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# The Death of Deference and the Domestication of Treaty Law

*Harlan Grant Cohen* \*

## I. INTRODUCTION

According to *Restatement (Third) of the Foreign Relations Law of the United States*, “Courts in the United States have final authority to interpret an international agreement for the purposes of applying it as law in the United States, but will give great weight to an interpretation made by the executive branch.”<sup>1</sup> Such “great weight” or deference reflects a common wisdom that the president plays a special constitutional role with regard to treaties. The president negotiates treaty terms and is thought to have special knowledge as to their meaning to the parties. The president knows what interpretations will best forward U.S. interests in the world. The president directs foreign relations with the United States’ treaty counterparties and has insight into both how they interpret these provisions and how they might react to various interpretations adopted by the United States. And it is the president and the executive branch that deal with the fallout from any U.S. interpretation with which other treaty parties disagree. In these regards, deference to the executive in treaty interpretation fits within a broader picture of deference to the executive in U.S. foreign relations law more generally.<sup>2</sup> According to conventional wisdom, dealing with foreign states requires special expertise, discretion, flexibility, and speed that militate in favor of presidential dominance

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (AM. LAW INST. 1987).

2. See Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 386–87 (2015) (describing the conventional wisdom).

over foreign relations and special forbearance to the executive in interpreting and applying foreign relations law.<sup>3</sup> When it comes to foreign relations, “Let the president do his job” becomes a common legal refrain.

But recent cases question whether this picture still reflects the reality of foreign relations law and whether the Restatement’s assessment is still accurate. In response to the government’s interpretation of a treaty in one case, the Supreme Court responded simply: “That reasoning is erroneous.”<sup>4</sup> In another, the Court explained that, “while we respect the Government’s views about the proper interpretation of treaties . . . we have been unable to find any other authority or precedent”<sup>5</sup> suggesting their view is correct. And during oral arguments in a third treaty-interpretation case, the Solicitor General was asked by a Justice, “[I]s there any possibility that there is any other country in the world that has the slightest interest in how the United States or any of its subdivisions deals with the particular situation that’s involved in this case?”<sup>6</sup> At least in these cases, the Court seems less than deferential to the executive branch’s views. Whatever weight the Court is giving them, it certainly seems less than “great.”<sup>7</sup>

At the same time, the Court seems to be domesticating the questions presented in treaty cases. Rather than focusing on the treaty and what its terms might mean in relations between the United States and others, the Court has been turning the question inward, focusing on implementing legislation, congressional intent, and ordinary methods of statutory interpretation. The effect of this trend is to reinforce the trend away from deference; by presenting the question as one of domestic lawmaking rather than of foreign relations, the Court disintegrates the arguments for executive

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3. *Id.*; see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

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

5. *BG Grp., PLC v. Argentina*, 134 S. Ct. 1198, 1208 (2014) (“We do not accept the Solicitor General’s view as applied to the treaty before us.”).

6. Transcript of Oral Argument at 17, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12–158).

7. Though admittedly, as Jean Galbraith points out in her contribution to this symposium, there has long been questions as to exactly how much weight “great weight” implied. Jean Galbraith, *What Should the Restatement (Fourth) Say About Treaty Interpretation?*, 2015 BYU L. REV. 1499, 1502–03 (2016).

interpretative primacy, while underlining arguments for the Court's own.

This reasoning from recent treaty cases, while seemingly out of step with prior practice and the *Restatement (Third)*, fits well with broader trends in foreign relations law jurisprudence from the United States Supreme Court headed by Chief Justice John Roberts. Elsewhere,<sup>8</sup> I have argued that (over the past ten years) the Roberts Court has been methodically whittling away the deference it traditionally granted to political branches in foreign relations by: (1) tightening its control over treaty interpretation in cases like *Hamdan v. Rumsfeld*,<sup>9</sup> *Bond v. United States*,<sup>10</sup> and *BG Group, PLC v. Argentina*;<sup>11</sup> (2) limiting the president's ability to override state laws in *Medellín v. Texas*<sup>12</sup> and to act without Congress in *Hamdan* and *Medellín*; (3) rejecting the president's construction of foreign relations statutes in *Hamdan*, *Bond*, and *Argentina v. NML Capital, Ltd.*;<sup>13</sup> and (4) increasing the Court's oversight over foreign relations by shrinking the scope of the political-question doctrine in *Zivotofsky v. Clinton (Zivotofsky I)*.<sup>14</sup>

Ten years into the Roberts Court,<sup>15</sup> the timeworn cliché that foreign affairs are different may simply no longer be valid. This may be the result of a backlash against perceived overreaching by the executive, a realization that globalization imbues even the most mundane of affairs with foreign affairs implications, a shift in the politics of the members of the Court, or a long-fused reckoning with the end of the Cold War.<sup>16</sup> But even after a strongly deferential and

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8. Cohen, *supra* note 2.

9. 548 U.S. 557 (2006).

10. 134 S. Ct. 2077 (2014).

11. 134 S. Ct. 1198, 1208 (2014).

12. 552 U.S. 491 (2008).

13. 134 S. Ct. 2250, 2258 (2014) (noting that "Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court," but concluding that "[t]hese apprehensions are better directed to" Congress).

14. 132 S. Ct. 1421 (2012).

15. Cohen, *supra* note 2, at 436–37.

16. See Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 652–53, 713 (2002) (prophesying that in a plurilateral, post-Cold War world, the Court would start to pull back on its traditional deference to the executive branch).

pro-presidential opinion in *Zivotofsky v. Kerry* (*Zivotofsky II*),<sup>17</sup> skepticism seems to be winning over deference most of the time.

This Article explores how this broader trend has played out with regard to treaty interpretation. It also examines the treaty cases of the past ten years and compares them to the prior patterns described by the *Restatement (Third)*.

Part II looks at deference to the executive branch's treaty interpretations. It puts the anecdotal evidence of diminishing deference in context by developing a complete data set of the Roberts Court treaty interpretation cases that can be compared to such sets from prior Courts. This data set suggests a significant shift at the Supreme Court; given how rarely the Court follows the executive's views on the meaning of treaties, it might be fair to say that the Court does not defer at all.

Part III looks at how the Court has reframed treaty questions, focusing, where possible, on domestic rather than international sources. The effect of this trend has been to sideline the president, increasing the Court's interpretative authority at the expense of the executive.

Part IV contemplates the current and future status of the "great weight" standard. Looking more closely at the treaty jurisprudence of the Courts of Appeals over the span of the Roberts Court, Part IV finds no evidence that the Supreme Court's newfound skepticism of the executive branch's treaty interpretations has caught on among lower courts. On the contrary, a new data set of the Circuit Courts' treaty interpretations reveals that the Courts of Appeal still adopt the executive branch's view the grand majority of the time. Should the Circuit Courts change their approach in light of the Roberts Court shifts? How should the *Restatement (Fourth)* approach deference to the executive branch in treaty interpretation?

Part IV then considers the possible routes for the *Restatement (Fourth) of the Foreign Relations Law* and whether a new doctrinal approach to treaty interpretation may be in order. The end goal is a doctrine of treaty interpretation that balances the courts' authority "to say what the law is"<sup>18</sup> with the executive branch's expertise on treaties and their meaning, while also leaving space for the president

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17. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

18. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

to articulate policies in U.S. relations with treaty partners and other states. The question is whether there is a doctrinal framework that can describe and harness the Roberts Court's trends while fulfilling the United States' varied goals in applying treaties. Part IV ends by suggesting that a "normalization"<sup>19</sup> of treaty deference may be the best way to channel current trends into a positive doctrinal direction.

## II. WEIGHING EXECUTIVE BRANCH VIEWS

### *A. Treaty Deference Trends*

Courts have not always deferred to the executive branch's interpretation of treaties. In fact, in the early years of the Republic, the Court seemed to do quite the opposite.<sup>20</sup> Nevertheless, over the past century, a doctrine, or perhaps doctrines, of deference to executive treaty interpretations has gained force, ultimately achieving recognition in the *Restatement (Third)*'s determination that the executive branch's interpretation was to be given "great weight."<sup>21</sup>

Two different paths led to this doctrine.<sup>22</sup> One path drew upon the executive branch's interpretations as evidence of the intent of the treaty framers.<sup>23</sup> The executive branch's interpretation deserved weight because the executive was involved in the negotiations and knew what the parties intended. The executive branch had no special power over treaty interpretation—it was for the courts to finally interpret the law—but the executive branch's views were strong and useful evidence of the most accurate reading of the treaty's terms.

A second path produced a true deference doctrine.<sup>24</sup> Cases on this path suggested that the executive should have some authority

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19. See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1970 (2015).

20. See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 506–07 (2007) (describing early nineteenth century cases).

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (AM. LAW INST. 1987).

22. See Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1741–44 (2007) (describing the two paths).

23. *Id.* Chesney points to *In re Ross*, 140 U.S. 453, 468 (1891) and *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) as the primary cases in this line.

24. Chesney, *supra* note 22, at 1741–44 (describing *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) and *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921)).

over treaty interpretation that the courts should properly recognize. This path drew on traditional arguments for executive prerogative, like executive control of foreign affairs<sup>25</sup> and the need for one voice,<sup>26</sup> the executive's involvement in everyday treaty interpretation, the need for flexibility in dealing with foreign states, the president's political accountability with regard to foreign affairs,<sup>27</sup> and the executive branch's expertise in foreign policy. Gradually over time, the second justification crowded out the former.<sup>28</sup>

The dominance of this deference model was suggested by empirical studies. In a study of the twenty-three treaty interpretation cases from the Warren, Burger, and Rehnquist eras, David Bederman found that the Court followed the executive's interpretation in nineteen of twenty-three cases, or roughly 83% of the time.<sup>29</sup> Looking solely at treaty interpretation cases from the beginning of the Rehnquist Court until 1993, the percentage grew even higher. The Rehnquist Court adopted the executive branch's view in nine of ten cases, or 90% of the time.<sup>30</sup> Robert Chesney later updated and expanded the study to include treaty interpretation cases from 1984 through 2005 at both the Supreme Court and the lower federal courts.<sup>31</sup> Chesney found that in sixty-seven treaty interpretation cases, the executive prevailed fifty-three times, or 79% of the time.<sup>32</sup> Of the remaining fourteen cases, four were inconclusive. And of the ten cases that did not follow the executive, four were later reversed on appeal.<sup>33</sup> If those four cases are excluded, the executive's win-rate goes up to 84%. If one excludes the inconclusive cases, that win-rate rises to 90%.

What do these percentages signify? How much deference do they suggest? It's hard to tell. There are many reasons a court might

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25. See Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 792 (2008).

26. Cf. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085–86 (2015) (wielding “one voice” justification to give the president exclusive control over issues related to recognition of states and governments).

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

28. Chesney, *supra* note 22, at 1744–48.

29. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 975 n.108, 1015–16 n.422 (1994).

30. *Id.* at 975 n.108.

31. Chesney, *supra* note 22, at 1752–58.

32. *Id.* at 1755.

33. *Id.*

adopt the same interpretation as the executive. In particular, the executive does have the best knowledge of the treaty negotiations, and its proffered interpretation may simply be right or, at least, the most reasonable. The raw numbers cannot distinguish cases in which the court agrees with the executive from cases in which the court simply follows the executive regardless of, or even in spite of, its own view.

Looking at how often the courts follow the executive in other cases can provide a helpful baseline. In a 2008 study, William Eskridge and Lauren Baer looked at cases involving either *Chevron*<sup>34</sup> or *Skidmore*<sup>35</sup> deference, the two prominent standards for deference to administrative agency decisions.<sup>36</sup> They found that from 1989 to 2005, the courts adopted the same view as the administrative agency 76.2% of the time when applying the test from *Chevron* and 73.5% of the time when applying the test from *Skidmore*.<sup>37</sup> In a different study from 2006, Thomas Miles and Cass Sunstein found that, from 1989 to 2005, the Supreme Court and circuit courts adopted the same view as the agency 67% of the time and 64% of the time respectively.<sup>38</sup> By any standard, *Chevron* sets out a pretty deferential test: under *Chevron*, the court is supposed to defer to any reasonable agency interpretation.<sup>39</sup> And yet the rates of agreement between the courts and the executive in those cases pale in comparison to the rates of agreement on treaty interpretation. Perhaps the executive is more likely to be correct in its interpretation of a treaty than a statute. Perhaps the potential reactions of other nations discipline the executive more than Congress does, making unreasonable treaty interpretations less likely than unreasonable agency interpretations of statutes. Both are, at the very least, debatable propositions. But the high numbers for treaties are at least suggestive that the courts were in fact giving the executive's views on treaties "great weight." As

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34. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

35. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

36. See *United States v. Mead Corp.*, 533 U.S. 218 (2001) (describing the relationship between the two tests).

37. 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, 1099, 1125 (2008).

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

39. *Chevron*, 467 U.S. at 844.

David Bederman put it, deference to the executive is “the single best predictor of interpretive outcomes in American treaty cases.”<sup>40</sup>

But then along came the Roberts Court. *Hamdan* was the first case to raise eyebrows and indicate that something might be changing.<sup>41</sup> *Hamdan* involved the proper interpretation of Common Article 3 of the Geneva Conventions.<sup>42</sup> The question was whether the conflict with Al-Qaeda was “not of an international character,”<sup>43</sup> and thus covered by the treaty provision. The executive branch took the view that, because the conflict with Al-Qaeda was taking place all over the world, it was of an international character.<sup>44</sup> The majority of the Court didn’t just reject the executive branch’s view; it rejected it out of hand. Interpreting Common Article 3 to cover any conflict not between two states, Justice Stevens described the executive branch’s view simply as “erroneous.”<sup>45</sup> No mention was made of deference, of great weight, or of respect for the executive branch’s view.

That decision in *Hamdan*, though, came one day after the Court cited the “great weight” standard and adopted the executive branch’s interpretation of the Vienna Convention on Consular Relations (VCCR) over that of the International Court of Justice (ICJ) in *Sanchez-Llamas v. Oregon*.<sup>46</sup> And in other cases, particularly those interpreting the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”), the Court has followed the executive branch’s interpretation.<sup>47</sup> One case might have been only an anomaly.

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40. Bederman, *supra* note 29, at 1015.

41. *See, e.g.*, Chesney, *supra* note 22, at 1726–27, 1729–33; Sullivan, *supra* note 25, at 782.

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

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

44. *See* Memorandum from President George W. Bush, to the Vice President, et al., on Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002) at ¶ 2.c, *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134–35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

45. *Hamdan*, 548 U.S. at 630. It is possible that Justice Stevens was suggesting a new “clearly erroneous” standard. He does not say so clearly though, nor does he explain how it relates to the prior “great weight” standard. Thanks to Pamela Bookman for the point.

46. 548 U.S. 331, 355 (2006).

47. *See, e.g.*, *Lozano v. Alvarez*, 134 S. Ct. 1224 (2014); *Chafin v. Chafin*, 133 S. Ct. 1017 (2013); *Abbott v. Abbott*, 560 U.S. 1 (2010). Notably though, Justice Stevens, joined in his dissent in *Abbott* by Justices Thomas and Breyer, questioned whether the executive

The 2013 term gave *Hamdan* some company. While agreeing with the executive's interpretation of the Hague Convention in *Lozano*, the Court summarily brushed aside the executive branch's interpretation of the United Kingdom-Argentina Bilateral Investment Treaty ("BIT") in *BG Group* and the Government's position on the requirements of the Chemical Weapons Convention in *Bond*.

The Court's reaction to the executive branch's interpretation of the United Kingdom-Argentina BIT in *BG Group* is telling. "While we respect the Government's views about the proper interpretation of treaties," the Court explained, "we have been unable to find any other authority or precedent"<sup>48</sup> supporting its view. Unconvinced, the Court "d[id] not accept the Solicitor General's view as applied to th[is] treaty . . . ."<sup>49</sup>

### B. Examining the Roberts Court Data

Anecdotally then, it seems that the Court may no longer be weighing the executive branch's view of treaties as heavily. This impression is supported by a more careful analysis of the data.

A close search of the cases reveals that between 2005 and 2015 (i.e., the Roberts Court era to date) there have been twelve cases involving treaties. Ten of those required at least some interpretation of a treaty.<sup>50</sup> Of those cases, the Court has agreed with the executive in five or six cases.<sup>51</sup> Three of these five or six cases in which the

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branch's view of the Hague Convention really was due to "great weight" in that case, accepting a much narrower range of circumstances in which such deference would be warranted. *Abbott*, 560 U.S. at 41–43 (Stevens, J., dissenting).

48. *BG Grp., PLC v. Argentina*, 134 S. Ct. 1198, 1209 (2014).

49. *Id.* at 1208.

50. Two of the twelve, *Negusie v. Holder*, 555 U.S. 511 (2009), and *Golan v. Holder*, 132 S. Ct. 873 (2012), ended up turning on something other than the treaty in question. In *Negusie*, the Court held that the Board of Immigration Appeals had wrongly relied on a prior Court decision, *Fedorenko v. United States*, 449 U. S. 490 (1981), and remanded the question to the agency for reconsideration. The Court thus never considered the meaning of the underlying treaties, the 1967 United Nations Protocol Relating to the Status of Refugees and the 1951 United Nations Convention Relating to the Status of Refugees. 555 U.S. at 522–23. In *Golan*, the Government argued that extension of the copyright term for foreign works was justified by U.S. obligations under the Berne Convention. In the end though, no provision of the Berne Convention was really in question and nothing turned on its interpretation. 132 S. Ct. at 884–94.

51. *Medellín* seems best counted as a partial victory and a partial defeat. See discussion *infra* notes 69–71 and accompanying text.

Court agreed with the executive (*Abbott v. Abbott*,<sup>52</sup> *Chafin v. Chafin*,<sup>53</sup> and *Lozano v. Montoya Alvarez*<sup>54</sup>) involve interpretation of one treaty, the Hague Convention. As previously mentioned, the Court also sided with the executive branch rather than the ICJ in interpreting the in *Sanchez-Llamas v. Oregon*.<sup>55</sup> And the Court agreed with the executive branch in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, in which the executive branch argued that hoasca, a hallucinogenic tea, was covered by the 1971 U.N. Convention on Psychotropic Substances.<sup>56</sup> The Court parted with the executive in that case though on the effect of that interpretation, holding that United States' obligations under the treaty alone could not serve as a justification for refusing a religious exemption for hoasca use under the Religious Freedom Restoration Act,<sup>57</sup> a different trend that I will come back to in Part III.

The Court, on the other hand, parted ways with the executive in *Hamdan*, dismissing the executive branch's view of the Geneva Conventions,<sup>58</sup> and *BG Group*, rejecting the executive branch's construction of the United Kingdom-Argentina BIT and largely brushing aside its concern about how similar language used in U.S. BITs might be interpreted by other courts.<sup>59</sup> In *Permanent Mission of India to the United Nations v. City of New York*,<sup>60</sup> the Court fails to even mention that the Solicitor General had submitted a brief<sup>61</sup> urging a different interpretation of the Vienna Convention on Diplomatic Relations than the one eventually adopted.<sup>62</sup> *Bond* is a bit harder to categorize. The Solicitor General argued that the Chemical

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52. 560 U.S. 1 (2010).

53. 133 S. Ct. 1017 (2013).

54. 134 S. Ct. 1224 (2014).

55. 548 U.S. 331, 345–50 (2006).

56. 546 U.S. 418, 422 (2005).

57. *Id.*

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

59. *BG Grp., PLC v. Argentina*, 134 S. Ct. 1198, 1208–09 (2014). Justice Sotomayor, in her concurrence, does leave some space for a different result regarding the language in U.S. BITs. *Id.* at 1213–15 (Sotomayor, J., concurring).

60. 551 U.S. 193 (2007).

61. Brief for the United States as Amicus Curiae Supporting Petitioners at 26–27, *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193 (2007) (No. 06 134).

62. 551 U.S. at 201–02.

Weapons Convention prohibited the use of toxic chemicals “under any circumstances” not permitted by the Convention and required the United States to criminalize Carol Anne Bond’s attempted poisoning of her neighbor.<sup>63</sup> Chief Justice Roberts attempts to avoid interpreting the Convention in his majority opinion,<sup>64</sup> instead applying a presumption to the interpretation of the statute implementing the Convention. That said, after summarizing the history of the Convention, the Chief Justice initially suggests that the Convention would not have been understood to cover entirely local conduct like *Bond’s* attempted poisoning. “The Convention, a product of years of worldwide study, analysis, and multinational negotiation, arose in response to war crimes and acts of terrorism,”<sup>65</sup> the Chief Justice writes. “There is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond’s common law assault.”<sup>66</sup> And while the interpretation that follows is of the statute rather than the treaty, the Court’s understanding of the treaty and its purposes clearly buttresses the majority’s view that “chemical weapons” as commonly understood, and as understood by the treaty’s drafters,<sup>67</sup> does not normally include simple poisonings.<sup>68</sup> Whether relying on that view or not, the Court is clearly not deferring to the president’s interpretation of the Convention.

*Medellín* is the most complicated case to categorize. In his brief, the Solicitor General argued that according to their terms, neither the Optional Protocol to the VCCR nor the U.N. Charter is privately enforceable in U.S. Courts.<sup>69</sup> Instead, “[t]he Optional Protocol and the U.N. Charter create an obligation to comply with

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63. Brief for the United States at 2, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158).

64. *Bond*, 134 S. Ct. at 2088 (“Fortunately, we have no need to interpret the scope of the Convention in this case.”).

65. *Id.* at 2087.

66. *Id.*

67. *Id.* (quoting Ian R. Kenyon, *Why We Need a Chemical Weapons Convention and an OPCW*, in *THE CREATION OF THE ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS* 1, 17 (Ian R. Kenyon & Daniel Feakes eds., 2007)).

68. See also Galbraith, *supra* note 7, at 1517 (observing that “the Court spends a great deal of effort in describing and interpreting the Chemical Weapons Convention itself”).

69. Brief for the United States as Amicus Curiae Supporting Petitioner at 27–30, *Medellín v. Texas*, 552 U.S. 491 (2008) (No. 06-984).

[the ICJ's judgment in] *Avena*, and those treaties implicitly give the President authority to implement that treaty-based obligation on behalf of the Nation.”<sup>70</sup> While the Court agreed with the former proposition, it went further than the government on the latter. Adopting a reading of the U.N. Charter's “undertakes to comply” language nowhere suggested by the Solicitor General, the Court found the obligation to follow ICJ judgments non-self-executing and as such subject to implementation by Congress rather than the president alone.<sup>71</sup> Depending on how we count it, *Medellin* could be categorized either with those cases in which the Court defers or those in which it does not. The best reading, I would suggest, is as a partial victory for the executive branch, bringing the count of cases in which the Roberts Court failed to defer to 4.5 out of 10. The Roberts Court's rate of agreement with the executive would stand at 55% and would still only be 60% even if *Medellin* is counted entirely among the executive's victories.

Beyond the high rate of disagreement (and perhaps even more tellingly), the Court mentions a standard of deference to the executive (the Restatement rule) in only four of the ten treaty interpretation cases,<sup>72</sup> and in two of those four, the Court specifically chooses not to defer.<sup>73</sup> The deference standard appears almost as an excuse for failing to defer in a particular case, an implicit suggestion that the case is merely an outlier and not a threat to the general rule.

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70. *Id.* at 11.

71. *Medellin v. Texas*, 552 U.S. 491, 508 (2008).

72. *See id.* at 513 (“[T]he 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))); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) (“[W]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.” (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961))); *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (“[T]he Executive Branch’s interpretation of a treaty ‘is entitled to great weight.’” (quoting *Sumimoto Shoji Am.*, 457 U.S. at 185)); *BG Grp., PLC v. Argentina*, 134 S. Ct. 1198, 1209 (“[W]e respect the Government’s views about the proper interpretation of treaties.”).

73. *See Medellin*, 552 U.S. at 525 (“The United States maintains that . . . the relevant treaties . . . ‘implicitly give the President authority to implement that treaty-based obligation’ . . . We disagree.”) (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984)); *BG Grp.*, 134 S. Ct. at 1209 (“[W]hile we respect the Government’s views about the proper interpretation of treaties, we have been unable to find any other authority or precedent suggesting that the use of the ‘consent’ label in a treaty should make a critical difference in discerning the parties’ intent.”).

Disagreements with the executive branch are also spread broadly across the Court. Executive branch interpretations have been rejected by Chief Justice Roberts and Justices Stevens, Breyer, and Thomas. Additionally, the Court rejected the executive branch's view in cases in which it appeared as party (*Hamdan* and *Bond*) and amicus (*Permanent Mission of India* and *BG Group*).

### *C. Deference's Slow Death?*

What's going on here? Over the years, scholars have put forward any number of suggestions on how the deference standard for treaty interpretation could or should be tailored. Can these cases be reconciled with one of them? The suggestion made in the reporters' notes to the *Restatement (Third)* seems to be an imperfect fit.<sup>74</sup> The reporters' notes explain that the Court is

more likely to defer to an Executive interpretation previously made in diplomatic negotiation with other countries, on the ground that the United States should speak with one voice, than to one adopted by the Executive in relation to a case before the courts, especially where individual rights or interests are involved.<sup>75</sup>

The Roberts Court, though, has been following the executive branch in precisely those cases involving private interests, specifically, the Hague Convention cases,<sup>76</sup> while diplomacy and negotiation-based arguments in *BG Group* and *Bond* have fallen on deaf ears.<sup>77</sup> An argument could be made that the government's interpretations in

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74. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 reporters' note 2 (AM. LAW INST. 1987).

75. *Id.*

76. *See* *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1228 (2014) (examining whether a time period in the Hague Convention was "subject to equitable tolling when the abducting parent conceal[ed] the child's location from the other parent"); *Chafin v. Chafin*, 133 S. Ct. 1017, 1021 (2013) (considering whether, after a child was returned to her country of habitual residence pursuant to an order issued under the requirements of the Hague Convention, an appeal of the order was moot); *Abbott*, 560 U.S. at 5 (examining "whether a parent has a 'righ[t] of custody' by reason of that parent's *ne exeat* right: the authority to consent before the other parent may take the child to another country").

77. *See* *BG Grp.*, 134 S. Ct. at 1208 (rejecting Solicitor General's argument that a local litigation provision may have been "a condition on the State's consent to enter into an arbitration agreement"); *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (dismissing the government's argument that an adverse holding would "undermine confidence in the United States as an international treaty partner").

*Hamdan*, *BG Group*, and *Bond*, at least, were mere litigating positions. In particular, some have viewed the executive branch's positions on the Geneva Conventions,<sup>78</sup> the U.K.-Argentina BIT,<sup>79</sup> and the Chemical Weapons Convention<sup>80</sup> as unprincipled and perhaps opportunistic. It is hardly clear though that that was true in those cases, and the Court gives little to hint that it was part of their reasoning.

Others have suggested that the deference standard had been softened in an earlier case, *El Al Israel Airlines v. Tsui Yuan Tseng*.<sup>81</sup> That decision cited the "great weight" standard, but further explained that "[r]espect is ordinarily due the reasonable views of the executive branch concerning the meaning of an international treaty."<sup>82</sup> To some observers, this standard sounded like a retreat to something similar to *Chevron* or even *Skidmore* deference.<sup>83</sup> Under this standard, only "reasonable views of the executive branch" need be considered, and those are due only "respect." In his previously mentioned study, Robert Chesney tried to examine whether *El Al* really was a turning point, specifically whether courts had been any less deferential afterwards than they had been before.<sup>84</sup> He found little difference, noting that the courts agreed with the executive branch in twenty-nine of thirty-four cases (or 85%) before *El Al* and twenty-three of twenty-eight (or 82%) afterwards.<sup>85</sup> Still, more time has passed since *El Al*, and perhaps its effects have only now fully sunk in. Perhaps the Court's view in *Hamdan*, *Bond*, *BG Group*, and *Permanent Mission of India* is that the executive branch's

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78. See, e.g., John Cerone, *Making Sense of the U.S. President's Intervention in Medellín*, 31 SUFFOLK TRANSNAT'L L. REV. 279, 295 (2008) (describing the executive's invocation of international law as "opportunistic").

79. See, e.g., Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards: BG Group v. Argentina*, 108 AM. J. INT'L L. 750, 762 (2014) (explaining that the U.S. Government sought to "draw a line that looked ad hoc and self-serving").

80. See, e.g., Julian Ku, *A Quick Reaction to Oral Argument in Bond v. U.S.: Missouri v. Holland is in Real Trouble*, OPINIO JURIS (Nov. 5, 2013, 2:14 PM), <http://opiniojuris.org/2013/11/05/quick-reaction-oral-argument-bond-v-u-s-missouri-v-holland-real-trouble/>.

81. 525 U.S. 155 (1999).

82. *Id.* at 168.

83. See, e.g., Joshua Weiss, *Defining Executive Deference in Treaty Interpretation Cases*, 79 GEO. WASH. L. REV. 1592, 1594-95 (2011).

84. Chesney, *supra* note 22, at 1756-58.

85. *Id.*

interpretation in each is simply unreasonable and unworthy of respect. No mention, however, is made of either *El Al* or its potential new standard.

These are just two possible doctrinal suggestions. The scholarly literature offers a full spectrum of possible treaty interpretation deference standards,<sup>86</sup> with advocates for total deference to executive branch views,<sup>87</sup> *Chevron*,<sup>88</sup> *Skidmore*,<sup>89</sup> sliding-scales of deference based on other available evidence of a treaty's meaning,<sup>90</sup> and almost no deference at all.<sup>91</sup> Scholars have suggested granting more deference on bilateral foreign policy issues and less on issues between private parties,<sup>92</sup> distinguishing cases based on whether the interpretation reflects a consistent internal policy or a one-time litigating position,<sup>93</sup> or that deference be denied the executive in cases determining the scope of the executive's own authority.<sup>94</sup> This Article could, with some finessing, try to reconcile the Roberts Court opinions with any number of these proposals.

But this discussion of potential deference standards misses the forest for the trees. The Roberts Court trend away from deference is stark, particularly in comparison to the trend towards greater deference that came before. One should, of course, be careful not to make too much of the numbers. This data on the Roberts Court is a very small sample and these cases may not be representative. For example, cases of executive overreach may have been more likely to

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86. *See id.* at 1759–71 (collecting and describing proposals); Weiss, *supra* note 83, at 1600–07 (same).

87. John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 864–82 (2001).

88. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L. J. 1170 (2007); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650 (2000).

89. Evan Criddle, Comment, *Chevron Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1928–34 (2003).

90. Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1942–43 (2005); Weiss, *supra* note 86, at 1607–12.

91. Alex Glashauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 27 (2005).

92. Van Alstine, *supra* note 90.

93. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 reporters' notes 2 (AM. LAW INST. 1987).

94. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1970 (2015).

reach the Supreme Court (perhaps the Court is more likely to grant certiorari in such cases), something the circuit courts' much higher rate of agreement with the executive might suggest.<sup>95</sup> But that was not the pattern in the past; Bederman found a 90% rate of agreement between the Rehnquist Court and the executive branch.<sup>96</sup> Perhaps the Roberts Court is uniquely on the lookout for such cases of overreach in deciding whether to grant certiorari. That said, a 55 to 60% rate of agreement still seems very low. Moreover, 55 to 60% probably overstates the amount of deference the Court is granting. In a number of the cases decided in favor of the executive, the result seems over-determined, with all of the other evidence of the treaty's proper meaning pointing in the same direction as that suggested by the executive branch.<sup>97</sup> It is hard to find a case in which the Court truly defers, adopting an interpretation despite some inclination in another direction. Moreover, we should expect the Court and the executive to agree on treaty interpretation much of the time. They are both looking at the same evidence, including evidence of what other treaty parties think the treaty means. We might expect that even in the absence of any knowledge of the executive branch's view of a treaty, the Court would adopt the same view as the executive at least half the time.<sup>98</sup>

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95. See *infra* Part IV.

96. See Bederman, *supra* note 29, at 975 n.108, 1015–16 n.422.

97. See, e.g., *Abbott v. Abbott*, 560 U.S. 1, 10–15 (2010) (laying out the Court's independent analysis of the treaty); *id.* at 16 (adding that “[t]his Court’s conclusion that *ne exeat* rights are rights of custody is further informed by the views of other contracting states”); *id.* at 20 (explaining that the Court’s view also “accords with [the treaty’s] objects and purposes”); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354 (2006) (first adopting an interpretation of the ICJ Statute, and then, finding the view of the executive branch to be in accord); *id.* at 347–50 (interpreting the Vienna Convention on Consular Relations directly, without reference to the executive branch’s view); *id.* at 356 (“Bustillo points to nothing in the drafting history of Article 36 or in the contemporary practice of other signatories that undermines this conclusion.”).

98. The counterargument would be that the executive has incentives to interpret treaties to accord with its policy goals rather than objective evidence of the treaty’s meaning. That is certainly true in some cases, and one might have intuitions that it would be the case in more. But the United States does not always appear as a party (rather than amicus), and in the absence of evidence of an ulterior motive, we might assume that the strongest, general interest of the United States is in adopting an interpretation that will carry the fewest repercussions with our treaty counterparties. Of course, a different way of putting all of this is that what is surprising is not that the Roberts Court so often disagrees with the executive, but that the

At 55 to 60%, it looks like the “great weight” standard, while still peaking over the water from time to time, is sinking. In contrast to the prior period, executive branch views now seem poor predictors of what the Court will actually decide. In fact, it begins to look as though the Court is granting the executive branch no deference at all in the interpretation of treaties.

Descriptively, we seem to be returning to the “evidence of intent” or persuasiveness model, in which the executive branch’s views are valued mostly for their ability to help unravel what treaty provisions actually mean. They are not given special authority above and beyond their persuasiveness. And normatively, this might be the right move to reign in executive overreaching at precisely a time when the number of policy issues covered by treaty obligations, e.g., local murder<sup>99</sup> and attempted murder,<sup>100</sup> seem to be expanding. But as evidenced in *BG Group*, the cost of this move is that it may ignore executive branch positions that are not built on the intent of the treaty drafters—in that case the drafters were the United Kingdom and Argentina—but instead on carefully considered foreign policy positions of the United States.<sup>101</sup>

### III. DOMESTICATING TREATY QUESTIONS

The Court’s control over treaty interpretation during the Roberts Court era has been reinforced by a second trend: domestication. Increasingly, the Court seems to be working to assimilate treaty interpretation questions into more traditional domestic-constitutional, statutory, or contract ones.

Some observers have worried that the Court may be turning in some treaty interpretation cases to domestic rather than international standards of interpretation. Such a trend could be dangerous, these observers worry, if the Court begins to interpret treaty obligations differently from other nations. The Court’s use of traditional U.S.

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executive’s interpretation has so often diverged from the objective evidence of the treaty’s meaning. Such a trend might very well explain the trend towards less deference.

99. See *Medellín v. Texas*, 552 U.S. 491 (2008).

100. See *Bond v. United States*, 134 S. Ct. 2077 (2014).

101. See *supra* note 59 and accompanying text. The Solicitor General had argued that the language of the U.K.-Argentina BIT was similar to language the United States had used in its own BIT and that the United States interpreted in specific ways. *BG Grp., PLC v. Argentina*, 134 S. Ct. 1189, 1209–10 (2014).

contract law principles to interpret the U.K.-Argentina BIT in *BG Group*<sup>102</sup> and its application of a presumption of federalism or of common English understanding to the language of the Chemical Weapons Convention in *Bond*<sup>103</sup> might seem particularly worrisome.

But this may not be the best interpretation of these decisions. In other treaty interpretation cases during this period, particularly ones concerning the Hague Convention, the Court actually seems to be embracing international standards of treaty interpretation like those in the Vienna Convention on the Law of Treaties.<sup>104</sup> The better reading of opinions like *BG Group* and *Bond*, I would suggest, is that the Court is increasingly separating interpretation of the treaty from interpretation of domestic obligations and, in particular, treaty interpretation from interpretation of the implementing legislation.<sup>105</sup> And cases that some might suggest should turn on interpretation of a treaty are instead turning on something else.

Thus in *Bond*, Chief Justice Roberts distinguishes between the Chemical Weapons Convention and the implementing legislation, the Chemical Weapons Convention Implementation Act, even though the language of the two is almost identical.<sup>106</sup> He then focuses on the latter, which, as an act of Congress, is subject to ordinary methods of statutory interpretation, including application of various presumptions. In this case, the Chief Justice applies a presumption that Congress intends to keep the normal balance of federal-state relations unless it clearly states otherwise,<sup>107</sup> finds

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102. See Roberts & Trahanas, *supra* note 79, at 755.

103. *Bond*, 134 S. Ct. at 2088, 2090 (noting that “it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute,” looking to what an “ordinary person would associate with instruments of chemical warfare,” and observing that “an educated user of English would not describe Bond’s crime as involving a ‘chemical weapon’”).

104. See Roger P. Alford, *Bond and the Vienna Rules*, 90 NOTRE DAME L. REV. 1561, 1566–70 (2015); see also Galbraith, *supra* note 7, at 1511–12 (noting the convergence between the Court’s approach and international rules, but suggesting that it is more “likely one rooted in common imperatives . . . than in direct causal ties”).

105. Although they are related and moving in parallel, this trend is distinct from the one away from deference. The Court sometimes uses one, sometimes the other, and sometimes both in the same decision. The Court seems to be experimenting with techniques of interpretative control, rather than adopting a single coherent methodology.

106. *Bond*, 134 S. Ct. at 2088.

107. *Id.* at 2089–90.

ambiguity in the term “chemical weapons,”<sup>108</sup> and thus determines the statute should not be understood to cover Carol Anne Bond’s “ordinary” attempted poisoning—a matter usually left to state law.<sup>109</sup> Although Chief Justice Roberts might be inclined to interpret the Chemical Weapons Convention similarly,<sup>110</sup> the logic is applicable only to a congressionally-enacted statute.

In *BG Group*, Justice Breyer uses “ordinary contract”<sup>111</sup> principles to determine whether the U.K.-Argentina BIT’s local litigation requirement is a question of “arbitrability” (subject to judicial review) or procedure (left to the arbitrators).<sup>112</sup> This might seem odd. Why should a treaty between two non-U.S. parties be interpreted according to U.S. contract law rather than international treaty law? Buried in the opinion is Justice Breyer’s answer. When parties appear before U.S. courts to have awards confirmed or vacated under international arbitration agreements, that process is governed by an American statute, the Federal Arbitration Act,<sup>113</sup> and under that Act, the federal court “should normally apply the presumptions supplied by American law.”<sup>114</sup> It is thus in that unique posture that the Court interprets the U.K.-Argentina BIT.

*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* also turns on questions of statutory, rather than treaty, law.<sup>115</sup> The Court in that case accepts the executive branch’s view that hoasca is covered by the Convention on Psychotropic Substances.<sup>116</sup> Following principles of U.S. law, however, the Court determines that U.S. obligations under that treaty are not, in and of themselves, sufficient justification for denying a religious exception under a U.S. statute, the Religious Freedom Restoration Act.<sup>117</sup> Additionally, in *Negusie v. Holder*, the Court avoids interpreting the Refugee Convention by holding that both the Board of Immigration Appeals

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108. *Id.* at 2090–91.

109. *Id.* at 2091–92.

110. *See supra* note 65 and accompanying text.

111. *BG Grp., PLC v. Argentina*, 134 S. Ct. 1198, 1206 (2014).

112. *Id.* at 1206–07.

113. *Id.* at 1205.

114. *Id.*

115. 546 U.S. 418, 438 (2006).

116. *Id.*

117. *Id.*

and Fifth Circuit incorrectly relied on a prior Supreme Court case.<sup>118</sup> The Court thus bases its decision on a domestic source, Supreme Court precedent, over which it can claim ultimate interpretative authority.

This trend of isolating the statutory or constitutional questions from treaty questions runs in parallel with a trend toward less deference to the executive on treaty interpretation. By shifting the question away from areas in which the executive might have special expertise or a special role towards areas within the Court's ordinary bailiwick, the Court essentially removes the executive from the equation. The executive's view of a treaty becomes irrelevant.

And *Medellín* encourages this development. Even if we don't read *Medellín* to establish a presumption against treaty self-execution,<sup>119</sup> *Medellín* does increase the uncertainty of whether any treaty provision will be found to be self-executing.<sup>120</sup> This uncertainty increases the importance of implementing legislation or other statutory bases for applying the treaty, which in turn, increases the interpretative focus on those sources rather than the treaty.

In the end, interpreting the Constitution or statutes, rather than treaties, allows the Court to consider questions specific to American law—like federalism or separation of powers—without: (1) doing damage to the treaty; (2) setting precedents about how the treaty should be interpreted by other states; and (3) asserting that the United States is not bound by its obligations. But, the drawback of this trend is that it drives a wedge between treaty commitment and compliance; even enacting the treaty's precise language into law is no guarantee that the treaty's obligations will be effective as U.S. law.<sup>121</sup>

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118. 555 U.S. at 522–23. The outliers here are again the Vienna Convention cases. Although those cases technically involve the International Child Abduction Remedies Act, 42 U.S.C. § 11601, rather than the treaty, the Court has acted as though they are interpreting the treaty directly. See Galbraith, *supra* note 7, at 1512.

119. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES (AM. LAW INST., Preliminary Draft No. 3, 2014).

120. John R. Crook, ed., *Contemporary Practice of the United States Relating to International Law*, 104 AM. J. INT'L L. 100 (2010) (“Seeking to address uncertainty regarding the self-executing character of some U.S. treaties following the U.S. Supreme Court's decision in *Medellín v. Texas*, the Senate Foreign Relations Committee is acting to document the Senate's intentions regarding new treaties.”).

121. See Galbraith, *supra* note 7, at 1523 (noting the problem with using different standards to interpret treaties, implementing legislation, and endorsing the opposite view: “[a]n incorporative statute should be interpreted in light of the underlying treaty”); Edward T.

## IV. WEIGHING “GREAT WEIGHT”

Given the current Roberts Court trends regarding treaties, what is left of the “great weight” standard? Is the Roberts Court’s approach an interesting exception or the foundation of a new rule? Should the *Restatement (Fourth)* amend or drop the “great weight” standard?

*A. Mixed Messages; Mixed Results*

The small sample of Roberts Court treaty cases and the relatively short period of time make it difficult to assess where things actually stand. Further complicating matters are the Court’s deliberately mixed messages: the Court continues to cite deference standards even as it brushes aside executive branch interpretations.<sup>122</sup> Is the Court signaling that the standard remains alive, particularly for lower federal courts—a sort of “listen to what we say, not what we do” lesson? Is it signaling a change in the meaning or interpretation of “great weight”? Does “great weight” weigh less than it once did?

And then there is the question of how lower federal courts have actually responded, particularly as the grand majority of treaty interpretations cases never reach the Supreme Court.<sup>123</sup>

Appendix 1 shows a circuit-by-circuit study of all appellate decisions interpreting a treaty in which the executive branch has expressed its view from 2005 through 2014.<sup>124</sup> These results do not

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Swaine, *Bond’s Breaches*, 90 NOTRE DAME L. REV. 1517, 1518 (2015) (expressing similar concerns). *But see* David H. Moore, *Treaties and the Presumption Against Preemption*, 2015 BYU L. REV. 1555, 1575–76 (2016) (suggesting such concerns may be overstated and avoidable).

122. *See supra* notes 73–74 and accompanying text.

123. Appendix 1, for example, shows thirty-four treaty interpretation cases from the Courts of Appeals during the Roberts Court era. This is a purposely conservative count. During that same period, the Supreme Court only heard ten to twelve such cases.

124. To assemble this dataset, research assistants searched the Westlaw database for federal court decisions going back to 1987, the date of publication for the last Restatement, using the search query: “(treaty or (international /s convention) or (international /s agreement)) /p interpret!” It is possible that a few cases may have been missed by the search, but it unlikely they would have made a difference to the sample. They then coded each case for (1) the treaty in question, (2) whether the executive branch expressed a view, (3) whether the court adopted that view, and (4) what standard of deference, if any, the court applied. A second research assistant and I each re-read the cases and checked the results. Not all decisions are crystal clear on what they are doing and some borderline cases had to be categorized. We tried to be conservative in including cases in this final set. For the purposes of this article, only

necessarily tell us how these courts are receiving the Supreme Court's signals or how much deference these courts are actually giving the executive branch. They are, at best, imperfect proxies. For one thing, it should take time for any effect of the Roberts Court opinions to be felt, and the samples get too small the closer we get to the present to tell us much. Beyond that though, the numbers do not do a very good job of measuring how much weight or "deference" is actually given.

Deference, of course, means something different from just coming out the same way. Deference implies instead that the executive interpretation is either taking the place of other interpretative evidence or overruling it. But these cases generally seem overdetermined. When the courts agree with the executive, they often cite to other evidence of the treaty's meaning, which supports the same view and includes the courts' own independent interpretation of the text.<sup>125</sup> This might suggest that deference is not doing much work. On the flipside, even where courts are truly deferring, they may want to put their decision on the most solid ground possible and may want to buttress that deference with other evidence, obscuring the real role the executive branch's view played in the courts' decision.

All that said, the data shows that the circuit courts are still adopting the executive's position the grand majority of the time. Appendix I shows thirty-four circuit court cases involving the interpretation of a treaty in which the executive expressed a view.<sup>126</sup>

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Roberts Court-era cases were included. The broader dataset though does not suggest different patterns.

125. See, e.g., *Yaman v. Yaman*, 730 F.3d 1, 13, 15 (1st Cir. 2013) (holding that the drafting history of the Hague Child Abduction Convention and its interpretation by foreign courts weighed in favor of not applying equitable tolling to a provision of that treaty); *Fulwood v. Fed. Rep. of Ger.*, 734 F.3d 72, 78 (1st Cir. 2013) (holding that plaintiff's interpretation of a bilateral treaty between Germany and the U.S. conflicted with the treaty's clear text); *De Los Santos Mora v. New York*, 524 F.3d 183, 188 (2d Cir. 2008) (rejecting plaintiff's interpretation of the Vienna Convention on Consular Relations due to the practices of "other States-parties to the convention" and the treaty's text); *Swarna v. Al-Awadi*, 622 F.3d 123, 135 (2d Cir. 2010) (holding that the government's view of residual immunity in the Vienna Convention on Consular Relations was, "supported by the Vienna Convention's drafting history").

126. This includes cases in which the executive branch's view is merely implied, for example, because it brought the prosecution or started the extradition process on the basis of a treaty interpretation challenged in the case. The study found many more cases of treaty

In only four of those did the court reject the view proffered by the executive branch.<sup>127</sup> The circuit courts have thus agreed with the executive 88% of the time, a number in line with trends of recent decades.<sup>128</sup> That said, it remains uncertain exactly what the Courts of Appeals are doing. The “great weight” standard” is mentioned in only twelve of the thirty-four cases (or 35% of the time).<sup>129</sup> In one of those, *World Holdings, LLC v. Federal Republic of Germany*,<sup>130</sup> the court rejected the executive branch’s view and in at least one other, *De Los Santos Mora v. New York*,<sup>131</sup> the court added its own caveats to that standard—in that case, a requirement that great weight was only due when there was a “settled view of the executive under successive national administrations.”<sup>132</sup> In eleven of the decisions, no standard of deference is mentioned at all.<sup>133</sup> If the Courts of Appeals are deferring, they are hardly publicizing that fact, suggesting they might be, at the very least, uncertain how much deference the executive really deserves.

#### *B. Toward a Restatement (Fourth)?*

So what does this mean for the *Restatement (Fourth)*? This raises complicated questions that go to the heart of the restatement process. Is the goal of the Restatement to simply record where

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interpretation where the executive branch expressed no view or where its view was not recorded in any way. It is possible that the executive branch did express a view in some of the latter cases and that those should be coded as cases in which the executive’s view was rejected, but it is unlikely there are many such cases as failure to deal with the executive branch’s view would likely have led to complaints and calls for rehearing the case. It is also possible that the executive branch expressed unrecorded views in cases in which the court agreed with it, and it’s unlikely the executive branch would have complained about its invisibility in those. All in all, it seems reasonable to work only with those cases in which the executive’s view is clearly recorded.

127. These cases have a “No” under the “Did court agree with Government?” column in Appendix 1.

128. See *supra* notes 29–33 and accompanying text.

129. These cases include the phrase “Great weight” under the “Deference Standard Applied” column in Appendix 1.

130. 613 F.3d 1310, 1317 n.11 (2010).

131. 524 F.3d 183 (2d Cir. 2008) (citing *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000)).

132. *Id.* at 188.

133. These cases include the phrase “Deference not mentioned” under the “Deference Standard Applied” column in Appendix 1.

things stand at publication or is it to make sense of current developments and channel them into the most positive possible directions?

If the goal is to simply map where law is, the next Restatement should at least record the potential move away from great weight standard, at least in the reporters' notes. Section 106(5) of the most recent draft of the *Restatement (Fourth)* rearticulates the old standard that "[c]ourts of the United States . . . will ordinarily give great weight to an interpretation by the executive branch."<sup>134</sup> The reporters' notes though do acknowledge that the court "at times has declined to follow the interpretation of the executive branch, sometimes without citing the 'great weight' standard."<sup>135</sup> This is a step in the right direction, but the eventual, final *Restatement (Fourth)* would do well to note that the recent cluster of cases actually raises doubt about the standard's continued vibrance. Beyond the question of deference, the next Restatement should probably also note the potential differences between implementing legislation and the treaty itself and choices available to courts to interpret one or the other.

But reading the two trends together suggests a path toward progressive development of the U.S. law on treaty interpretation. Together, these two trends suggest a broader domestication of the treaty negotiation process, not just a domestication of the question before the court, but a domestication of the deference due executive interpretations. In such an integrated treaty practice, treaty interpretation questions would be, as much as possible, assimilated into domestic interpretive methods. When possible, the court will interpret the statute or other domestic authority rather than the treaty. When not possible, the court will interpret the treaty itself, using techniques appropriate for an instrument negotiated between states, but granting the executive no more deference than it would in statutory interpretation. This would align practice to a large extent with the suggestion of Ganesh Sitaraman and Ingrid Wuerth that deference on foreign affairs issues be normalized and assimilated into

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134. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106(5) (AM. LAW INST., Preliminary Draft No. 4, 2015).

135. *Id.* § 106 reporters' note 8.

the broader methods of U.S. law.<sup>136</sup> In many cases, this practice might mean no deference to the executive branch. In most though, it might mean something like *Skidmore*, or persuasiveness deference, where the executive's view is valued for its expertise and as a gloss on other available evidence. In some, where the executive has a longstanding, well-worked out view of the treaty or provision, one potentially even at odds with what other nations think, it might be due something like *Chevron* deference. This would recognize the dual role played by the executive in treaty interpretation—on the one hand, as an administrator of our treaty obligations responsible for the everyday interpretation of what those treaties require, and on the other, as negotiator-in-chief, articulating the United States' views of the law to and with the rest of the world. In at least some cases, the executive branch treaty interpretations will themselves be acts of diplomacy and negotiation. Even then, though, as Sitaraman and Wuerth suggest, deference would be subject to a similar reasonableness standard,<sup>137</sup> and the executive should not be granted special deference in defining the scope of its own powers under a treaty.<sup>138</sup>

Whether or not such a “normalization” of treaty interpretation accurately or fully reflects the current state of the law, normalization might be the most normatively appealing way to harness the trends already in effect. Its main advantages are its coherence and relative clarity. One could make a strong argument that internationalization would be a more normatively appealing approach. Treaties should be read as international commitments, the executive's foreign policy concerns should be given primacy, implementing legislation should be read in accordance with international law, and the most important presumption should be *Charming Betsy*.<sup>139</sup> Such an approach might do the best job aligning the United States with its international commitments.<sup>140</sup> The debate between these two visions cannot be resolved here. To the extent though that the Court seems to already

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136. Sitaraman & Wuerth, *supra* note 94.

137. *Id.* at 1969–70.

138. *Id.* at 1970.

139. According to the *Charming Betsy* presumption, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

140. See Galbraith, *supra* note 7, at 1523; Swaine, *supra* note 121, at 1518; John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 680 (2010).

be moving in the direction of normalization or domestication, reifying that approach can at least clarify the baselines against which the president, Congress, and the courts are working. The president is on notice how to argue about treaty interpretation, Congress is on notice how implementing legislation will be read and how it might need to be amended, and the courts are on notice where to start their inquiries. Foreign policy implications and concerns can be assessed and managed with those baseline understandings in mind.

#### V. CONCLUSION

The Supreme Court's opinion of executive branch treaty interpretations seems to be in flux. The Roberts Court, at least, seems uncertain whether executive branch interpretations truly deserve to be given "great weight" when the Court is asked to interpret a treaty. But the doubt visible in the Supreme Court's, and to a much lesser extent, the circuit court's treatment of executive branch treaty interpretations has yet to make it into drafts of the *Restatement (Fourth) of the Foreign Relations Law of the United States*. Nor have the drafts of *Restatement (Fourth)* noted the Court's moves to domesticate treaty interpretations and to distinguish treaties from implementing legislation. Whether the reporters agree with these moves or not, they must acknowledge them. If they do not, there is risk the *Restatement (Fourth)* could be outdated before it's even finalized.

The Court is chipping away at the "great weight" standard. The reporters for the *Restatement (Fourth) of the Foreign Relations Law of the United States* must now decide whether to buttress it or to let it topple and begin to build a new one.

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*The Death of Deference*

**Appendix 1: U.S. Courts of Appeals Treaty Interpretation  
Deference, 2005–2014**

<i>Circuit</i>	<i>1st</i>	<i>1st</i>	<i>2nd</i>	<i>2nd</i>	<i>2nd</i>	<i>2nd</i>
<b>Case Name</b>	Yaman v. Yaman	Fulwood v. Fed. Republic of Germany	Guaylupo-Moya v. Gonzales	De Los Santos Mora v. New York	United States v. Cuevas	Pierre v. Gonzales
<b>Citation</b>	730 F.3d 1	734 F.3d 72	423 F.3d 121	524 F.3d 183	496 F.3d 256	502 F.3d 109
<b>Decision Date</b>	9/11/2013	10/30/2013	9/12/2005	4/24/2008	7/27/2007	9/11/2007
<b>Treaty in Question</b>	Hague Convention on the Civil Aspects of International Child Abduction	Certain Matters Arising from the Validation of German Dollar Bonds	International Covenant on Civil and Political Rights; Convention on the Rights of the Child	Vienna Convention on Consular Relations	Extradition Treaty, June 19, 1909, U.S.-Dom. Rep.; UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	Convention Against Torture
<b>Did court agree with Government?</b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>Deference Standard Applied</b>	Great weight	Great weight	Deference not mentioned	view of the Executive under successive	Deference not mentioned	Substantial deference; Respect is ordinarily due the Executives reasonable views

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<i>Circuit</i>	<i>2nd</i>	<i>2nd</i>	<i>2nd</i>	<i>2nd</i>	<i>2nd</i>	<i>2nd</i>	<i>2nd</i>
Case Name	United States v. Rommy	ACLU v. DOD	Sacirbey v. Guccione	Brzak v. UN	Swarna v. Al-Awadi	United States v. Babel	Lozano v. Alvarez
Citation	506 F.3d 108	543 F.3d 59	589 F.3d 52	597 F.3d 107	622 F.3d 123	662 F.3d 610	697 F.3d 41
Decision Date	11/5/2007	9/22/2008	12/9/2009	3/2/2010	9/25/2014	10/27/2012	10/1/2012
Treaty in Question	Treaty on Mutual Assistance in Criminal Matters (MLAT), June 12, 1981, U.S.-Neth.	Third and Fourth Geneva Conventions of 1949	Serbian Extradition Treaty	Convention on Privileges and Immunities of the United Nations	Vienna Convention on Consular Relations	United Nations Charter	Hague Convention on the Civil Aspects of International Child Abduction
Did court agree with Government?	Yes	No	No	Yes	Yes	Yes	Yes
Deference Standard Applied	Deference not mentioned	Respect is ordinarily due the Executive's reasonable views	Deference not mentioned	Great weight	Great weight	Deference not mentioned	Great weight

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<i>Circuit</i>	<i>2nd</i>	<i>3rd</i>	<i>3rd</i>	<i>3rd</i>	<i>4th</i>	<i>4th</i>	<i>5th</i>
Case Name	Doc v. Holder	Hoxha v. Levi	Fund for Animals v. Kemphorne	Rancl v. AG of the United States	Ordinola v. Hackman	Zhenli Ye Gon v. Holt	Sanchez v. R.G.L. ex rel Hernandez
Citation	763 F.3d 251	465 F.3d 554	538 F.3d 124	540 F.3d 165	478 F.3d 588	774 F.3d 207	761 F.3d 495
Decision Date	8/19/2014	10/3/2006	8/14/2008	8/22/2008	2/22/2007	12/16/2014	8/1/2014
Treaty in Question	United Nations Convention Against Transnational Organized Crime	US-Albanian Extradition Treaty; Convention Against Torture	Convention between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals	Convention Against Torture, Convention Against Transnational Organized Crime	Extradition Treaty between the United States and Peru	Extradition Treaty between the United States and the United Mexican States	Hague Convention on the Civil Aspects of International Child Abduction
Did court agree with Government?	Yes	Yes	Yes	No	Yes	Yes	Yes
Deference Standard Applied	Great weight	Defers because Political Question	Respect is ordinarily due; Great weight	Deference not mentioned	Great weight	Substantial deference	Great weight

<i>Circuit</i>	<i>7th</i>	<i>10th</i>	<i>11th</i>	<i>11th</i>	<i>11th</i>	<i>11th</i>	<i>11th</i>
Case Name	Jogi v. Voges	Niang v. Gonzales	Maharaj v. Secretary for Dept. of Corrections	United States v. Rodriguez	Baran v. Beaty	Gandara v. Bennett	World Holdings, LLC v. Federal Republic of Germany
Citation	480 F.3d 822	422 F. 3d 1187	432 F.3d 1292	162 F. App'x 853	526 F.3d 1340	528 F.3d 823	613 F.3d 1310
Decision Date	3/13/2011	9/8/2005	12/15/2005	1/4/2006	5/9/2008	5/22/2008	8/9/2010
Treaty in Question	Vienna Convention on Consular Relations	Convention Against Torture	Vienna Convention on Consular Relations	Vienna Convention on Consular Relations	Hague Convention on the Civil Aspects of International Child Abduction	Vienna Convention on Consular Relations	Agreement Between the United States of America and the Federal Republic of Germany Regarding Certain Matters Arising from the Validation of German Dollar Bonds (the "1953 Treaty")
Did court agree with Government?	Yes	Yes	Yes	Yes	Yes	Yes	No
Deference Standard Applied	Found support in Government's position	Substantial Deference	Some Deference	Entitled to Deference	Entitled to Deference	Great Weight	Great weight, but exception

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<i>Circuit</i>	<i>11th</i>	<i>D.C.</i>	<i>D.C.</i>	<i>D.C.</i>	<i>D.C.</i>	<i>Federal Circuit</i>
Case Name	United States v. Duboc	Haver v. C.I.R.	Bennett v. Islamic Republic of Iran	McKesson Corp. v. Islamic Republic of Iran	Earle v. District of Columbia	DeArchbold v. United States
Citation	694 F.3d 1223	444 F.3d 656	618 F.3d 19	672 F.3d 1066	707 F.3d 299	499 F.3d 1310
Decision Date	9/11/2012	4/12/2007	9/10/2010	2/28/2012	12/28/2012	9/15/2007
Treaty in Question	Mutual Legal Assistance Treaty (MLAT) between Thailand and the United	Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation	Vienna Convention on Diplomatic Relations	Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran	Vienna Convention on Consular Relations	Panama Canal Treaty
Did court agree with Government?	Yes	Yes	Yes	Yes	Yes	Yes
Deference Standard Applied	Deference not mentioned	Deference not mentioned	Deference not mentioned	Deference not mentioned	Great weight	Deference not mentioned

