach "would accelerate the trend of circumventing Congress in key decisions involving war powers and civil liberties" and "radically increas[e] the executive branch's capacity . . . to break the law."[91] But the fear is misplaced. Because we would tether the executive to the expressed will of Congress, we would not give the executive lawbreaking powers, and we would hardly eliminate Congress as a major player in key decisions in foreign affairs. *Chevron* itself is far from a blank check to the executive; the power to interpret ambiguities is not the power to ignore statutes. At the Supreme Court itself, the executive loses about one-third of the time, even when *Chevron* is applied.[92] Within the lower courts, prominent agencies lose at an even higher rate.[93] Indeed, we believe that our proposal may well have a democracy-promoting function, one that should appeal to those who seek a greater role for Congress: if the national legislature distrusts the President, it has every reason to legislate clearly, so as to reduce his room to maneuver. A future Congress, for example, might issue a more detailed AUMF, one that more carefully described the entities against which force could be used and the limits under which the President might operate, rather than leaving those issues to a President it did not trust or to courts that had no expertise in the area. In this respect, our approach might well revitalize Congress's own role, precisely by encouraging greater specificity.[94]

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decisions under Step Two). Review of executive interpretations for reasonableness nonetheless should be expected to have a significant function. It would, for example, raise questions about apparently arbitrary differences across time or across nations, as in an executive judgment that the civil rights statutes apply in England and Germany but not in France and Italy; any such judgment would have to be explained.

91. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234 (2007).

92. *See* Miles & Sunstein, *supra* note 90, at 831-33.

93. *See id.* at 849 (reporting a validation rate of 64% in EPA and NLRB cases).

94. Jinks and Katyal contend that under our approach, "[m]embers of Congress, when enacting legislation, would now have to contemplate whether any statutory ambiguities would be used to permit the President to violate longstanding treaty commitments." Jinks & Katyal, *supra* note 91, at 1275. Perhaps. But Congress can also incorporate those commitments into the authorizing statute or any general statute. Aware of the President's power of interpretation, Congress might well impose greater restrictions on what the President can

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One additional note before we begin. It is tempting to evaluate any institutional proposal in the light of current events – for example, to assess our suggestion with close reference to the approach of a particular administration (e.g., the Bush Administration) to a set of prominent issues (say, civil liberties in connection with the war on terror). We suspect, though we are not sure, that the skeptical reaction of Jinks and Katyal is not entirely uninfluenced by visible controversies in which the Bush Administration is widely perceived to have interpreted law in a way that is both wrong and likely to undermine important social values. We hope that our own arguments will not be assessed in such a narrow frame. As many of our examples suggest, our proposal would permit the executive to interpret statutes in a way that should be congenial to those skeptical of the Bush Administration – for example, by applying civil rights and environmental statutes extraterritorially.

Those who accept *Chevron* itself must acknowledge that it will lead to many results that they find uncongenial (perhaps by allowing certain administrations to interpret environmental statutes narrowly). The argument for *Chevron* depends on a broader set of institutional judgments. In the domain of foreign relations, the application of *Chevron* should not be ruled out of bounds by pointing to cases in which, say, the Bush Administration has interpreted ambiguous statutes so as to compromise desirable principles of international law. As we shall suggest, the ultimate evaluation should depend on more general judgments about institutional capacities.

1. *Traditional Deference to the Executive in Foreign Relations*

In some ways, deference to the executive in foreign relations cases is commonplace. Before the enactment of the FSIA, courts would relax sovereign immunity when the executive suggested that they should do so. This practice was institutionalized in the twentieth century. The State Department would intervene in cases when it preferred a particular outcome, and courts typically followed the view of the Department.[95] Indeed, courts deferred to a kind of executive jurisprudence, parsing State Department opinions for principles that would control cases in which the State Department did not intervene.[96] Today, courts continue to take account of the executive's views in FSIA cases[97] and to

do. *Chevron* does not limit Congress's role in any way. *Chevron*izing foreign relations law would not reduce legislative power; it would reduce judicial power (to resolve ambiguities on the basis of either canons of interpretation or policy).

95. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983).

96. *See id.* at 487-88.

97. *See* Republic of Austria v. Altmann, 541 U.S. 677, 701 & n.21 (2004).

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engage in pre-FSIA style deference to the executive in cases involving head-of-state immunity.[98]

In addition, a strain of thinking about the act of state doctrine has long held that courts should defer when the executive informs them that this doctrine should not apply in a particular case.[99] In a clear analogy to *Chevron*, courts also usually give weight to the executive's interpretation of a treaty.[100] They defer absolutely to the executive's decision whether to recognize a foreign state.[101] And even when the executive and Congress come into conflict about the extent of their respective foreign relations responsibilities, in most instances courts effectively defer to the executive by refusing to decide on the merits because of concerns about justiciability.[102] In the face of such a refusal, the views of the executive prevail.

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98. *See* Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004) (deferring to the executive's recognition of the President of China's immunity); United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997) (deferring to the executive's denial of immunity to the former leader of Panama).

99. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 420 (1964), *superseded by statute*, Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301, 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2000)). *But see* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972) (plurality opinion) (rejecting blanket deference to the executive, but suggesting that the executive's views are entitled to weight).

100. *See* United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000). A recent war on terror case exemplifies this view. *See* United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (deferring to the executive's interpretation of the Geneva Conventions); *see also* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006). A contrary view is urged in Evan Criddle, Comment, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1931 (2003), on two grounds: (1) the meaning of treaties is controlled by the expectations of the parties, not by the will of the executive, which is an interested party; and (2) treatymakers cannot delegate interpretive power to the executive because executive institutions "lack independent law-generative power absent a treaty partner's consent." With respect to (2), the problem is that when 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. A presumed delegation to the executive seems both more natural and better than a delegation to the federal courts. With respect to (1), we agree that the expectations of the parties are controlling, but by hypothesis there are no clear expectations in the face of ambiguity. It is true that the executive is the representative of an interested contracting party, *see id.* at 1930, but the courts are also representatives of the United States without the dual advantages of expertise and accountability. We acknowledge the possibility that the interpretation of the executive may reflect some kind of bias.

101. *See* Mingtai Fire & Marine Ins. Co. v. United Parcel Serv., 177 F.3d 1142, 1145 (9th Cir. 1999).

102. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (addressing treaty termination); Campbell v. Clinton, 203 F.3d 19, 24 (D.C. Cir. 2000) (addressing the War Powers Resolution); *see also* Schneider v. Kissinger, 412 F.3d 190, 193

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Deference to the executive in foreign relations cases is traditionally based on both constitutional and functional considerations. Courts sometimes say that the executive has the primary foreign relations power.[103] This power is traced to the Vesting Clause of Article II and other provisions.[104] But the explicit grants of foreign relations power to the executive are rather sparse and ambiguous. From the document itself, it is hardly clear that the executive has "primary" authority in the domain of foreign affairs.[105] Hence the underlying justifications are often less textual than functional, based on traditional practices and understandings. Courts say that the nation must speak in "one voice" in its foreign policy; the executive can do this, while Congress and the courts cannot.[106] They say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively; the other branches cannot.[107] As emphasized in *Chevron*, the executive, unlike the judiciary, is politically accountable as well as uniquely knowledgeable, and its accountability argues for deference to its judgments about how to assess the competing facts and values.[108] Of course, none of these advantages justifies absolute deference to the executive in all cases, and courts have not gone this far. The executive cannot violate a clear law (putting constitutional questions to one side). But in cases of ambiguity, courts are inclined to defer to the position of the executive.

2. *Conflicts Between Regulations and International Comity*

In light of this longstanding deference to the executive, it is surprising that courts have not, so far, consistently and clearly indicated that they will accept the views of the executive about whether to apply the international relations doctrines.[109] Suppose that the executive interprets a statute in a manner that

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(D.C. Cir. 2005) (dismissing on political question grounds a lawsuit concerning Henry Kissinger's authorization of CIA intervention in Chile).

103. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936).

104. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 35-45 (2d ed. 1996).

105. *See* Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 66-68 (discussing constitutional provisions giving certain foreign affairs authority to Congress).

106. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413-14 (2003).

107. *See Curtiss-Wright Export Corp.*, 299 U.S. at 320.

108. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984).

109. *Compare* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (reserving the question of deference), *and Garamendi*, 539 U.S. 396 (giving deference), *with* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (rejecting deference).

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violates those doctrines. Should a court defer to this interpretation, or should it reverse the interpretation on the grounds that it violates the doctrines?

This question might well pose a *literal* conflict between *Chevron* deference and the international relations principles. Suppose, for example, that an agency entitled to *Chevron* deference issues a regulation that conflicts with the international relations principles. If so, the court must develop rules of priority. Alternatively, the conflict might not literally involve *Chevron* because the executive has not exercised delegated power to make rules or to conduct adjudications[110]—but it might nonetheless present a difficult question of how to reconcile executive power with comity. Suppose, for example, that the Department of Justice concludes that antitrust law should apply outside the territorial boundaries of the United States, but the decision does not follow any kind of formal procedure. If the decision is offered in litigation, it is possible that *Chevron* deference would be denied on the ground that litigation positions do not receive deference.[111] Nonetheless, we believe that such deference is due to litigation positions in the domain of foreign relations and that even if deference is not formally given, a court might want to pay a great deal of attention to the views of the executive.

In the face of a conflict between the executive's view and the comity principles, a court might take one of three positions. First, it could hold that international comity doctrines prevail over the executive's interpretation. Perhaps the principles would be treated as part of *Chevron* Step One and thus defeat the executive's view. Second, a court could hold that the executive's interpretation prevails. Perhaps the executive, in effect, has discretion whether to interpret a statute in a way that violates international law or potentially offends foreign sovereigns. Third, a court might hold that some middle position is preferable: perhaps the executive interpretation and the international comity doctrines receive equal weight. A court might, for example, require the executive to take account of international comity but defer to an interpretation that endangers comity for especially good reasons.

The case law, so far, reflects a range of positions and is difficult to parse; there is no settled view about the relationship between the views of the executive and the doctrines. In some cases, the views of the executive have

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110. In some circumstances, an agency is entitled to *Chevron* deference even if it has not exercised such power. *See supra* text accompanying notes 68-73.

111. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988); Fla. Manufactured Hous. Ass'n v. Cisneros, 53 F.3d 1565, 1574 (11th Cir. 1995).

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proved crucial.[112] In other cases, courts have referred to the comity doctrines without paying much attention to the position of the executive.[113]

C. *The Argument for Executive Power*

Our minimal suggestion here is that in cases in which the executive has adopted an interpretation via rulemaking or adjudication, or is otherwise entitled to deference under standard principles of administrative law, the executive's interpretations should prevail over the comity doctrines. Those doctrines, we argue, should not be treated as part of the court's analysis under *Chevron* Step One. It follows that courts should defer to the executive's judgment unless it is plainly inconsistent with the statute, unreasonable, or constitutionally questionable. The executive is in the best position to reconcile the competing interests at stake, and in the face of statutory silence or ambiguity, Congress should therefore be presumed to have delegated interpretive power to the executive. If the executive decides that the statute should be interpreted so as to overcome the comity principles, it ought to be

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112. *See, e.g.*, Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005) (deferring to the President as to whether an alien could be removed to Somalia without his consent when the statute was ambiguous); Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343 (Fed. Cir. 2005) (holding that the Commerce Department's interpretation trumped international trade law). For similar cases in which *Chevron* deference seemed to trump deference to international trade treaties and case law, see *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004), which held that international law concerns were only a "guide"; *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), which held that a Commerce Department interpretation trumped concerns over WTO violations; and *Federal Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995), in which the court deferred to the Commerce Department's methodologies in determining antidumping margins.

113. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (rejecting an EEOC interpretation of an ambiguous provision of Title VII that violated the presumption against extraterritoriality), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e(f) (2000)). Justice Scalia, concurring, argued that the interpretation was not reasonable, even if *Chevron* applied. *See id.* at 260 (Scalia, J., concurring). The dissent argued that the EEOC's interpretation was entitled to deference and that the statute was best interpreted to apply abroad, at least when U.S. nationals were involved. *See id.* at 260-78 (Marshall, J., dissenting); *cf.* Small v. United States, 544 U.S. 385, 388-89 (2005) (applying the presumption against extraterritoriality to a law concerning gun possession); Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) (applying the *Charming Betsy* canon to an alien removal law). For a case somewhere in the middle, see *Spector v. Norwegian Cruise Lines Ltd.*, 545 U.S. 119, 135-36 (2005), in which the Court agreed with regulatory agencies that the Americans with Disabilities Act should be applied to foreign-flagged ships in American waters in a manner that did not violate international law.

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permitted to interpret the statute in that way. There is no reason to distrust the executive's competence in making the underlying choices.

Beyond this minimal suggestion, we contend that in the domain of foreign relations, the approach signaled in *Chevron* should apply even if the executive is not exercising delegated authority to make rules or conduct adjudications. It is highly relevant here that considerations of constitutional structure argue strongly in favor of deference to the executive—a point that makes the argument for deference stronger than in *Chevron* itself. For those who reject this contention, we suggest that the level of deference signaled by the Court's decision in *Mead* provides the proper standard—and that *Skidmore* deference, even if weaker, confers a measure of authority on the executive.

Our basic conclusions follow from the grounds for the international comity principles. We have criticized the entanglement theory, but even if the theory is right, the executive branch, unlike the judiciary, is in a good position to know whether concerns about entanglement justify a decision to invoke comity. If the executive is not worried about entanglement, and if Congress has expressed no such worry through legislation, the argument for deference to the executive is strong. Litigation produces entanglement problems when the decision on the merits is likely to offend a foreign sovereign, perhaps leading it to withdraw cooperation in some area of foreign relations that is vital to America's interests. The court has no expertise in determining whether a certain kind of litigation will offend a foreign sovereign, whether the sovereign is likely to respond by reducing cooperation, or whether such cooperation is valuable. These judgments are all at the core of the foreign relations expertise of the executive.

Now consider the consequentialist theory. The underlying inquiries required by this theory are highly complex and have empirical and normative dimensions, for which the executive's institutional position gives it a decisive advantage over the courts—even more so than under the entanglement theory. Two points are important here.

First, the executive branch carefully tracks relations with foreign states. Thus it is in a better position to predict whether a particular act of deference to foreign interests is likely to result in reciprocation by foreign states or whether such states would retaliate for a violation of the comity principles. The prediction is based on subtle factors—including the nature of the relationship with the foreign state, the cultural norms of that state, its legal system and other institutions, its politics, and so forth. These are factors followed and assessed by the Department of State. They are well beyond the usual kind of judicial fact-finding.

It follows that the executive branch is in a better position to understand the benefits of foreign reciprocation or the likelihood and costs of retaliation than the judiciary. Suppose, for example, that in response to litigation against China

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by Chinese victims of state repression, China begins to issue vague threats against Taiwan. Are these threats credible? Are they meant to signal that China will take a more confrontational stance toward Taiwan if the United States allows Chinese citizens to sue China for human rights violations? Or do they perhaps signal a general chilling of relations, in which case the United States may have more trouble obtaining Chinese assistance in pressuring Iran to abandon its nuclear plans? Courts cannot answer these questions; the executive can.

The second point involves accountability. In deciding whether American law should be applied abroad, or whether a statute should be construed in conformance with international law, the executive must balance competing interests and make value judgments. It must ask questions not only about reciprocity and retaliation, but also about the importance of applying, say, the National Labor Relations Act to protect Americans aboard a foreign ship in American waters, or the ban on sex discrimination to American companies doing business in China, or the Endangered Species Act to the activities of American institutions operating in Japan.[114] At least at first glance, those judgments should be made by those who are accountable to the public, not by courts. The executive might well pay a price if it concluded that American civil rights or environmental law ought not be applied to American activities in other nations. As in the *Chevron* context, the executive is far more likely than a court to be punished by the public if it causes or fails to resolve tensions with other countries or a foreign policy crisis. Indeed, although courts routinely anger foreign sovereigns,[115] we cannot think of any case in which the public has put pressure on courts because of such crises – probably because the connection between judicial decisions and international tensions is not salient enough.

The flip side of accountability is concern about political bias.[116] Because courts are independent, they may be more neutral than the executive, and thus perhaps more likely to interpret the statute impartially. But this concern is identical in the *Chevron* context in which, as we noted, courts have plausibly concluded that the executive's control over policy justifies its heightened

114. One court has held, however, that the ESA applies abroad. *See* Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990) (holding that the clear text of the ESA requires extraterritorial application), *rev'd on other grounds*, 504 U.S. 555 (1992). *But see* Natural Res. Def. Council, Inc. v. Dep't of the Navy, No. CV-01-07781, 2002 U.S. Dist. LEXIS 26360, at *65, *70 (C.D. Cal. Sept. 17, 2002) (citing an implementing regulation applying the ESA "upon the high seas," but finding "unpersuasive" the argument that the ESA applies "in the territorial waters of another nation").

115. *See* LOWENFELD, *supra* note 13, at 633-37.

116. *See* Criddle, *supra* note 100.

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authority over the interpretation of statutes. In any case, judges may have biases of their own. Any relevant "bias" on the part of the executive in the domain of foreign affairs is best understood as the operation of democracy in action—at least if the executive's interpretation is reasonable and if constitutionally sensitive issues are not involved.

Thus, the expertise rationale for deference to the executive is stronger in the foreign relations setting than in the traditional *Chevron* setting, while the accountability rationale for deference is at least equally strong. These conclusions suggest that if the approach in *Chevron* is correct, deference to executive interpretations in foreign relations cases must also be the appropriate approach. The core reason is that resolution of statutory ambiguities involves judgments of policy, and those judgments are best made by the executive. None of this means that courts have no relevant expertise. Courts might have a better sense than the executive of how enforcement of foreign judgments may harm the integrity of the American judicial system. But this advantage is relatively minor compared to the advantages of the executive.

What we have said so far also applies when statutes and common law are relatively clear—i.e., outside the *Chevron* setting—if the executive branch argues that the court should dismiss the case rather than reach the merits. Here, to be sure, there is a greater danger of conflict between the executive and Congress, but Congress has not objected to the traditional doctrines of executive deference, and until it does so, the constitutional problems seem more theoretical than real.[117] The normative question is whether the executive's institutional expertise gives it advantages over courts in this setting as it does in the *Chevron* setting, and the answer is surely yes. In both cases, the argument for deference to the executive is that it has more expertise than the courts in foreign relations and that the executive's accountability for foreign relations is more important than the courts' independence from political pressure.[118]

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117. With one exception: the Senate has objected to the executive's claim that its interpretations supersede interpretations communicated to the Senate when it consents to a treaty, and it frequently has attached conditions to treaties in which it expressed this view. *See* Gary Michael Buechler, *Constitutional Limits on the President's Power To Interpret Treaties: The Sofaer Doctrine, the Biden Condition, and the Doctrine of Binding Authoritative Representations*, 78 GEO. L.J. 1983 (1990).

118. It is possible to raise one more concern: federalism. But courts have had little patience for federalism arguments in foreign relations cases; it is clear that the foreign policy of the national government prevails over the statutory and common law of the states. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (holding that executive diplomatic policy prevails over state law); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Zschernig v. Miller, 389 U.S. 429, 441 (1968) (holding that state laws with foreign relations impact may be preempted even when there is no conflicting federal statute or treaty).

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D. A Historical Evolution

Many of the international relations principles are very old. The *Charming Betsy* doctrine, the presumption against extraterritoriality, international comity, foreign sovereign immunity, the penal and revenue rules, and the act of state doctrine can all be traced back to the nineteenth century, and most of them to the early years of the Republic.[119] Many of them evolved during the ascendancy of ideas that are no longer important or even relevant in American jurisprudence—including natural law ideas and the pre-*Erie* conception of the common law—and in a period when the United States was a small, weak nation whose foreign policy was inward-looking and in some ways isolationist. The national government was weaker relative to the states, and the presidency was weaker relative to Congress.[120]

Things are almost unimaginably different today. The vast changes in foreign policy, the greater relative power of the United States, the institutional development of American government, and new ways of thinking about law suggest that the international relations principles need to be reconceived. We offer here a brisk overview of the relevant developments. The basic point is that *Chevron* represents a clear judicial recognition of changing developments in the domestic domain; a parallel shift, recognizing interpretive power for the executive, might well be taken as recognition of related developments on the international side. Indeed, the latter shift, in the domain of foreign affairs, is far simpler to explain and to defend than the former one. In these circumstances, the real oddity is that domestic law has been *Chevron*ized whereas foreign relations law has not.

It is a commonplace that the rise of the administrative state in the twentieth century revolutionized constitutional law.[121] Under nineteenth-century constitutional law, it was assumed that while Congress would regulate the national market, most important domestic issues would be controlled by states

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119. *See* Underhill v. Hernandez, 168 U.S. 250 (1897) (act of state doctrine); Hilton v. Guyot, 159 U.S. 113 (1895) (international comity); The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (penal rule); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) (presumption against extraterritoriality); The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) (foreign sovereign immunity); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (*Charming Betsy* doctrine).

120. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 (5th rev. ed. 1984) (tracing the rise of the power of the presidency over the course of American history); ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (2004) (same).

121. *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

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and municipalities; these included labor-management relations, environmental protection, commercial fraud, antitrust problems, workplace safety, and much more.[122] Massive technological change in the late nineteenth century—and the emergence of an industrialized, interdependent, highly urbanized national economy—undermined this allocation of authority. In the twentieth century, courts and the political branches ultimately agreed that much regulation would need to occur at the national level, despite the losses to local control and other federalism values.[123] They also agreed that although the executive usually could not act without congressional authorization, broad delegations of regulatory authority were necessary and permissible because of the many institutional advantages of the executive, including specialization and the capacity for flexible responses to rapidly changing circumstances.[124] *Chevron* itself can be seen as a culmination of this development. Indeed, the decision is a natural product of the repudiation of judge-made common law and the large-scale shift to lawmaking by executive institutions.[125]

It is easy to see a parallel process occurring in foreign relations law, though with one wrinkle.[126] The Framers agreed that the national government's foreign relations powers would be less restricted than its domestic relations powers, and so formally the national government has had a freer hand from the beginning.[127] The major change was thus in the realm of separation of powers, and specifically the massive increase in the executive's foreign affairs power relative to that of Congress.[128] Critics of this transformation fear executive

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122. *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 19-35 (1982).

123. For an overview, see STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 18-20 (6th ed. 2006).

124. *See id.* at 71-74. For a classic statement in favor of administrative discretion, see JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

125. *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2583-84 (2006).

126. *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 4-5, 19-21 (1999). As White has pointed out, the transformation of foreign relations law predated the transformation of domestic constitutional law by a few decades. This historical fact makes it possible, though perhaps too conveniently, to trace the foreign constitutional law transformation to America's achievement of great power status at the end of the Spanish-American War in 1898, just as it is possible to trace the domestic constitutional law transformation to the period following the Great Depression.

127. *See* 1 BRADFORD PERKINS, THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE CREATION OF A REPUBLICAN EMPIRE, 1776-1865, at 58-59 (1993).

128. *See* SCHLESINGER, *supra* note 120, at ix-x.

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overreaching,[129] and there is reasonable dispute about the extent of this risk and about how best to limit it. But critics and supporters agree that changes in the global environment justify at least some expansion of executive powers.

To say this is not to take a stand on whether the President can act on his own. It is merely to acknowledge that legislation often grants the executive some discretion to act rapidly in response to perceived threats. Hence, the increase in executive power, usually made possible by statutes, has reflected a recognition by Congress of this pragmatic point.[130] In these circumstances, deference to the executive's views on the meaning of ambiguous statutes, rather than invocation of the comity principles, is a step that seems at once modest and a bit late. To be sure, the executive often acts outside of the context of crises or genuine emergencies, and our argument extends far beyond those limited settings, in which no one wants courts to issue temporary restraining orders. But even when time is not of the essence, the stakes are often very high, and the question remains: when a statute is ambiguous, should the ambiguity be settled by courts or the executive? If the executive's interpretation is reasonable and does not raise serious constitutional problems, we think that the answer is clear.

E. Objections and Responses

We are aware that our proposal faces a number of potential objections. Let us explore them in sequence.

1. Nondelegation Canons?

It would be possible to respond that some or all of the comity doctrines should be seen as nondelegation canons. If this is so, then a clear statement from Congress is required to produce a result that compromises comity. Perhaps the doctrines apply under Step One and thus forbid contrary interpretations from the executive. The most obvious candidate for this approach is the principle calling for conformity to international law. For example, Jinks and Katyal appear to understand the *Charming Betsy* canon in these terms, suggesting that the executive is bound by international law in the

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129. In the context of individual rights, see DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

130. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989) (describing statutes delegating emergency powers to the executive, as well as congressional and judicial acquiescence in broad executive interpretations of those statutes).

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face of statutory ambiguity.[131] The same analysis might be applied to the presumption against extraterritoriality.[132]

In our view, however, there are serious problems with any effort to classify the comity doctrines as nondelegation canons. It is reasonable to say that Congress must speak clearly if it seeks to raise a serious constitutional question and thus that the executive may not raise such a question on its own;[133] courts plausibly insist that the national lawmaker must expressly authorize invasions of constitutionally sensitive domains. But in light of the distinctive role of the executive in the area of foreign relations,[134] a clear statement principle would make no structural sense, at least as a general rule.

A more refined version of this argument would attempt to disaggregate the comity principles and urge that one or a few of them, such as the principle against violations of international law, trump executive interpretations. Invoking the notion of an "executive-constraining zone," Jinks and Katyal refer to international law that has the status of supreme federal law and suggest that such law should not be subject to the interpretive authority of the executive.[135] We agree that the executive is bound by such law. But we also believe that self-executing treaties and statutes incorporating international law should be subject to executive interpretation to the extent that they are ambiguous and the executive's interpretation is reasonable. Indeed, it is well established that when treaties are ambiguous, the executive has a degree of interpretive power.[136] There are significant advantages to permitting the executive, rather than the courts, to settle genuine ambiguities when doing so turns on

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131. *See* Jinks & Katyal, *supra* note 91, at 1268.

132. *Cf.* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (suggesting that the internal affairs clear statement rule is part of a set of "clear statement rules [that] ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation"). *But see* Natural Res. Def. Council v. Dep't of the Navy, No. CV-01-07781, 2002 U.S. Dist. LEXIS 26360 (C.D. Cal. Sept. 17, 2002) (respecting an executive regulation requiring the ESA to be applied outside of American territory and on the high seas).

133. *See, e.g.*, Nadarajah v. Gonzales, 443 F.3d 1069, 1076 (9th Cir. 2006).

134. See *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005), for a recent statement.

135. Jinks & Katyal, *supra* note 91, at 1234.

136. *See, e.g.*, United States v. Stuart, 489 U.S. 353, 369 (1989); David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994). To be sure, it is plausible to raise questions about this idea. *See, e.g.*, David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999) (criticizing judicial deference to executive interpretations of treaties).

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judgments of policy and principle. Judges do not lack biases of their own, as the *Chevron* cases themselves establish.[137]

Jinks and Katyal contend that when international law is incorporated into national law, is made at least partly outside of the executive, and regulates the executive,[138] the executive lacks the authority of interpretation. We assume that they mean by this the authority to interpret ambiguous treaties, given that under our *Chevron*izing approach clear treaties are not subject to interpretations by the executive. If they are right on this point, much of our argument remains untouched; they are objecting to a small though important piece of the puzzle. But here as well, Jinks and Katyal are rejecting current law, which includes no such exception to the principle that the President is entitled to interpret ambiguous treaties. And if taken as generally as it appears to be meant, their view cannot be reconciled with the premises of *Chevron* itself. The evident appeal of their proposal lies in the principle that foxes should not guard henhouses – that those limited by law should not be able to interpret the scope of the limitation. But *Chevron* itself complicates this principle, on the apparent theory that the courts, and not the executive, might turn out to be the fox.

2. *Self-Dealing*

It is tempting to object that there is a risk of self-dealing whenever the executive interprets statutes that grant and limit its own authority. Invoking this concern, Jinks and Katyal contend that "*Chevron* deference should not be awarded to agencies when they interpret organic law in the executive-constraining zone."[139]

We are alert to the risk of self-dealing, but it is important to make some distinctions. *Chevron* applies to agency interpretations of statutes, not of regulations, and the executive's interpretation of regulations is not our topic here.[140] In any case, existing law hardly deprives agencies of *Chevron* deference "when they interpret [statutes] in the executive-constraining zone."[141] Most of the relevant statutes, including the statute in *Chevron* itself, constrain as well as

137. *See* Miles & Sunstein, *supra* note 90, at 834-63 (showing the effect of judges' political convictions in applying *Chevron*).

138. *See* Jinks & Katyal, *supra* note 91, at 1236.

139. *Id.* at 1266.

140. That issue is governed by *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which called for judicial deference to agency interpretation of agency regulations. It is unclear why the ordinary principle of *Seminole Rock* would not apply in the domain of foreign affairs, and Jinks and Katyal make no argument against its application.

141. Jinks & Katyal, *supra* note 91, at 1266.

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empower agencies. If agencies are denied *Chevron* deference whenever they are construing statutes that constrain their own powers, then agencies will always be denied *Chevron* deference.[142]

We think but are not sure that Jinks and Katyal mean to object, in particular, to our suggestion that the executive can interpret statutory ambiguities so as to violate non-self-executing treaties and customary international law, in violation of the *Charming Betsy* canon, which they repeatedly extol.[143] (Recall that the canon is necessary only if international law has not been enacted into domestic law.) We have rejected the view that *Charming Betsy* might be taken as a nondelegation canon, but we understand that view and the arguments that can be invoked on its behalf. However, we see no reason for thinking that courts are more sensitive to international law than the executive is, whether international law is understood in the capacious and optimistic sense claimed by Jinks and Katyal or in a narrower one.[144] The executive, far more than the courts, will feel the political consequences if a misinterpretation or violation of international law leads to an international crisis, and it can better appreciate the consequences when international law and geopolitics collide.[145] Even if we are wrong on this point, the essentials of our view remain intact.

3. Mead, Chevron, *and Bureaucracy*

Jinks and Katyal offer a creative argument in the alternative. They suggest that deference should be granted only if the executive has followed some kind of internal procedure that ensures balanced decision-making. The central idea appears to be that the executive must allow a significant role for its own expert

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142. As we have noted, some statutes, such as FOIA and the APA, constrain agencies without delegating interpretive power to them; to the extent that statutes in the foreign relations domain are analogous, they do not provide sensible occasions for *Chevron* deference.

143. *E.g.*, Jinks & Katyal, *supra* note 91, at 1263, 1268.

144. *See id.* at 1266-67.

145. As a simple example, consider the case of *Mingtai Fire & Marine Insurance Co. v. United Parcel Service*, 177 F.3d 1142 (9th Cir. 1999), in which the outcome turned on whether Taiwan was a party to an international treaty. Taiwan was not a signatory, but China was; Taiwan is formally a part of China, not a sovereign state, yet as a functional matter it is treated as a sovereign state by the United States and other countries. If the court had held that Taiwan was not a party, it might have angered China; if it held that Taiwan was a party, it might have angered Taiwan. Sensibly, the court deferred to the State Department's view instead of basing its holding on its own interpretation of international law. It is the executive, not the judiciary, that will have to deal with the diplomatic aftermath.

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bureaucrats and that if the ultimate decision departs from "deliberative and sober bureaucratic decision-making," no deference is due.[146]

We agree that the executive ought to use procedures that improve deliberation, which requires the incorporation of expert knowledge. But we do not think that courts should require such procedures as a precondition for deference. In the ordinary context of administrative law, an agency receives *Chevron* deference even if the Administrator decides on a course of conduct that departs from the views of her informed staff. Courts do not look behind the agency's process to explore who, exactly, influenced the decision and to what extent.[147] An investigation of that process would strain judicial capacities and discourage candor within the agency. It would also disregard the fact that the ultimate decision is legitimately made by the agency head, not the staff. Of course that decision would be struck down if it were unreasonable under *Chevron* Step Two or were otherwise arbitrary.[148] In fact, arbitrariness review—not judicial investigation of the internal workings of the agency—operates as the principal check on agency decisions that attend insufficiently to the facts.

It would be possible to take the Jinks and Katyal argument in a more conventional way. Perhaps they mean to say that when the agency is not entitled to *Chevron* deference under standard principles, it should not receive such deference in the domain of foreign affairs. As we have noted, agencies receive *Chevron* deference when they are exercising delegated authority to make rules or to conduct adjudication; when agencies are not exercising such power, agencies may or may not receive *Chevron* deference. Perhaps Jinks and Katyal's proposal can be amended to suggest that in the domain of foreign affairs, rulemaking or adjudication is a necessary precondition for *Chevron* deference. This is an amendment rather than an application of current law because agency decisions sometimes receive deference even when rulemaking and adjudication are not involved.[149]

We disagree with this conclusion on the ground that even in those circumstances, the executive, rather than the courts, should be allowed to sort out ambiguities. But under current law, it is true that the executive sometimes will not receive deference when no formal procedure has preceded its decision. In the domain of foreign affairs, as elsewhere, it is certainly worth considering

146. Jinks & Katyal, *supra* note 91, at 1281.

147. *But cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 496-97 (1951) (allowing reviewing courts to consider the contrary judgment of the hearing examiner as part of the review of the whole record).

148. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983).

149. *See* Barnhart v. Walton, 535 U.S. 212, 221-22 (2002).

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the possibility that a mere litigation position is not entitled to judicial deference or that the executive must state its views in some public place in advance of a particular controversy. And if Jinks and Katyal do mean to work within current law, the executive, deprived of *Chevron* deference, will nonetheless receive *Skidmore* deference[150]—a lower level, to be sure, but one with which we (and we expect the executive) would be quite willing to live.

4. Short Term, Long Term, and Stability

Under *Chevron*, administrative law doctrine faces a dilemma: what if the Clinton Administration interprets the Clean Air Act in one way and the Bush Administration disagrees? If the statute is ambiguous, might not *Chevron* produce a great deal of instability in the meaning of national law, in a way that makes it more difficult for Congress and the executive branch to maintain their commitments?

The law is plain: as long as the underlying statute is unclear and the new interpretation is reasonable, a President may depart from the views of his predecessor. *Chevron* itself involved a shift by the Reagan Administration, rejecting the view of the Carter Administration, and the Court upheld this shift. The defense of this proposition is not obscure. The interpretation of ambiguous statutes typically turns on judgments of policy, and thus it is perfectly appropriate for shifts to occur in response to new facts and new values. It would be hard to approve of a principle that would freeze the law permanently in the mold chosen by the first President who made a relevant choice.

Nonetheless, Jinks and Katyal object that our approach would not bar "short-term executives from acting in ways that are against a nation's long-term interests."[151] They believe that under our approach, a President could construe the Geneva Conventions narrowly, in a way that would ultimately harm American interests, above all by subjecting American troops to a risk of serious mistreatment. We do not take a position on the proper construction of the Geneva Conventions, but the question of how to handle relevant ambiguities is more complex than Jinks and Katyal allow. Suppose that the President concludes that a narrow understanding of ambiguities in the Geneva Conventions promises to help national security, and even to protect our troops, because it will uncover relevant information and deter terrorism. Suppose

150. *See* United States v. Mead Corp., 533 U.S. 218, 237-38 (2001); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

151. Jinks & Katyal, *supra* note 91, at 1262.

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further that this understanding would not weaken other nations' willingness to comply with the Geneva Conventions but instead might increase their willingness to comply (for example, because they approve of this understanding). If so, the President's interpretation will serve, not undermine, our long-term interests. Perhaps the President is wrong. Are federal judges more likely to be right? We do not disagree with Jinks and Katyal's suggestion that sometimes presidents devote excessive attention to the short term, but the appropriate remedy is not to ask that policy decisions be made by courts.

We should add that Jinks and Katyal's claim that the President responds to short-term incentives while the courts do not is self-defeating. If that is true generally, then it must be true when presidents sign treaties as well as when they seek to evade them, in which case an old treaty, entered into by a short-sighted President, may very well undermine American interests today. We do not mean to insist that this is necessarily the case, only to point out that the ad hoc nature of Jinks and Katyal's empirical claims undermines their overall argument. They note that the U.S. government regularly runs deficits,[152] but we assume that they do not want to turn fiscal policy over to the judiciary!

5. Eliminating Congress?

Jinks and Katyal think that we ignore the role of Congress, and they argue that it would be better for courts to interpret ambiguities than to defer to the President. It is easier, they contend, for Congress to correct the errors of courts (because presidents will presumably go along) than to correct the errors of presidents (who will threaten a veto).[153] This point leads them to insist that we should be comparing the President's and Congress's expertise and accountability, rather than the President's and the courts'.

This argument simply denies the premise of our argument, taken from *Chevron*. *Chevron* is rooted in the assumption that Congress must delegate its powers because it does not have the time and resources to regulate. This is why it sets up agencies like the EPA in the first place. If power is delegated to nonexpert courts rather than to expert agencies, then more errors will occur and Congress will have to correct them, defeating the purpose of delegation. On this view, the risk of presidential bias is less troublesome than the risk of judicial error. Congress is out of the picture to the extent that, by assumption, it must delegate rather than regulate directly. Jinks and Katyal's argument about "asymmetric" error applies to the ordinary *Chevron* context to the same

152. *Id.* at 1263.

153. *See id.* at 1253-55.

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extent that it applies to foreign relations. Our purpose is not to mount a new defense of *Chevron* but to take the standard rationale as a given and argue that, if it is correct, it applies with equal or greater force to foreign relations. When statutes are genuinely ambiguous and someone must interpret them, we do not understand how the choice is between the executive and Congress, rather than between the executive and courts.

6. *Miscellanea*

A few other claims by Jinks and Katyal deserve brief comment. First, they seem to think that our claim about the importance of speed and flexibility is limited to times of crisis,[154] for which existing norms and practices are sufficient. Our emphasis on speed and flexibility is meant to refer to a general characteristic of foreign relations, one that makes that area particularly resistant to regulation by broad rules set out in advance by statute or by the judiciary. The need for flexibility in domestic regulation, too, is a standard rationale for relying on regulatory agencies rather than courts in the administrative state. We merely extend this rationale to foreign relations.

Second, Jinks and Katyal object that we have failed to define the boundaries to which our analysis applies.[155] We can do no better than to say that our analysis applies to litigation with substantial foreign relations implications—indeed, under current law, courts already must decide whether or not litigation has foreign relations implications.[156] Boundary problems are ubiquitous in the law, and Jinks and Katyal provide no reason for thinking that our boundary is more troublesome than any other legal boundary. And to the extent that we draw directly on *Chevron*, we eliminate a boundary, with the suggestion that the *Chevron* framework should apply to executive interpretations in foreign affairs as well as in the areas of environmental protection, communications policy, and so on.

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154. *See id.* at 1250, 1252.

155. *See id.* at 1257-62.

156. This problem arises frequently, for example, when states pass laws that are related to traditional police powers but that also have foreign policy implications. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968) (striking down a state inheritance statute because of its foreign affairs implications).

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IV. HARD CASES: THE AUMF AND THE WAR ON TERROR

It should be clear that the analysis thus far bears on many questions raised by the war on terror. It is readily imaginable that congressional enactments will contain ambiguous provisions that may or may not be construed to fit with the international relations doctrines. The anti-comity principles, no less than the comity principles, might conflict with the views of the executive in the context of terrorism-related judgments. In our view, the executive should usually be entitled to interpret genuinely ambiguous provisions as it sees fit, subject to the qualifications that its interpretations must be reasonable and that Congress must specifically authorize intrusions on constitutionally sensitive interests.

A. The AUMF in General

Because of the pervasive importance of the war on terror, the number of imaginable cases is large. For example, the executive might want civil rights statutes not to apply to American businesses operating in Saudi Arabia because of the importance of Saudi Arabia's cooperation in combating terrorism. But for purposes of analysis, it will be useful to focus on just one example, the 2001 Authorization for Use of Military Force, by which Congress authorized the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[157]

If the discussion thus far is correct, the President is permitted to interpret ambiguities in the AUMF as he (reasonably) sees fit, even if the consequence is to overcome the international comity doctrines.[158] Indeed, the argument for this conclusion is even stronger than in ordinary contexts because the basic purpose of the AUMF is to protect the nation in a way that might well compromise comity with some other nations.

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157. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. 2002)).

158. This argument is developed in Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005).

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A response might be supported with an analogy. The executive branch is not entitled to *Chevron* deference insofar as it is enforcing the criminal law.[159] The reason is straightforward: prosecutors within the Department of Justice have not been delegated the authority to interpret the statutes that they implement. For the Department of Justice, the power of prosecution is not plausibly taken to confer law-interpreting authority as well.[160] Perhaps the same can be said when the President implements the AUMF; indeed, it might be urged that the President has the same relationship to the AUMF that the Department of Justice has to criminal statutes. The analogy suggests a more general point. To the extent that the President is not implementing the AUMF with measures that have the force of law, the predicate for *Chevron* might seem to be absent.

A narrow counterargument would be that under the AUMF, the President or his delegates can indeed make rules and regulations, and thus if they do so, they will be entitled to *Chevron* deference. An authorization to use force is best taken to grant the power to issue necessary rules to ensure that force is properly used. But suppose that no such rules have been issued. In the context of an authorization to use force, most of the President's decisions are not preceded by rulemaking or adjudication, and thus the grant or denial of such authority is irrelevant. A delegation of prosecutorial power is very different, especially in view of the rule of lenity, which asks courts to interpret statutory ambiguities favorably to criminal defendants. It would be odd to assume that Congress meant to give those who enforce the criminal law the authority to combine prosecutorial and interpretive functions. By its very nature, any authorization for the use of force is best taken as an implicit delegation to the President to resolve genuine ambiguities as he (reasonably) sees fit.[161]

Indeed, this conclusion seems appropriate for any delegation of power to the President in the particular domain of foreign relations. The President's

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159. *See* Crandon v. United States, 494 U.S. 152, 158 (1990). For an argument that existing law is wrong on this count, see Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

160. *But see* Kahan, *supra* note 159. The best response, implicit in current law, is that a combination of interpretive and prosecutorial power would disserve liberty, in part because it would jeopardize the interest in fair notice; perhaps the prosecutor's interpretation would surprise the defendant. In any case, rule of law principles suggest that criminal statutes should not be construed as broadly as (some) prosecutors might like, given the distinctive incentives of the prosecutorial arm of the government.

161. The same point has broader implications. It might well suggest that executive officers other than the President—such as the Secretary of State and the Secretary of Defense—are entitled to *Chevron* deference in the context of foreign affairs, even if they have not exercised delegated authority to make rules or to conduct adjudications.

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interpretation must not, of course, plainly violate the law; if it did, it would be struck down under *Chevron* Step One. Many imaginable interpretations of the AUMF would be invalid. But insofar as the law is unclear, reasonable interpretations deserve respect.

We have seen that *Chevron* is based on a legal fiction[162] about congressional instructions with respect to interpretive power—a fiction that is rooted in entirely sensible judgments, pragmatic in character, about institutional capacities with respect to expertise and accountability. And if these are the foundations for *Chevron*, then the implication here is straightforward: the President should be taken to have the authority to interpret ambiguities as he chooses. Interpretation of an authorization to use force, at least as much as any delegation of authority to agencies, calls for an appreciation of consequences and for complex judgments of value. For the AUMF, the best reconstruction of congressional will is that ambiguities are subject to presidential interpretation.

B. Hamdi

The Supreme Court's decision in *Hamdi* does not speak in these terms, but its conclusion is broadly consistent with them. We think that our approach strengthens the plurality's conclusion. The plurality accepted the executive's claim that the AUMF granted it the power to detain Hamdi,[163] notwithstanding the Non-Detention Act, which forbids the executive to imprison or detain a citizen of the United States without congressional authorization.[164] The AUMF is quite general, and under standard principles of statutory interpretation, it should arguably yield to the prior, relatively specific Non-Detention Act, which was intended to apply during wartime. This conclusion might be supported by the idea that implied repeals are disfavored. And indeed Justice Souter, joined by Justice Ginsburg, argued—not implausibly—that the AUMF was simply too vague to provide the kind of clear authorization required by the Non-Detention Act for detention of an American citizen.[165] He also suggested that the AUMF did not authorize the executive to

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162. *See supra* note 66 and accompanying text.

163. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

164. 18 U.S.C. § 4001(a) (2000). In light of the AUMF, it would not be easy to argue that the Non-Detention Act settles the issue at *Chevron* Step One. *See Hamdi*, 542 U.S. at 518-29 (plurality opinion) (discussing powers created by the AUMF). We are not arguing here that the executive has the power to interpret the Non-Detention Act, because that statute is more plausibly seen as akin to the APA. Our focus is on the AUMF, which is, for reasons explained in the text, an appropriate foundation for analysis under *Chevron*.

165. *See Hamdi*, 542 U.S. at 547-48 (Souter, J., concurring).

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violate international law and that the detentions did violate (or may have violated) international law.[166]

The plurality rejected this conclusion. It argued that the AUMF clearly authorized the executive to detain enemy combatants and thus satisfied the Non-Detention Act.[167] The plurality's principal claim was that the power of detention was a necessary implication of the power to use force. The plurality also noted that the AUMF might implicitly incorporate principles of international law, but that these principles did not forbid detention of enemy combatants.[168]

We believe that even if Justice Souter was correct to say that the AUMF was ambiguous rather than clear, the plurality was right to accept the government's claim that it had the authority to detain enemy combatants. If the AUMF was ambiguous, the executive should have had discretion to interpret it in a reasonable fashion, and it is surely reasonable to conclude that a statute that authorizes the use of force also authorizes detention.[169] Further, even if both opinions were correct in saying that the AUMF implicitly incorporated international law, the government should have prevailed. Because the executive has primacy in the interpretation of international law, its not-unreasonable interpretation that the detentions complied with international law should control. Indeed, the executive should be permitted to violate international law if its interpretation of the domestic statute is reasonable and if the statute is genuinely ambiguous. Less controversially, our approach would permit courts, in future disputes about the scope of the AUMF, to resolve these disputes by deferring to reasonable executive interpretations of the AUMF and of international law (if the AUMF incorporates international law).

The difference between our approach and that of the *Hamdi* plurality can be seen by imagining that active hostilities in Afghanistan cease but that the United States refuses to release the detainees because they continue to pose a terrorist threat. The plurality refused to address this issue but implied that the detention would be unlawful:

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166. *See id.* at 548-53.

167. *Id.* at 517 (plurality opinion).

168. *See id.* at 520-21.

169. It would be possible to invoke the avoidance canon to ban an interpretation of the AUMF that would allow detention of an American citizen, but the question of the power to detain is analytically distinct from the due process question, which involves the proper procedures for detention. The Court reasonably separated the question of statutory interpretation from the due process issue.

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> Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.[170]

The Court seemed to say that the AUMF implicitly incorporates international law as a constraint on executive action, or perhaps that its application to the hypothetical case would be ambiguous and so the *Charming Betsy* canon should be applied.[171] In any event, the Court's interpretation of international law would resolve the issue. We think the better approach is to acknowledge the President's authority to interpret the statute in a reasonable fashion, regardless of whether that interpretation results in a violation of international law. Thus, the President would decide whether the AUMF permitted him to detain enemy combatants after active hostilities ended while the threat identified in the AUMF continued, and the Court would defer to a reasonable decision. In making this decision, the President could take account of the full range of relevant considerations, including American security, the security of foreign states, the interests of the detainees' states in protecting their citizens, the possible reactions of foreign states and organizations, moral constraints, and larger concerns about any damage that would result to international law in the abstract if the United States violated it.

Nothing said here suggests that the President's interpretive power is unlimited. Congress has ultimate control, as long as it has not intruded on the President's constitutional authority (an issue that we do not explore here). Any effort to interpret the AUMF, or any other statute dealing with terror, must contend with *Chevron* Steps One and Two and thus must count as a reasonable construction of ambiguous terms.

There are other limitations. Suppose, for example, that the President makes a plausible claim of statutory authority to engage in actions that threaten constitutionally sensitive interests, such as the right to free speech or the right to be free from unreasonable searches and seizures. As we have seen, statutes are generally not construed to threaten such interests, even under *Chevron*.

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170. *Hamdi*, 542 U.S. at 521 (plurality opinion).

171. *See* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293 (2005); *cf.* Bradley & Goldsmith, *supra* note 79 (arguing that the AUMF should be interpreted in light of history and international law but that it cannot be construed as forbidding the executive to violate international law).

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What is the role of the avoidance canon in the face of executive interpretation? In our view, constitutionally sensitive rights should probably have a kind of interpretive priority, in the sense that they defeat the interpretation of the executive, just as in the domestic context.[172] Of course any interpretive canon is subject to legislative override. If Congress seeks to press the constitutional issue, it is entitled to do so.

C. Hamdan

Consider in this light the Court's decision in *Hamdan*, which provides an illuminating, and in a way striking, contrast with *Hamdi*. At issue was the President's authority to try Salim Ahmed Hamdan in military commissions. In brief, the Court held that the President lacked that authority under the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.[173] The Court held that the President had not made the requisite showing that it would not be "practicable" to rely on the procedures in ordinary courts-martial.[174] A plurality also concluded that "conspiracy" to violate the law of war was not an offense triable by military commissions.[175]

Under our framework, the conclusions in *Hamdan* might be supported in the following way. Perhaps the President violated Step One of *Chevron*, even if he was entitled to deference; perhaps the relevant sources of law were sufficiently clear. But it would not be simple to defend this position. On the key points, the provisions are at least ambiguous.[176] Perhaps it could be said that in *Hamdan*, the President was not entitled to any kind of *Chevron* deference because the UCMJ is the analytical equivalent of the APA or FOIA: a statute that controls the executive, not a statute that the executive is charged with implementing. This argument is not implausible, but it must contend

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172. We do not address the question whether this proposition holds during emergencies, including the emergency that produced the AUMF. *Compare* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE (2007) (arguing that courts should defer to the executive during emergencies), *with* Sunstein, *supra* note 105 (emphasizing the importance of clear congressional authorization).

173. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786 (2006).

174. *Id.* at 2791.

175. *Id.* at 2779 (plurality opinion).

176. Jinks and Katyal disagree. *See* Jinks & Katyal, *supra* note 91, at 1269-70. If they are right, and the provisions were clear, then the case becomes easy under our framework as well as theirs. Recall that under *Chevron* Step One, the executive loses when the statute is plain. The President could not, for example, interpret the AUMF to justify the use of military force against those not plausibly or reasonably connected with persons or organizations responsible for the attacks of 9/11—an exceedingly important limitation on his authority.

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with the suggestion, pressed by the government and endorsed above, that the AUMF is the relevant statute and that the President can plausibly understand it to allow him to convene military commissions.

Standing by itself, we believe that the government's claim has considerable force. But it faces two obstacles. First, the AUMF must be squared with the UCMJ. If, as the Court suggested, the UCMJ is best read to disallow the creation of military commissions, perhaps the AUMF must be interpreted to be compatible with it, rather than to override it. On this view, the Court was correct in *Hamdan* not because the President lacks authority to interpret the AUMF, but because he cannot interpret the AUMF so as to override the UCMJ, especially in light of the principle disfavoring implied repeals of legislation. (Back to *Chevron* Step One.) The challenge here is to establish that the UCMJ is sufficiently clear so as to disable the President from interpreting the AUMF to allow him to establish military commissions. Without attempting to parse the relevant provisions of the UCMJ, we will simply assert that under ordinary understandings, it is not easy to meet that challenge.

The best way of doing that, and of understanding the result in *Hamdan*, identifies a second obstacle to allowing the President to interpret the AUMF in this manner. The obstacle here is a distinctive kind of nondelegation canon – one that requires Congress to speak clearly if it seeks to allow the executive to depart from the usual methods for conducting criminal trials. The motivating idea is that unless Congress has unambiguously said otherwise, or unless history clearly warrants, the government may not convict people (including enemy combatants) of crimes except through the ordinary channels and procedures, with their numerous guarantees against error and unfairness. In our view, *Hamdan* is difficult to explain without resort to a principle of this kind. Indeed, the plurality gestured in this direction with the suggestion that to justify use of military commissions without explicit congressional authority, "the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution."[177]

To be sure, the use of a clear statement principle of this sort would be easiest to defend if it were undergirded by the Due Process Clause. Under the avoidance canon, the President should not be permitted to raise serious due process problems without clear congressional authorization. The Court did not explicitly point to due process concerns in *Hamdan*. But its emphasis on Hamdan's right to see the evidence against him, and to attend the trial, suggest

177. *Hamdan*, 126 S. Ct. at 2780 (plurality opinion).

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that it was unwilling to allow a departure from traditional institutions and traditional procedures unless Congress gave explicit authorization.[178]

This reading of *Hamdan*, however, is in tension with the outcome in *Hamdi*. Recall that in *Hamdi*, two Justices contended that the AUMF should not be construed to overcome the Non-Detention Act and thus that explicit congressional authorization was required to detain Hamdi;[179] the plurality rejected this position.[180] In *Hamdan*, by contrast, explicit authorization seemed to be required for the use of military commissions. Why was a repeal by implication found in *Hamdi* but rejected in *Hamdan*? If the two outcomes are to be reconciled, perhaps the reason is that by tradition and necessity, detention is clearly incidental to the authority to use force—whereas neither tradition nor necessity clearly supports the use of military commissions in the circumstances of *Hamdan*. But we are not at all confident that it can be shown that detention is more traditional and necessary than military commissions: both are established incidents of military action. Perhaps the better reconciliation is that *Hamdan* rests on a distinctive clear statement principle for use of nontraditional institutions for adjudicating guilt or innocence—a principle that might particularly appeal to judges who are reluctant to second-guess military decisions (such as those involving detention) but who are more willing to insist on the traditional adjudicative forms. But a liberty interest was at stake in both *Hamdi* and *Hamdan*; why should a clear statement principle apply to an institution that adjudicates guilt or innocence and not to an institution that determines whether a person is dangerous and therefore should be detained?

It would be easy to suggest that under the analysis we have offered, *Hamdan* is simply wrong—that the President reasonably construed the AUMF to allow the use of military commissions to try suspected terrorists.[181] The most sympathetic reconstruction of *Hamdan* sees it as a vindication of an implicit

178. Jinks and Katyal are wrong to suggest that our Article implies approval of the idea that the Constitution does not protect detainees abroad. *See* Jinks & Katyal, *supra* note 91, at 1271-72. We cited *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in our earlier works to describe the law, not to endorse it.

179. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 539, 547-48 (2004) (Souter, J., concurring).

180. *Id.* at 517 (plurality opinion).

181. Indeed, Justice Thomas's reliance on the principle of executive deference, based on the President's institutional advantages, is very much in the spirit of our argument that foreign relations should be *Chevron*ized. *See Hamdan*, 126 S. Ct. at 2823-24, 2845-46 (Thomas, J., dissenting).

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interpretive principle to the effect that Congress must explicitly authorize a departure from standard adjudicative forms and procedures.[182]

D. A Note on Congress

It might be thought that the argument for judicial deference to executive interpretation of ambiguous law serves, in a sense, to take the side of the executive against the national legislature. On an extreme version of the view that we have defended, the expertise of the executive and its special role in the domain of foreign affairs mean that courts should grant discretion to the executive unless Congress has made its view unmistakably clear—and possibly even when Congress has done so. *Chevron*-style deference, mixed with a requirement of an exceedingly clear congressional statement, might be taken to suggest a transfer of authority, not from courts to the executive, but from Congress to the President.

Our argument should not be taken in this way. Nothing we have said here is inconsistent with the view that the executive must follow the will of Congress. The issues we have explored involve genuinely ambiguous statutes, and the question is whether the court will respect the view of the executive or instead rule in the way indicated by the comity doctrines. If Congress seeks to resolve the question, it is entitled to do exactly that under *Chevron* Step One. To be sure, it might be tempting to read the argument for executive power to suggest a kind of clear statement principle; perhaps that principle would be constitutionally inspired in some domains, such as the suggestion that Congress should not lightly be taken to intrude on the President's inherent power to settle important questions of foreign relations.[183] When the President does have a legitimate claim to such power, there is indeed reason for a clear statement principle, justified by reference to the avoidance canon. But the argument we have made is limited to cases of real ambiguity, in which there is no claim of inherent constitutional power and the question is whether to follow the views of the executive or instead one or another comity principle.

It follows that our argument does not bear on cases in which the executive asks a court to ignore a clear statute because of its foreign relations implications in situations in which the executive's view is clearly at odds with that of Congress. A subset of such cases includes high-profile conflicts between the

182. For more detailed discussion, see Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. (forthcoming 2007).

183. *See supra* note 134 and accompanying text (noting the apparent clear statement principle in *Jama*).

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executive and Congress, as when the executive seizes steel mills in the absence of congressional authorization,[184] sends troops to war in violation of a statute that restricts the use of troops without congressional approval,[185] or engages in espionage in apparent conflict with existing statutes.[186] Courts sometimes resolve these cases by determining which branch has the constitutional authority to act; at other times, they avoid resolving these cases on justiciability grounds.[187] In this Article, we do not express an opinion on these longstanding disputes. Our focus, involving problems that are less sensational but far more important to the ordinary operation of federal law, is on statutes that are ambiguous rather than clear, which is the standard domain of the international relations doctrines.

CONCLUSION

In this Article, we have attempted to understand the international relations doctrines and to explore the role of the executive in interpreting ambiguous statutes that might be taken to be inconsistent with those doctrines. In our view, the doctrines reflect not a concern about entanglement alone but a rough consequentialist judgment on the part of the federal courts, to the effect that the risks to American interests outweigh the potential benefits. Courts believe, for example, that a violation of international law is not likely to be in the interest of the United States, and thus they construe ambiguous statutes so as not to produce violations of international law. The same assessment underlies the presumption against extraterritorial application of federal law. It is for this reason that clear congressional authorization is required to threaten international comity.

The obvious problem is that courts are not institutionally well equipped to make the relevant judgments. When the governing statute is vague or ambiguous, there is no sufficient reason to forbid the executive to balance the underlying interests as it chooses. By virtue of its knowledge and accountability, the executive is in the best position to make the appropriate consequentialist judgments – to assess the risks to American interests and the

184. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

185. *See* Campbell v. Clinton, 203 F.3d 19, 24 (D.C. Cir. 2000) (Silberman, J., concurring) (arguing that a challenge to the use of force under the War Powers Resolution is nonjusticiable).

186. *See* Eric Lichtblau & James Risen, *Legal Rationale by Justice Dept. on Spying Effort*, N.Y. TIMES, Jan. 20, 2006, at A1.

187. *Compare Youngstown*, 343 U.S. at 588-89, *with Campbell*, 203 F.3d at 24.

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value of, say, applying environmental and civil rights statutes outside of the nation's borders. As a matter of constitutional structure, moreover, the President has a distinctive role in this domain. It follows that courts should defer to executive interpretations of ambiguous enactments. Deference of this kind would greatly simplify the relevant inquiries; it would also ensure that the relevant judgments are made by those who are best suited to make them.

If this approach were adopted, the executive would have greater power to interpret statutory ambiguities in the domain of foreign affairs. The most serious objection to this result is that it would unduly concentrate power in the executive branch. There are three responses to this objection. First, nothing said here excludes the possibility that Congress is entitled to the last word; under *Chevron* Step One, clear legislation is controlling. Second, a grant of authority to the executive may well result in a more expansive use of rights-protecting provisions in American law; recall that under our approach, the executive is permitted to apply U.S. antidiscrimination laws to American companies operating abroad. Third, other canons of interpretation, most notably constitutional avoidance, operate as a check on executive authority. We have emphasized that under conventional principles, the legislature must unambiguously authorize the executive to intrude into the domain of constitutionally sensitive rights, such as the right to a fair hearing or the right to freedom of speech.

With these qualifications, the grant of interpretive discretion to the executive emerges as a sensible recognition of the inevitable role that judgments of policy and principle play in resolving statutory ambiguities—and of the advantages of ensuring that those judgments are made by those who have relevant information and democratic accountability.

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