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Abstract: How should courts handle cases that implicate foreign relations or national security? What weight should courts give to the executive branch's view of the law in these matters? To date, one can identify in the jurisprudence of the U.S. Supreme Court no less than four theoretical approaches—varying by the degree of judicial deference due to the executive—that suggest competing visions about the constitutional role of courts in these areas. Each approach has been criticized fiercely for either abdicating the constitutional duty of the courts or obstructing the nation's pursuit of its security and foreign policy objectives. Absent a clear principle guiding when to apply each approach, courts invoke these approaches intermittently, generating considerable confusion. Current doctrine is missing a framework for mediating tensions between the four approaches. This Article seeks to fill that gap. It draws from the Margin of Appreciation (MoA), a doctrine international courts, especially in Europe, use widely to calibrate the level of deference owed to the principal decision-maker in separation of powers and human rights issues. Compared to parallel doctrines courts traditionally apply, the MoA offers a sophisticated framework for addressing deference claims by the executive. The doctrine provides courts criteria for optimizing the mode of their review, disciplines judicial decision-making, and reduces costs of judicial errors in matters of national importance. This Article reconstructs the MoA as a domestic law doctrine. It makes the necessary adaptations for "domesticating" the MoA and develops criteria for considering deference claims in a variety of foreign affairs and national security matters. In doing so, this Article demonstrates how a domestic MoA approach can generate more nuanced judicial engagement with foreign affairs, encourage deliberative decision-making by policymakers, and promote interbranch dialogue about the role of legal institutions in the high-stakes areas of foreign affairs and national security.

NOTE: Because not all platforms support graphics, the figures in this article are archived at, https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/63-5/Gil_graphics.pdf [https://perma.cc/H7R4-F9T4].

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INTRODUCTION

How should courts handle cases that implicate foreign relations or national security? What weight should courts give to the executive branch's view of the law in these matters? In 2020, in *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA*, the U.S. Supreme Court candidly admitted that it does not have clear answers to these questions.[1] This case concerned an interpretation of a treaty governing international arbitrations. The question was whether the Court should give deference to the interpretation offered by the U.S. government. For a unanimous Court, Justice Clarence Thomas wrote, "We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any."[2] The *GE* decision, however, did not reach the merits of the issue, as the Court ultimately held that "[t]here is no need to resolve deference issues when there is no need for deference."[3]

Justice Thomas's statement alludes to a longstanding splintering within the Supreme Court regarding the proper role of the judiciary in foreign affairs cases. A few years ago, the Justices laid bare their positions. In 2018, in *Trump v. Hawaii*, a divided Court upheld a Presidential Proclamation restricting the entry of nationals from several predominantly Muslim countries to the United States.[4] In doing so, the Court rejected statutory challenges under the Immigration and Nationality Act (INA) and constitutional challenges under the Establishment Clause.[5] At first glance, the underlying disagreement between four of the five opinions—the Chief Justice's majority opinion, Justice Anthony Kennedy's concurrence, Justice Stephen Breyer's dissent (joined by Justice Elena Kagan), and Justice Sonia Sotomayor's dissent (joined by Justice Ruth Bader Ginsburg)[6]—appears to concern a narrow topic: the weight that ought to be given to Trump's statements on the campaign trail regarding banning Muslims from entering the country.[7] But the broader issue that manifests in these opin-

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[1] GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1640 (2020) (holding that Convention on the Recognition and Enforcement of Foreign Arbitral Awards "does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories").

[2] *Id.* at 1647.

[3] *Id.* (quoting Edelman v. Lynchburg Coll., 535 U.S. 106, 114–15 n.8 (2002)). The Court found that there was no need for deference because it agreed with the executive's reading of the treaty. *Id.*

[4] 138 S. Ct. 2392, 2423 (2018).

[5] *Id.*

[6] Justice Thomas concurred to add dicta on the nationwide injunctions imposed by the district court, but joined the majority on the main questions posed in the case. *See id.* at 2425–29 (Thomas, J., concurring).

[7] *See, e.g.*, Jenna Johnson, *Donald Trump Is Expanding His Muslim Ban, Not Rolling It Back*, WASH. POST (July 24, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/ [https://perma.cc/JQB2-M9D3] (dis-

ions is how to shape the relationship between the courts and the President over matters implicating foreign affairs. It is not simply that the Justices applied certain tests and reached different conclusions, or that they disagreed about the meaning of a term in a statute or a constitutional provision; it is that they drew upon very different visions of their constitutional role in this area.

There are four principal theoretical approaches to this issue, and each was implicitly referenced by a different opinion in *Trump v. Hawaii*.[8] The majority followed an approach referred to here as *deference*.[9] Under this approach, courts should give substantial—and, typically, conclusive—weight to the views of the executive when cases have foreign relations or national security implications.[10] The deference approach is premised on various formal and functional reasons, and is often analogized to the deference given to administrative agencies under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[11] The next approach, embodied in Justice Kennedy's concurring opinion, also showed deference to the President, but additionally sought to distance the Court from Trump's entry policy. It expressed skepticism about the capacity of courts to subject those sorts of statements to judicial scrutiny.[12] Kennedy's view, although not explicitly articulated, reflects an approach termed *avoidance*.[13] This approach contends that foreign affairs matters should be kept far away from the courtroom and that when such cases do require judicial resolution, courts should be unconditionally deferential to the executive. Although judges and scholars who advocate for *avoidance* typically support broad executive power,[14] these advocates also believe that judicial involvement

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cussing President Trump's ban on Muslims entering the United States); *see also Trump*, 138 S. Ct. at 2401 (majority opinion) ("At the heart of [plaintiff's] case is a series of statements by the President and his advisers both during the campaign and since the President assumed office.").

[8] *See generally Trump*, 138 S. Ct. at 2403, 2423–24, 2424, 2429 (containing four different opinions, each illustrating different modes of deference).

[9] *See id.* at 2403–24; *infra* Section II.B.

[10] The Chief Justice's statutory and constitutional analyses took a deferential view of the President's authority to issue the Proclamation. *See Trump*, 138 S. Ct. at 2403–24. In evaluating the plaintiff's statutory claims, the Chief Justice noted that the "deference traditionally accorded the President in this sphere" informed his reading of the INA. *Id.* at 2409. In considering the constitutional question, he applied the deferential rational basis review. *Id.* at 2420.

[11] 467 U.S. 837, 865 (1984). *See generally* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000) (considering foreign affairs law from the perspective of the *Chevron* doctrine in administrative law); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170 (2007) (applying *Chevron* doctrine to laws governing foreign relations and diplomacy).

[12] *Trump*, 138 S. Ct. at 2423–24 (Kennedy, J., concurring).

[13] *See id.* at 2423–29; *infra* Section II.A.

[14] *See infra* notes 65–67 and accompanying text.

in foreign affairs matters will harm the judiciary as an institution and might permanently undermine constitutional guarantees in other contexts.[15]

Next, Justice Breyer's dissenting opinion adopted an approach known as *procedural review* for its tendency to focus on the decisional processes underlying substantive outcomes, rather than the outcomes themselves.[16] Breyer examined the lawfulness of the travel ban by considering the efficacy of the ban's system of individual exemptions and waivers.[17] Finding that the government failed to take necessary measures to implement the waivers as written, he ruled against it.[18] Finally, Justice Sotomayor's dissenting opinion refuted the government's claim that the rationale underlying the travel ban policy was national security.[19] She adopted a nondeferential view that can be described as *substantive engagement*.[20] Under this approach, the judiciary must closely scrutinize government action in this domain, similarly to how it does in other areas of public policy. Even though respect for the government's view may be justified in particular contexts and subject to certain conditions, a sweeping foreign affairs deference doctrine is inappropriate.[21]

It is difficult to say with certainty which opinion took the correct approach or which approach corresponds more with precedent. This uncertainty begins with the lack of constitutional clarity on the appropriate level of judicial review in foreign affairs. "[W]here foreign relations are concerned the Consti-

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[15] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (warning that judicial review of a military detention order during wartime might create a damaging precedent that will "[lie] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need"), *abrogated by Trump*, 138 S. Ct. 2392; *see also* Mark V. Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2680 (2005).

> [I]f courts purport to police the policymaking process but actually supervise it with an extremely loose hand, the negative case asserts that the judicial-review mechanism might *worsen* the political branches' performance because their members might mistakenly believe that the courts will bail the people out of whatever trouble the political branches make.

Tushnet, *supra*, at 2680.

[16] *See Trump*, 138 S. Ct. at 2429–33 (Breyer, J., dissenting); *infra* Section II.C.

[17] *Trump*, 138 S. Ct. at 2445.

[18] *Id.* at 2429–33.

[19] *Id.* at 2438–45 (Sotomayor, J., dissenting).

[20] *See id.*; *infra* Section II.D.

[21] To be sure, I do not claim that these approaches are mutually exclusive or that their proponents view any of them as generally applicable simply when a case involves foreign affairs. For instance, the Chief Justice's reasoning in *Trump v. Hawaii* can also be described as proceduralist for its holding that the President deserves deference in this case because "the Proclamation reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies." 138 S. Ct. at 2402 (majority opinion). Nonetheless, as will be explained *infra* in Part II, I think that this typology is analytically and descriptively sound.

tution seems a strange, laconic document: although it explicitly lodges important foreign affairs powers in one branch or another . . . , many powers of government are not mentioned."[22] As nontextualist modalities of constitutional interpretation also fail to bring clarity,[23] debates over the authority of courts in this domain often take a functionalist character; scholars search for a theory that will make the constitutional scheme work best.[24] But this, in turn, also proves difficult because ascertaining the best structure of the constitutional foreign affairs apparatus largely depends on one's view of the world and America's role in it.[25]

What follows, as *Trump v. Hawaii* illustrated, is jurisprudential disarray. Especially in recent years, judges decide cases with foreign affairs implications without subscribing to a particular approach and without a guiding principle

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[22] LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 13–14 (2d ed. 1996); *see* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 67 (1990) (noting the lack of guidance the U.S. Constitution provides for national security issues); H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 527 (1999) ("The relevance of constitutional law to the distribution of power over foreign affairs and national security is, unfortunately, clearer than is its content."). *But see* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 262 (2001) (extracting four foreign affairs principles from the Constitutional text and concluding that "there is no remarkable lacuna in the foreign affairs Constitution").

[23] For example, scholars have relied on pre- and post-founding era evidence but reached strikingly different conclusions regarding the scope of the Article II Vesting Clause. *Compare* Prakash & Ramsey, *supra* note 22, at 234 (inferring from historical analysis that "the Constitution establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power"), *with* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004) (arguing that there is no "direct Founding support" for such a broad reading of the Vesting Clause).

[24] Functionalist arguments pervade in discussions over a broad array of foreign affairs topics. *See generally* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007) (discussing national security law); Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507 (2011) (explaining the development of international law); Bradley, *supra* note 11 (discussing statutory interpretation); Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411 (2015) (discussing foreign sovereign immunity); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007) (exploring international law and statutory interpretation); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004) (discussing the applicability of the political question doctrine to foreign affairs); Ganesh Sitaraman & David Zionts, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516 (2015) (discussing war powers); John Yoo, *Politics as Law?: The Anti-ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851 (2001) (explaining the separation of powers in treaty interpretation).

[25] For example, people who view the international system as anarchic and controlled by state power would likely believe that deference or avoidance best serve American interests as these approaches will typically uphold legal interpretations that permit the greatest use of state power. *See* Daniel Abebe, *Why Comparative International Law Needs International Relations Theory*, *in* COMPARATIVE INTERNATIONAL LAW 71, 74 (Anthea Roberts, Paul B Stephan, Pierre-Huges Verdier & Mila Versteeg eds., 2018).

for when an approach should prevail.[26] Absent a coherent and unified interpretive framework, current legal doctrine cannot offer litigants or decision-makers predictability, certainty, or stability—all of which are crucial for making informed, rational policy decisions and serve important rule-of-law goals. More significantly, in this state of affairs, judicial errors in the high-stakes domains of foreign affairs and national security are likely to occur.

This Article argues that the Margin of Appreciation (MoA), a doctrine long applied on the other side of the Atlantic, provides a better framework to manage these jurisprudential tensions. The European Court of Human Rights (ECtHR) developed this doctrine to guide judges on how to define the limits between national and supranational authority.[27] Simply put, the MoA is a deference doctrine. It provides criteria for determining when deference to national authorities is warranted and what level of scrutiny the Court should apply when allegations of human rights violations are brought for its judgment.[28] The ECtHR gives member states varying degrees of deference—margin—to decide how to balance the state's protection of fundamental rights and its protection of a public interest. Deference is justified on the basis that national powers may be better suited to determine the content and requirements of national interests and the necessity of any restrictions.[29]

Much like *Chevron* deference, the MoA helps resolve normative ambiguities: situations in which the application of the law to the facts of a case requires deliberation about its meaning in a way more akin to lawmaking.[30] Unlike *Chevron*, however, the MoA does not assume a delegation of lawmaking pow-

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[26] One illustration of this doctrinal confusion is the inconsistent application of the political question doctrine in the context of foreign affairs. This is evident, for example, by the expansive treatment it receives from lower courts compared to the Supreme Court. *See* Alex Loomis, *Why Are the Lower Courts (Mostly) Ignoring* Zivotofsky I*'s Political Question Analysis?*, LAWFARE (May 19, 2016), https://www.lawfareblog.com/why-are-lower-courts-mostly-ignoring-zivotofsky-political-question-analysis [https://perma.cc/7PNM-EVRY].

[27] The ECtHR is a supranational tribunal established by the European Convention on Human Rights (ECHR) to ensure state compliance with the Convention and its protocols.

[28] *See infra* Part III.

[29] *See generally* YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002) (explaining the origin of the MoA and its deference to member states in certain scenarios); ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012) (discussing the concept of the margin of appreciation in international affairs); HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996) (analyzing leading ECHR case law and the MoA's development); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705 (2006) (discussing how the substantive concept of the margin of appreciation addresses the relation between fundamental freedoms and collective goals).

[30] By analogy to the *Chevron* doctrine, the term "normative ambiguities" refers to a situation in which the law "is silent or ambiguous with respect to the specific issue." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

er to the state, or to the executive in the *Chevron* analogy. It posits that although it is a court's responsibility to interpret the law, state authorities having a role in the process itself would be beneficial in terms of its quality and democratic legitimacy.[31] In practice, courts impose limits on states' interpretive discretion but, when appropriate, acknowledge some zone of deference to the national authorities.

The width of the MoA, or the size of the zone of deference, is not fixed.[32] ECtHR judges calibrate it depending on the controlling circumstances of the case at hand.[33] Even though the idea that judges have significant discretion to determine the amount of deference owed to policymakers may sound ill-advised to proponents of judicial deference, the doctrine as applied in ECtHR jurisprudence is not a form of window dressing. European experience proves that this framework has disciplined judicial decision-making and advanced a stable status quo. Despite criticism by both human rights advocates and state sovereignty sympathizers,[34] both the ECtHR and member states appear more committed to it than ever.[35]

To be sure, this Article does not suggest adopting the MoA at the national level without necessary modifications. The doctrine has developed as an international law device that functions "to balance the sovereignty of the Contracting States with the need to secure protection of the rights embodied in the

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[31] The ECtHR's jurisdiction extends "to all matters concerning the interpretation and application of the Convention and the protocols." Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 32, *ratified* Nov. 1, 1998, C.E.T.S. No. 155 [hereinafter Protocol No. 11 to the ECHR]; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 5 [hereinafter ECHR]. Its decisions are binding upon all member states. Protocol No. 11 to the ECHR, *supra*, art. 46.

[32] The ECtHR frequently emphasizes that the margin of appreciation is not a blank check for national policymaking, but rather a *limited* area in which the ECtHR will defer to the national authorities. *See, e.g.*, Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 91–92 (1978) (noting that the national margin of appreciation is "accompanied by a European supervision").

[33] *See, e.g.*, Schalk & Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409, 437.

[34] *See infra* notes 155–161 and accompanying text.

[35] In 2013, the Committee of Ministers of the Council of Europe adopted Protocol 15. *See* Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, *ratified* Aug. 1, 2021, C.E.T.S. No. 213. Protocol 15 codified the margin of appreciation, which had developed as a judge-made doctrine, in the Preamble of the Convention. *See id*. The Protocol was entered into force upon ratification in 2021. As for the ECtHR, in addition to the pervasive use of the doctrine in its jurisprudence, two of its judges have in recent years published essays in defense of the doctrine and its application by the Court. *See* Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 381, 398 (2012); Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 HUM. RTS. L. REV. 487, 491–502 (2014).

Convention."[36] It thus applies *vertically*, similarly to federalism doctrines. By contrast, the problem this Article addresses concerns the *horizontal* allocation of authority between the federal executive and judiciary.[37] The latter gives rise to somewhat different issues and should be adapted accordingly.[38] Moreover, the doctrine in its European form has not fully lived up to its envisioned role, as the factors determining the scope of the margin are not sufficiently specified in the case law and the ECtHR does not always clarify how giving the state a margin of appreciation bears on its analysis.[39] The framework suggested in this Article seeks to avoid these deficiencies.[40]

Rather than proposing adoption of the MoA, this Article draws on its rationale—well-suited to the unique problems arising in horizontal separation of powers disputes, particularly in foreign affairs and national security—and reconstructs it as a domestic law doctrine.

This Article proceeds in four parts. Part I describes the four theoretical approaches to the role of courts in foreign affairs and explores the relationship between them.[41] Part II explains the MoA and examines the functions it serves in the case law of the ECtHR.[42] Part III turns to reconstructing the MoA as a foreign relations law doctrine.[43] My analysis takes two parts. First, I identify the factors that justify giving the executive a degree of deference in interpreting various types of foreign relations laws and consider how those factors determine the proper scope of the margin. This analysis incorporates elements from the four theoretical approaches identified above and considers their prop-

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[36] Letsas, *supra* note 29, at 720.

[37] To be sure, national courts across the world have loosely applied the MoA in cases involving deference claims by executive agencies. Neither court judgments nor other literature, however, has thus far considered the difficulties in application of the doctrine in the horizontal context. *Cf.* DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW: COMPARATIVE PERSPECTIVES (Guobin Zhu ed., 2019) (providing examples to horizontal application of the MoA in China, Denmark, Hong Kong and France).

[38] Some scholars have warned against what they have called "warped" application of the MoA to the domestic context. *See* Margit Cohn, Legal Transplants, A Theoretical Framework, and Case Study: The Birth and Life of the Margin of Appreciation Doctrine 10 (2022) (unpublished manuscript) (on file with author).

[39] *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 21 (1981) (failing to articulate a margin of appreciation analysis).

[40] There are questions that may arise concerning the competence of the ECtHR, as a supranational tribunal, to deal with matters that may fall outside the scope of the EU Convention. *See, e.g.*, Lord Leonard Hoffmann, The Universality of Human Rights: Judicial Studies Board Annual Lecture 1 (Mar. 19, 2009) (transcript available at the United Kingdom Courts and Tribunals Judiciary), https://www.judiciary.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/ [https://perma.cc/2WTV-PYRX]) (speaking to the universality of human rights). These difficulties do not arise at the national level and, therefore, need not be addressed in the context of this article.

[41] *See infra* notes 46–136 and accompanying text.

[42] *See infra* notes 137–192 and accompanying text.

[43] *See infra* notes 193–260 and accompanying text.

er weight in different contexts. Second, I clarify the practical effect of the MoA on judicial analysis. The most significant contribution of this framework is that it avoids the pitfalls of current debates about the proper role of courts in this domain. As this Article will explain, at a high level of abstraction, each of the four approaches referenced in *Trump v. Hawaii* prioritizes certain values over others *a priori*.[44] But since these risks and values are not equally implicated in all cases, insisting dogmatically on one particular approach yields suboptimal results. The domestic MoA provides an analytically rigorous method for identifying what risks arise in a given case, and then tailors the level of deference and mode of analysis accordingly. In so doing, the framework promotes efficiency, narrows the area of disagreement between the four approaches, and promotes uniformity in law. Finally, Part IV considers potential objections to the approach proposed.[45]

A note on the scope of application of the theoretical framework presented in this Article: my analysis focuses on the United States. The core thesis, while borrowing the MoA framework from Europe, corresponds with the particular substantive and institutional challenges posed by U.S. foreign affairs jurisprudence and engages primarily with American constitutional scholarship. Nonetheless, at a higher level of abstraction, the risks and underlying values this Article considers are not country-specific. The theory of judicial review I lay forth here can readily be applied to other law systems that accept the basic premises of judicial review and share the democratic commitment to the rule of law.

I. A Typology of Judicial Review of Foreign Affairs

Over the years, judges and scholars have developed a wide array of descriptive and normative arguments to address the tension between judicial review and foreign affairs. The Sections within this Part categorize these arguments into four distinct theoretical approaches: (1) avoidance;[46] (2) deference;[47] (3) procedural engagement;[48] and (4) substantive engagement.[49] To a certain degree, this typology constitutes a continuum of judicial deference to the executive branch, where avoidance is viewed as virtually an *absolute deference* regime and substantive engagement is viewed as a *no deference* regime. Yet, these approaches vary not only in the level of deference they demand, but

[44] For example, the deference approach seeks to reduce judicial error costs and maximize efficacy by giving greater weight to foreign affairs expertise, and it is willing to tolerate the risks associated with executive bias. The substantive engagement approach prioritizes the opposite values.

[45] *See infra* notes 261–272 and accompanying text.

[46] *See infra* notes 51–80 and accompanying text.

[47] *See infra* notes 81–102 and accompanying text.

[48] *See infra* notes 103–119 and accompanying text.

[49] *See infra* notes 120–136 and accompanying text.

also in their social values (and those they are willing to compromise), their underlying judicial philosophy, and their practical effects.

After describing the four approaches, I will demonstrate that the conflict between them stems from the different relative importance they attach to a set of competing constitutional values.[50] In that sense, commentators debating the "best" approach are frequently talking past each other. This Part concludes that the right way forward is not to choose between these approaches, but rather to create a framework that mediates the tensions between them.

A. Avoidance

As used in this Article, the term *avoidance* encompasses approaches that call for courts to refrain from intervening in matters that touch upon national security and foreign affairs. The call for virtually absolute judicial deference is unconditioned by *substance* (the tradeoffs underlying the challenged executive action) or *process* (whether the legislature has authorized the executive to take that action). Instead, judicial involvement is discouraged precisely on the basis that the case implicates national security or foreign relations.

A few notable Supreme Court decisions have attempted to articulate a theoretical rationale for such treatment of foreign affairs cases. The signature case in this series is *United States v. Curtiss-Wright Export Corp*.[51] In 1936, in *Curtiss-Wright*, the Supreme Court rejected a claim that President Roosevelt's imposition of an arms embargo on the parties in the Chaco War violated the nondelegation doctrine.[52] Writing for the Court, Justice George Sutherland reasoned that "[t]he President [is] the sole organ of the federal government in the field of international relations."[53] This assertion rested on two propositions. First, the powers to conduct foreign relations derive not from the Constitution, but instead are vested in the federal government "as necessary concomitants of nationality."[54] Second, because effective exercise of power in international relations requires certain institutional characteristics that only the President possesses—secrecy, unity, and knowledge of "the conditions which prevail in foreign countries"—it is necessary for Congress to accord him or her "a degree of discretion and freedom from statutory restriction."[55]

Although *Curtiss-Wright* did not directly consider the relationship between the executive and the judiciary, these two propositions offer a formal

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[50] *See infra* Section I.E.

[51] 299 U.S. 304, 311 (1936).

[52] *Id.* at 329.

[53] *Id.* at 320.

[54] *Id.* at 318; *see also id.* ("It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.").

[55] *Id.* at 320.

and a practical justification for avoidance, respectively. As a formal matter, if foreign affairs powers are indeed extra-constitutional, then they are beyond the reach of judicial power. Judicial power extends only to cases arising under the Constitution and the laws of the United States.[56] As a practical matter, courts are even less knowledgeable than Congress on global affairs. Thus, the rationale for granting the President freedom from *statutory* restriction seems at least equally valid with respect to freedom from *judicial* restriction.[57]

The ideas underlying avoidance are not limited to the sweeping view of presidential foreign affairs authority expressed in the *Curtiss-Wright* decision.[58] Statements reflecting skepticism about the propriety and practicability of judicial checks on the executive's conduct of foreign policy are deeply rooted in U.S. jurisprudence.[59] Courts give this skepticism practical effect in various ways, including denials of certiorari by the Supreme Court;[60] invocation of justiciability barriers such as standing, ripeness, and the political question doc-

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[56] U.S. CONST. art. III, § 1 (setting rules for the United States judicial branch).

[57] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 797 (2008) ("Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.").

[58] *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) ("In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. . . . The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." (citations omitted)); *see also* Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 382 (2000) ("The truly radical part of *Curtiss-Wright* is not its emphasis on presidential power, but rather its claim that that power arose outside the Constitution.").

[59] *See, e.g.*, Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id.; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting) ("I do not think that the Federal Government's war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them."); Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." (citations omitted)). For the reluctance of federal courts to review national security matters on the merits, see Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 15–20 (2021).

[60] *See* Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 125–26 (2011), https://columbialawreview.org/wp-content/uploads/2016/05/Vladeck.pdf [https://perma.cc/N3LZ-K5B9] (providing examples of national security issues that the Supreme Court has consistently refused to consider in the aftermath of the Court's 2008 decision in *Boumediene v. Bush*, 553 U.S. 723).

trine;[61] deferential treatment of "state secrets" claims by the government;[62] refusal to apply the Freedom of Information Act in national security related litigation;[63] and application of various international comity doctrines.[64]

Among legal academics, scholars who support broad executive authority, such as Professors John Yoo, Eric Posner, and Adrian Vermeule, and more narrowly by others such as Professor Mark Tushnet, have expressed views consistent with avoidance. Yoo's work, relying on textual, historical, and functional arguments, offers support for executive unilateralism in issues such as war-making, international law, and statutory foreign relations law interpretation.[65] In the national security context, Posner and Vermeule champion executive primacy in national security decision-making, noting that "because the executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security, it is natural, inevitable, and desirable

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[61] *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 45–68 (6th ed. 2017).

[62] *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1092–93 (9th Cir. 2010) (en banc) (dismissing a suit brought by a former Guantánamo detainee who alleged that the government tortured him because continuing with litigation would likely reveal state secrets and undermine national security).

[63] *See* Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just., 331 F.3d 918, 937 (D.C. Cir. 2003).

[64] *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2099–119 (2015) (describing various comity doctrines); Posner & Sunstein, *supra* note 11, at 1179–81 (explaining the *Chevron* doctrine in connection to foreign relations law). For a critique on the invocation of comity by U.S. courts, see generally Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63 (2019).

[65] For example, Professor Yoo argued not only that historical evidence suggests that the treaty-interpretation power was constitutionally conferred upon the President but, further, that a "proposed delegation of authority to interpret treaties to the judiciary runs counter to the original understanding and violates modern Article III jurisprudence." John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1307–08 (2002) (summarizing the argument advanced in Yoo, *supra* note 24). In the wake of the 2006 case *Hamdan v. Rumsfeld*, in which the Supreme Court set aside the President's interpretation of the Geneva Conventions, Yoo and Professor Julian Ku published a critique that focused on the functional deficiencies of the judiciary as an interpreter of foreign affairs statutes. Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 199 (2006); Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006). They contended that "as a matter of institutional competence, the federal judiciary suffers significant disadvantages in resolving ambiguities in laws relating to foreign affairs when compared to the Executive Branch." Ku & Yoo, *supra*, at 199. *See generally* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005) (discussing the ambiguities in the Constitution's approach to war powers and foreign policy). For specific applications, see, for example, Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2519–26 (2006) (discussing war powers); John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 430–40 (2003) (discussing war powers vis-à-vis the limited role of the judiciary); Julian G. Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 176–99 (analyzing customary international law); Yoo, *supra* note 24 (describing the treaty interpretation power).

for power to flow to this branch of government."[66] Based on this conclusion, they insist that the judicial role must be limited and deferential to tradeoffs made by the executive. Although not sharing their underlying conviction that executive primacy is desirable, Tushnet nonetheless agrees that judicial intervention would likely make things worse.[67]

The avoidance approach aspires to maximize the executive's ability to promote national interests in the international arena. Its premise—that judicial involvement will likely impede the effective pursuit of foreign policy goals—rests on a Realist view of international relations. Under this view, the outside world is dangerous and anarchic, and states must wield power to ensure their survival.[68] Courts lack the resources to identify threats and the institutional capacity to assess how to utilize state power effectively. Moreover, the judiciary might also impose unnecessary limits on state power by enforcing international law[69] or domestic law.[70] It is thus appropriate that courts refrain from deciding matters of foreign affairs and that, when such cases do require judicial resolution, courts defer to the executive nearly unconditionally.

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[66] POSNER & VERMEULE, *supra* note 24, at 4.

[67] *See* Tushnet, *supra* note 15, at 2680.

> [I]f courts purport to police the policymaking process but actually supervise it with an extremely loose hand, the negative case asserts that the judicial-review mechanism might *worsen* the political branches' performance because their members might mistakenly believe that the courts will bail the people out of whatever trouble the political branches make.

Id.

[68] *See, e.g.*, KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 102–28 (1979) (discussing his realist formulation of international politics and the anarchic state).

[69] Using international law to constrain presidential decision-making, under this view, is inappropriate because international law is, at best, a political device. According to the Realist view, international law is merely a reflection of the balance of powers in the world. States—especially powerful states—make, interpret, and enforce international law to promote their self-interest, and so only the organ of government who is responsible to direct the state's foreign affairs may properly engage with international law. *See* Anne-Marie Slaughter & Thomas Hale, *International Relations: Principal Theories*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 7 (Anne Peters ed., 2013), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e722?print=pdf [https://perma.cc/ZH4B-QUQ9].

> States may create international law and international institutions, and may enforce the rules they codify. However, it is not the rules themselves that determine why a State acts a particular way, but instead the underlying material interests and power relations. International law is thus a symptom of State behaviour, not a constraint upon it.

Id.

[70] Using domestic law to constrain presidential decision-making, under this view, is legally erroneous. The President, as the single representative of the nation in the international arena, should be the ultimate interpreter of the law governing the conduct of foreign affairs.

Most of the objection to avoidance stems from the doctrine's underlying assumption that constitutionalism does not constrain foreign affairs and national security matters. Avoidance doctrines rest on a sharp distinction between the (lawless) outside world and the domestic domain. As critics have pointed out, this stark dichotomy has always been questionable. It is especially unconvincing today, when "[g]lobalization and economic integration and advances in transportation, technology, and communications have fundamentally transformed foreign relations, so that it now engages with basic economic issues traditionally understood to be part of domestic affairs."[71] Indeed, as cases like *Rumsfeld v. Padilla*,[72] *Medellín v. Texas*,[73] and *Zivotofsky* ex rel. *Zivotofsky v. Clinton*[74] illustrate, the government regularly takes actions that have foreign policy implications and that simultaneously affect domestic legal rights.[75] Suggesting that normal constitutional constraints ought to be relaxed simply because a case implicates foreign affairs might become the exception that swallows the rule.

Moreover, the functionalist argument for absolute deference is too simplistic.[76] It is true that the executive has unique institutional virtues that enable it to exercise power rapidly, efficiently, and uniformly.[77] But executives are also vulnerable to multiple forms of bias and their incentive structure is suboptimal.[78] Constitutionalism presupposes that elected officials will be tempted to pursue short-term goals at the expense of long-term public interests or fun-

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[71] Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1942 (2015).

[72] 542 U.S. 426, 433–34 (2004) (evaluating the designation of a U.S. citizen who was detained in Chicago as an enemy combatant).

[73] 552 U.S. 491, 497–99 (2008) (evaluating a presidential determination that a state court must comply with a ruling of the International Court of Justice).

[74] 566 U.S. 189, 191 (2012) (analyzing the refusal to list the birthplace of a U.S. citizen born in Jerusalem as "Israel").

[75] *See* Sitaraman & Wuerth, *supra* note 71, at 1942; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV.1617, 1672 (1997) ("[A]s the world becomes more interconnected, domestic law and activity increasingly have foreign consequences, and vice versa.").

[76] By referring to *functionalist* reasoning, I mean the process of constructing a law by asking what meaning would best realize its underlying purpose. *See* Curtis A. Bradley, *Introduction: The Irrepressible Functionalism in U.S. Foreign Relations Law*, *in* 1 FOREIGN RELATIONS LAW, at ix, ix (Curtis A. Bradley ed., 2019).

[77] Yoo, *supra* note 24, at 872.

[78] *See, e.g.*, Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT'L L. 1239, 1254–58 (2006) (drawing on political science literature to challenge the executive-centric approach to war powers); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1586–89 (2009) (invoking organization theory to demonstrate the costs of unitary decision-making in national security policy); Sitaraman & Zionts, *supra* note 24, at 90 (analyzing various behavioral biases in the context of war powers); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 69–72 (describing various forms of biased decision-making in unitary bodies).

damental beliefs, and seeks to check political decision-making.[79] As events such as the internment of Japanese-Americans during World War II and the use of coercive interrogation techniques during the War on Terror illustrate, executives' tendency to favor short-term objectives motivates disregard of legal boundaries and individual rights.[80]

All in all, avoidance might be appropriate in some extreme situations where the benefits of unitary action outweigh the enormous democratic costs. But this approach's definitive denial of any role for the judiciary in foreign affairs seems to ignore the important function this branch serves in a constitutional democracy.

*B. (*Chevron*-Style) Deference*

A more moderate approach to foreign affairs deference draws upon the principles of the administrative law doctrine that the Supreme Court adopted in 1984 in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[81] Under *Chevron*, judicial review of federal agency action should accord a considerable, and typically conclusive, weight to an agency's interpretation of the statutes it administers. The *Chevron* test comprises a two-step inquiry.[82] Courts first consider whether Congress has directly spoken on the matter at issue. If Congress has not, then the second question for the court is whether the agency's position is an appropriate interpretation of the law.[83] If the agency's interpretation is reasonable, the court will defer to the agency rather than enforcing its own construction.

Chevron's formal and functional justifications for interpretive deference have made the doctrine appealing to foreign relations law scholars. As a formal matter, *Chevron* rests on the theory that when Congress enacts laws that leave certain issues open, it intends to delegate authority to the executive agency to resolve those issues.[84] In such circumstances, therefore, deferring to executive discretion essentially follows the commands of Congress. From a functional perspective, underlying *Chevron* is the recognition that the construction of am-

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[79] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 636 (2008) ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

[80] As generally recognized today, both Japanese-American internment and the interrogation techniques used in the War on Terror were unlawful under domestic and international law and, according to some views, rose to the level of torture.

[81] 467 U.S. 837, 842–44 (1984).

[82] Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 610 (2014).

[83] *Chevron*, 467 U.S. at 843.

[84] *Id.* at 865. As judges and commentators have noted, however, this theory is rooted in a legal fiction and, therefore, it is impossible to understand—and justify—the doctrine without its functional dimension. *See, e.g.*, Bradley, *supra* note 11, at 671–72; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 377–79 (1986) (discussing the *Chevron* doctrine's applicability to an immigration case).

biguous statutes in the administrative state frequently involves professional judgments and assessments of competing social values.[85] In those situations, legal interpretation becomes nearly tantamount to policymaking. Because judges generally lack specialized knowledge in the field in question and are not democratically accountable, they appropriately accept the agency's statutory construction when the case necessitates both specialized knowledge and policy-based discretion. On this account, the doctrine "importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."[86]

This theory of deference in administrative law fits neatly into the field of foreign relations law for several reasons. First, interpreting different types of foreign relations laws involves, in varying degrees, similar engagement with legal ambiguities that require professional judgments, factual assessments, and the expression of value preferences.[87] Second, centralizing interpretive authority in the executive branch promotes two important values in foreign policymaking: uniformity across the federal government and flexibility for the executive (i.e., allowing the executive, the de facto ultimate interpreter of the law, authority to deviate from its own precedent when deemed appropriate).[88] Third, the *Chevron* framework articulates rationales for established judicial practices in foreign relations law, such as according "great weight" to the executive's treaty interpretations.[89] Finally, adopting the *Chevron* framework accepts some limitations on foreign affairs deference, thereby mitigating the risks associated with avoidance.[90]

The *Chevron* doctrine applies to laws that the executive branch is charged with administering, but not to laws that regulate agency action.[91] It requires

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[85] *Chevron*, 467 U.S. at 865.

[86] City of Arlington v. F.C.C., 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

[87] *See, e.g.*, Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2665–68 (2005) (applying the *Chevron* framework to the Authorization for Use of Military Force of 2001, which was a joint Congressional resolution allowing military force against those responsible for the September 11 terrorist attacks).

[88] Bradley, *supra* note 11, at 673; *see also* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 954 (2014) ("[T]he United States must be able to speak with one voice in order to achieve its interests . . . .").

[89] *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 513 (2008) (noting that it is "well settled that the United States' interpretation of a treaty 'is entitled to great weight'" (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85(1982)); Bradley, *supra* note 11, at 702–04 (discussing treaty deference in the United States and how it is analogous to the *Chevron* framework).

[90] Recall that under *Chevron*, deference is owed only to *reasonable* executive constructions of *ambiguous* laws. 467 U.S. at 843.

[91] United States v. Mead Corp., 533 U.S. 218, 226–27, 238 (2001) (reasoning that "different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it" depending on whether the statute grants executive agencies specific authority to carry out certain imperatives or whether the agency action falls within its generally conferred authority).

courts to defer to the executive agency only when the law is vague (step one) and the agency's construction is reasonable (step two). In some situations, it may be overridden by other canons of statutory construction, such as the constitutional avoidance canon. As a result, power is distributed rationally between the three branches: Congress maintains the final authority to decide how much discretion it is willing to delegate to the executive; if it so chooses, Congress may enact specific laws and limit any legal uncertainty that could trigger *Chevron* deference. The judiciary formally preserves some interpretive power by deferring to the executive branch only in supposedly limited circumstances. And the executive is sufficiently empowered to direct foreign policy. In this respect, *Chevron* seems to offer a well-structured middle ground between the two extreme choices of avoidance on the one hand, and judicial supremacy on the other.

Despite these advantages, the *Chevron* framework has several limitations as an overarching foreign relations law doctrine. *Chevron* advances a trade-off between Congressional and judicial control of executive action. To a significant degree, the courts agree to step back from their constitutional role as final arbiters of the law on the theory that doing so will motivate Congress to clearly delineate when it intends to limit executive discretion. Indeed, scholars who champion the *Chevron* perspective in foreign affairs specifically invoked this argument. Professor Curtis Bradley notes that "to the extent that Step One of *Chevron* encourages Congress to be more specific in its enactments, it may actually reduce Executive power over time."[92] Professors Eric Posner and Cass Sunstein were even more conclusive, contending that "if the national legislature distrusts the President, it has every reason to legislate clearly, so as to reduce his room to maneuver."[93] Neither Bradley nor Posner and Sunstein, however, have tested their hypotheses. There are good reasons to question the notion that judicial deference to the executive in foreign affairs will encourage congressional action. Political science literature suggests that Congress is poorly structured to assert its power in the foreign affairs domain for several reasons, none of which concerns the level of judicial deference.[94]

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[92] Bradley, *supra* note 11, at 674.

[93] Posner & Sunstein, *supra* note 11, at 1199.

[94] In brief, members of Congress, whose main focus during their term in office is improving their reelection prospects, tend to invest large portions of their time and labor in topics serving that end. As neither individual constituents nor organized interest groups generally rank foreign policy as a high priority, the costs to the individual members of legislatures in this fraught area would often outweigh any benefits. Moreover, Congress as an institution faces collective action problems. Legislation is a costly and difficult process that must navigate countless roadblocks before, during, and even after enactment. To overcome these obstacles and gather enough votes, it is sometimes inevitable that a statute will leave some loose ends. *See generally* Elad D. Gil, *Totemic Functionalism in Foreign Af-*

Another drawback of importing the *Chevron* rationale into the field of foreign affairs is the uncertain future of the original *Chevron* decision.[95] Although it is premature to pronounce a formal abrogation of the doctrine, the Supreme Court has substantially limited its scope in recent years. The Court has voiced skepticism about its constitutionality, its compatibility with the Administrative Procedure Act, and its applicability in cases that otherwise appear to fall within its scope.[96]

The Supreme Court's actions cast doubt about the efficacy of *Chevron* as an overarching framework for deference in administrative law and question its capacity to serve as a framework for deference in foreign relations law that features additional complexities. Perhaps aware of this puzzle, Posner and Sunstein suggest releasing *Chevron* deference from its doctrinal roots and applying it in foreign affairs cases even in situations in which the original doctrine would not apply.[97] On this account, however, foreign affairs deference is far less controlled and structured than thought to be.[98] This broad conception of *Chevron* "triggers deference in a vast, potentially unacceptable, range of circumstances."[99] In particular, Professors Jinks and Katyal stress that under this expansive view of foreign affairs deference, the doctrine departs from its functional rationales.[100] *Democratic accountability* is irrelevant for policies that are made in secret and concern the liberty of foreigners who take no part in the political process, and *bureaucratic expertise* cannot be assumed to apply in

fairs Law, 10 HARV. NAT'L SEC. J. 316, 317 (2019) (assessing "the conceptual underpinnings of totemic functionalism and critically analyz[ing] its pervasive effect in foreign affairs law").

[95] *See* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relation Law*, 159 U. PA. L. REV. 783, 787, 817–21 (2011) ("As a growing set of empirical studies has shown, *Chevron* has exerted anything but a defining hold on Supreme Court treatment of agency interpretation of federal laws.").

[96] *See* Michigan v. E.P.A., 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (noting that *Chevron* deference is "in tension with Article III's Vesting Clause"); King v. Burwell, 576 U.S. 473, 474 (2015) (denying *Chevron* deference to an agency reading of the Internal Revenue Code that raised a question of "economic and political significance" (quoting Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014))); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations."). Claims that *Chevron* is in decline preceded this series of cases. *See* Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 730, 772 (2007) (arguing that "*Chevron* is becoming less relevant").

[97] Posner & Sunstein, *supra* note 11, at 1199, 1203. Professor Bradley does not seem to share this view. *See* Bradley, *supra* note 11, at 675 (arguing that the *Chevron* framework is not particularly helpful in the context of foreign affairs).

[98] *See* Posner & Sunstein, *supra* note 11, at 1195–98 (discussing the canonical constraints on executive discretion in the foreign affairs context).

[99] *See* Jinks & Katyal, *supra* note 24, at 1258, 1257–62 (contending that Posner and Sunstein have failed to define the limits of their approach to foreign affairs deference).

[100] *Id.* at 1246–47.

each instance requiring judicial deference, but rather must be examined on a case-by-case basis.[101]

Finally, on its own terms, a *Chevron*-style deference approach does not extend to all aspects of foreign relations law that a court may encounter. For example, *Chevron* cannot explain how much deference is due to the executive when it interprets the Constitution's grants of foreign affairs powers.[102] So even if one accepts the rationale underlying the *Chevron*-style deference approach, the proper form of judicial review in relation to cases where this approach does not apply remains uncertain.

C. Procedural Engagement

Theories of judicial review of foreign affairs do not always focus directly on deference as the standard for defining the judicial-executive relationship. Proceduralist approaches, as termed here, are theories that direct courts to consider the decisional processes underlying substantive outcomes rather than the outcomes themselves. A court may invalidate a government action if it was not taken according to "duly established procedures" or by the appropriate political actor.[103] But, as a general principle, proceduralist judges avoid decisions that rely on their own balancing of social values and resolution of moral questions.

Proceduralism as a method for constitutional inquiry is mostly attributed to the Legal Process, a school of thought that came to dominate academic legal thinking in the post-World War II era and reemerged in the 1980s and 1990s—albeit as a less coherent movement than it once was.[104] Legal Process theorists

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[101] *Id.*

[102] Bradley, *supra* note 11, at 679. Critics have also taken issue with the suitability of the *Chevron* framework to treaty interpretation. *Compare id.* at 702 (grounding *Chevron* deference to an agency's treaty interpretation in the theory that "the United States treatymakers have delegated interpretive power to the executive branch because of its special expertise in foreign affairs"), *with* Evan J. Criddle, Comment, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1930 (2003) (arguing that a unilateralist approach to treaty interpretation "unnecessarily invite[s] inconsistency between domestic and foreign treaty constructions; draw U.S. treaty law into conflict with international law; and provoke reciprocal, self-serving interpretations by foreign treaty partners").

[103] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1951).

[104] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); HART & SACKS, *supra* note 103 (collecting materials that were developed in the 1950s); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Process-based theories have begun to reemerge in the 1980s, at least partly in recognition of John H. Ely's groundbreaking book. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW *passim* (1980); *see also* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707,

sought to reconcile judicial review with the counter-majoritarian difficulty: the difficulty posed by unelected judges striking down decisions of democratically accountable institutions.[105] This effort toward reconciliation generated a number of significant insights about the nature of law and legal institutions.[106] One key insight, for present purposes, is that deliberative and reasoned decisions reached in good faith by the most competent institutional actor are more likely to generate good outcomes, and thus carry a strong claim for deference.[107] From this logic, it follows that courts should police the political system by focusing on the public policymaking processes. Procedural review encourages policymakers to follow established procedures for the enactment and creation of public policy, promising that if they do so, their decisions will be upheld. Moreover, this form of judicial review emphasizes the institutional strengths of the judiciary. Whereas courts have no comparative institutional advantage in making substantive moral or political judgments, they have expertise on "the processes by which issues of public policy are fairly determined" and a unique perspective when the political system malfunctions.[108]

Against this backdrop, the contention for process-oriented adjudication might be especially strong in foreign affairs. Matters of foreign affairs often require expert perspectives on foreign nations and security threats. The constitutional mandates are notoriously open-ended, the consequences of error are often especially serious, and the informational deficit of courts is nearly always greater compared to other matters. It should therefore come as no surprise that federal courts have favored proceduralism in many instances impli-

726–37 (1991); Daniel B. Rodriguez, Review Essay, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 940–46 (1989).

[105] BICKEL, *supra* note 104, at 16–23; *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998) ("[T]o the extent that democracy entails responsiveness to popular will, how [does one] explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?"). Since posed by Bickel in 1962, the problem has framed the central debates in American constitutional law and became an "obsession" for legal scholars. *See* Friedman, *supra*, at 334–36 & nn.1–10.

[106] *See generally* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994) (summarizing the core assumptions of the Legal Process School); Anthony J. Sebok, *Reading* The Legal Process, 94 MICH. L. REV. 1571 (1996) (reviewing HART & SACKS, *supra* note 103).

[107] *See* HART & SACKS, *supra* note 103, at 695 (suggesting that "the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment"); Eskridge & Peller, *supra* note 104, at 721–22 (1991) (explaining why, under the Legal Process tradition, process is crucial for making good policy).

[108] ELY, *supra* note 104, at 102, 102–03; Fuller & Winston, *supra* note 104, at 363–64. Later process-based accounts have developed additional justifications for procedural review. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–75 (1999); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 4 (2008).

cating national security. From the Civil War to the War on Terror, challenges to executive security policies in times of war and exigency have generally followed a process-based framework.[109] In this framework, the court assesses whether the policy in question conforms to separation-of-powers principles—whether it has been properly authorized—and whether the process adopted for limiting individual rights is proper in a given circumstance.[110] Arguably, focusing on these questions has ensured proper democratic deliberation and offered a procedural safeguard against excessive deprivation of individual rights.[111]

Over the years, proceduralism has provoked criticism from both supporters and skeptics of judicial review. Critics have questioned the distinction between process and substance, insisting that substantive value judgments are essential to any recognition of process failures.[112] Hence, the appearance of neutrality is all but ingenuine and obscures the underlying value choices of the judges.[113] A judge considering a challenge to executive policy, for example, might insist on legislative authorization in various degrees of specificity based

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[109] *See* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 3–45 (2004) (describing some of the landmark wartime cases in U.S. history from a proceduralist perspective); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1016–17 (2008) (analyzing the War on Terror jurisprudence in the U.S. Supreme Court and lower courts and concluding that nearly all of the judicial activity in this context has been around procedural issues); Sunstein, *supra* note 78, at 58–65, 83–98 (describing how judicial minimalism pervaded in wartime cases but also giving examples of cases that adopted a maximalist pro-executive approach).

[110] Issacharoff & Pildes, *supra* note 109, at 5–6; Sunstein, *supra* note 78, at 53–54. For a critique of the process-based framework, see Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 904–29 (2012).

[111] Issacharoff & Pildes, *supra* note 109, at 36–44; Sunstein, *supra* note 78, at 77–103; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring).

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government . . . . A reasonable balance is more likely to be reached on the judgment of a different branch . . . .

Hamdi, 542 U.S. at 545.

[112] *See, e.g.*, Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 140 (1981) (contending that procedural assessments must involve judicial value choices); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 615 (1988) ("There was no neutral way to distinguish between substance and process because the very same controversial substantive issues that made a theory of procedural neutrality attractive were always potentially implicated in determining the procedural legitimacy of any particular institutional decision."); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) ("The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values . . . .").

[113] *See* Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 722 (1991) ("Although the Court invokes process theory, it often does so dishonestly in order to legitimate a wholly substantive approach.").

on her own view of the merits of the policy.[114] So, although the ruling is informed by substantive judgments, those judgments are not transparent, and the judge need not defend her position.

Moreover, proceduralism has been criticized as ineffective in preventing illegality and unnecessary limitation of liberty. Critics have noted, for example, that the series of process-oriented decisions issued in the wake of the September 11 attacks had very little effect on governmental conduct and provided scarce protection for individual rights.[115] Forcing the government to jump through additional procedural hoops does arguably little to create meaningful change in how security and liberty are balanced. Insisting on legislative approval, for instance, is typically a very weak check on executive power as legislators often delegate broad authority to the executive in this area.[116] Professor David Dyzenhaus describes such delegations as "grey holes"—domains in which there appear to be constraints on executive action, however, these constraints are trivial and ineffective at preventing certain government action.[117] According to Dyzenhaus, grey holes are ultimately worse than bare unlawful governmental acts because they create a façade of legality.[118]

Proponents of proceduralist theories acknowledge that sometimes this form of judicial review will not sufficiently prevent unwarranted deprivations of rights.[119] Yet they do not explain in which circumstances, if at all, courts should abandon this mode of review and what approach courts should adopt instead.

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[114] *See, e.g.*, Martinez, *supra* note 109, at 1076 ("[W]hen a court wants to uphold the substance of government action, it does so by pushing the case into *Youngstown* categories one or two (finding congressional authorization), and when it wants to strike an action down, it pushes the case into category three." (citing Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)).

[115] *See, e.g.*, Vladeck, *supra* note 60, at 127 (arguing that the Supreme Court's War on Terror jurisprudence "reflect[s] general substantive acquiescence in most of the government's counterterrorism policies, whether or not the Justices intend to do so"); Martinez, *supra* note 109, at 1015; Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 238–39 ("Final judgments in habeas cases were thus directly and proximately linked to relief in less than two percent of actual releases from Guantánamo."). *But see* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 864–69, 889–93 (2013) (arguing that even such limited judicial involvement generates an "observer effect" and indirectly constrains executive power).

[116] *See, e.g.*, Laura K. Donohue, *The Perilous Dialogue*, 97 CALIF. L. REV. 357, 370–73 (2009) (providing historical examples of over-broad national security legislation).

[117] DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 42 (2006) (noting that these grey holes, or apparent restraints on executive action, "are so insubstantial that they pretty well permit government to do as it pleases").

[118] *Id.* at 42–47 ("[G]rey holes permit government to have its cake and eat it too . . . .").

[119] *See* Issacharoff & Pildes, *supra* note 109, at 36–40 (analyzing the judiciary's focus on process-based review of executive action that may seem to ignore the importance of the constitutional rights at stake); Sunstein, *supra* note 78, at 52–56 (discussing tensions between national security risks and civil liberties, as well as procedural protections to prevent undue deprivation of rights).

D. Substantive Engagement

Substantive engagement theories suggest a straightforward answer to the question of how courts should decide cases about national security and foreign affairs: just as they decide any other case.[120] Courts should use ordinary tools of construction and fact-finding and apply the law to the facts of the case. Proponents of substantive judicial review do not deny that foreign affairs raise challenging separation of powers issues. Nor do they suggest that deference to policy determinations of the political branches is always unwarranted. They do, however, insist on a sharp distinction between law and policy, and assert that it is the duty of the courts to pronounce the law.[121]

Scholars advance a variety of justifications in support of such an undeferential judicial posture in foreign affairs. Most basically, in systems where adjudication is the primary vehicle for legal recourse, limiting—let alone, foreclosing—judicial review might permit, encourage, and ultimately legitimize illegal exercises of executive power.[122] Judicial review is, therefore, crucial for ensuring the lawful exercise of official authority. Furthermore, some advocates of substantive engagement challenge the functional basis for judicial deference in matters of foreign-affairs.[123] One of this argument's central points is that in the globalized and interconnected world of the twenty-first century, it is impossible to draw a bright-line distinction between foreign and domestic affairs. Giving the executive a free hand simply because an issue involves some "for-

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[120] For examples of substantive engagement approaches, see THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 5 (1992) ("[I]n our system *only* courts can end disputation, thereby helping the nation to find its single voice."); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 316 (1990) (affirming that the "courts have a core responsibility under the Constitution to resolve disputes"); KOH, *supra* note 22, at 3 ("[H]istory should remember the Iran-Contra affair not as an aberration, an error on the part of certain individuals within a particular administration, but as a fundamental failure of the legal structure that regulates the relations among the president, Congress, and the courts in foreign affairs."); Aharon Barak, *The Supreme Court 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 27–28 (2002) (exploring the lead of the U.S. Supreme Court among courts in modern democracies); Sitaraman & Wuerth, *supra* note 71, at 1897 ("[S]cholars and courts should embrace normalization as the new paradigm for foreign relations law.").

[121] *See, e.g.*, FRANCK, *supra* note 120, at 5 ("When courts speak in cases and thereby incidentally affect some aspect of foreign relations, they do not make foreign policy. They make judicial policy."); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasizing that it is the duty of the judiciary "to say what the law is").

[122] *See, e.g.*, KOH, *supra* note 22, at 134–49 (describing the contribution of judicial deference to the Iran-Contra scandal).

[123] *See* FRANCK, *supra* note 120, at 45–59 (disproving several prudential reasons for judicial deference in foreign affairs law); Diehl & Ginsburg, *supra* note 78, at 1251 (criticizing an executive-centric national security policy); Pearlstein, *supra* note 78, at 1586–1618 (criticizing executive unilateralism in national security law and policy from a functionalist perspective); Sitaraman & Wuerth, *supra* note 71, at 1935–49 (making a case against executive essentialism with regards to foreign relations law).

eign" components might increase executive power as a whole and compromise civil liberties as a result.[124]

Another set of substantive engagement theories stresses the importance of judicial action to the protection of individual rights, especially during national security crises.[125] This set contends that the judicial process is better structured to balance security and liberty than the political process. "The Constitution is predicated on the idea that democracies and political officials will often be tempted to take actions that appear to offer short-term benefits even if they are contrary to our collective long-term interests."[126] The courts, in contrast, "stand above the political fray."[127] Their obligation to articulate reasoned opinions and to abide by precedent, or at least harmonize with it, together with their freedom from electoral accountability, afford them unique advantages in assessing the long-term effects of security measures on constitutional law.[128] Citing notorious examples in which the Court, deferring to the political process, upheld race-based detention,[129] criminalization of speech,[130] and other deprivations of civil rights and liberties, many scholars conclude that judicial deference undermines the crucial role of the judiciary as the protector of civil liberties.[131]

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[124] *See generally* GORDON SILVERSTEIN, IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY (1997) (describing how Congress and the courts have ceded power to the President in foreign affairs matters since the Vietnam War).

[125] *See, e.g.*, Barak, *supra* note 120, at 153–56; David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2585–94 (2003); Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 239, 253–54 (2006); Jinks & Katyal, *supra* note 24, at 1264–65.

[126] David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1341 (2008) (book review).

[127] Jinks & Katyal, *supra* note 24, at 1264 & n.23 (quoting Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1711–12 (1998)); *see also* Huq, *supra* note 110, at 894 ("Judges, after all, benefit from a relative insulation from the distortive influences upon the political branches. In consequence, their independent judgment about the fit between a government decision and the law may be particularly telling.").

[128] In a similar line of reasoning, scholars argue that courts are better positioned to interpret and enforce international law protections of human rights. For a U.S.-centric perspective, see Jinks & Katyal, *supra* note 24, at 1264–65. For other perspectives, see generally Aharon Barak, *International Humanitarian Law and the Israeli Supreme Court*, 47 ISR. L. REV. 181 (2014); Rosalie Silberman Abella, *International Law and Human Rights: The Power and the Pity*, 55 MCGILL L.J. 871 (2010); Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009).

[129] *See* Korematsu v. United States, 323 U.S. 214, 218–19 (1944) (upholding Japanese internment in the United States during World War II), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[130] *See* Schenck v. United States, 249 U.S. 47, 48 (1919) (prohibiting individuals from printing and distributing written materials condemning the U.S. draft for World War I).

[131] *See* Cole, *supra* note 126, at 1335; *see also* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 54–88 (2014) (discussing the impact of the Supreme Court's 1944 decision to uphold Japanese internment in *Korematsu v. United States* and how it exemplifies a broader pattern of the Court's failure to uphold individual rights in times of crisis).

A third set of these theories emphasizes the role of courts in enforcing the separation of powers.[132] In disputes concerning the respective constitutional powers of the executive and the legislature, only the courts can offer an impartial, authoritative, and principled resolution.[133] Without judicial determination, foundational legal questions will remain unsettled. Some examples of unsettled legal questions are the constitutionality of the War Powers Resolution and the claimed unilateral presidential authority to terminate treaties. And, crucially, when courts leave these disputes unresolved they nearly always rebound to the greater power of the executive, ultimately expanding its authority.[134] In contrast, in episodes such as the *Steel Seizure* case and the controversy over the sovereign status of Jerusalem, the Supreme Court instituted broad, comprehensive resolutions of interbranch disputes regarding foreign affairs powers.[135] These decisions guided future administrations on how to carry out their constitutional duties and clarified important areas of constitutional law.

Most of the criticism against the substantive engagement approach aligns with the rationales and justifications underlying the other approaches. Nonetheless, it is worth noting that U.S. courts have rarely adopted a substantive engagement approach. Particularly in times of exigency, courts hesitate to intrude on sensitive policy issues and are unlikely to invalidate actions that the government finds essential for protecting national security or achieving foreign policy goals.[136] If so, then there may be cause for caution. Insisting on direct judicial engagement with these policy issues might lead the courts to adopt

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[132] *See, e.g.*, FRANCK, *supra* note 120, at 5; GLENNON, *supra* note 120, at 316–21; KOH, *supra* note 22, at 181–84.

[133] *See* FRANCK, *supra* note 120, at 8 (criticizing the political question doctrine for creating inconsistency in divisions between the political branches and the judiciary); GLENNON, *supra* note 120, at 314–21 (discussing the political question doctrine); *cf.* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980) (arguing that the federal courts should not decide separation of powers disputes between the political branches); Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 176–77 (1990) ("Excessive reliance upon the Court deceives us into thinking that these disputes are purely constitutional in nature and that only the Justices can resolve them.").

[134] GLENNON, *supra* note 120, at 320.

[135] *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 31–32 (2015) (striking down that statute on the grounds that it unconstitutionally usurps the President's power to recognize foreign nations); Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 192–93 (2012) (refusing to apply the political question doctrine to a case involving a claim to enforce a statute requiring the U.S. State Department to record "Israel" as the birthplace of Americans born in Jerusalem who made such requests); Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring) (setting forth a framework for assessing the constitutionality of presidential assertions of power).

[136] *But see Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 34–35 (1866) (holding that the use of military commissions to try civilians during war is unconstitutional when the civilian courts are open and functioning).

pro-executive positions—a result that would further undermine the separation of powers and civil liberties.

E. The Result: A Normative Impasse

Each of the four approaches described in this Part seeks to maximize certain constitutional values and mitigate some of the risks posed by adjudication involving foreign affairs, while also de-emphasizing other constitutional considerations and potential perils. Table 1 below summarizes the variation among the four approaches.

Table 1: Comparison of the Values/Risks Implicated in Each Theoretical Approach

Approach	Values Maximized	Risks Reduced	Risks Increased
Avoidance	Unitary decision-making Institutional competence	Judicial error costs	Executive overreach Excessive rights limitation
(Chevron-Style) Deference	Institutional competence Democratic legitimacy	Judicial error costs	Executive overreach Indeterminacy (boundary problems)
Procedural Review	Separation of Powers Procedural rule of law	Executive overreach	Excessive rights limitation Indeterminacy (boundary problems)
Substantive Review	Substantive rule of law Protection of rights	Executive overreach Excessive rights limitation	Judicial error costs

Insofar as this portrayal of the debate is correct, there seems to be a normative impasse. Those who prefer efficiency and flexibility in the conduct of foreign affairs would be inclined to favor avoidance or deference; those who value deliberative decision-making and separation of powers would likely support procedural theories; those who prioritize protection of individual rights would tend to support substantive engagement theories. Although this Article does not purport to break through this impasse, it will propose a principle of risk management. The key to negotiating the apparent impasse lies in recognizing that: (1) efforts to eliminate risks necessarily create other risks; and (2) cases vary in the degree to which they implicate each of these values and risks. By identifying the factors that differentiate cases in those respects, we can articulate criteria to guide courts in optimizing their treatment of foreign affairs cases—applying substantive engagement when it is desirable, deference when appropriate, and so forth. As Part IV will explain, this is roughly how the MoA

approach operates. But before I turn to develop this argument, the next Part introduces the MoA doctrine as it applies in its place of origin.

II. The Margin of Appreciation Doctrine: Origins and Theoretical Foundations

The ECtHR developed the MoA to delimit the lines between national and supranational authority.[137] The term "margin of appreciation" refers to three things. First, it refers to a certain measure of discretion that states retain in interpreting their human rights obligations and balancing rights with other national interests.[138] I will later refer to this feature as the allocative function of the MoA.[139] Second, the MoA is a deference doctrine that sets the terms under which deference to national authorities in their application of treaty obligations is appropriate, and to what degree.[140] And third, the MoA refers to a dynamic standard of review, something akin to the levels-of-scrutiny scheme applicable in U.S. law.[141]

The ECtHR originally developed the doctrine in response to the implementation of Article 15 of the European Convention on Human Rights (ECHR or Convention),[142] which allows states to derogate from certain Convention provisions during public emergencies, such as war.[143] In considering the conditions under which a state may invoke Article 15, the ECtHR acknowledged:

> By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of dero-

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[137] While most of the scholarly work on the margin of appreciation focuses on its application under EU law, references to the doctrine and an increasing acceptance of its rationales are evident in the practice of the Inter-American Court of Human Rights and the United Nations Human Rights Committee. Legg, *supra* note 29, at 75–80.

[138] Yourow, *supra* note 29, at 3–5.

[139] *See infra* Section II.A.

[140] *See infra* Section II.B.

[141] *See infra* Section II.C.

[142] *See, e.g.*, Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 92 (1978) (stating that Article 15 leaves national authorities with a wide margin of appreciation because of their "direct and continuous contact with the pressing needs of the moment"); Greece v. United Kingdom, App. No. 299/57, 1958–59 Y.B. Eur. Conv. on H.R. 174 (Eur. Comm'n on H.R.). For analysis of the margin of appreciation in the context of Article 15, see Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 Hum. Rts. Q. 625, 627–37 (2001).

[143] ECHR, *supra* note 31, art. 15 (stating that nations could deviate from the European Convention "[i]n time of war or other public emergency").

> gations necessary to avert it. In this matter Article 15 [paragraph 1] leaves those authorities a wide margin of appreciation.[144]

The court nevertheless noted that the permissible "margin" afforded to the national authorities is not unlimited, and, more importantly, that its boundaries are subject to judicial control.[145] Over the years, the doctrine has been extended to other provisions of the Convention and become a fundamental interpretative principle in ECtHR jurisprudence. Importantly, as the ECtHR noted in 2010, in *Schalk v. Austria*, "The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background . . . ."[146] The court accords states a wider margin—a greater degree of deference—in situations involving national security,[147] social and economic policies,[148] morally or religiously sensitive issues,[149] evaluation of facts,[150] and matters where there appears to be no European consensus.[151] States, however, are typically given a narrower margin in cases where their actions allegedly rest on racial or ethnic discrimination under Article 14,[152] pertain to personal autonomy,[153] involve limitations of political rights under Articles 8–11,[154] or are in conflict with the consensus view among member states.

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[144] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 91–92.

[145] *Id.*

[146] Schalk & Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409, 437.

[147] *See, e.g.*, Brannigan & McBride v. United Kingdom, App. Nos. 14553/89 & 14554/89, 17 Eur. H.R. Rep. 539, 569 (1993) (deferring to state authorities on the issue of national emergency); *see also* ARAI-TAKAHASHI, *supra* note 29, at 27–29, 105–08, 209 (discussing whether member states have overstepped their margin of appreciation).

[148] *See, e.g.*, Hatton v. United Kingdom, 2003-VIII Eur. Ct. H.R. 189, 217 (holding that states' regulation of night flights in commercial airports is subject to a wide margin of appreciation).

[149] *See, e.g.*, Galan v. Italy, App. No. 63772/16, ¶ 115 (May 18, 2021), https://hudoc.echr.coe.int/eng?i=002-13309 [https://perma.cc/5DRX-TYM9] (granting state authorities a wide margin of appreciation in determining the scope of passive electoral rights); S.A.S. v. France, 2014-III Eur. Ct. H.R. 349, 380–81 (rejecting a challenge to a French law—the so-called Burqa Ban—prohibiting clothing designed to conceal one's face); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 18 (1976) (granting the national authorities a wide margin of discretion to balance freedom of speech and the public interest in protecting morals).

[150] *See, e.g.*, Winterwerp v. Netherlands, App. No. 6301/73, 2 Eur. H.R. Rep. 387, 403 (1979) ("[T]he national authorities are to be recognised as having a certain discretion, since it is in the first place for the national authorities to evaluate the evidence . . . .").

[151] *See, e.g.*, Petrovic v. Austria, App. No. 20458/92, 33 Eur. H.R. Rep. 307, 320–21 (1998) (noting the lack of consensus among member states with respect to denial of parental leave allowance to fathers).

[152] *See, e.g.*, Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 25–26 (1981) (striking down U.K. sodomy law for violating the right to respect for private life).

[153] *Id.*

[154] *See, e.g.*, Redaktsiya Gazety Zemlyaki v. Russia, App. No. 16224/05, ¶ 50 (Feb. 21, 2018), https://hudoc.echr.coe.int/eng?i=001-178714 [https://perma.cc/XL4Y-AEK6] (applying a narrow margin of appreciation in case concerning limitation on the freedom of the press).

The pervasive use of the MoA in ECtHR jurisprudence has been heavily criticized. Some commentators have criticized the court for what they consider an incoherent and confused application of the doctrine.[155] Others view the doctrine itself as a threat to the rule of law,[156] licensing application of a judicial double standard[157] and inviting the abdication of judicial responsibility.[158] Those who demand the ECtHR abandon the doctrine have noted its lack of textual foundation in the Convention. They have also argued that it stands at odds with the plain language of Article 32, which vests in *the court* the power to interpret and apply the Convention. These critics argue that by affording states a loosely-defined room for discretion in their fulfillment of treaty obligations, the court compromises the *raison d'être* of the ECHR: guaranteeing effective enforcement of universally enshrined human rights.[159]

Still others, on the other hand, bemoan that the court "has not taken the doctrine of the margin of appreciation nearly far enough."[160] According to this view, the Strasbourg judges should conceptualize the doctrine as limiting their competence; namely, that with respect to some matters, the states have not surrendered their sovereignty to the authority of the court.[161]

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[155] *See* Jan Kratochvíl, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETH. Q. HUM. RTS. 324, 351 (describing the application of the doctrine as "an eclectic case-by-case analysis by the Court"). Several commentators have described the doctrine, as currently applied, as an empty rhetorical device that obscures the real reasons behind decisions. *See* Ronald St. J. MacDonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83, 85 (Ronald St. J. MacDonald, Franz Matscher & Herbert Petzold eds., 1993); Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 HUM. RTS. L. REV. 495, 500–06 (2018). There is, however, no agreement among critics as to the effect of this practice. *Compare* Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 125–47 (2004) (arguing that the ECtHR's failure to formulate an adequately defined standard for the doctrine has resulted in granting states undue deference), *with* ARAI-TAKAHASHI, *supra* note 29, at 232 (noting that the doctrine sometimes serves as a mere rhetorical tool while, in fact, the ECtHR has reviewed the question presented in the case on the merits).

[156] Brauch, *supra* note 155, at 125–47.

[157] *See* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 844 (1999) ("Inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards.").

[158] *See, e.g.*, Gross & Ní Aoláin, *supra* note 142, at 628 (citing multiple sources expressing this view).

[159] *See* Z v. Finland, 1997-I Eur. Ct. H.R. 323, 357–58 (Meyer, J., dissenting in part) ("But where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not."); *see also* Benvenisti, *supra* note 157, at 844 (asserting that "[m]argin of appreciation . . . is at odds with the concept of the universality of human rights"); Lord Anthony Lester, *Universality Versus Subsidiarity: A Reply*, 1 EUR. HUM. RTS. L. REV. 73, 75–76 (1998) (arguing that the Convention will only be effective if the ECtHR and national courts cooperate to enforce human rights).

[160] Lord Hoffmann, *supra* note 40, at 14.

[161] *Id.* at 25–26. For a response to this line of criticism by an acting judge in the ECtHR, see Spano, *supra* note 35, at 492–99.

Notwithstanding the disapproval of the doctrine by both champions and opponents of supranational human rights adjudication, the ECtHR continues to expand and extend the doctrine and, perhaps more significantly, the contracting states seem to strongly support it. Indeed, the Committee of Ministers of the Council of Europe recently suggested including the doctrine in the text of the Convention.[162] One might reasonably ask how, even with strong opposition from both human rights advocates and state sovereignty supporters, the MoA keeps expanding and growing in significance. The answer, it seems, lies in the way that the doctrine can mediate the tensions between the aspiration to promote EU-wide acceptance and enforcement of certain human rights, and the limited consent of member states to surrender their sovereignty.

The Sections within this Part discuss how the MoA doctrine serves three functions: (1) a device for allocating decision-making authority;[163] (2) a dynamic standard of review;[164] and (3) a qualified deference doctrine.[165]

A. The MoA as a Device for Allocating Authority

Like other human rights charters, the ECHR features partly defined concepts and open-textured standards—broad, and often fuzzy, statements of principles that invite tradeoffs between competing values.[166] Giving content to the Convention's abstract terms in practice requires the interpreter to resolve ambiguities pertaining to law, facts, and, inevitably, moral choices. In a legal system built on subsidiarity, some principle must be applied to draw a line between the sphere of national and international supervisory authority. The MoA *is* that principle; the ECtHR retains final authority to define and enforce a minimum standard for the protection of rights while recognizing a residual space of state discretion.[167]

The allocative function of the doctrine is especially salient in the application of the so-called limitation clauses.[168] The ECHR permits certain excep-

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[162] *See supra* note 35 and accompanying text (noting the Committee's support of the MoA).

[163] *See infra* notes 166–171 and accompanying text.

[164] *See infra* notes 172–189 and accompanying text.

[165] *See infra* notes 190–192 and accompanying text.

[166] For example, Article 8 of the Convention, covering protection of the rights to privacy and family life, allows member states to interfere with protected rights to the extent "necessary in a democratic society in the interests of national security, public safety or the economic well-being." ECHR, *supra* note 31, art. 8(2).

[167] Professor Yuval Shany refers to this space as the "zone of legality." Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 910 (2005). In his conception, given the legal and cultural diversity among member states, some of the norms and concepts in the Convention are inexplicit by design. The ECtHR's role is to articulate limits for state discretion while deferring to decisions that fall within these limits. *Id.*

[168] Like other modern constitutions, the ECHR follows a model of constitutionalism that draws a distinction between the scope of the right and the limitation of one's ability to exercise it in certain

tions and allows states to restrict the exercise of rights in order to achieve legitimate ends such as national security, public order, and economic well-being.[169] Assessing the measures taken to advance these goals, as well as a measure's necessity and appropriateness, implicate predictive and value judgments that national authorities are best placed to make. The MoA provides the authorities some latitude to factor in these considerations when deciding the degree to which the right in question may be curtailed.[170] Likewise, when the Convention requires states to take positive measures to guarantee certain rights, the choice as to the proper means is within the MoA.[171] The ECtHR, in turn, refrains from closely scrutinizing their decisions and choices of means out of recognition that the ECHR system allocates these types of decision-making to the member states, subject to certain conditions. The judges will intervene only if they find that the national authorities balanced the competing rights and interests in a way that exceeded the margin afforded to state discretion.

B. The MoA as a Qualified Deference Doctrine

Judge Robert Spano of the ECtHR has described the MoA as the court's willingness "to defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations."[172] As Judge Spano's statement submits, the MoA is the framework through which the ECtHR calibrates the degree of deference given to the national authorities. Yet unlike the categorical nature of deference regimes applicable in U.S. foreign relations law (such as the sweeping call to accord "great weight" to executive treaty interpretations),[173] here the court uses a sliding scale of deference that examines a variety of metrics to determine what degree of deference is due.[174]

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circumstances. Narrowing or expanding the scope of the right will typically require a constitutional amendment, while imposing limitations on its application is done at the sub-constitutional level in accordance with constitutional limitation clauses. AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 99–100 (2012).

[169] ECHR, *supra* note 31, arts. 2, 4–6, 8–11, 15.

[170] Gerards, *supra* note 155, at 498; Letsas, *supra* note 29, at 710–11.

[171] *See, e.g.*, Taxquet v. Belgium, 2010-VI Eur. Ct. H.R. 145, 175 ("A State's choice of a particular criminal-justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention." (citation omitted)).

[172] Spano, *supra* note 35, at 491.

[173] Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982). Another example is "political question" deference. *See* Bradley, *supra* note 11, at 659–60.

[174] For example, in the context of free speech, Judge Dean Spielmann, the ECtHR President between 2012 and 2015, noted that "[t]he appropriate width of margin . . . follows a sliding scale which fixes the boundaries according to the type of speech and the manner in which the ideas are expressed." Spielmann, *supra* note 35, at 398.

Essentially, there are three axes that ECtHR employs to calibrate the degree of deference—the width of the margin—to state authorities. The first axis is the relative institutional advantages of state authorities, also known as the expertise factor.[175] A common justification of the doctrine in ECtHR case law is that the respondent state is in a better position than the international court to assess certain issues.[176] For example, domestic authorities could have a greater capacity to evaluate how a local legal rule affects a protected right, special expertise to predict the outcome of different courses of action (for example, to what degree a national security emergency necessitates derogation from certain treaty provisions),[177] or simply better access to information.[178] When a case involves such factors, the ECtHR will often accept that the national authorities "had greater knowledge . . . in deciding how to deal, in the most appropriate manner, with the case before [the national authorities]" and, therefore, give them considerable deference.[179]

The second axis the ECtHR considers is the level of uniformity among member states. In this practice, commonly called consensus analysis, the judges survey the positions of member states on the topic in question. If the court can identify European consensus, it tends to be less deferential to outlier positions.[180] In contrast, when there is greater variance among member states, the

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[175] *See* LEGG, *supra* note 29, at 145–74 (explaining how expertise factors into the margin of appreciation analysis); Shany, *supra* note 167, at 918–19 (discussing the weakness of international courts deciding domestic issues due to their lack of expertise).

[176] *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 17–18 (1976) (holding that "State authorities are in principle in a better position than the international judge" to evaluate the necessity of measures restricting free speech). For recent cases invoking this rationale, see, for example, Ilnseher v. Germany, App. Nos. 10211/12 & 27505/14, ¶ 130 (Dec. 4, 2018), https://hudoc.echr.coe.int/eng?i=001-187540 [https://perma.cc/PK4Y-3ZX7]; Dubská & Krejzová v. Czech Republic, App. Nos. 28859/11 & 28473/12, ¶¶ 174–187 (Nov. 15, 2016), https://hudoc.echr.coe.int/eng?i=001-168066 [https://perma.cc/KG3M-PS2S].

[177] *See generally* Brannigan & McBride v. United Kingdom, App. Nos. 14553/89 & 14554/89, 17 Eur. H.R. Rep. 539 (1993).

[178] For example, scholars have argued that decisions made by national authorities in addressing the COVID-19 pandemic should generally be granted a wide margin. *See, e.g.*, Sze Hian Ng, *Should the COVID-19 Pandemic Broaden States' Margin of Appreciation Under the European Convention on Human Rights?*, LONDON SCH. OF ECON. L. REV. BLOG (Nov. 9, 2021), https://blog.lselawreview.com/2021/11/covid-19-pandemic-broaden-states-margin-appreciation-european-convention-human-rights [https://perma.cc/ZS5L-YYZW].

[179] Egeland & Hanseid v. Norway, App. No. 34438/04, 50 Eur. H.R. Rep. 13, 36 (2009) (Rozakis, J., concurring); *see also* Pla & Puncernau v. Andorra, 2004-VIII Eur. Ct. H.R. 215, 234 (noting that domestic courts are "better placed than an international court to evaluate" domestic legislation that involves "an issue of interference with . . . family life").

[180] Other scholars have undertaken a broader analysis of this methodology and its implementation. *See, e.g.*, KANSTANTSIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 10–71 (2015); LEGG, *supra* note 29, at 116–27; Clare Ryan, *Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights*, 56 COLUM. J. TRANSNAT'L L. 467, 493–97 (2018).

court is less likely to insist on uniformity and usually adopts a deferential stance.[181]

Third, the ECtHR takes into account the proper operation of the national democratic process. The ECtHR values the role of democratic participation in settling sensitive moral and social issues and in deciding how to allocate national resources. Therefore, it tends to accord a wider margin in these areas.[182] The rationale underlying this ground for deference is democratic legitimacy: the people of every nation have stronger claim than a panel of judges, let alone foreign judges, to authoritatively resolve unsettled moral issues in the legal system that regulates *their* conduct and to choose how to optimally use state resources to promote public welfare.[183] Nonetheless, deference on this ground is context-specific and, more importantly, granted only when the democratic process has functioned properly. For example, in 2013, in *Animal Defenders International v. United Kingdom*, which involved a free-speech challenge to a law banning paid political advertising, the ECtHR noted that "[t]he quality of the parliamentary and judicial review of the necessity of the measure is of particular importance" for allowing the state a margin of appreciation.[184] In another example, the court expressly affirmed that the "procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation."[185] When the measure in question is found to hinder democratic participation or target under-represented groups, the ECtHR seems to be less deferential.[186] In this way, the MoA operates in a similar fashion to procedural models of judicial review, where the court focuses on fostering democratic participation and due process.[187]

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[181] It is nonetheless possible that the ECtHR will accept the legitimacy of outlier positions even against the backdrop of a common European practice. *See, e.g.*, A, B & C v. Ireland, 2010-VI Eur. Ct. H.R. 185, 242–43 (upholding (partly) Ireland's policy on abortions); Odièvre v. France, 2003-III Eur. Ct. H.R. 51, 72–73 (upholding France's policy on maternal anonymity that burdens children who seek to trace their biological mothers).

[182] *See generally* Lautsi v. Italy, 2011-III Eur. Ct. H.R. 63 (involving the hanging of religious emblems in schools); *A, B & C*, 2010-VI Eur. Ct. H.R. 185 (involving abortion rights); J.A. Pye (Oxford) Ltd. v. United Kingdom, 2007-III Eur. Ct. H.R. 365 (involving the implementation of social and economic policies); Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 187 (involving voting rights of inmates).

[183] *See generally* JEREMY WALDRON, LAW AND DISAGREEMENT (1999) (analyzing political philosophy regarding legislative integrity and constitutional democracy).

[184] 2013-II Eur. Ct. H.R. 203, 233–34.

[185] Connors v. United Kingdom, App. No. 66746/01, 40 Eur. H.R. Rep. 189, 217 (2004).

[186] LEGG, *supra* note 29, at 92–94.

[187] *See* ELY, *supra* note 104, at 102; *see also* Janneke Gerards, *Procedural Review by the ECtHR: A Typology*, *in* PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES 127, 127–29 (Janneke Gerards & Eva Brems eds., 2017); Spano, *supra* note 35, at 497–502.

Recognizing that the respondent state is due a wider or narrower margin of appreciation is not the end of the analysis. The deference afforded the state serves as a second-order reasoning that informs, rather than preempts, the first-order reasoning of considering the merits of the case.[188] Often, when the ECtHR affords substantial deference to a state, that is enough to conclude that there is no violation of the Convention. But this conclusion is not automatic. The court may find that some other first-order or second-order reasons override the deference due to the national authorities.[189]

C. The MoA as a Dynamic Standard of Review

The flip side of the degree of deference is intensity of review. The ECtHR further invokes the doctrine to modify the intensity of its review process. Operating similarly to the levels-of-scrutiny scheme applicable in U.S. law, the court uses the scope of the margin due to the national authorities to determine the type of analysis a case requires.[190] When it finds that the issue merits a wide margin

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[188] The distinction between first- and second-order reasoning is a fundamental concept in practical philosophy. In short, the core claim is that people do not make decisions simply by assessing the balance of reasons—moral, utilitarian, and others—for and against a particular course of action, but often invoke second-order reasons that are used to decide whether to act or refrain from acting based on first-order reasons. Conceding to higher authority is an example of second-order reasoning, one that philosophers refer to as exclusionary second-order reasoning. Deferring to expertise is another example, one in which the decision-maker may incorporate the expert's advice into the first-order reasoning, but will nonetheless engage in it. The margin of appreciation seems closer to the second example, thus operating as a nonexclusionary second-order reason. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 35–39 (Princeton Univ. Press 1999) (1975) (defining exclusionary second-order reason as reason for not acting on the first-order reason); Stephen R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 S. CAL. L. REV. 913, 945–52 (1989) (discussing the distinction between first-order and second-order reasoning and how it relates to the philosophy of law); *see also* LEGG, *supra* note 29, at 18–21 (discussing Raz's distinction between first-order and second-order reasoning and arguing that deference involves international tribunals to analyze nonexclusionary second-order reasons).

[189] *See, e.g.*, Fox v. United Kingdom, App. No. 12244/86, 13 Eur. H.R. Rep. 157, 168 (1990). In that case, while the Court recognized the wide margin due to national law enforcement authorities "in taking effective measures to counter organised terrorism," it concluded that the United Kingdom violated Article 5 because it failed to provide any information showing that the arrests of the plaintiffs met a "reasonableness of suspicion" standard as required by the provision. *Id.*

[190] Several commentators have identified similarities between the margin of appreciation and the American levels-of-scrutiny scheme. *See, e.g.*, Jennifer M. Westerfield, *Behind the Veil: An American Legal Perspective on the European Headscarf Debate*, 54 AM. J. COMPAR. L. 637, 644 (2006) ("[W]hen the ECHR margin of appreciation is narrowed, the effect is similar to the heightening of an American court's level of scrutiny."); *see also* David Beatty, *Law and Politics*, 44 AM. J. COMPAR. L. 131, 134–35 (1996) (comparing generally the margin of appreciation doctrine with deference tests in the United States and Canada); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 447–49 (2001) (discussing the tiers of scrutiny and deference in U.S. jurisprudence); Koen Lemmens, *The Margin of Appreciation in the ECtHR's Case Law*, 20 EUR. J.L. REFORM

of appreciation, the court may consider whether the decision was arbitrary, capricious, or manifestly unreasonable. In contrast, when the margin afforded to state authorities is narrow or zero, the court will scrutinize closely the rationale advanced by the government and the effect of the decision on the right in question.[191] As judges and commentators have noted, the ECtHR has not adequately clarified this aspect of the doctrine; the scope of the margin is not always indicative of the strictness of the scrutiny and, in some cases, is not identified in the first place.[192] Whether or not this critique is justified in the EU context is beyond the scope of this Article. Assuming, *arguendo*, that the critique is correct, the next Part will seek to better guide judges on how to determine the scope of the MoA in the domestic context and what the implications of this practice entail.

III. Incorporating the Margin of Appreciation Concept into Domestic Law

At first glance, it may seem that the MoA has nothing to offer to the study of the role of national courts in the field of foreign affairs. Indeed, even if the frameworks are similar, it might be said that there are simply too many uncontrolled variables: the vertical operation of the doctrine in contrast to the horizontal nature of the relationship between the national judiciary and executive branches; the narrow scope of a doctrine that focuses only on human rights law; the centrality of consensus analysis in determining the right margin that has no equivalent in the national context; and the subsidiary role of the ECtHR, different from the role of a national judiciary.[193]

This Article contends that despite the dissimilarities, there are significant theoretical and practical benefits in conceptualizing the role of courts in foreign affairs through the prism of the MoA. I will describe these benefits at some length in Part IV. But first, I must clarify how the MoA would work as a *domestic* law doctrine. A national court deciding foreign affairs cases confronts somewhat different problems than an international court ruling on state com-

78, 93 (2018) (noting the similarities between the margin of appreciation and American levels of scrutiny approach at a general level).

[191] Similarly, the intensity of the proportionality assessment by the ECtHR varies with the width of the margin of appreciation. Costanza Nardocci, *Equality & Non-discrimination Between the European Court of Justice and the European Court of Human Rights. Challenges and Perspectives in the Religious Discourse* 8 (Univ. of Milan-Biocca Sch. of L., Rsch. Paper Series No. 18-12, 2018), https://ssrn.com/abstract=3301171 [https://perma.cc/MC7K-VNHS].

[192] Egeland & Hanseid v. Norway, App. No. 34438/04, 50 Eur. H.R. Rep. 13, 37 (2009) (Rozakis, J., concurring) (observing that despite declaring a wide margin of appreciation, "the Chamber did not confine itself simply to a review of the reasonableness and non-arbitrariness of the national decisions in the case"); Gerards, *supra* note 155, at 499; Kratochvíl, *supra* note 155, at 330–43.

[193] For additional discussion on the similarities and dissimilarities between the ECtHR and the U.S. Supreme Court, see Donoho, *supra* note 190, at 447–66.

pliance with a human rights treaty. It follows that the operation of the doctrine and the factors that the court uses to determine the actual scope of the margin would need to be adapted if the principles of the MoA are to prove useful for tackling the problems that arise in the domestic context.

In this Part, I sketch the general principles of a domestic MoA doctrine. Section A describes the factors that should guide the courts in determining when to grant the government a margin of appreciation and how to determine its scope.[194] Section B then examines how the courts can translate the scope of the margin, once determined, into a relatively clear standard of review.[195]

I focus on the scope of the margin and the consequences it holds for the court's standard of review as these are the two most critical points for the success of the doctrine. Moving successfully from the rather vague concepts often invoked by U.S. judges, such as "zone of deference,"[196] "great weight,"[197] or a "degree of independent authority,"[198] to an analytical framework capable of guiding judges and providing clarity and predictability to litigants and policymakers, will require clarifying these two points rigorously.

A. Factors Informing the Scope of the Margin

The ECtHR views the varying scope of the MoA as one of the doctrine's central features.[199] As one commentator notes, "[W]here no width of the margin was identified, there was no concrete test that the Court used in deciding whether a violation of the Convention had occurred."[200] Nonetheless, identifying the appropriate scope has proven difficult in practice. It has not been rare to find this issue at the heart of the underlying disagreement between majority, dissenting, and concurring opinions.[201] In other cases, the judges simply avoid-

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[194] *See infra* notes 199–259 and accompanying text.

[195] *See infra* note 260 and accompanying text.

[196] Al Bahlul v. United States, 767 F.3d 1, 57, 61 (D.C. Cir. 2014) (Brown, J., concurring in part and dissenting in part).

[197] *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187, 194, 196 (1961) (invoking the term "great weight" in the context of executive treaty interpretation).

[198] Hamdan v. Rumsfeld, 415 F.3d 33, 41 (D.C. Cir. 2005) (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003)), *rev'd*, 548 U.S. 557 (2006).

[199] *See, e.g.*, Petrov & X v. Russia, App. No. 23608/16, ¶ 124 (Oct. 23, 2019), https://hudoc.echr.coe.int/eng?i=001-187196 [https://perma.cc/68FG-7AE6]; Schalk & Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409, 437; Fretté v. France, 2002-I Eur. Ct. H.R. 345, 368; *see also* Gerards, *supra* note 155, at 502–03; Lemmens, *supra* note 190, at 91–93; Spielmann, *supra* note 35, at 392–411.

[200] Kratochvíl, *supra* note 155, at 346.

[201] *See, e.g.*, Egeland & Hanseid v. Norway, App. No. 34438/04, 50 Eur. H.R. Rep. 13, 38–39 (2009) (Malinverni, J., concurring) (reasoning that it is "essential that the case law establish clear, objective and specific criteria that make it possible to identify in which cases it is appropriate to accord states a wide margin of appreciation or, on the contrary, to limit it" and arguing that the majority was wrong in giving the United Kingdom a wide margin in a case involving the freedom of the press).

ed indicating the scope of the margin or recognized a "certain" margin of appreciation—a term lacking any practical content.[202] To overcome these deficiencies in the domestic context, clear criteria must be established for ascertaining the proper scope of the margin.

At the theoretical level, widening and narrowing the margin of appreciation shifts the risks inherent in judicial review of foreign affairs, as identified in Part I.[203] For example, granting a wide margin of appreciation to the executive decreases judicial error costs, but increases the risk of executive overreach. On the other hand, narrowing or eliminating the margin might reduce the danger of excessive rights limitations, but runs a greater risk that the most competent actor will not be the one making the decisions, and thus, the decisions will be less accurate.

As noted, there may be disagreement about the importance of these values, but the significant point here is that these are not fixed risks. Rather, they fluctuate with identifiable factors featuring to varying degrees in different cases. For example, a case which asks the court to declare a war unconstitutional generates different risks than a controversy over the meaning of a term in the Hague Convention on the Civil Aspects of International Child Abduction.[204] The social costs of erroneous judicial intervention and how such intervention could undermine the principle of democratic governance are amplified in the first case, but seem less threatening in the second. If that observation is generally correct, then the key for assigning the optimal deference in any given case lies in identifying the factors that affect the risks and benefits involved and articulating them as criteria informing the scope of the margin. The following Subsections examine three such factors. At base level, the first factor—normative ambiguity—determines whether a margin is appropriate at all.[205] The two other factors—type of law[206] and proceduralism[207]—provide additional guidance for determining the scope of the margin.

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[202] Kratochvíl, *supra* note 155, at 340–42 (noting that a common practice of the ECtHR is to refer to the MoA doctrine without identifying the margin's width).

[203] *See supra* Table 1.

[204] *Compare* Smith v. Obama, 217 F. Supp. 3d 283, 284–85 (D.D.C. 2016) (seeking declaration that a military campaign against ISIL in Iraq and Syria was illegal), *vacated, appeal dismissed as moot sub nom.* Smith v. Trump, 731 F. App'x 8 (D.C. Cir. 2018) (per curiam), *with* Abbott v. Abbott, 560 U.S. 1, 5 (2010) (seeking an order requiring the plaintiff's son's return to Chile under the Hague Convention).

[205] Subsection 1.

[206] Subsection 2.

[207] Subsection 3.

1. Normative Ambiguity

Normative ambiguity, or "legal indeterminacy," is an inevitable feature of all law.[208] For every legal norm, there are circumstances in which the appropriate application of the norm will "require[] deliberation about its meaning" and therefore, will be open to dispute.[209] And yet, that fact alone does not mean that a margin of appreciation is appropriate. Normative ambiguity should be viewed as a necessary but not sufficient condition for providing a margin to a government that is applying a given norm. It is critical to further investigate the source of ambiguity and the epistemic tools required for resolving it. A margin might be appropriate when resolving the ambiguity if the law at issue implicates predictive security, foreign policy judgments, or an assessment of foreign affairs that the executive is better positioned to make. In this domain, where judicial decision-making and policymaking converge, there is room for judicial-executive cooperation in resolving normative ambiguities.

Professor Raz's analytical distinction between the deliberative stage and the executive stage in the law can provide further clarification of this point.[210] Raz posits that any form of government decision-making typically has a deliberative component and an executive component. The deliberative component includes an assessment of moral questions and policy reasons for action, and a conclusion is framed in general terms. Meanwhile, the executive component constitutes identifying the particular circumstances and implementing the appropriate action.[211] Judicial institutions typically operate in the executive stage, and "they hold themselves bound to recognize and enforce certain reasons not because they would have approved of them had they been entrusted with the question in the deliberative stage but because they regard their validity as authoritatively settled by custom, legislation, or previous judicial decisions."[212] But when the law provides insufficient guidance for acting within the executive stage, courts act in the deliberative stage, looking at a broader set of reasons for and against a particular action.[213] It is in that stage that a margin of appreciation might be justified. Given that the deliberative stage includes moral choices, and because, especially in the foreign affairs area, reasons for and against a particular action often depend on specialized knowledge, it seems

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[208] *See generally* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003) (arguing for the need to design institutions to reduce legal indeterminacy).

[209] *Id.* at 877.

[210] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 213–14 (2d ed. 1980).

[211] *Id.* at 213. Raz acknowledges that the executive stage also consists of "a residual element of choice which is left as indifferent by the conclusion of the deliberative stage." *Id.*

[212] *Id.* at 214.

[213] In countries that follow the common law tradition, their decisions will in fact create new law.

plausible that affording some deference to the views of the executive serves the public interest.

Consider, in this respect, the following example. In 2018, in *Al-Alwi v. Trump*, the U.S. Court of Appeals for the D.C. Circuit considered a Guantanamo Bay detainee's habeas petition, alleging that the government's legal authority to hold him in wartime detention had "unraveled."[214] In essence, his contention was that the unprecedented characteristics of the prolonged war in Afghanistan render the traditional legal rule for the duration of detention, known as the end-of-hostilities rule, inapplicable, and therefore that it can no longer provide a legal basis for his detention.[215] Notably, the Supreme Court anticipated such scenario in 2004, in *Hamdi v. Rumsfeld*, when it observed that the detention authority under the 2001 Authorization of Military Force (AUMF) is premised on "longstanding law-of-war principles."[216] The Court then cautioned, "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."[217] Although the Court made this percipient observation, it provided no guidance on: (1) how future courts should decide whether a longstanding law-of-war principle has unraveled; and (2) if it has, what legal standard should apply to the detention of enemy combatants.[218]

These inquiries are not purely legal; they involve judgments about the nature and intensity of the military conflict, as well as predictions about its trajectory and the individual threat posed by returning captured combatants. Moreover, they entail unsettled moral judgments, such as how much risk U.S. forces and civilians should bear to protect the liberty interests of detainees. In answering these questions, for which courts lack expertise and resources, there might be reasons to give increased weight to the views of the executive branch. As this Section will explain further, this does not mean that the executive will prevail, as other considerations may support a different conclusion.

Sometimes, however, normative ambiguity does not indicate strong justification for a wide margin of appreciation. In 2006, in *Hamdan v. Rumsfeld*, the Supreme Court considered an alleged al-Qaeda operative's challenge to the

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[214] Al-Alwi v. Trump, 901 F.3d 294, 297 (D.C. Cir. 2018).

[215] *Id.* at 297–98. According to this international law principle, captured enemy combatants may be detained until the end of active hostilities. For the application of this principle to the armed conflict between the United States and al-Qaeda, see Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations Under the 2001 AUMF*, 47 COLUM. HUM. RTS. L. REV. 204, 234–36 (2016).

[216] Hamdi v. Rumsfeld, 542 U.S. 507, 519, 521 (2004).

[217] *Id.* at 519, 521.

[218] For an alternative legal standard for wartime detention of suspected terrorists, see, for example, Yuval Shany, *A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention*, 93 INT'L L. STUD. 102, 120–28 (2017).

legality of a system of military commissions established to try him pursuant to President G.W. Bush's Military Order of November 13, 2001.[219] At issue were two ambiguous legal provisions. The first was the AUMF, which authorized the President to use "all necessary and appropriate force" against covered organizations and individuals.[220] Relying on *Hamdi*, the government argued that the AUMF granted the President authority to exercise his full war powers, including "the capture, detention, *and trial* of unlawful combatants."[221] Meanwhile, Hamdan maintained that the AUMF provided no basis to convene military commissions of the form and function specified in the Presidential Order.[222]

The second provision at issue was Common Article 3 of the 1949 Geneva Conventions (CA3) that secures certain minimum protections for persons detained in non-international armed conflicts.[223] Here, the ambiguity related to the question of whether CA3 was applicable to Hamdan at all. The government argued that CA3 was inapplicable because the war with al-Qaeda in which Hamdan was captured was of an "international character."[224] Contesting this theory, Hamdan argued that CA3 provides a "minimum yardstick of protection" in all conflicts and is thus applicable.[225] The Court rejected the government's reading of both the AUMF and CA3 and struck down the Military Order. In so doing, it resolved the normative ambiguities by employing regular methods of legal construction, including textual analysis informed by legislative history, as well as application of the presumption against implied repeal of legislation.[226]

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[219] 548 U.S. 557, 630 (2006).

[220] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001).

[221] Brief for Respondents at 7–8, *Hamdan*, 548 U.S. 557 (No. 05-184) (quoting *Hamdi*, 542 U.S. at 518).

[222] Brief for Petitioner at 6, *Hamdan*, 548 U.S. 557 (No. 05-184).

> To construe that phrase as authorizing commissions that try offenses, much less offenses unrecognized by the law of war, in a forum far removed in time and distance from any battlefield, and without important procedural safeguards, would provide to the President an almost limitless authority that Congress could not have intended . . . .

Id.

[223] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[224] Brief for Respondents, *supra* note 221, at 48.

[225] *Hamdan*, 548 U.S. at 631 n.63 (quoting INT'L AND OPERATIONAL L. DEP'T, JUDGE ADVOC. GEN.'S SCH., U.S. ARMY, LAW OF WAR WORKSHOP DESKBOOK 228 (2000), https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DOD004280.pdf [https://perma.cc/DR7V-6CSD] (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 218 (June 27))).

[226] *Hamdan*, 548 U.S. at 566, 594, 629–31 (noting that "there is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in

In the application of these ordinary interpretive methods, the executive has little to no epistemic advantages over judges and, accordingly, the functional case for deference is weaker. The Office of Legal Counsel (OLC) at the Department of Justice developed the executive's position regarding the inapplicability of CA3 in a memorandum.[227] The OLC memo relies on ordinary tools of legal analysis and does not presume to invoke any special expertise or rely on information that was unavailable to the Court.

Based on the distinction between the two examples, it is clear that the propriety of giving the executive a margin is closely connected to the *source* of the ambiguity. When resolving the case requires complex policy-based or facts-based assessments, or resolution of morally contested issues, the executive has more to bring to the table, and thus her voice should be amplified. In contrast, when the executive invokes regular interpretive tools, the case for deference is weaker.

2. The Type of Law

Some types of laws call for a wider margin of appreciation than others.[228] Indeed, the idea that the *type of law* matters underlies a range of deference doctrines, including *Chevron*.[229] The basic logic is as follows.

First, the executive has different roles in the creation of different types of laws. In the domestic context, the President's lawmaking role is limited, at least formally to the veto power.[230] Apart from this constitutional role, the executive's duty is to "take Care that the Laws be faithfully executed."[231] By contrast, in the treaty-making process, the executive plays a far more active role—arguably the principal role.[232] Insofar as interpretation is about giving effect to

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UCMJ Article 21," concluding that CA3 is applicable based on its literal meaning and analysis of its legislative history (citation omitted)).

[227] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Dep't of Just., to Alberto R. Gonzales, Couns. to the President & William J. Haynes, Gen. Couns., Dep't of Def. 37 (Jan. 22, 2002). https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf [https://perma.cc/W26J-MTD8].

[228] *Cf.* Bradley, *supra* note 11, at 651 ("The propriety of deference may well vary depending on the type of law at issue.").

[229] *See generally* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1115–16 (2008) (surveying a range of deference standards). Under *United States v. Mead Corp.*, *Chevron* deference is due only for implementation of laws that delegate authority "to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority." 533 U.S. 218, 226–27 (2001).

[230] U.S. CONST. art 1, § 7.

[231] *Id.* art. II, § 3.

[232] For the distribution of powers in the creation of treaties, see generally Harold Hongju Koh, *The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?*, 15 YALE J.

the intent of the drafter, the special role of the executive in treaty-making may warrant giving its positions special weight.[233]

Similarly, the President has a key role in the development of customary international law (CIL) by virtue of his power to conduct foreign relations.[234] CIL is created by consistent state practices undertaken with a sense of legal obligation, or *opinio juris*.[235] Because CIL is formed in this way, it seems to be the type of law most suitable for allowing the President some margin of appreciation. Articulating a position regarding an emerging or existing CIL norm will often require assessment of other states' behavior. This assessment entails examining states' actions and statements, and assessing whether these are made out of a sense of legal obligation. It will also inevitably involve questions of foreign policy as states often act in a certain manner in their international relations or express their views in order to affect the trajectory of emerging norms.[236] Moreover, given the uncertain status of CIL in U.S. law, courts

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INT'L L. 331 (1990) (discussing presidential power to make treaties subject to Senate consent). For a description of the gradual accretion of presidential power in this domain, see generally Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009) (noting the President's ability to make law over an immense array of issues); U.S. CONST. art. II, § 2, cl. 2. Furthermore, the President interprets treaties for the U.S. "in the course of conducting foreign relations." Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1220 (2018). On this account, giving deference to the President's interpretation of a treaty ensures uniformity in domestic and international treaty construction. *See* Bradley, *supra* note 11, at 702–03.

[233] *See, e.g.*, Coplin v. United States, 6 Cl. Ct. 115, 135 (1984) ("Because the Executive Branch is involved directly in negotiating treaties, it is well situated to assist the court in determining what the parties intended when they agreed on a particular provision."), *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom.* O'Connor v. United States, 479 U.S. 27 (1986). *But see* Criddle, *supra* note 102, at 1930–31 (cautioning that giving the executive *Chevron* deference in treaty construction undermines the principle that the "'*shared* expectations of the contracting parties' control in the interpretation of international agreements," especially since the executive is not a faithful agent in this context but rather an interested party (emphasis added) (quoting Air France v. Saks, 470 U.S. 392, 399 (1985))). Note, however, that Professor Criddle does not contest the idea that the executive is due some deference given its constitutional role in the treaty-making process. *Id.* at 1933–34 (advocating for persuasiveness deference in the lines of *Skidmore v. Swift & Co*., 323 U.S. 134 (1944)).

[234] *See* Bradley & Goldsmith, *supra* note 232, at 1227 ("Because the executive branch controls U.S. diplomacy and practice on the international stage, it plays a leading role in developing the state practice for the United States relating to CIL."). For theoretical underpinning of this practice, see generally Yahli Shereshevsky, *Back in the Game: International Humanitarian Lawmaking by States*, 37 BERKELEY J. INT'L L. 1 (2019) (analyzing the use of unilateral, nonbinding lawmaking initiatives in the context of international humanitarian law).

[235] *See, e.g.*, *Report of the International Law Commission to the General Assembly*, 73 U.N. GAOR Supp. No. 10, at 120, U.N. Doc. A/73/10 (2018) (considering, *inter alia*, "public statements made on behalf of States; official publications; government legal opinions; [and] diplomatic correspondence" as "[f]orms of evidence of acceptance as law (*opinio juris*)").

[236] *See* Bradley & Goldsmith, *supra* note 232, at 1230 ("[B]ecause the content of CIL is often uncertain and debatable, the executive branch's role in interpreting CIL enhances its ability to influence the creation of what are in effect new CIL rules.").

hesitate before making authoritative pronouncements about its content and, as a result, do not develop knowledge and expertise in this area.[237] This is yet another reason to accord a margin of appreciation to the executive in the United States.

On the other hand, constitutional provisions concerned with safeguarding human rights were created to protect individuals from the government, a purpose that affording a margin of appreciation may tend to defeat.[238] An example that rewards examination is the government's claimed authority to target and kill suspected terrorists who are U.S. citizens, a claim that received absolute deference from the federal courts in the form of various non-justiciability doctrines.[239] The issue first arose in relation to the contemplated targeted killing of Anwar al-Aulaqi, a U.S. citizen accused of leading an al-Qaeda affiliate in Yemen. In a series of legal memoranda, the Obama Administration considered whether the constitutional protections of life and liberty applied to al-Aulaqi and, if so, how they should be understood in that context.[240] The Administration concluded that the constitutional protections applied, but proposed a standard for application that essentially negated traditional due process constraints.[241] For example, the process due to al-Aulaqi did not include notice of

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[237] The formal status of CIL under the U.S. Constitution and the authority of federal courts to interpret and enforce it are matters of some controversy. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849–70 (1997); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 481–93 (1989).

[238] *See generally* THE BILL OF RIGHTS IN MODERN AMERICA (David J. Bodenhamer & James W. Ely, Jr. eds., 2008) (discussing challenges to the protections afforded in the Bill of Rights today).

[239] *See* Jaber v. United States, 861 F.3d 241, 257 (D.C. Cir. 2017) (precluding judicial review of the plaintiff's case on the grounds that it was "not the role of the Judiciary to second-guess the determination of the Executive"); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (dismissing case brought on behalf a man who was killed as a suspected terrorist on non-justiciability grounds).

[240] *See* Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., to the Att'y Gen. 6 (Feb. 19, 2010), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-02-19_-_olc_aaga_barron_-_al-aulaqi.pdf [https://perma.cc/ZE4X-9CXM]; Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., to the Att'y Gen. (July 16, 2010), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf 40–41 [https://perma.cc/Q9E7-E5AV]; *see also* U.S. DEP'T OF JUST., LAWFULNESS OF A LETHAL ACTION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 2 (2011), https://irp.fas.org/eprint/doj-lethal.pdf [https://perma.cc/XWX6-7ZX8].

[241] *See* Memorandum from David J. Barron, *supra* note 240, at 6–7; U.S. DEP'T OF JUST., *supra* note 240, at 2, 7–10 (invoking the due process balancing analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976)). The Obama Administration concluded that the use of lethal force is lawful when the targeted individual poses an "imminent threat of violent attack against the United States" and capture is infeasible. *See* Memorandum from David J. Barron, *supra* note 240, at 6–7. Such operations, the Administration determined, are consistent with international humanitarian law obligations and invoke similar conditions under the Fourth Amendment's reasonableness test that excuse certain lethal actions executed outside of typical constitutional constraints. *Id.*

the allegations against him, a chance to respond to those allegations, or a final decision made by a neutral decision-maker.[242]

The import of vague international law tests into constitutional analysis, as several scholars have noted, dilutes those fundamental constitutional rights and puts their very essence at risk.[243] In the al-Aulaqi case, affording a margin to the executive seems unjustified. When a case implicates individual rights, courts should consider narrowing or eliminating the margin of appreciation.

Second, the degree of self-interest in the executive's motives varies in the application of different types of laws. In areas where self-interest runs high, there should be a degree of skepticism about the propriety of a margin. *Chevron* itself stands for the idea that deference is due only with respect to the interpretation of statutes that confer rule-making or adjudicatory authority on the executive agency, but not for statutes that regulate agency action. Likewise, international law scholars have argued that deference to treaty interpretations ought to be limited in circumstances where the construction of the treaty might be biased.[244] Concerns of opportunistic motives and self-dealing in legal interpretation should translate into narrow margins of appreciation. This justifies treating power-conferring statutes and non-power-conferring statutes differently. It also supports drawing a distinction between treaties based on the propensity of executives to engage in self-dealing in their interpretation. For simplicity, I propose to categorize treaties as either *regular treaties* or *suspect treaties*.

Another context in which executive self-interest might become an issue is when the executive interprets the scope of its own constitutional authority vis-à-vis the legislature. In these cases, where the court is asked "to police the boundary between the Legislature and the Executive," there are reasons to lim-

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[242] *Cf.* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863))); *see also* H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 137–46 (2016) (discussing the constitutionality of the targeted killing of Americans abroad).

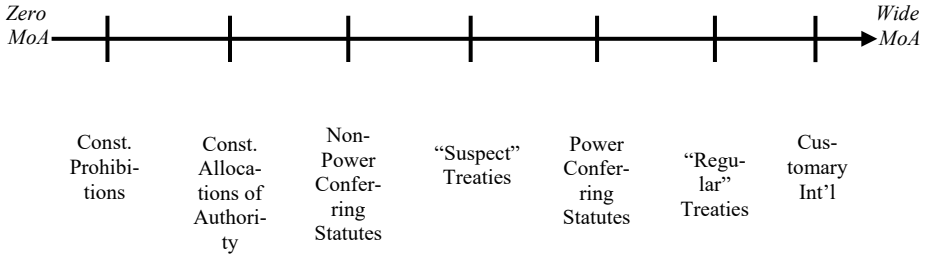
[243] POWELL, *supra* note 242, at 145 ("If . . . we insist that the usual constitutional prohibitions *must* limit the executive in such circumstances, then it is almost inevitable that the lawyers will redefine the 'limits' so they permit what policy makers think necessary."); *see* Trevor Morrison, *The White Paper and Due Process*, LAWFARE (Feb. 7, 2013), https://www.lawfareblog.com/white-paper-and-due-process [https://perma.cc/D3Q2-S2TW] ("[T]he White Paper fundamentally changes the role of the *Mathews* analysis (and may make it incoherent in doing so), but without acknowledging it.").

[244] *See* Jinks & Katyal, *supra* note 24, at 1236–45 (arguing that international law that operates in the "executive-constraining zone" should receive higher scrutiny from the courts); Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1944 (2005) (drawing a distinction between "bilateral treaties that regulate the international conduct of treaty partners" and "multilateral treaties that address solely the relations between private parties" for the purpose of determining the appropriate weight accorded to executive interpretations).

it the margin of appreciation.[245] Take for instance the President's constitutional authority to initiate military action without seeking legislative approval.[246] In recent years, the view across administrations was that unilateral presidential authorization to use military force is constitutional when "necessary to advance American national interests abroad" and "the anticipated hostilities would not rise to the level of a war in the constitutional sense."[247] This view leaves little role for congressional deliberation and, accordingly, has been described by commentators as a "meaningless" test.[248] Its outcome, which expands the President's authority over war-making, is not the product of a neutral analysis, but rather of a power-seeking executive. As such, it should be entitled to less margin of appreciation.

Based on the foregoing, it is possible to sketch out a sliding scale of the scope of the margin of appreciation based on the type of law at issue, as follows:

Figure 1: Scope of the Margin of Appreciation Based on a Type-of-Law Inquiry



Examination of these factors is highly contextual, and the type-of-law inquiry is only one factor that other, more compelling factors may override. In other words, this sliding scale is not dispositive, but rather should be viewed as a rule of thumb. A decision as to the appropriate margin should follow the specific analysis of the law at issue within the context of the case, as well as of the other factors described in this Section.

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[245] City of Arlington v. F.C.C., 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

[246] *See generally* RICHARD F. GRIMMETT, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: AFTER THIRTY-EIGHT YEARS (2012) (discussing cases "in which [the War Powers Resolution] was used, as well as cases in which issues of its applicability were raised").

[247] April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. __, at *1, *5 (May 31, 2018), https://www.justice.gov/olc/opinion/file/1067551/download [https://perma.cc/829Y-NSHV]; *see* Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 28–29 (2011).

[248] Curtis Bradley & Jack Goldsmith, *OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force*, LAWFARE (June 5, 2018), https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force [https://perma.cc/39AZ-MZWT].

3. Proceduralism

The final factor for determining the scope of the margin focuses on the procedural aspects of the executive action at issue. To be entitled to a margin, it is not enough that the executive's structural advantages in expertise and democratic accountability be relevant for settling the normative ambiguity. The executive must also employ those advantages in its decisional process.[249] This factor adopts proceduralism as an external, but not necessarily decisive, factor influencing the judicial stance.

There are three distinctive proceduralist inquiries that might be relevant in any given case. The first concerns the level of democratic support. When the executive's position is in accord with the legislature, it should generally carry more interpretive weight and serve as a factor for widening the margin. For example, the fact that Congress endorsed the Obama Administration's claim that the detention authority under the AUMF encompasses members of "associated forces," should help guide the courts in treating this reading of the statute more favorably.[250] Legislative endorsement is important because of its potential to reflect the opinion of a plural and deliberative body. It provides both democratic legitimacy and some assurances that any curtailment of rights is necessary to advance collective social goals.

The second inquiry examines the quality of decision-making. Deliberative decision-making processes inside the executive that employ available bureaucratic expertise and utilize rigorous fact-finding procedures may appropriately be viewed with greater deference than looser processes that may tolerate or invite arbitrary or capricious decisions.[251] Take *Trump v. Hawaii*, decided by the Supreme Court in 2018, for example.[252] The majority's deferential approach seems to have been affected by the procedural improvements in the Proclamation as compared to earlier iterations of the President's entry policy. Given the "worldwide review process undertaken by multiple Cabinet officials and their agencies," the Chief Justice found that the government had shown

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[249] This rationale embraces insights drawn from John H. Ely's theory of procedural judicial review and other proceduralists accounts. *See* ELY, *supra* note 104, at 74–102 (laying forth his representation reinforcing theory of judicial review).

[250] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011).

[251] A similar test applies in administrative law under *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944) (holding that courts will seek guidance from the view of the administrating agency depending upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"). In the foreign affairs context, Professors Jinks and Katyal have argued that the use of proper procedures should be "a precondition for deference." Jinks & Katyal, *supra* note 24, at 1279–80.

[252] 138 S. Ct. 2392, 2421 (2018).

that the Proclamation bore a rational relationship to a "legitimate national security interest."[253] The Court, applying a rational relationship standard of review, upheld the executive action.[254] In her dissent, Justice Sotomayor also looked closely at how the entry suspension decision was made. She focused more, however, on the historical background of the decision, including statements by then-candidate Trump pledging to "ban Muslims from entering the United States."[255] She concluded that the history warranted application of "heightened scrutiny" instead of rational basis review.[256] Scrutinizing the evidence, Justice Sotomayor found that the formal process was merely a window dressing made to conceal unconstitutional motives behind the travel ban.

My point in this example is not to suggest which view is preferred, but rather to emphasize the underlying principle adopted by both the majority and dissenting opinions. Specifically, that there is a close relationship between the quality of the decision-making process and the depth of judicial scrutiny. A wider margin of appreciation is justified when the executive uses its epistemic advantages to form its position.

The third procedural inquiry is specific to cases in which the executive action burdens individual rights. The more rigorous the process for examining rights violation afforded by the executive in its decision making, the lower the risk that judicial deference will result in a wrongful deprivation of rights. Greater procedural care by the executive may, therefore, justify a wider margin of appreciation.[257] Here, again, *Trump v. Hawaii* provides an example. In Justice Breyer's dissenting opinion, he considered the efficacy of a system of individual exemptions and waivers that the Proclamation established. The government contended that the application of that system reconciled the Proclamation with the broader scheme of the Immigration and Nationality Act (INA), which mandates a "strict case-by-case scrutiny of applications," and ensured its neutrality towards religion by admitting Muslims meeting the waiver criteria.[258] Finding that the government failed to prove that it had taken the measures necessary for implementing the waivers, Justice Breyer would have upheld the lower court's injunction prohibiting enforcement of the Proclamation.[259]

In sum, it may be appropriate in foreign affairs cases involving normative ambiguity to afford the executive a margin of appreciation. In such cases, three

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[253] *Id.* at 2421, 2422.

[254] *Id.* at 2423.

[255] *Id.* at 2435 (Sotomayor, J., dissenting).

[256] *Id.* at 2441.

[257] This idea is central to Professor Sunstein's theory of judicial minimalism, which I classify here as a strand of procedural theories. *See* Sunstein, *supra* note 78, at 99–103.

[258] *Trump*, 138 S. Ct. at 2430 (Breyer, J., dissenting).

[259] *Id.*

factors should be considered to determine whether to afford a margin and how to calibrate its scope: (1) the source of the ambiguity, or whether addressing it requires expertise in international affairs or national security; (2) the type of law at issue; and (3) proceduralism. The next section considers the practical effect of the MoA on the court's analysis.

B. Practical Consequences

How should the MoA guide the actions of judges in practice? The foundational premise for approaching this question rests on *Marbury v. Madison*: the Constitution vests in the judiciary the responsibility of "say[ing] what the law is."[260] That precept applies with the same force in foreign affairs as it does in other fields. A judge that invokes the MoA doctrine invites the executive to help, but not to supplant, the court in carrying out this duty. The more the court views the executive as a trusted partner in ascertaining the effect of a particular legal rule in a given case, the wider the margin of appreciation should be. The division of labor between the court and the executive can be depicted graphically as follows:

Figure 2: Wide Margin of Appreciation

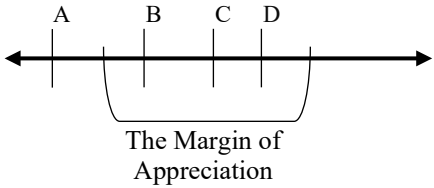
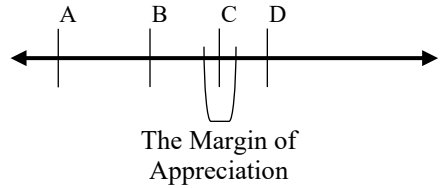


Figure 3: Narrow Margin of Appreciation



Figures 2 and 3 present the spectrum of possible interpretations of a law that, using ordinary tools of legal interpretation, a court can read plausibly in four possible ways, represented by points A–D. Figure 2 depicts a situation in which the court finds that a wide margin of appreciation is appropriate; namely, that the government's reading of the relevant law should receive substantial weight from the court. Readings that fall within the margin—in this example, readings B, C, and D—are those for which the added weight given to the government's view overrides reasons for rejecting these readings' validity. In contrast, the reasons for rejecting reading A, which falls outside the margin of ap-

[260] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). An equivalent of this statement at the statutory level is the Administrative Procedure Act that provides "the reviewing court shall decide all relevant questions of law." 5 U.S.C. § 706.

preciation, outweighs the reasons for accepting it, even when the court factors the government's endorsement. In other words, the edges of the margin mark the boundaries of where the court will no longer accept the government's view. The effect of the margin of appreciation in this example is as follows: if the government chooses either reading B, C, or D, its view will receive deference and the decision challenged in the case will be upheld. But if the decision relies on reading A, it will be struck down.

In Figure 3, the margin of appreciation is significantly narrower. Here, the government's view is given minimal or no weight, and accordingly, it bears minimal or no influence on the court's interpretation process. The court effectively renders reading C as the only acceptable reading of the law. Any decision that will not be lawful under that reading, the court will strike down.

This conception readily explains how courts can modify the intensity of their review in accord with the scope of the margin of appreciation. When the scope of the margin is at its zenith, it virtually operates as a presumption of legality and dictates to the court to rarely invalidate government action. When the margin is still wide, but there are some reasons for limiting it, its effect is similar to *Chevron* deference: the court's scrutiny is lenient, focusing on whether the government's construction of the law is unreasonable or arbitrary. In these situations, the burden of persuasion on the party challenging the government's view is significantly elevated. On the other side of the spectrum, when the margin is zero or exceptionally narrow, the court accords little or no weight to the government's view and takes its own assessment of the first-order balance of reasons. Between these ends there is a range of intermediate margin where the court gives varying weight to the government's views. In practice, this intermediate margin could mean that the court hones in on what it views as the ideal construction of the law as applied to the case, but defers to a slightly different reading suggested by the government. In the example above, the court will eliminate readings A and B, but will defer to the government's choice between C and D.

IV. Objections and Responses: The Benefits of the Margin of Appreciation Approach

This Part concludes the case for an MoA approach in foreign relations law by considering and responding to potential objections. Section A addresses the question of whether the approach is too deferential.[261] Section B considers whether the MoA is too intrusive by undermining established foreign affairs jurisprudence.[262]

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[261] *See infra* notes 263–266 and accompanying text.

[262] *See infra* notes 267–272 and accompanying text.

A. Too Deferential?

One potential critique is that the MoA makes courts too obsequious in relation to the executive. In this view, importing this international doctrine into a domestic legal system will function simply to excuse unwarranted deference to the executive. If the law is truly going to govern foreign affairs, the MoA poses a threat, providing a rationalization for legally dubious assertions of executive power.[263]

It is true that courts may invoke the MoA as a pretense for excessive deference.[264] But here, as elsewhere, the potential for abuse is not necessarily dispositive. Further, when courts properly apply the MoA, they must carefully analyze and vet the reasons for deference in a transparent manner that provides observers with the information necessary to check them. The doctrine promises that judicial action will be principled, look beyond short-term gains and losses, and utilize the advantages of each of the respective branches of government while maintaining the courts' final interpretive authority. More fundamentally, the doctrine captures the nature of the appropriate judicial-executive relationship in the area of foreign affairs, a field characterized by indeterminacy and vague boundaries between law and policy. In such a field, judicial supervision should not always identify the exact point where the balance-of-interests tips beyond what the law permits. In some situations, it may suffice—and, indeed, be preferable—for a court to demarcate the outer legal boundaries, while leaving the fine balancing within those boundaries to decision-makers better equipped to make those determinations.

Moreover, by providing a principled framework for distinct treatment for a range of situations and various types of laws, courts will be less prone to make broad pronouncements about the deference due to the executive's views on foreign affairs or to invoke blanket non-justiciability doctrines all too familiar in cases involving foreign affairs and national security.[265] Indeed, an MoA inquiry accounts for at least some of the criteria defining a "political question" under *Baker v. Carr* that the Supreme Court identified in 1962.[266] But instead of foreclosing judicial review, the MoA offers a more moderate and calibrated solution by adjusting the intensity of review. This analysis would thus allow

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[263] *See generally* REBECCA SANDERS, PLAUSIBLE LEGALITY: LEGAL CULTURE AND POLITICAL IMPERATIVE IN THE GLOBAL WAR ON TERROR (2018) (discussing the legality of counterterrorism practices enacted post-9/11 by American officials).

[264] This line of criticism has frequently been made by commentators in the European context. *See supra* notes 155–159 and accompanying text.

[265] *See, e.g.*, BRADLEY & GOLDSMITH, *supra* note 61, at 45–68 (discussing the non-justiciability doctrine in the context of foreign relations law).

[266] 369 U.S. 186, 217 (1962).

courts to reach the merits of cases that they otherwise might choose, or believe themselves compelled, to avoid.

Another potential benefit of the doctrine is that it fosters uniformity in the law. As described above, the underlying disagreement between pro-executive and pro-judicial theories of the judicial role concerns the allocation of the various risks posed by judicial review in this field. Judges that tend to be more sensitive to rights violations will likely adopt more activist postures than judges that are more wary about the potential risks of judicial errors in the areas of foreign affairs and national security. The result, as we have seen, is relatively confusing and inconsistent case law. The MoA is not a rights-oriented or government-oriented framework. Instead, it helps judges identify which risks are more theoretical and which more real in any given case. Even though the doctrine will not eliminate all ideological disagreements, it can reduce their effect and advance uniformity accordingly.

B. Too Intrusive?

Another potential objection is that the MoA undermines the purposes long-held doctrines of foreign affairs deference served by empowering courts to decide how much weight, if any, the government's views ought to be given. According to this line of reasoning, these doctrines are not only grounded in functional considerations that merit substantial deference on their own terms, but also in formal constitutional values. For example, one interpretation of Article II of the U.S. Constitution is that "the power to make treaties, and by extension to interpret them, remains an executive one."[267] In the statutory context, *Chevron* rests on the theory that Congress formally delegated some lawmaking authority to the executive.[268] Under this reasoning, filling interpretive gaps in foreign affairs statutes that qualify for *Chevron* deference is a power delegated to the executive, not to the judiciary. In that case, courts then might lack formal authority to disregard executive views on foreign relations law, even when they believe that the margin ought to be narrow.

As an initial matter, formal arguments about the interpretive authority over foreign relations laws are hardly dispositive. The Constitution's assignment of foreign affairs powers is incomplete, or at least controverted.[269] Against this backdrop, it should come as no surprise that functionalist reason-

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[267] Yoo, *supra* note 24, at 870.

[268] Bradley, *supra* note 11, at 673 ("As a formal matter, the *Chevron* doctrine also purports to preserve Congress's role as the lawmaker. Courts defer to agencies because Congress has presumptively delegated lawmaking power to those agencies.").

[269] *See* Powell, *supra* note 22, at 545 (discussing the ambiguities latent in the U.S. Constitution regarding issues of foreign affairs).

ing plays a significant role in clarifying textual ambiguities relating to the authority over foreign affairs.[270] If the MoA is a useful functionalist framework, then it can in fact complement rather than displace formal considerations. Moreover, an MoA inquiry in some circumstances protects formal constitutional allocations of authority as well. For example, the type-of-law factor provides that given the legislative authority vested in the President in the Treaty Clause, some margin of appreciation would be justified for executive branch treaty interpretations.

As for a possible conflict between *Chevron* and the MoA, when *Chevron* formally controls under the *Mead* test, it overrides other factors and dictates a wide margin of appreciation in accord with the *Chevron* doctrine.[271]

Beyond this, any objection on the grounds that the MoA will induce the courts to jettison the traditional deference due the executive in foreign affairs is unconvincing. Recent doctrinal and empirical studies suggest that, both in cases touching upon foreign affairs and in general, deference to the executive is on decline.[272] The contemporary picture is complex; one can no longer anticipate with any certainty what degree of deference will be afforded to the executive in a given case. With this doctrinal instability in the background, the MoA provides greater clarity about when and what degree of deference will be shown, especially compared to the opaque nature of the current deference regime. Perhaps more significantly, it provides a coherent theory justifying a more regularized practice. Those who believe that functional deference to the executive in foreign affairs is generally desirable should welcome this framework.

CONCLUSION

Few, if any, topics in foreign relations law have produced more uncertainty and controversy than the relationship between the judiciary and the executive. This is understandable given the issues at stake: improper judicial intervention—whether too intrusive, too deferential, or simply erroneous—might put sensitive national and individual interests at peril. This Article argues that no one theoretical approach of the four typically applied by U.S. courts is the

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[270] *See generally* Bradley, *supra* note 76 (discussing the application of functionalist reasoning in modern U.S. judicial decisions).

[271] United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

[272] *See, e.g.*, Harlan Grant Cohen, *The Death of Deference and the Domestication of Treaty Law*, 2015 BYU L. REV. 1467, 1467–68 (arguing that the Supreme Court is moving away from the "great weight" standard in treaty interpretation); Deeks, *supra* note 115, at 876–79 (evaluating competing empirical accounts about deference to the executive in national security law); Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829 (2018) (showing that the executive's success rate in the Supreme Court has been in decline since the Reagan Administration); Sitaraman & Wuerth, *supra* note 71, at 1919–35 (describing a steady decline in foreign affairs deference during the last twenty-five years).

best lens through which to view and understand this relationship. Instead, drawing on the European MoA doctrine, it has sought to develop a framework that guides courts on how to determine the proper mode of adjudication based on a set of factors that affect the risks and potential benefits involved. The MoA affirms the formal primacy of the judiciary in law interpretation, but at the same time views the executive as a partner to be trusted in light of the circumstances. This approach can help promote effective interbranch dialogue and cooperation regarding the role of law in the conduct of foreign policy. At the very least, it encourages and rewards responsible and deliberative decision-making within the executive and has the potential to deter arbitrary or illegal conduct in the realm foreign affairs.