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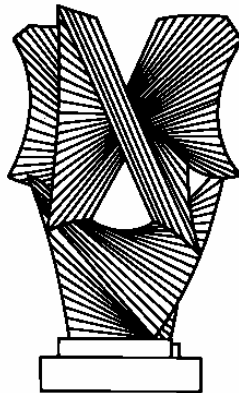
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## CHEVRONIZING FOREIGN RELATIONS LAW

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## **Chevronizing Foreign Relations Law**

Eric A. Posner\* and Cass R. Sunstein\*\*

### **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, ambiguous statutes are usually interpreted to conform to international law, and statutes are usually not understood 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 various settings, the costs of American deference to foreign interests are less 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. 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 so as to apply extraterritorially, or so as to conflict with international law, it should be permitted to do so. The analysis of the interpretive power of the executive follows 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.*

### **I. Introduction**

Federal law contains a range of international comity doctrines, developed by judges in order 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 in the current period, courts should 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 those in the best position to balance the competing interests.

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

1. The Civil Rights Act of 1964 forbids discrimination on the basis of sex.<sup>1</sup> American businesses are operating in Saudi Arabia; they discriminate against female workers, who 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.<sup>2</sup> It follows that unless Congress has clearly said otherwise, the prohibition on sex discrimination applies only within the physical boundaries of the United States.<sup>3</sup> The usual rationale, applied here, 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 information about relations with Saudi Arabia, says no.<sup>4</sup> Should courts defer to the executive?
2. The Immigration and Naturalization Act authorizes the Immigration and Naturalization Service (INS) to detain dangerous aliens who cannot be repatriated because their home countries will not accept them. The INS interprets this authorization as permitting it to hold an alien convicted of manslaughter for an indefinite period. The alien brings suit, arguing that the INS has violated the statute, which is unclear on the particular question. Under the *Charming Betsy* doctrine, which requires courts to construe ambiguous statutes so as not to violate international law, the immigration statute should not be interpreted to permit “prolonged and arbitrary” detention, which violates international human rights law.<sup>5</sup> The executive branch, which has good information about the consequences of violating international law, argues against use of the *Charming Betsy* doctrine. 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 in cases of expropriations of property in violation of international law. A plaintiff sues Austria, arguing that it expropriated art works 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

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<sup>1</sup> 42 USC 2000(e)(2).

<sup>2</sup> See *Small v. United States*, 544 US 385 (2005).

<sup>3</sup> *EEOC v Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). The actual case involved discrimination on the basis of race, religion, and national origin.

<sup>4</sup> Cf. *Spector v. Norwegian Cruise Line, Ltd.*, 124 S Ct 2169 (2005) (involving application of Americans With Disabilities Act to foreign-flagged ships, urged by the executive branch).

<sup>5</sup> *Ma v. Reno*, 208 F.3d 815 (9<sup>th</sup> Cir. 2000), vacated by *Zadvydas v. Davis*, 533 U.S. 678 (2001).

expropriations. The executive branch argues that the FSIA should not apply retroactively, apparently because it fears that litigation would upset delicate international arrangements to provide compensation of victims of Nazi oppression where necessary. Should the court accept the interpretation of the executive branch?<sup>6</sup>

Each of these examples raises two questions. The first involves the operation of the international relations doctrines. Why, exactly, should courts assume that statutes should be interpreted to avoid extraterritorial application (as in the first example) and violations of international law (as in the second example)? The conventional explanation is that otherwise foreign sovereigns will be offended, but neither of our first two examples provides a strong case for such a view.<sup>7</sup> Indeed, the third example is a case in which the Supreme Court was willing to risk offending a foreign sovereign in order to vindicate another, competing principle. We will argue that the international relations doctrines are best understood by reference to an account that emphasizes the costs of deferring to foreign interests, which may be substantial, as well as the benefits. As we shall show, important American interests may justify giving offense to foreign sovereigns, including, for example, the interests in vindicating laws forbidding discrimination and protecting environmental harm and endangered species.<sup>8</sup>

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 by the courts. Drawing an analogy to the *Chevron* doctrine in

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<sup>6</sup> *Austria v. Altmann*, 541 U.S. 677, 701 (2004).

<sup>7</sup> The literature on the international comity doctrines is too large to cite here, but in any event it is overwhelmingly doctrinal and historical, not theoretical. On comity itself, see, e.g., Joel R. Paul, *Comity in International Law*, 32 Harv. Int'l L.J. 1 (1991) (arguing that the discretionary use of comity is a means by which courts balance domestic and foreign interests); Michael Ramsey, *Escaping International Comity*, 83 Iowa L. Rev. 893 (1998) (exploring uses and limits of comity principles). On the *Charming Betsy* canon, see, e.g., Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479 (1998) (arguing that the canon should be used by courts to determine the intent of the political branches). On extraterritoriality, see, e.g., Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179 (1991) (objecting that the Supreme Court's broad interpretation of the presumption of extraterritoriality is outdated). On the act of state doctrine, see, e.g., Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 Harv. Int'l L.J. 1 (1998) (arguing that courts have unnecessarily applied the doctrine broadly to investment contracts with foreign governments); Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 Colum. L. Rev. 1907 (1992) (noting the difference in application of the doctrine to liberal and nonliberal states, finding liberal states sometimes are subject to more stringent evaluation). On the Foreign Sovereign Immunities act, see, e.g. Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* ch. 7 (2d ed. 2003). We will cite other sources, *infra*.

<sup>8</sup> See, e.g., *EDF v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (interpreting the National Environmental Policy Act to apply extraterritorially, at least to Antarctica, even in the face of claim that application of NEPA would violate the Protocol on Environmental Protection to the Antarctic Treaty); *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); *NRDC v. US Department of the Navy*, 2002 US Dist. LEXIS 26360 (C.D.Cal. 2002) (accepting regulation applying Endangered Species Act to the high seas, even outside of the United States)

administrative law,<sup>9</sup> and arguing that often *Chevron* applies directly, we contend that courts should defer to the executive on the ground that the resolution of 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 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. At one time, the U.S. government was not intensely concerned about conduct on foreign soil, because such conduct had little or no impact on the well-being of American citizens. Today, the U.S. government often does care about that conduct. One reason is that foreign firms produce goods that compete in the world market with goods produced in the United States, and hence the conduct of foreign businesses might greatly affect American workers and consumers. Antitrust law can be used against foreign businesses to ensure that they do not engage in anticompetitive practices that injure Americans.<sup>10</sup> 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 or Iraq might well cause international tensions. Americans also care about whether foreign sovereigns adequately investigate and prosecute international terrorists who 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 to the United States, deferring to the interests of foreign sovereigns can produce benefits for Americans that outweigh the costs. For this reason, courts have concluded that that the national lawmaker 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 in institutional competence, to allow the executive branch to resolve issues of international comity, at least where the underlying statute is unclear.<sup>11</sup> Suppose that the executive branch interprets an antitrust statute, or the

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<sup>9</sup> See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

<sup>10</sup> U.S. antitrust litigation against foreign firms doing business on foreign soil has been a significant source of international tension. See Andreas F. Lowenfeld, *International Litigation and Arbitration* 916-18 (3rd ed. 2006). So have American discovery practices. See *id.*

<sup>11</sup> Thus, we agree with Curtis Bradley's conclusion 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) (courts defer to reasonable agency interpretations of ambiguous statutes even if such interpretations may violate international law). We also believe that Bradley correctly emphasizes the executive's superior expertise in foreign relations. But his argument and ours is different. Ours is theoretical and functional, albeit influenced by constitutional constraints; his is predominantly doctrinal, focused on the source of law. Thus, unlike us, he argues that *Chevron* deference is not appropriate for (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 does not try to advance a

Endangered Species Act, to apply abroad in violation of the presumption against extraterritoriality. The executive branch is in an exceedingly good position to balance the relevant interests, and it can also claim a constitutional warrant for making the underlying judgments in the face of congressional silence.

This simple argument fits with the logic of some recent decisions,<sup>12</sup> but it also has radical implications. The most obvious is that courts should play a smaller role in interpreting statutes that touch on foreign relations than they currently do. Another is that the executive branch should be given greater power to decide whether the U.S. will violate international law than it currently has. Yet another 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. Our argument also implies greater deference to the executive when it intervenes in private litigation. Under our approach, 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 such a statement is forthcoming, and so long as it is reasonable, the courts would promote comity, or reject comity, only to the extent that the executive wanted that result.

## II. International Relations Doctrines

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

### A. Comity Doctrines

Charming Betsy canon. The *Charming Betsy* canon provides that an ambiguous statute will be interpreted so as to avoid conflicts with international law. Return to one of cases with which we began: An ambiguous law that permits the Immigration and Naturalization Service 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.<sup>13</sup>

Extraterritoriality. The presumption against extraterritoriality provides that an ambiguous statute will be interpreted not to apply to territory outside the United States.

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theory of the international comity doctrines, as we do. Of course he was unable to explore the many recent developments in the law governing judicial review of agency interpretations of law, traced below.

<sup>12</sup> See, e.g., *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 348 (2005), and in particular the emphasis on “our customary policy of deference to the President in matters of foreign affairs.” *Id.*

<sup>13</sup> *Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001). The canon gets its name from *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (interpreting statute prohibiting trade with France so as not to apply to citizen of neutral state, which would have violated international law of neutrality).

The Civil Rights Act of 1964 does not explicitly say whether it applies abroad or not; it is therefore interpreted not to apply to discriminatory behavior of American businesses located in Saudi Arabia.<sup>14</sup> It has similarly been held that the National Environmental Policy Act, which is silent on the question of extraterritorial application, does not apply abroad, and hence does not (for example) require an environmental impact statement for U.S. military installations in Japan.<sup>15</sup>

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 for breach of contract 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 may not accept this argument because it would involve an evaluation of Cuba's conduct; it must assume that Cuba's title is valid.<sup>16</sup>

Foreign sovereign immunity. In the nineteenth century, the Supreme Court developed the doctrine of foreign sovereign immunity, according to which foreign sovereigns are granted immunity from liability for violation of the law.<sup>17</sup> The rule was relaxed in the twentieth century, mainly in cases involving a commercial defendant owned by a foreign sovereign.<sup>18</sup> In 1976, the doctrine was codified in the Foreign Sovereign Immunity Act.<sup>19</sup> Originally a judge-made doctrine, the idea of foreign immunity is now governed by a statute that contains various exceptions that judge-made law never recognized—for example, denying immunity to state sponsors of terrorism.<sup>20</sup> A related doctrine provides immunity to heads of state.<sup>21</sup>

Comity in general. Case law equivocates between calling international comity a rule and a value. 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 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 value.<sup>22</sup> For example, the Supreme Court cited international comity in explaining why courts should

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<sup>14</sup> *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). We note below some complexities in this decision and surrounding doctrine.

<sup>15</sup> See *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993); see also *ARC Ecology v. U.S. Dept. of Air Force*, 411 F.3d 1092 (9th Cir. 2005) (holding that CERCLA does not apply extraterritorially to an American military base in the Philippines).

<sup>16</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>17</sup> *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812),

<sup>18</sup> *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983) (discussing history).

<sup>19</sup> Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1602.

<sup>20</sup> *Id.*, § 1605(a)(7).

<sup>21</sup> *Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004).

<sup>22</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985) (holding that antitrust claims were properly arbitrated under the Arbitration Act).



defer to the judgments of international arbitrators used to resolve international contractual disputes.<sup>23</sup> In a recent case, Justice Breyer cited concerns about international comity to explain his uneasiness with application of the Alien Tort Statute to cases in which both parties are aliens and the tortious conduct took place on foreign territory.<sup>24</sup> Courts also appeal to international comity to justify staying litigation in the United States when parallel litigation exists in foreign countries.<sup>25</sup> In these ways, comity operates as a freestanding value that sometimes enters into the resolution of difficult cases.

Taken as a whole, this body of doctrines implies that courts should take seriously the interests of foreign sovereigns, to the extent that 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 whose resolution they have a strong interest; by judging their activities; or by issuing judgments against them.

## B. Anticomity Doctrines

Some international relations doctrines do not promote comity at all. On the contrary, they sacrifice comity for the sake of American interests that are perceived as important. We shall call these the “anticomity doctrines.”

The revenue rule. The revenue rule provides that an American court will not enforce a tax judgment of another nation.<sup>26</sup> Suppose that a Canadian or American citizen fails to pay taxes in Canada. The defendant 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 judgment. Note that the revenue rule is rooted in state rather than federal law; notably, 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, the American court is forbidden to enforce a foreign criminal judgment.<sup>27</sup> By contrast, an American court is generally supposed to enforce other types of judgments—for example, breach of contract or tort—unless there are public policy reasons not to do so.<sup>28</sup> It should be clear that the revenue and penal rules

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

<sup>24</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring).

<sup>25</sup> See, e.g., *National Union Fire Ins. Co. v. Kozeny*, 115 F. Supp. 2d 1243, 1249 (D. Colo. 2000) (stay of proceedings granted while litigation proceeded in London); *Nippon Emo-Trans Co. v. Emo-Trans, Inc.*, 744 F. Supp. 1215, 1236 (E.D.N.Y. 1990) (stay of proceedings pending the outcome in the Japanese court); see also *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11<sup>th</sup> Cir. 2004) (holding that Foundation Agreement tribunal was better suited to resolve the dispute because it was more familiar with German law).

<sup>26</sup> *Restatement (Third) of Foreign Relations* § 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”).

<sup>27</sup> *Id.*

<sup>28</sup> *Restatement (Third) of Foreign Relations* §§ 481-82.

do not show much respect for the interests of a foreign state—a problem, as we shall see, for those who argue that international relations doctrines are supposed to prevent entanglements. The penal rule, like the revenue rule, is rooted in state rather than federal law.<sup>29</sup>

Public Policy Exceptions to Enforcement of Foreign Law and Judgments. The revenue and penal rules aside, courts do enforce foreign private law judgments—for example, judgments resulting from breaches of contract or torts—and also enforce foreign private law when most of the events or transactions take place on foreign soil.<sup>30</sup> And yet 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.<sup>31</sup> 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 allows in the United States.<sup>32</sup> It follows that American courts will not uphold judgments against defendants under British libel law, even if ordinary conflicts principles would call for such liability.

These anticomity 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 anticomity doctrines do determine legal outcomes, and they are applied by federal courts in diversity cases. As we shall now see, the existence of doctrines that jeopardize comity casts the international relations doctrines in a distinctive light.

### III. Behind the Doctrines

What underlies these various doctrines? It is tempting to suggest that they track Congress' own intentions. Perhaps Congress ordinarily expects and hopes that its enactments will be interpreted conformably to international law. Perhaps Congress does not want American law to be applied extraterritorially unless the legislature has said so

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<sup>29</sup> 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. 61 (2002); Philip J. McConaughay, *Reviving the Public Law Taboo*, 35 Stan. J. Int'l L. 255 (1999). Public law includes antitrust law, securities law, and so forth; not just tax and criminal law. The public law taboo has been breaking down, but still remains strong. *Id.* at 256-57.

<sup>30</sup> *Restatement (Third) of Foreign Relations* § 481.

<sup>31</sup> See, e.g., *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2nd Cir. 2000) (finding that civil war in Liberia resulted in corrupt courts, subject to substantial factional pressure); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) (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 (3rd Cir. 1994) (lack of notice of a South Korean entry of order of execution violated due process); *Banco Minero v. Ross*, 172 S.W. 711 (Tex. 1915) (no real opportunity for defendant to be heard in Mexican courts, arbitrary denial of an appeal for failure to stamp a document).

<sup>32</sup> *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661, 664 (N.Y. App. Div. 1992) (British libel laws violate U.S. public policy because they conflict with First Amendment protections).

explicitly. But this explanation seems highly artificial. Congress frequently enacts statutes that violate international law, apply extraterritorially, or otherwise ignore notions of comity.<sup>33</sup> Perhaps Congress' 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 any intentions or even to have thought about the question at all. The comity doctrines are not easily justified as a mere mirror of congressional instructions. If there is affirmative evidence, in context, that Congress endorses the outcomes indicated by comity, it might be reasonable to speak confidently about Congress' intentions; but in the cases that we are discussing, no such evidence can be found.<sup>34</sup>

On an alternative view, the doctrines track congressional intentions only because they provide the background against which Congress legislates.<sup>35</sup> 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 legislates otherwise. In a sense, the doctrines are incorporated by implicit reference. As with the canon against retroactivity,<sup>36</sup> 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 signaling 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.

The most common explanation for international comity doctrines is that they avoid unnecessary tensions, or entanglements, with foreign states.<sup>37</sup> We now evaluate this

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<sup>33</sup> E.g., Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (2006) (Act of State doctrine shall not be used to decline jurisdiction over property confiscation violating international law after Jan. 1, 1959); Helms-Burton Act, 22 U.S.C.S. §§ 6021-6091 (2006) (mandating the Cuban embargo remain in place until a change in government occurs).

<sup>34</sup> See, e.g., *EDF v. Masset*, 986 F.2d 528 (D.C. Cir. 1993) (discussing extraterritorial application of NEPA without being able to identify evidence of congressional intentions).

<sup>35</sup> This view is endorsed in *NEPA Coalition v. Aspen*, 837 F. Supp. 466 (D.D.C. 1993) (assuming that Congress legislates with awareness of presumption against extraterritoriality); *Aramco*, 499 U.S. at 248.

<sup>36</sup> *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

<sup>37</sup> See Duncan Hollis, *Spector v. Norwegian Cruise Line Ltd.*, 99 Am. J. Int'l L. 881 (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*, 50 Cath. U.L. Rev. 591 (2001) (arguing cooperative comity helps to minimize conflicts with foreign courts); Harold 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 cite comity as helping to preserve international

conventional wisdom, which we will call the *entanglement theory*. We will argue that it is inferior to a broader theory, which we will call the *consequentialist theory*. This theory, we suggest, helps explain those principles that require a clear congressional judgment on certain questions.<sup>38</sup> It is important to try to understand the underpinnings of the doctrines, and such an understanding 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 says that international comity doctrines reduce the risk that courts will inadvertently cause foreign policy tensions or crises by offending other nations. Courts have made this argument about all of the comity doctrines described above. The act of state doctrine prevents courts from angering foreign sovereigns by expressing disapproval of their sovereign acts.<sup>39</sup> The FSIA similarly prevents courts from declaring that a foreign sovereign has violated an American law that the foreign government regards as an insult to its sovereignty.<sup>40</sup> The presumption against extraterritoriality prevents courts from interfering with the ability of foreign governments to regulate activity on their own soil,<sup>41</sup> in a way that threatens to create international conflict.<sup>42</sup> The common theme is 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, which then might retaliate against the United States 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 bad rather than good, 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, certainly as an account of the international relations doctrines taken as a whole. The problem with the theory is that it identifies the *benefits* of deferring to foreign sovereigns (avoiding offense, retaliation, conflict), but it does not account for the *costs* of deferring to foreign sovereigns (preventing the U.S. from advancing its interests, including the goal

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relations and encouraging efficiency in the resolution of disputes through discretionary cooperation between foreign courts).

<sup>38</sup> 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. See *Small v. U.S.*, 544 U.S. 385 (2005). We bracket these considerations.

<sup>39</sup> *Sabbatino*, 376 U.S. at 415.

<sup>40</sup> *Verlinden*, 461 U.S. at 488.

<sup>41</sup> 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."); *Aramco*, 499 U.S. at 248 (similar).

<sup>42</sup> *Hirt v. Richardson*, 127 F. Supp.2d 833 (W.D. Mich 1999).

of protecting American citizens from antidiscrimination, or preventing the loss of endangered species or some other kind of serious environmental harm). Thus, it implies, implausibly, that courts should always defer, which they do not.

An evident difficulty is that the anticomity rules flatly contradict the theory. The public policy exception to the choice of law rules permits the court to refuse to enforce a foreign judgment or foreign law if it violates American public policy. In order to apply this rule, the court must evaluate the sovereign act of a foreign country against American policies. In addition, the revenue and penal rules prohibit courts from enforcing foreign laws and judgments, in a way that is more likely to increase than to decrease international tensions. Strikingly, courts have argued that the revenue and penal rules advance international comity by preventing courts from evaluating foreign tax and criminal laws case by case.<sup>43</sup> But this argument does not bear scrutiny. One would more straightforwardly avoid offending foreign sovereigns by enforcing their revenue and penal laws than by refusing to enforce them. Indeed, this is the theory of the act of state doctrine.

In addition, numerous exceptions to the FSIA permit courts (among other things) to evaluate the conduct of foreign sovereigns when they engage in commercial and other activities.<sup>44</sup> And 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 they have really consented to a norm of customary international law or not. Might not foreign sovereigns be offended when American courts hold that their laws violate public policy, or refuse to enforce their tax judgments and fines, or decline to grant them immunity, or reject their claim that some norm of international law exists? These judgments will frequently trouble foreign sovereigns, potentially leading to foreign policy tensions that will need to be resolved.

None of this means that the avoidance of foreign entanglements plays no role in existing doctrine. As we mentioned, a foreign entanglement—more accurately, causing offense to a foreign state—is a real cost. Consider, for example, an effort to invoke the National Environmental Policy Act to block a joint United States-Russian plan for the transportation of nuclear material—an effort that, if successful, might cause serious tensions with Russia.<sup>45</sup> 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. If a statute is interpreted so as to conform to international law, such interests may be thwarted, in a way that harms American citizens. The failure to apply overseas the antitrust laws, the antidiscrimination laws, or the environmental laws may mean real injury to American citizens. Perhaps some of the doctrines represent a categorical judgment that the risk of international

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<sup>43</sup> *Pasquantino v. U.S.*, 125 S.Ct. 1766, 1788 (2005) (“the principal evil against which the revenue rule was traditionally thought to guard [is] judicial evaluation of the policy-laden enactments of sovereigns”); *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir.1929) (L. Hand, J., concurring), *aff’d* on other grounds, 281 U.S. 18 (1930).

<sup>44</sup> Foreign Sovereign Immunities Act, 28 U.S.C. § 1605.

<sup>45</sup> *Hirt v. Richardson*, 127 F. Supp.2d 833 (W.D. Mich 1999).

tension outweighs that injury, at least enough so 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 problem with the entanglement theory is that entanglements are not always bad, the theory provides no basis for distinguishing good or tolerable entanglements from bad entanglements, and (most important) the theory says nothing about the benefits for American interests that might outweigh the cost of entanglements. Taken literally, the entanglement theory suggests that courts should interpret statutes and common law rules so as always to defer to foreign sovereigns, but courts clearly do not do this. 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.

A more refined understanding of the entanglement theory might emphasize an institutional point, involving the need for express congressional authorization of courses of action that threaten to create tensions with other nations. Without express authorization, courts ought not to take steps that threaten to produce international conflicts; accidental or inadvertent conflicts should be avoided. The idea is not that Congress seeks to avoid entanglements, but that if it has not expressed its will clearly, entanglements should be avoided. If they are to occur, it must be because the national legislature has specifically authorized them.

This idea is appealing in the abstract. But for the reasons just stated, an insistence on legislative authorization cannot account for all of the international relations doctrines. Some of them operate so as to offend foreign sovereigns, even in the face of legislative silence. As we have said, international tensions are undesirable, but it may make sense to increase the risk of such tensions if doing so promotes important social values (domestic and international). Suppose, for example, that extraterritorial application of the National Environmental Policy Act, so as to govern environmentally sensitive decisions by the United States abroad, could possibly irritate other sovereigns—but at the same time would reduce the likelihood of serious environmental harm.<sup>46</sup> Is it so clear that NEPA, which is ambiguous on the question of extraterritoriality, should be interpreted in a way that requires an unambiguous congressional statement in order to apply abroad? In our view, the answer is not so clear, which suggests that the underlying explanation for the doctrines must lie elsewhere.

## **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 of deference exceed the costs. With this formulation, we do not mean a formal cost-benefit analysis, which would of course be impossible in the circumstances; the point is instead that the doctrines are best understood as rooted in an all-things-

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<sup>46</sup> See, e.g., *id*; *Born Free USA v. Norton*, 278 F. Supp 2d 5 (D.D.C. 2003).

considered assessment of consequences, which importantly include the legitimacy and strength of the American interests in violating the ordinary requirements of comity.

The costs of deference include the loss of American control over activities whose regulation would promote American interests – not simply those of the United States as sovereign, but also those of American citizens in ensuring fidelity to the principles embodied in American law. The benefits of deference include the reciprocal gains from deference, on the part of foreign states, to American regulation and also the reduced likelihood of causing international tensions, which could ultimately hurt American interests. The benefits will, of course, be obtained only if the foreign sovereign actually reciprocates or if the risk of such tensions is real. Thus, deference is based on two factors: (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; and (2) a judgment that the benefits of reciprocation or nonretaliation by foreign states exceed the cost of deference by the United States. In our view, intuitive judgments with respect to (1) and (2) help to explain the operation of the international relations doctrines, and some incongruities as well. Our goal in this section 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.

To see how this consequentialist theory works, 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 U.S. does not recognize as serious, or of a criminal conviction that emerged from procedures that the U.S. 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 fine; 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.<sup>47</sup> To avoid enforcing foreign convictions, the U.S. is willing to give up enforcement of American convictions abroad. Other nations appear to hold similar views.<sup>48</sup> 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 contain numerous other protections.<sup>49</sup>

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

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<sup>47</sup> The point is made explicitly in *Small v. United States*, 544 U.S. 385 (2005).

<sup>48</sup> See *Restatement (Third) of Foreign Relations* § 482, reporters' note 3.

<sup>49</sup> See *Restatement (Third) of Foreign Relations* § 475.

major liberal democracies. Importantly, enforcing such judgments promotes trade and investment, especially if foreign sovereigns enforce American judgments as well. But where the civil laws of other countries do offend American public policy, the laws and judgments are not enforced. Here, as before, other nations appear to have the same attitude, so U.S. courts would not induce reciprocal benefits even if they acted otherwise.<sup>50</sup>

The act of state doctrine requires U.S. courts to treat the acts of foreign sovereigns within their own territory as valid.<sup>51</sup> Though the contours of the doctrine are ambiguous, one of its chief effects is to ensure the enforcement of acts taken within the territory of the foreign sovereign, and regulating behavior on the foreign territory. 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 on their territory, and a weaker interest in regulating activity on American territory—and similarly for the U.S. government. This presumption seems entirely reasonable. As long as other states behave similarly, and they appear to do so,<sup>52</sup> the American courts ensure that the U.S. 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 U.S. 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 on foreign soil. All in all, the rule almost certainly creates a net benefit. The U.S. 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, and hence the presumption applies, subject to congressional override.<sup>53</sup>

One of these exceptions provides further evidence of the existence of consequentialist balancing on the part of courts. International law recognizes that a ship at sea is under the jurisdiction of the state whose flag it flies, and this rule is generally recognized in U.S. law. But when foreign ships are in American territorial waters, general American statutes apply to protect the peace of the port, with the exception that “[a]bsent a clear statement of congressional intent, general statutes may not apply to foreign-flag

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<sup>50</sup> *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 (D.C. Cir. 1984) (English anti-suit injunction sought to prevent U.S. courts from adjudicating claims).

<sup>51</sup> See *Restatement (Third) of Foreign Relations* § 443, reporters’ note 1.

<sup>52</sup> See *Restatement (Third) of Foreign Relations* § 443, reporters’ note 12.

<sup>53</sup> For an argument in favor of extraterritorial application of antitrust and securities laws, on the ground 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*, 39 *Harv. Int’l L.J.* 101 (1998). As we note, *infra*, 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.



vessels insofar as they regulate matters that involve only the internal order and discipline of the vessel, rather than the peace of the port.”<sup>54</sup> The special treatment of the “peace of the port” suggests that America’s interest in maintaining security in its ports and coastal waters outweighs the foreign interest—more precisely, America’s interest in deferring to the foreign interest—in regulating conduct onboard. Thus, the National Labor Relations Act does not apply to the crew of the foreign ship, but ordinary criminal laws do.<sup>55</sup> Moreover, the NLRA is applicable to labor relations between American longshoremen and the foreign ship.<sup>56</sup>

The Foreign Sovereign Immunities Act reflects a more complex balancing. The United States prohibits plaintiffs from suing foreign sovereigns on account of sovereign acts such as acts of war or the use of police powers; the loss to American interests is thought to be outweighed by the gain—avoiding affront to foreign sovereigns and reducing the risk of litigation against the U.S. government on account of its sovereign acts in foreign courts.<sup>57</sup> But the important exception for commercial activity is also mutually beneficial, as it permits wholly owned commercial entities to make enforceable contractual commitments when they do business on foreign territory.

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 doing so is in their interest.<sup>58</sup> Thus, international law already reflects the outcome of a consequentialist calculus. A particular rule benefits the U.S. by constraining the activity of other states but hurts the U.S. by constraining the U.S.; nonetheless, on balance the political branches believe that the rule provides a net benefit for the U.S. 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 retaliation exceeds the benefit of the new legislation, given that the U.S. government consented to (say) the treaty in the first place because it believed the benefits from international cooperation would exceed the costs, including the cost of refraining from future legislation inconsistent with the treaty. 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 the laws are clear enough.

On the other side, the revenue rule provides a potential counterexample to our thesis. It seems, at first sight, doubtful 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

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<sup>54</sup> *Spector v. Norwegian Cruise Line Ltd.*, 125 S. Ct. 2169, 2177 (2005).

<sup>55</sup> *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). *Spector*, 125 S.Ct. at 2182, further modified the rule by providing that it applies only if the ship’s internal affairs are affected in the first place, thus recognizing that a statute may be applied extraterritorially if this does not burden the foreign sovereign.

<sup>56</sup> *Longshoremen v. Ariadne Shipping Co.*, 397 U.S. 195, 198-201 (1970).

<sup>57</sup> *Verlinden*, 461 U.S. at 493.

<sup>58</sup> See, e.g., Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* ch. 1 (2005) (discussing the literature).

weaker than the case for the penal rule. Indeed, one might argue the revenue rule should be folded into the standard choice of law analysis, where 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.<sup>59</sup>

This argument was addressed in recent years by the Second Circuit in *The Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*<sup>60</sup> 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 is that, as a matter of historical fact, the U.S. government and apparently every other government have strong reservations about enforcing the tax judgments of foreign nations. Although the U.S. entered a handful of tax treaties many decades ago that provided for enforcement of tax judgments, the Senate was unhappy with the collection process. Commenting on some proposed new treaties, the relevant Senate Committee said "it is not believed wise to have one government collect the taxes which are due another government."<sup>61</sup> The Committee further noted that "in many instances, or perhaps all, the courts would be called upon to enforce very harsh civil penalties, and it was not deemed wise for our courts to undertake this particular job."<sup>62</sup> This was in 1951. Since that time, the executive has apparently come to agree with the Committee's position:

Consistent with this continuing policy, the United States has over the years entered into a number of tax treaties with foreign sovereigns that provide for information exchange and, sometimes, limited collection assistance, but notably fail to make any provision for general enforcement of foreign tax judgments or claims. It seems to us that the usual absence in our negotiated tax conventions of any provision for the extraterritorial enforcement of a sovereign's tax judgments or claims cannot be not accidental, but instead must reflect the considered policy of the political branches of our government. Thus, the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws. In this area of foreign relations policy where the political branches have primacy, courts must be wary of intruding in a way that undermines carefully conceived and negotiated policy choices. Accordingly, as a general matter, that version of the revenue rule under which United States courts abstain from assisting foreign sovereign plaintiffs with extraterritorial tax enforcement is fully consistent with our broader legal, diplomatic, and institutional framework.<sup>63</sup>

Thus, 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

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<sup>59</sup> Many scholars take 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).

<sup>60</sup> 268 F.3d 103 (2d Cir. 2001).

<sup>61</sup> *Id.* at 117, quoting S. Ex. Rep. No. 1, at 21 (1951), available at 1 *Legislative History of United States Tax Conventions* 605 (1962).

<sup>62</sup> 268 F.3d at 117, quoting 1 *Legislative History* at 1377.

<sup>63</sup> *Id.* at 119 (footnote omitted).

unfair. The benefits are zero if, as the court hints, other states are not willing to enforce American tax judgments.<sup>64</sup>

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, and why the U.S. government has not attempted to alter existing practices. It is not clear that any post hoc account adequately explain the current situation. Perhaps the best answer is that nations tend to enforce contracts and punish torts in roughly the same way, while taking widely varying approaches to taxation, as they do to the enforcement of criminal law; thus, courts have more confidence in evaluating the first type of case than the second type of case. Whatever the answer, 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.<sup>65</sup> Where 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.<sup>66</sup>

This discussion of the revenue rule should make clear that the rule/standard dimension is orthogonal to the question of what is the best account of the international relations rules. Many of the current doctrines are general rules, reflecting aggregate judgments. Usually the U.S. benefits when foreign states do not regulate activities on American territory even though the U.S. may not regulate activities on foreign territory—but this is not always the case. The U.S. might, for example, be willing to run the risk that foreign antitrust law will be applied to American companies on American soil so as to be able to apply American antitrust law to foreign companies on foreign soil (but which export to the U.S.). Or the U.S. might be willing to allow foreign states to regulate the practices of foreign businesses who employ foreigners on American soil in return for the

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<sup>64</sup> *Id.* at 115 (noting that enforcement of tax judgments is usually a matter of treaty). It might also be that to the extent 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 substantive disagreement 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 tries 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* at 224-26. However, we disagree with Dodge's additional argument in favor of an exception for private plaintiffs on fairness grounds. “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. Dodge's argument also privileges private victims over the victims whose public law claims are pursued by their government; and we see no reason for making such a distinction.

<sup>65</sup> See *supra* notes \_\_\_\_.

<sup>66</sup> The court does, to be sure, cite the entanglement theory as well. 268 F.3d at 112.

right to regulate American businesses that employ Americans on foreign soil. The penal and revenue rules are “rules”; so are the provisions of the Foreign Sovereign Immunities Act.

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.<sup>67</sup> 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 errors costs, and we take no position on whether existing international relations doctrines are insufficiently or excessively rule-like.<sup>68</sup>

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 is consistent 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; let us turn to the nature of those disputes.

### 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 (1) an empirical determination or conjecture (a) that the foreign state will actually reciprocate if deference occurs or (b) that it might retaliate in some way if deference is withheld; and (2) a judgment that the benefits of reciprocation or nonretaliation by foreign states exceed the cost of deference by the United States. Perhaps some cases are easy, but many are difficult. It may well be that in the face of statutory ambiguity, courts have no choice but to rely on some kind of presumption. To the extent that statutes are in equipoise, the international relations doctrines may well be a sensible way to proceed. To

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<sup>67</sup> Compare *Soc’y of Lloyd’s v. Reinhart*, 402 F.3d 982 (10th Cir. 2005) (English and American court procedures are substantially similar, and English system is fair), and *United States v. Small*, 333 F.3d 425 (3rd Cir. 2003), rev’d on other grounds, 544 U.S. 385 (Japanese trial record and transcript sufficient evidence of fair and impartial proceeding), with *Bridgeway Corp.*, 201 F.3d at 142 (determining Liberian judicial system was prone to corruption and factionalism), and *Choi*, 50 F.3d at 250 (lack of notice for South Korean property order violates due process).

<sup>68</sup> Jack Goldsmith argues 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, whether they should 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.

the extent that the doctrines operate as clear statement principles, defeating the more likely interpretation, they are harder to defend.

A second objection to the consequentialist theory is that courts do not insist as much on reciprocity as the theory might appear to suggest. The evidence here is mixed. In many cases, courts do 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.<sup>69</sup> But in other cases, courts do not discuss the actions of the foreign state, and even reject the notion that reciprocity matters.<sup>70</sup> 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 reciprocated, or would retaliate, and thus fall back on crude presumptions that they do in some cases (extraterritorial application of statutes, for example) and not others (enforcement of penal judgments, for example).

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. Nor is it clear that environmental statutes, such as the Endangered Species Act, should not apply to decisions by American actors in other nations, at least if it is believed that Americans generally have an interest in the continued existence of such species, wherever they may be found.<sup>71</sup>

A final objection to the consequentialist theory is that it is too narrow. One might argue that courts should defer to foreign sovereign interests even when a reciprocal benefit is not readily identifiable, because such deference will tend to advance America's international reputation. States may not reciprocate in a narrow way—for example, by enforcing American judgments when American courts enforce their judgments—and they may not otherwise retaliate, but they may nonetheless reciprocate by cooperating in other areas of foreign relations when they might not otherwise be inclined to do so. The problem with this argument is that it implies either that courts should always defer to foreign interests—which seems unrealistic and implausible—or should calculate the general reputational costs from failing to defer, which seems impossible.

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<sup>69</sup> *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000 (5th Cir. 1990) (court exercised its discretion not to recognize Abu Dhabi judgment because of lack of reciprocity). See generally *Hilton v. Guyot*, 159 U.S. 113, 163-65 (1895), a seminal Supreme Court case on international comity, which required that the reciprocity condition be satisfied.

<sup>70</sup> *Ingersoll Mill. Mach. Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987) (finding that reciprocity should no longer be considered a requirement or concern for foreign judgment recognition); see generally Paul, *supra*, at 49 (arguing that courts do not determine whether foreign sovereign reciprocates); Uniform Foreign Money Judgments Recognition Act (not requiring reciprocity for enforcement of foreign judgments); *Restatement (Third) of Foreign Relations* § 481, reporters' note 1 (discussing cases on both sides but concluding that reciprocity is not required).

<sup>71</sup> On the standing question, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that concrete interest is required to challenge failure to apply Endangered Species Act abroad); on the merits, see *Defenders of Wildlife v. Lujan*, 911 F.2d 117. (8<sup>th</sup> Cir. 1990), reversed on standing grounds, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

A more general question, signaled by these various questions, involves the position of the executive. An understanding of the grounds for the international relations doctrines, and the legitimate questions and doubts, suggests that that position is crucial, as we shall now see.

### III. Executive Power

In our view, the executive should 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 NEPA so as to apply extraterritorially. The executive is in the best position to make the underlying judgments. Moreover, the constitutional position of the President in the domain of foreign affairs strongly supports this conclusion. But to understand these claims, it is necessary to 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 v. Natural Resources Defense Council*,<sup>72</sup> which involved an ambitious effort by the EPA to increase private flexibility under the Clean Air Act.<sup>73</sup> Upholding the rule, 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.<sup>74</sup> If not, the second inquiry is whether the agency's decision is "permissible," which is to say reasonable.<sup>75</sup> The resulting rule is that executive interpretations of ambiguous statutes must be upheld so long as they are reasonable—a dramatic grant of law-interpreting power to executive agencies.

In explaining this rule, the Court could not, and did not, contend that the relevant provision of the Clean Air Act contained any explicit delegation to the executive. Hence the Court noted that "sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."<sup>76</sup> The Clean Air Act does give the EPA the power to issue regulations; in granting that power, perhaps the Act is best taken to say that the EPA is implicitly entrusted with the interpretation of statutory terms. The Court referred to this possibility, noting that Congress might have wanted the agency to strike the relevant balance with the belief "that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so."<sup>77</sup> But lacking any evidence on the question, the Court did not insist that Congress in fact so thought. On the contrary, it said that Congress's particular intention "matters not."<sup>78</sup>

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<sup>72</sup> *Chevron*, 467 U.S. at 837.

<sup>73</sup> 42 U.S.C. § 7401 et seq (2000).

<sup>74</sup> 467 U.S. at 842–43.

<sup>75</sup> *Id.*

<sup>76</sup> *Chevron*, 467 U.S. at 844.

<sup>77</sup> 467 U.S. at 865.

<sup>78</sup> *Id.*

Instead the Court referred to two points about institutional competence: as compared with executive agencies, judges lack expertise and they are not politically accountable. Technical specialization is relevant to interpretation of the Clean Air Act, and here the executive has conspicuous advantages over courts.<sup>79</sup> And in interpreting law, the agency may “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.”<sup>80</sup> The Court was alert to the fact that it was reviewing a decision made by the Reagan Administration, altering an interpretation by the Carter Administration; and to say the least, the Reagan Administration had a self-conscious program for reorienting the administrative state. Some of that program would inevitably be undertaken through fresh interpretations of statutory terms. In the Court’s view, that was hardly objectionable. It would be appropriate for agencies operating under the Chief Executive, rather than judges, to assess “competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved in light of everyday realities.”<sup>81</sup>

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 — by, for example, using dictionaries, consulting statutory structure, deploying canons of construction, or relying on legislative history if that technique is thought to be legitimate.<sup>82</sup> Under *Chevron* Step One, the executive will lose if the standard sources show that it is wrong.<sup>83</sup> (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.<sup>84</sup>) 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. Perhaps the Court was saying that the resolution of statutory ambiguities sometimes calls for technical expertise, and that when expertise matters, deference would be appropriate. On this view, having roots in the New Deal’s enthusiasm for technical competence,<sup>85</sup> specialized administrators, rather than judges, should make the judgments of policy that are realistically at stake in disputes over ambiguous terms. But the Court’s

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See Stephen Breyer, *On the Uses of Legislative History*, 65 So. Cal. L. Rev. 845 (1992) (arguing in defense of use of legislative history).

<sup>83</sup> See, e.g., *MCI Telecom. Corp. v. AT&T Co.*, 512 U.S. 218 (1994).

<sup>84</sup> See below.

<sup>85</sup> See James Landis, *The Administrative Process* (1935).

emphasis on accountability suggested a second possibility: Perhaps the two-step inquiry is based on a healthy recognition that in the face of ambiguity, agency decisions must rest on judgments of value, and those judgments should be made politically rather than judicially. On this view, having roots in legal realism,<sup>86</sup> value choices are a significant part of statutory construction, and those choices should be made by democratically accountable officials. This reading suggests a third and more ambitious possibility: Perhaps *Chevron* is rooted on the separation of powers, requiring courts to accept executive interpretations of statutory ambiguities in order to ensure against judicial displacement of political judgments.<sup>87</sup> In the domain of foreign relations, this possibility might seem especially attractive.

But the Supreme Court has settled on a different understanding of the foundations of *Chevron*: *Courts defer to agency interpretations of law when and because Congress has told them to do so.*<sup>88</sup> On this view, the deference principle is a reading of legislative instruction, and 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 hence *Chevron* cannot be grounded on an explicit or implicit legislative instruction on that question. It follows that *Chevron* rests on a kind of legal fiction,<sup>89</sup> to the effect that a grant of the authority to make rules and conduct adjudications, and perhaps other authority as well,<sup>90</sup> carries with it interpretive power too. This, at any rate, is the prevailing account of *Chevron*.

This account raises many questions, and we shall return to it below. For the moment, the central point is that executive officers, entrusted with implementing the law, are frequently entitled to settle the meaning of ambiguous statutory provisions – a claim with evident implications for the international relations doctrines.

3. *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?* The executive may not receive *Chevron*-style deference if the agency has not exercised delegated power to make rules or to undertake adjudications.<sup>91</sup> 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.<sup>92</sup>

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<sup>86</sup> See Karl Llewellyn, *Some Realism About Realism*, 44 Harv. L. Rev. 1222 (1931) (outlining various ingredients of realist view).

<sup>87</sup> See Douglas Kmiec, *Judicial Deference to Executive Agencies*, 2 Admin. L.J. 269, 277-28 (1988).

<sup>88</sup> *United States v. Mead*, 533 U.S. 218 (2001); *Barnhart v. Walton*, 535 U.S. 212 (2002).

<sup>89</sup> 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.

<sup>90</sup> *Barnhart v. Walton*, 535 U.S. 212 (2002).

<sup>91</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

<sup>92</sup> We use the word “may” because the doctrine is complicated here. See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (longstanding agency interpretations can be entitled to deference even if not promulgated through notice and comment rulemaking).



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. At the other end of the spectrum is the mere “litigating position,” where the executive asserts a particular interpretation for the first time in litigation in which the executive is a party or an amicus. Interpretations produced by rulemaking or adjudication receive *Chevron* deference.<sup>93</sup> Agency interpretations that emerge from policy statements, or from interpretive rules, are often not entitled to *Chevron* deference, but they do receive a measure of respect under *Mead* and *Skidmore*.<sup>94</sup>

By contrast, litigating positions 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.<sup>95</sup> The refusal to defer to litigation positions is plausible in general. But it may well be inapplicable in the foreign relations setting, where the executive branch simply may not be able to set policy through formal procedures or in advance because of the fluidity of events. We will return to this point below.

(b) *Nondelegation canons?* Courts have sometimes denied the executive law-interpreting authority on the ground that the key decisions must be explicitly made by the national lawmaker. The most important principle is that the executive is not permitted to construe statutes so as to raise serious constitutional doubts.<sup>96</sup> So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement. Some canons of interpretation thus operate as part of the court’s analysis during Step One; the executive’s interpretation might fail because it is inconsistent with the meaning of the statute, as established, in part, by reference to the canon against constitutional avoidance.

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.<sup>97</sup> Other interpretive principles, also serving as nondelegation canons, trump *Chevron* as well. One of the most general is the rule of lenity, which says that in the face of

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<sup>93</sup> See, e.g., *State of Michigan v. EPA*, 213 F.3d 663 (DC Cir 2000).

<sup>94</sup> *Mead*, 533 U.S. at 227-28; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>95</sup> See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (no deference to litigating position); *Arabian American Oil Co.*, 499 U.S. at 257-58 (EEOC’s litigating position contradicted its earlier stance, was not supported by adequate evidence, and therefore not entitled to deference). See also infra text accompanying notes \_\_\_. As we note there, litigating positions receive no deference, but existing decisions suggest that *Chevron* deference might be available when the interpretation is not a product of rulemaking or adjudication. The word “might” is crucial, see *Barnhart v. Walton*, 535 U.S. 212 (2002) (giving deference to such an interpretation.)

<sup>96</sup> See, e.g., *Solid Waste Agency v. USACE*, 121 S. Ct. 675, 683 (2001); *DeBartolo Corp v. Fla. Gulf Coast*, 485 U.S. 568 (1988).

<sup>97</sup> One of us discusses this idea more generally in Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

ambiguity, criminal statutes will be construed favorably to criminal defendants.<sup>98</sup> Similarly, the executive cannot interpret statutes and treaties unfavorably to Native Americans.<sup>99</sup> Consider also the notion that unless Congress has spoken with clarity, the executive is not allowed to apply statutes retroactively.<sup>100</sup> There are many other examples.<sup>101</sup> In areas ranging from broadcasting to the war on terror,<sup>102</sup> the nondelegation canons operate as constraints on the interpretive discretion of the executive.

(c) *Organic statutes and others.* Under administrative law principles, it is also important to distinguish between statutes that authorize agency action (sometimes called “organic” statutes), and more general statutes, such as the Freedom of Information Act (FOIA) and the Administrative Procedure Act (APA),<sup>103</sup> which regulate agency behavior. According to standard principles, agencies are entitled to deference insofar as they are construing statutes with whose implementation they are charged, but not to deference in the interpretation of the more general statutes that regulate their conduct.<sup>104</sup> The Environmental Protection Agency, for example, does not receive deference insofar as it is interpreting FOIA to permit it to keep certain information secret.

For our purposes, we might therefore distinguish between statutes that grant the executive the authority to address some foreign affairs problem (“authorizing statutes”) and statutes that incorporate a background comity (or anticomity) judgment that applies to a range of disputes (“international relations” statutes). Authorizing statutes may be general, such as the statute that provides the president with authority to regulate immigration,<sup>105</sup> or specific, such as the Authorization for Use of Military Force against al Qaeda.<sup>106</sup> International relations statutes apply regardless of the type of cause of action or enforcement, and indeed apply even to common law litigation. Typical international relations statutes include the Foreign Sovereign Immunities Act and the Uniform Foreign Money Judgment Act. Statutes of this kind are indeed general, but they are not akin to statutes limiting agency authority, such as FOIA and the APA.

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<sup>98</sup>But see Dan Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 Harv. L. Rev. 469 (1996) (arguing in favor of deference to prosecutors’ interpretations of ambiguous statutes).

<sup>99</sup>See *Ramah Navajo Chapter v. Lujan*, 112 F3d 1455, 1461–62 (10th Cir. 1997) (grounding a canon of statutory construction favoring Native Americans in “the unique trust relationship between the United States and the Indians”); *Williams v. Babbitt*, 115 F2d 657, 660 (9th Cir. 1997) (noting in dicta that courts “are required to construe statutes favoring Native Americans liberally in their favor”); *Tyonek Native Corp v. Secretary of Interior*, 836 F2d 1237, 1239 (9th Cir. 1988) (noting in dicta that “statutes benefiting Native Americans should be construed liberally in their favor”).

<sup>100</sup> *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

<sup>101</sup> *United States Department of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *National Association of Regulatory Utility Commissioners v. FCC*, 880 F2d 422 (D.C. Cir. 1989).

<sup>102</sup> See Curtis Bradley and Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047 (2005) (exploring role of international law and canons of construction in interpretation of authorization to use military force).

<sup>103</sup> 5 USC § 551 et seq.

<sup>104</sup> See Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 208-09 (2006).

<sup>105</sup> See, e.g., *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999) (applying *Chevron* deference principles to immigration statute).

<sup>106</sup> Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

It is generally agreed that an authorization statute, such as the Immigration and Naturalization Act or the Food and Drug Act, is subject to analysis under *Chevron*.<sup>107</sup> In addition, there is no reason in principle why that analysis—understood as a recognition of the executive’s primary role in advancing interpretations of statutes—cannot be extended to an authorization statute such as the Authorization for Use of Military Force, which initiated the military attack on Afghanistan.<sup>108</sup> To be sure, the law is not settled here. When rulemaking and adjudication are not involved, deference may not be available.<sup>109</sup> In our view, however, deference is fully appropriate under any delegation of foreign affairs authority to the President. We shall return to the issue in more detail below;<sup>110</sup> for now, let us simply assert that when Congress grants such authority to the President, it ought to be understood to instruct courts to defer to his reasonable interpretations of ambiguous statutory terms. Further, international relations statutes may be ambiguous, in general or as applied in particular cases, as they reflect general judgments by Congress, whose meaning may not be clear in any particular case; again deference to the executive’s reasonable interpretations of ambiguous provisions is justified, or so we will argue.

### C. 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 not—peculiarly—settled on a general principle of deference where an executive agency advances an interpretation of a statute that has foreign relations implications.

In this section, we first discuss the established rules and then we turn to our recommendations. The argument 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 some kind of formal procedure or otherwise through channels that trigger *Chevron*. Even if no formal procedure and no such channels are involved, 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. If a relevant interpretation exists, the comity doctrines are trumped, because they should not be taken to operate as constraints on the executive under *Chevron* Step One. If the interpretation is unreasonable, of course, it will be invalid under Step Two; but Step Two invalidations are rare in the domestic sphere,<sup>111</sup> and they should be rare here as well. If there is no

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<sup>107</sup> See, e.g., *Young v. Community Nutrition Institute*, 476 US 974 (1986) (applying deference principles to Food and Drug Act).

<sup>108</sup> See Part IV, *infra*.

<sup>109</sup> See note *supra*.

<sup>110</sup> See *infra*.

<sup>111</sup> See Thomas Miles and Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation*, U. Chi. L. Rev. (forthcoming 2006) (finding that a very small percentage of cases, in the Supreme Court and the lower courts, invalidate agency 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

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 comity doctrines do not belong in the same category as that canon or other exceptions.

### *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 courts should do so. This practice was institutionalized in the twentieth century; the Department of State would intervene in cases when it believed that the court should take or deny immunity, and courts typically followed the view of the Department.<sup>112</sup> Indeed, courts deferred to a whole “executive jurisprudence,” parsing State Department opinions for principles that would control cases where the State Department did not intervene.<sup>113</sup> Today, courts continue to take account of the executive’s views in FSIA cases<sup>114</sup> and engage in pre-FSIA style deference to the executive in cases involving head-of-state immunity.<sup>115</sup>

A strain of thinking about the act of state doctrine has also long held that courts should defer when the executive informs them that the act of state doctrine should not apply in a particular case.<sup>116</sup> In a clear analogy to *Chevron*, courts also usually defer when the executive advances a treaty interpretation,<sup>117</sup> and when the executive expresses a view about head of state immunity.<sup>118</sup> They defer absolutely to executive determinations of whether a foreign state “exists” or not.<sup>119</sup> And even when the executive and Congress come into conflict about the extent of their foreign relations responsibilities, in most instances courts effectively defer to the executive by refusing to decide on the merits because of concerns about justiciability.<sup>120</sup> In the face of such a refusal, the views of the executive effectively prevail.

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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.

<sup>112</sup> See *Verlinden*, 461 U.S. at 487.

<sup>113</sup> *Id.* at 487-88.

<sup>114</sup> See *infra* note \_\_\_\_.

<sup>115</sup> See *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (deferring to executive’s grant of immunity to president of China; *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997) (deferring to executive’s denial of immunity to former leader of Panama).

<sup>116</sup> See discussion in *Sabbatino*, 376 U.S. at 420. But see *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (rejecting blanket deference to executive).

<sup>117</sup> *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. Pa. 2002) (deferring to executive’s interpretation of Geneva Conventions).

<sup>118</sup> *Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004).

<sup>119</sup> *Mingtai Fire & Marine Ins. Co. v. UPS*, 177 F.3d 1142, 1145 (9th Cir. 1999).

<sup>120</sup> E.g., *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (War Powers resolution); *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (treaty termination); see also *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (dismissing a lawsuit based on Henry Kissinger’s authorization of CIA intervention in Chile on political question grounds).

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.<sup>121</sup> This power is sometimes traced to the vesting clause of the Constitution, the Commander-in-Chief clause, and other provisions.<sup>122</sup> 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.<sup>123</sup> Hence the underlying justifications are often less textual than functional, or based on traditional practices and understandings. The nation must speak in “one voice” in its foreign policy; the executive can do this, while Congress and the courts cannot.<sup>124</sup> The executive has expertise and flexibility; can keep secrets; can efficiently monitor developments; can act quickly and decisively. The other branches cannot.<sup>125</sup> Unlike the courts, and as emphasized in *Chevron*, the executive 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. Of course, none of these advantages justify 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 (Including A Brief Tour)

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.<sup>126</sup> Suppose that the executive interprets a statute in a manner that violates those doctrines. Should a court defer to the 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<sup>127</sup>—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 the antitrust law should apply outside the territorial boundaries of the United States, but the decision does not follow any kind of formal

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<sup>121</sup> *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319-20 (1936).

<sup>122</sup> *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

<sup>123</sup> See Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47 (2004)(discussing constitutional provisions giving foreign affairs authorities to Congress).

<sup>124</sup> See, e.g., *Garamendi*, 539 U.S. at 413-14 and citations therein.

<sup>125</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

<sup>126</sup> Compare *Garamendi*, supra (deference) and *Sosa*, supra (deference), with *First National City Bank*, supra (rejecting deference) and *Kirkpatrick*, supra (rejecting deference).

<sup>127</sup> Note, however, that in some circumstances, an agency is entitled to *Chevron* deference even if it has not exercised such power. See supra.

procedure; it is offered in litigation. If so, it is possible that *Chevron* deference would be denied to that decision, on the ground that litigating positions do not receive deference.<sup>128</sup> Nonetheless, we believe that such deference is due to litigating positions in the domain of foreign relations; and even if this judgment is rejected, a court might want to pay a great deal of attention to the relevant position of the executive, and hence a conflict with the comity principles is easily imaginable.

In the face of such a conflict, a court might take one of three positions. First, it could hold that the international comity doctrines prevail over the executive's interpretation. Perhaps the principles would be treated as part of *Chevron* Step One, and hence 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 way is preferable: perhaps the executive interpretation and the international comity doctrines receive equal weight. A court might, for example, require that the executive 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 proved crucial. In other cases, courts have referred to the comity doctrines without paying much attention to the position of the executive.

A leading case is *Jama v. Immigration and Customs Enforcement*,<sup>129</sup> where the Supreme Court indicated the importance of the executive's view. An alien was ordered to be removed to Somalia, his country of birth and citizenship; he objected that he could not be removed without consent from Somalia. The statute was unclear, and the Court was badly divided on whether such consent was a prerequisite for removal. In resolving the question in the government's favor, the Court seemed to suggest that so long as there was room for ambiguity, the executive's view would prevail.<sup>130</sup> Indeed, the Court appeared to go well beyond *Chevron* so as to adopt a kind of clear statement principle, arguing that the view of the President would settle the law unless Congress had clearly provided otherwise: "To infer an absolute rule of acceptance where Congress has not clearly set it forth would run counter to our customary policy of deference to the President in matters of foreign affairs."<sup>131</sup> The Court stressed that removal decisions "may implicate our relations with foreign powers and require consideration of changing political and economic circumstances."<sup>132</sup> In these circumstances, the Court was reluctant to construe an ambiguous statute to limit the executive's discretion. Strikingly, the Court made no

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<sup>128</sup> See *Bower v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988); *Florida Manu. Hous. Ass'n v. Cisneros*, 53 F.3d 1565, 1574 (11<sup>th</sup> Cir. 1995).

<sup>129</sup> 543 U.S. 335 (2005).

<sup>130</sup> *Id.* at 348.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

reference to the possible relevance of international law and the international relations doctrines, emphasizing instead the views of the executive.

A contrary signal can be found in *EEOC v. Arabian American Oil Co.*, which involved the EEOC's interpretation of Title VII to prohibit employment discrimination by an American employer against an American employee on foreign territory.<sup>133</sup> The defendant argued that the EEOC's interpretation of the statute violated the presumption against extraterritoriality. The Court agreed, but it did not directly confront the *Chevron* issue, because the EEOC does not have the authority to issue rules and EEOC's interpretations have not been consistent.<sup>134</sup> In line with our argument here, it would have been possible for the Court to follow the view of the current executive and hence to apply Title VII extraterritorially because the executive argued for that result. In his concurring opinion, Justice Scalia suggested that the presumption against extraterritoriality must prevail over the agency's interpretation, but he gave no account of why the presumption should receive priority. More recently, the Court has endorsed the presumption without indicating that the executive's view matters at all; it has treated the presumption as part of the analysis under Step One.<sup>135</sup>

The Court offered mixed and confusing signals in *Spector v. Norwegian Cruise Line, Ltd.*,<sup>136</sup> where it held that the Americans with Disabilities Act may be applied to foreign-flagged ships except to the extent that application of the ADA would interfere with the internal affairs of those ships. In his plurality opinion, Justice Kennedy wrote that "general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel in United States territory if the interests of the United States or its citizens, rather than interests internal to the ship, are at stake."<sup>137</sup> But such statutes do not apply to regulate matters "that involve only the internal order and discipline of the vessel, rather than the peace of the port"—an exception rooted in "international comity."<sup>138</sup>

Cruise ships flying under foreign flags offer accommodations and travel services to over seven million Americans each year,<sup>139</sup> and hence the United States had considerable interest in protecting its citizens against violations of the ADA (a fact that helps account for the executive's claim that the statute should indeed apply). Hence there would be no blanket rule against application of that statute; the outcome would depend on whether there would be an effect on the internal affairs of the ship. In answering that question, the plurality emphasized the International Convention for Safety of Life At Sea, and thus suggested the importance of taking "conflicts with international law into account"—but it did so only in the context of indicating that attention to the convention

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<sup>133</sup> 499 U.S. 244 (1991).

<sup>134</sup> *Id.* at 256-57. Justice Scalia, concurring, held that EEOC's interpretation was not reasonable, even if *Chevron* applied. *Id.* at 260. 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 are involved. *Id.* at 260-78.

<sup>135</sup> See *Small v. United States*, 544 U.S. 385 (2005).

<sup>136</sup> 124 S. Ct. 2169 (2005).

<sup>137</sup> *Id.* at 2177.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2178.

was explicitly “urged by the United States” in its brief.<sup>140</sup> It is noteworthy, however, that no member of the Court paid a great deal of attention to the position of the executive, or suggested that that position might be determinative—a striking difference from *Jama*, decided only six months earlier. It would be easy to imagine an opinion to the effect that application of the ADA would be justified in large part by reference to the claims of the executive, which was in the best position to balance the competing interests.

In *Ali v. Ashcroft*,<sup>141</sup> the court of appeals refused to defer to the Immigration and Naturalization Service’s interpretation of a statute that provides for the deportation of aliens. The petitioners argued that the statute did not permit deportation to countries without functioning governments—Somalia, in this case as in *Jama*. The government claimed that INS regulations permitted such deportation, and were a reasonable interpretation of the statute. The court disagreed, holding that, in fact, INS regulations did not provide for such deportation. Much more relevantly for our purposes, the court said that the petitioners’ interpretation of the statute was consistent with international law—including customary international law of human rights and three human rights treaties—given that the petitioners would be subject to human rights abuses if they were returned to Somalia. Hence the court suggested that the international comity principles would trump the executive’s interpretation, though the absence of clarity in the governing regulations made the suggestion less than a holding. It is not at all clear that the court’s analysis survives the Supreme Court’s more recent decision in *Jama*.

In *Ma v. Ashcroft*,<sup>142</sup> the court of appeals spoke in similar terms. It held that the INS could not indefinitely detain an alien convicted of manslaughter because his home country would not repatriate him. The court rejected the agency’s interpretation of its authority to detain because *Chevron* was trumped by the existence of a serious constitutional question—here, under the due process clause.<sup>143</sup> The court said that *Chevron* principles “are not applicable where a substantial constitutional question is raised by an agency’s interpretation of a statute it is authorized to construe.”<sup>144</sup> This use of the Avoidance Canon is entirely compatible with our approach here.<sup>145</sup> But the court, citing the *Charming Betsy* canon, also noted that indefinite detention would violate international law.<sup>146</sup> The notation played only a modest role in the court’s analysis, but it is noteworthy that there was no suggestion that the executive’s view might prevail over international law.

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<sup>140</sup> *Id.* at 2180.

<sup>141</sup> 346 F.3d 873 (9th Cir. 2003).

<sup>142</sup> 257 F.3d 1095 (9th Cir. 2001).

<sup>143</sup> *Id.* at 1105 n. 15; see also *id.* at 1106-107.

<sup>144</sup> *Id.* at 1106.

<sup>145</sup> This principle can be found in many cases in the domain of immigration law. See, e.g., *US v. Witkovich*, 353 U.S. 194 (1957); *Romero v. INS*, 39 F.3d 977 (9th Cir. 1994); *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006).

<sup>146</sup> See also *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000) (rejecting INS interpretation of statute that would permit it to deport petitioner to country where he would be tortured, citing the Convention Against Torture and the domestic implementing statute).



A major contrast is provided by *Corus Staal BV v. Department of Commerce*,<sup>147</sup> in which the court of appeals allowed an agency's interpretation of a statute to defeat the *Charming Betsy* canon. In the court's view, the agency's methodology for determining whether a firm has engaged in illegal dumping was based on a reasonable interpretation of an ambiguous statute, and thus entitled to respect under *Chevron*. The appellant argued that this methodology had been rejected by the World Trade Organization in several interpretation of the Antidumping Agreement, a provision of the General Agreement on Tariffs and Trade. The court simply rejected the argument that it should give deference to either the GATT or the WTO's interpretations of GATT articles; the executive's interpretation prevailed.<sup>148</sup>

These cases leave a great deal of uncertainty, but we can summarize them, or at least their hints, as follows. Where the executive does not express a view on the meaning of a statute or the outcome of litigation, courts apply the international relations doctrines. Where the executive's interpretation is ambiguous, arguably unconstitutional, unreasonable, or ambiguous, the international comity doctrines are given considerable and perhaps decisive weight. Where the executive's interpretation can be found in a formal rule or adjudication, there is a chance that it will prevail over the doctrines. But, as noted earlier, cases in the last category are extremely rare—only the trade cases decided by the Federal Circuit seem clearly to belong to this category—so the actual approach of courts when *Chevron* and the comity doctrines conflict remains uncertain.<sup>149</sup> It is also unclear whether courts would defer to the executive when it issues its interpretation in an informal manner, not preceded by rulemaking or adjudication.

The conflicts discussed so far concern the conventional *Chevron*-style setting where the executive advances an interpretation of an ambiguous statute. Other conflicts occur without any such interpretation. A recurring controversy is whether in act of state cases, courts should defer to the executive's determination that a decision on the merits would or would not cause foreign relations problems. The courts have wavered on this issue. In earlier cases, courts generally deferred.<sup>150</sup> Although more recently the Supreme Court has divided on this issue, courts usually give the executive's views some weight.<sup>151</sup> In Foreign Sovereign Immunity cases, the courts similarly will take into consideration the judgment of the executive that adjudicating the liability of a foreign sovereign would

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<sup>147</sup> 395 F.3d 1343 (1st Cir. 2005).

<sup>148</sup> For similar cases where *Chevron* deference seemed to trump deference to international trade treaties and case law, see *Allegheny Ludlum Corp. v. U.S.*, 367 F.3d 1339, 1348 (Fed.Cir. 2004) (holding international law concerns were only a "guide"); *Timken Co. v. U.S.*, 354 F.3d 1334 (Fed.Cir. 2004) (Department of Commerce interpretation trumped concern over WTO violations); *Federal Mogul Corp. v. U.S.*, 63 F.3d 1572 (Fed.Cir. 1995) (deferring to Commerce methodologies for determining anti-dumping margins).

<sup>149</sup> Some people have mistakenly interpreted *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979), as holding that the *Charming Betsy* canon trumps *Chevron* deference; but as Bradley explains, this view is in error. See Bradley, *supra*, at 685.

<sup>150</sup> See *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947), and the discussion in *Sabbatino*, *supra* at 936.

<sup>151</sup> See *Sabbatino*, *supra*; *Banco Nacional de Cuba*, *supra*; *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 408 (1990).

interfere with foreign relations.<sup>152</sup> In Anti-Terrorist Act and Alien Tort Statute cases, courts have also paid close attention to the executive's views about the implications of the litigation for foreign relations.<sup>153</sup>

By contrast, we are unaware of cases in which the executive has intervened to argue that foreign law or foreign judgments should, or should not, be enforced because of their foreign relations implications. As a general matter, however, courts agree that the executive's views should be taken into account when determining whether international comity requires them to abstain from deciding a case on the merits.<sup>154</sup>

From a doctrinal perspective, this latter group of cases and the *Chevron* cases are different. In the *Chevron* setting, courts defer to the executive's interpretation of an ambiguous statutory provision because they interpret the authorizing statute as implicitly delegating law-interpreting authority to the executive.<sup>155</sup> In the other setting, the statute or common law is more or less clear, and the court abstains or grants immunity because of the executive's views about the foreign policy implications of a decision on the merits. In analytical terms, however, the two settings are similar, and raise identical normative and institutional questions. In both settings, the background legal rules reflect a crude balancing of the costs and benefits of judicial decisions that may offend foreign sovereigns. And in both settings, the question arises whether these background rules are so crude, so insensitive to day-to-day changes in foreign relations, and so clumsy in the hands of judges who lack information and expertise about foreign relations, that it would be better if judges defer to the executive whenever they can do so.

#### **D. The Argument for Executive Power**

Our account of the international relations doctrines and the rationale for the *Chevron* rule imply that in the context of foreign relations, the executive's interpretations should prevail over the comity doctrines. Those doctrines should not be treated as part of the court's analysis under 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, because the executive is in the best position to reconcile the competing interests, and in the face of statutory silence or ambiguity, Congress should therefore be taken to have delegated interpretive power to the executive. If the executive

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<sup>152</sup> See *Austria v. Altmann*, 541 U.S. at 702; *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) (allowing U.S. intervention because of "clear foreign policy interests").

<sup>153</sup> See, e.g., *Sosa*, 542 U.S. at 760-61.

<sup>154</sup> *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*, pending before the Supreme Court, also test this proposition; in these cases, the executive's interpretation of a treaty conflicts with the International Court of Justice's interpretation of this treaty. There have been some rare but notable cases where deference, or not much deference, was given; e.g., *Zschernig v. Miller*, 389 U.S. 429 (1968) (holding a state law invalid under dormant foreign affairs preemption even though the executive branch said that it did not interfere with foreign relations).

<sup>155</sup> Note again that this is a legal fiction, as Justices Scalia and Breyer have independently explained; there is no actual instruction from Congress for courts to follow, and in the face of silence, courts attribute, to Congress, an instruction to defer. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516-17; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370-82 (1986).

decides that the statute should be interpreted so as to overcome the comity principles, it ought to be permitted to interpret the statute in that way. There is no reason to distrust the executive's competence in making the underlying choices. In fact the *Chevron* approach *literally* applies to any executive interpretation that follows formal procedures, and the logic of the case suggests that it should literally apply as well to interpretations in the domain of foreign relations that do not follow such procedures.

It is 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. Hence it should not be important whether the executive's decision follows rulemaking or adjudication, or otherwise has the force of law. In the context of foreign relations, the answer is supplied by the interpretation of the executive, subject to the constraint of reasonableness.

1. *Comparative advantages.* This conclusion follows whatever the ground 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. 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 are vital to America's interests. The court has no expertise in determining whether a certain kind of litigation will offend a foreign sovereign or not, whether the sovereign is likely to respond by reducing cooperation, and whether such cooperation is valuable or not. These judgments are all at the core of the foreign relations expertise of the executive.

Now consider the consequentialist theory. Recall that this theory holds that the U.S. should defer to a foreign act only if (1) the foreign state will or is likely to reciprocate for comity, or retaliate for violating the comity rules; and (2) the benefits from such reciprocation or nonretaliation exceed the costs of deference. These two conditions require complex inquiries, with empirical and normative dimensions, for which the executive's institutional position gives it a decisive advantage over the courts. Three points are important here.

First, the executive branch carefully tracks relations with foreign states, and it is in a better position to predict whether a particular act of deference is likely to result in reciprocation by foreign states, or whether such statutes 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 factfinding.

Second, the executive branch is in a better position to understand the benefits of foreign reciprocation or the likelihood and costs of retaliation than the court is. Suppose, for example, that, in response to litigation against China by Chinese victims of Chinese repression, China begins to issue vague threats to Taiwan. Are these threats credible? Are

they meant to signal that China will take a more confrontational stance toward Taiwan if the U.S. allows Chinese citizens to sue China for human rights violations? Or perhaps they merely signal a general chilling of relations, in which case the U.S. may have more trouble obtaining Chinese assistance in pressuring Iran to abandon its nuclear plans? Courts cannot answer these questions; the executive can.

The third point involves accountability. In deciding whether American law should be applied abroad, or whether a statute should be construed conformably to international law, the executive must balance competing interests and make judgments of value. 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.<sup>156</sup> 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 concludes that American civil rights or environmental law ought not to be applied to American activities in other nations. As in the *Chevron* context, the executive is far more likely to be punished by the public if it causes or fails to resolve tensions with other countries or a foreign policy crisis than a court is. Indeed, although courts routinely anger foreign sovereigns,<sup>157</sup> we cannot think of any case where 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. Because courts are independent, they may be more neutral than the executive is, and thus, perhaps, more likely to interpret the statute impartially. But this concern is identical in the *Chevron* context, where, as we noted, courts have plausibly concluded that the executive's control over policy justifies its heightened 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.<sup>158</sup>

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, then deference to executive interpretations in foreign relations cases must also be the appropriate approach. The core reason is that resolution of statutory ambiguities involve judgments of policy, and those judgments are best made

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<sup>156</sup>One court has held, however, that the Endangered Species Act applies abroad. See *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8<sup>th</sup> Cir. 1990) (holding that clear text of ESA requires extraterritorial application), reversed and vacated on standing grounds, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); but see *NRDC v. U.S. Dept. of Navy*, 2002 US Dist LEXIS 26360 (C.D.Cal. 2002) (citing implementing regulatory that ESA applies within the United States and also "upon the high seas," but leaving undecided question whether ESA applies "in the territorial waters of another nation.").

<sup>157</sup> See Lowenfeld, *supra*, at 618-20.

<sup>158</sup> See *infra*.

by the executive. None of this means that courts have no relevant expertise. Courts might have a better sense of how enforcement of foreign judgments may harm the integrity of the American judicial system than the executive does. But this advantage is relatively minor compared to the advantages of the executive.

What we have said so far also applies outside the *Chevron* setting, where statutes and common law are relatively clear, and the executive branch argues that the court should not decide on 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.<sup>159</sup> 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 in foreign relations than the courts do, and that the executive's accountability for foreign relations is more important than the courts' independence from political pressure.<sup>160</sup>

A possible counterargument is that Congress, in one important instance, reduced the executive's influence over foreign relations, and did so with the executive's approval. As noted above, the FSIA was enacted, in part, because diplomatic pressure on the Department of State to grant immunity to foreign sovereigns resulted in inconsistent decisions.<sup>161</sup> Before the statute was enacted, courts would permit lawsuits against foreign sovereigns if the Department of State sanctioned such suits, and the Department of State generally sanctioned suits when the disputed act was commercial in nature—for example, when the defendant was a business owned by the foreign sovereign—and not otherwise. The FSIA codified the State Department's jurisprudence, with some modifications.<sup>162</sup> In doing so, it drastically reduced the State Department's discretion to depart from its own rules in order to reward friends or punish enemies where United States foreign policy interests so required. But the statute itself contains important pockets of executive discretion.<sup>163</sup> And, more to the point, the Supreme Court has signaled that courts should take into account the executive's view about whether they should exercise jurisdiction over a sovereign in any particular case.<sup>164</sup> Thus, even a statute that to all appearances

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<sup>159</sup> 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 attaches conditions to treaties in which it expresses 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).

<sup>160</sup> It is possible to raise one more concern, that of 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., *American Ins. Ass'n v. Garamendi*, 537 U.S. 1100 (2003) (executive policy prevails over state law); *Zschernig*, 389 U.S. at 441 (state laws with foreign relations impact preempted even when no conflicting federal statute).

<sup>161</sup> See *Verlinden*, 461 U.S. at 487.

<sup>162</sup> *Id.*

<sup>163</sup> E.g., 28 U.S.C. § 1605(a)(7)(A) (denying immunity to state sponsors of terror if they have been designated as such by the President).

<sup>164</sup> *Altmann*, 451 U.S. at 701-02 (“should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct,

takes away the discretion of the executive has been “Chevronized.” The executive and a majority of the Supreme Court appear to believe that, although courts can handle routine cases involving foreign sovereign defendants, they should continue to defer to the executive when it states an interest, despite the fact that such an approach reopens the door to political pressure. Once again, the executive’s flexibility and expertise takes precedence.

2. *A response.* It would be possible to respond that all or some of the comity doctrines should be seen as nondelegation principles, and that if this is so, then a clear statement from Congress is required in order 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; perhaps Congress should be required to speak clearly if it wants to require to authorize a violation. The same analysis might be applied to the canon against extraterritoriality;<sup>165</sup> perhaps the executive should not be permitted to decide on extraterritorial application of domestic law on its own.

In our view, however, it would not be easy to categorize the comity doctrines as nondelegation principles. It is reasonable to say that Congress must speak clearly if it seeks to raise a serious constitutional question, and hence that the executive may not raise such a question on its own<sup>166</sup>; 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,<sup>167</sup> a clear statement principle, in that area, would make no structural sense, at least as a general rule. A more refined 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, perhaps if the United States has independently committed itself to the relevant international law. At most, however, this argument would justify a narrow use of clear statement principles,<sup>168</sup> and even such a narrow use is not simple to defend.

## E. A Historical Evolution

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that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”) (footnotes omitted). The court cites several lower court cases that took account of the state department’s statements of interest in FSIA cases. *Id.* at n.21. Although the majority’s language is not strong, the dissent furiously objects to it on the ground that it undermines the purpose of the statute. *Id.* at 736 (“Taking what the Court says at face value, the Court does express an opinion on the question: Its opinion is that the Executive statement may well be entitled to deference, and so may well supercede federal law that gives courts jurisdiction.”).

<sup>165</sup> Cf. *Spector*, supra note, at 2182, suggesting that the internal affairs clear statement rule is part of a set of “clear statement rules [that] ensure that Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.” But see *NRDC v. U.S. Department of the Navy*, 2002 US Dist. LEXIS 26360 (C.D.Cal. 2002) (respecting executive regulation requiring Endangered Species Act to be applied outside of American territory and on the high seas).

<sup>166</sup> See, e.g., *Nadarajah v. Gonzales*, 443 F. 3d 1069 (9th Cir. 2006).

<sup>167</sup> See *Jama*, 543 U.S. at 348, for a recent statement.

<sup>168</sup> Cf. *Spector*, supra note, which is consistent with this line of argument insofar as it pays little attention to the views of the executive—but in our view, the Court was mistaken not to give weight to those views.

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.<sup>169</sup> 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 U.S. 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, than they are today.<sup>170</sup>

To say the least, things are almost unimaginably different today. The vast changes in foreign policy, the greater relative power of the United States, the institutional structure of American government, and ways of thinking about law suggest, at the least, 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 a 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 “Chevronized” whereas foreign relations law has not been.

It is a commonplace that the rise of the administrative state in the twentieth century revolutionized constitutional law.<sup>171</sup> 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 and municipalities; these included labor-management relations, environmental protection, commercial fraud, antitrust problems, workplace safety, and much more.<sup>172</sup> 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.<sup>173</sup> They also agreed that although the executive usually could not act without congressional authorization,<sup>174</sup> broad delegations of regulatory authority to the executive

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<sup>169</sup> See *The Schooner Charming Betsy*, supra (1804) (*Charming Betsy* doctrine); *United States v. Palmer*, 16 U.S. 610 (1818) (presumption against extraterritoriality); *Hilton*, supra (1895) (International comity); *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812) (foreign sovereign immunity); *The Antelope*, 10 Wheat. 66, 123 (1825) (penal rule); *Underhill v. Hernandez*, 168 U.S. 250 (1897) (act of state doctrine).

<sup>170</sup> See Edward S. Corwin, *The President: Office and Powers, 1787-1984* (5th rev. ed. 1985) (tracing the rise of the power of the presidency over the course of American history); Arthur Schlesinger, Jr., *The Imperial Presidency* (2004) (same).

<sup>171</sup> See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421 (1987).

<sup>172</sup> See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities* (1982).

<sup>173</sup> For an overview, see Stephen Breyer et al., *Administrative Law and Regulatory Policy* 16-20 (6<sup>th</sup> ed. 2006).

<sup>174</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

were necessary and permissible because of the many institutional advantages of the executive, including specialization and a capacity for rapid change over time.<sup>175</sup> *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 of the large-scale shift to lawmaking by executive institutions.<sup>176</sup>

It is easy to see a parallel process occurring in foreign relations law, though with one wrinkle.<sup>177</sup> The wrinkle is that 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.<sup>178</sup> 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.<sup>179</sup> Critics of this transformation greatly fear executive overreaching,<sup>180</sup> 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. A modern president, unlike George Washington, needs to be able to respond quickly to intercontinental ballistic missiles, cyberattacks, terrorist attacks, global financial crises, and other dangers that will not wait for Congress to act. The critics of broad executive power have not argued that ambiguities in federal statutes should be construed by judges, rather than by the President and those who operate under him.

To say this is not to take a stand on the question 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—and hence the increase in executive power, usually made possible by statutes, has reflected a recognition by Congress itself of this pragmatic point.<sup>181</sup> 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.

It follows that the argument for *Chevron*-style deference in foreign affairs is similar to, and at least as strong as, the case for such deference in domestic affairs. The parallel historical rise in executive power in both contexts, though the explicit permission

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<sup>175</sup> See Breyer et al., *supra* note, 71-74. For a classic statement in favor of administrative discretion, see James Landis, *The Administrative Process* (1935).

<sup>176</sup> See Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, Yale L.J. (forthcoming 2006).

<sup>177</sup> See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1 (1999). As White points 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.

<sup>178</sup> See Bradford Perkins, *The Creation of a Republican Empire, 1776-1865*, 59 (1993).

<sup>179</sup> See Schlesinger, *supra*.

<sup>180</sup> In the context of individual rights, see David Cole, *Enemy Aliens* (2004).

<sup>181</sup> See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385 (1989) (describing statutes delegating emergency powers to the executive and congressional and judicial acquiescence in broad interpretations of those statutes by the executive).



or at least acquiescence of Congress as well as courts, is hardly surprising. All that is left is to acknowledge the importance of executive deference in foreign relations as clearly as we do in the domestic setting.

### F. 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 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.

We do not mean our argument to be taken in this way. 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, as for example with the suggestion that Congress should not lightly be taken to intrude on the President's inherent power to settle important questions of foreign relations.<sup>182</sup> When the President does have a 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, where there is no claim of inherent constitutional power, and where the question is whether to follow the views of the executive or instead one or another comity principle.

It follows that nothing we have said bears on cases where the executive asks a court to ignore a clear statute because of its foreign relations implications in situations where the view of the executive is clearly at odds with that of Congress. A subset of such cases includes high-profile conflicts between the executive and Congress, as when the executive seizes steel mills in the absence of congressional authorization,<sup>183</sup> sends troops to war in violation of a statute that restricts the use of troops without congressional approval,<sup>184</sup> or engages in espionage in apparent conflict with existing statutes.<sup>185</sup> 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.<sup>186</sup> In this Article, we do not express an opinion on these longstanding disputes.

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<sup>182</sup> See *supra* (discussing apparent clear statement principle in *Jama*).

<sup>183</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>184</sup> See *Campbell*, 203 F.3d at 24 (Silberman, J., concurring) (arguing that challenge to use of force under the War Powers Resolution is nonjusticiable).

<sup>185</sup> See Eric Lichtblau and James Risen, *Legal Rationale By Justice Dept. On Spying Effort*, *New York Times*, Jan. 20, 2006, at A1.

<sup>186</sup> Compare *Youngstown*, 343 U.S. at 588-89, and *Campbell*, *supra*.

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.

#### IV. 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 anticomity 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 be entitled to interpret such 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.

Because of the pervasive importance of the war on terror, the number of imaginable cases is large. For example, the executive might want the 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 the Use of Military Force (AUMF), 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.<sup>187</sup>

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. 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 at least some other nations.

From the standpoint of standard administrative law doctrine, it might be responded that with the AUMF, the President has been given neither adjudicatory authority nor the authority to engage in notice-and-comment rulemaking—and hence that he is not authorized to do anything, under the AUMF, having the force and effect of law. On this view, elaborated above, the precondition for *Chevron* deference is absent. This argument might be supported with an analogy. The executive branch is not entitled to *Chevron* deference insofar as it is enforcing the criminal law.<sup>188</sup> The reason is

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<sup>187</sup> Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

<sup>188</sup> See *Crandon v. U.S.*, 494 U.S. 152, 158 (1990). For an argument that existing law is wrong on this count, see Kahan, *supra*.

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.<sup>189</sup> 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 the statutes under which it brings prosecutions.

A narrow response would be that under the AUMF, the President or his delegates can indeed make rules and regulations, and hence if they have done so, he or they are would be entitled to *Chevron* deference under standard principles. 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. If we step back a bit, we will see that the objection to *Chevron* deference is unconvincing even on its own terms. In ordinary *Chevron* cases, a delegation of law-interpreting power is inferred from the authority to produce rules or orders with the force of law. But in the context of an authorization to use force, most of the President's decisions are not preceded by rulemaking or adjudication, and hence the grant or denial of such authority is irrelevant. By its very nature, any AUMF is best taken as an implicit delegation to the President to resolve ambiguities as he (reasonably) sees fit.<sup>190</sup> Indeed, this conclusion seems appropriate for any delegation of power to the President in the particular domain of foreign relations. The President's interpretation must not, of course, plainly violate the law; if it did, it would be struck down under Step One. But insofar as the law is unclear, reasonable interpretations deserve respect.

We can approach this question from a different direction. As we have seen, *Chevron* is based on a recognition that the interpretation of ambiguous terms depends not on purely legal expertise, but also on judgments about both fact and value.<sup>191</sup> Where Congress has not spoken, interpretations must depend, at least in part, on assessments of the consequences of one or another approach; agencies are in a comparatively good position to make such assessments. And where questions of value are at stake, agencies, subject as they are to presidential control,<sup>192</sup> should resolve those questions as they deem most sensible. We have seen that *Chevron* is based on a legal fiction<sup>193</sup> about congressional instructions with respect to interpretive power—a fiction that is rooted in entirely sensible judgments, pragmatic in character, about institutional capacities. And if these are the foundations for *Chevron*, then the question here is straightforward: the

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<sup>189</sup> But see Kahan, *supra* note. 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 will 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 government.

<sup>190</sup> 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. The logic of our argument so suggests.

<sup>191</sup> See Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum L. Rev. 2071 (1990).

<sup>192</sup> Certainly in theory, and sometimes in practice. See Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001).

<sup>193</sup> See Scalia, *Judicial Deference*, *supra* at 516-17.

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 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.

The Supreme Court's decision in *Hamdi* does not speak in these terms, but its conclusion is broadly consistent with them, and we think that our approach is preferable to the one taken by the Court.<sup>194</sup> The plurality accepted the executive's claim that the AUMF granted it the power to detain Hamdi, notwithstanding the Nondetention Act, which forbids the executive to imprison or detain a citizen of the United States without congressional authorization.<sup>195</sup> The AUMF is quite general, and under standard principles of statutory interpretation, it should arguably yield to the prior, relatively specific Nondetention Act, which was intended to apply during wartime. However, the plurality argued that the AUMF clearly authorized the executive to detain enemy combatants, and thus satisfied the Nondetention Act.<sup>196</sup> The plurality also noted that the AUMF may implicitly incorporate principles of international law, but that these principles did not forbid detention of enemy combatants.<sup>197</sup> 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 Nondetention Act for detention of an American citizen.<sup>198</sup> He also suggested that the AUMF did not authorize the executive to violate international law and the detentions did violate (or may have violated) international law.<sup>199</sup>

We believe that even if Justice Souter was correct to say that the AUMF was ambiguous rather than clear, the government should have prevailed on its 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 authorizes detention. 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 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 international law (if the AUMF incorporates international law).

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<sup>194</sup> *Hamdi v. Rumsfeld*, 542 U.S. 407 (2004).

<sup>195</sup> 18 U.S.C. 4001(a).

<sup>196</sup> *Hamdi*, 542 U.S. at 517.

<sup>197</sup> *Id.* at 520-21.

<sup>198</sup> *Id.* at 547-48.

<sup>199</sup> *Id.* at 542-52.

The difference between our approach and that of the plurality can be seen by imagining that active hostilities in Afghanistan cease but the U.S. 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:

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.<sup>200</sup>

The court seems to say that the AUMF implicitly incorporates international law as a constraint on executive action, or perhaps that its application to the hypothetical case is ambiguous and so the *Charming Betsy* canon should be applied.<sup>201</sup> 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 permits him to detain enemy combatants after active hostilities end but the threat identified in the AUMF continues, and the court would defer to a reasonable decision.

Nothing said here suggests that the President's interpretive power is unlimited. Any effort to interpret the AUMF, or any other statute dealing with terror, must contend with *Chevron* Steps One and Two, and hence must count as a reasonable construction of ambiguous terms. There are other limitations. Suppose, for example, that the President make a plausible claim of statutory authority to engage in actions that threaten constitutionally sensitive interests. As we have seen, statutes are generally not construed to threaten such interests, even under *Chevron*. 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. It follows that when canons collide, liberty generally receives the benefit of the doubt.<sup>202</sup> Of course any interpretive canon is subject to legislative override.

## Conclusion

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<sup>200</sup> *Id.* at 521.

<sup>201</sup> See Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. Law Rev. 293 (2005); cf. Bradley & Goldsmith, *supra* (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).

<sup>202</sup> We do not address the question whether this proposition holds during emergencies, including the emergency that produced the AUMF. Compare Eric A. Posner and Adrian Vermeule, *Terror in the Balance* (forthcoming 2006) (arguing that courts should defer to executive during emergencies) and Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47 (2004) (emphasizing the importance of clear congressional authorization).

In this Article, we have attempted to understand the international relations doctrines and to explore the role of the executive of 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 hence ambiguous statutes are not construed 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 value of importance 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 result in an undue concentration of power in the executive branch. There are three responses to this objection. The first is that nothing said here excludes the possibility that Congress is entitled to the last word; and there can be no question that most of the time, clear legislation is controlling. The second response is that 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 the antidiscrimination laws to American companies operating abroad. The third response is that other canons of interpretation, most notably constitutional avoidance, operate as a check on executive authority. With these qualifications, the grant of interpretive discretion to the executive emerges, not as an undue concentration of authority, but as a sensible recognition of the inevitable role of judgments of policy and principle 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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