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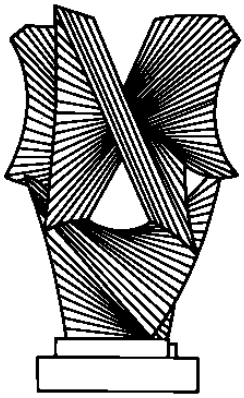

THE GLOBAL DETERMINANTS OF U.S. FOREIGN AFFAIRS LAW

Daniel Abebe

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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The Global Determinants of U.S. Foreign Affairs Law

Daniel Abebe[*]

A recurring debate in foreign affairs law focuses on the appropriate level of congressional and judicial deference to the President. In answering that question, most scholars focus on the Constitution, Supreme Court precedent, and historical practice for guidance, or evaluate the expertise and strategic incentives of Congress, the President, and the courts. For them, the inquiry exclusively centers on domestic, internal constraints on the President. But this analysis is incomplete. Determination of the appropriate level of deference has consequences for how the President can pursue American interests abroad. If the U.S. wants to be successful in achieving its foreign policy goals, it requires some consideration of the external world in which the President acts. This Article challenges the conventional wisdom by arguing that the appropriate level of constraint on the President requires an evaluation of both internal constraints from domestic sources and external constraints from international politics. It provides a framework to integrate both sets of constraints, develops a theory of external constraints, and describes the normative implications of this approach for foreign affairs law. The Article argues that the failure to account for both internal and external constraints and to recognize their relationship might yield a deference regime that either does not provide the President with sufficient freedom to pursue U.S. interests (over-constrained), or leaves the President free to act without sufficient congressional and judicial oversight (under-constrained). It further explains the conditions under which higher and lower levels of constraints are preferable and moves us closer to determining the appropriate level of deference to the President in foreign affairs.

[*] Assistant Professor of Law, University of Chicago Law School. Thanks to Anu Bradford, Omri Ben-Shahar, Emily Buss, Adam Cox, Richard Epstein, Lee Fennell, Tom Ginsburg, Todd Henderson, William Hubbard, Aziz Huq, Saul Levmore, Jonathan Masur, Richard McAdams, Randy Picker, Eric Posner, Gerry Rosenberg, Duncan Snidal, Lior Strahilevitz, Sherod Thaxton and the participants at the University of Chicago Law School Faculty Workshop for comments and suggestions. All mistakes are mine.

I. INTRODUCTION

Perhaps the most important question in foreign affairs law concerns the appropriate level of congressional and judicial deference to the President. In other words, how much, if at all, should Congress and the courts constrain the President? The two main approaches to the question are legalist and functionalist. The legalist approach turns to the Constitution, Supreme Court precedent, and historical practice for guidance, while the functionalist one hinges on an evaluation of institutional competencies and incentives. Despite these differences, both legalist and functionalist approaches focus on the role of Congress and the courts as constraints on the President. So, to determine the appropriate level of deference to the President, scholars evaluate only domestic, internal factors.

But is that sufficient? Determining the appropriate level of deference to the President may turn on more than domestic, internal constraints from the Constitution, congressional statutes and case law. For example, let's assume the U.S. decides to promote human rights, democracy, or free trade. Whatever the foreign policy goal, our ultimate aim is to structure our foreign affairs framework to make it easier for the President to achieve U.S. interests, while ensuring that the President is not completely unfettered in ways that raise costs for the U.S. We might begin our inquiry by looking to internal or domestic factors, but we would surely be unwise to end our analysis there. Most critically, we also need to know something about the external world in which the U.S., through the President, is trying to achieve American foreign policy goals in the teeth of countervailing forces. My aim here is to explore the complex consequences of this simple observation.

One way to understand the role of external factors in foreign affairs is to frame the relationship between Congress and the President in principal-agent terms. Imagine that Congress is the principal and the President is its agent in foreign affairs. Congress wants the President to use his expertise in foreign affairs to pursue its interests, while still constraining the President to ensure that he doesn't deviate from Congress's interests. Ideally, Congress wants to optimize the level of constraint to strike a balance: the President can use his specialized competency to achieve U.S. foreign affairs goals, while staying loyal to the interests of Congress.

Consider one example of the problem. If the U.S. is the world's only superpower, the President can more easily pursue U.S. interests, whatever they might be. Since no other country can match the U.S., the external constraints on the President are weak. The U.S. has substantial freedom of action and the President—the agent of Congress—will have a greater range of opportunities to deviate from the principal's wishes. However, if the U.S. is no longer a superpower and is operating in a world with multiple powerful countries like China, India, and Russia, the President will have greater difficulty pursuing U.S. interests. Why? In a world with other powerful countries, the U.S. will necessarily

have to compete with them in pursuing its foreign affairs goals, and the presence of such countries will constrain the U.S.'s ability to achieve them. These countries represent international or external constraints on the President or agent. With these external constraints, the President's range of opportunities to deviate from the principal's interests narrows. What thus becomes clear is that the constraints on the President exist on two levels, internal and external, and understanding the appropriate level of deference to the President requires a tool that integrates both those internal and external constraints into a single analytic framework.

This Article provides that framework and argues that we cannot determine the appropriate level of constraint on the President solely by resorting to the Constitution's text, theories of separation of powers, historical practice, or institutional competencies; rather, we need to know something about the U.S.'s role in international politics. The claim is that the level of internal constraints on the President should vary with the level of external constraints on the U.S. Internal constraints generally refer to the level of deference to or oversight of the President. External constraints, however, are linked with the presence of other powerful countries. For example, in a multi-polar world,[1] there are several other powerful countries competing with the U.S. to achieve their foreign affairs goals. Similarly, in a bipolar world,[2] there is one other powerful state challenging the U.S. for dominance. In each example, the presence of these competing states creates strong constraints on the U.S., making it more difficult for the President to pursue American interests.

But, if the U.S. is the single most powerful state or hegemon of a unipolar world,[3] the external constraints on the U.S. are weak because there are no other competing powerful states. The U.S. has greater freedom to pursue its interests. In other words, variation in the structure of the international politics—multi-polar, bipolar, or unipolar worlds—results in variation in the strength of external constraints on the U.S.

This framework produces a simple normative logic: as external constraints strengthen, internal constraints should weaken; as external constraints weaken, internal constraints should strengthen. When the external constraints on the U.S. are strong, the President has to pursue American interests in a difficult, competitive international environment. The President is likely to be disciplined from engaging in risky or sub-optimal foreign affairs activity by the external constraints, namely the presence of other

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[1] Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1946 (1997) ("U.S. predominance has been undercut by the rise in economic power of Europe and Asia, by accelerating international interdependence, and by the end of the Cold War.").

[2] KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 170 (1979) ("The United States is the obsessing danger for the Soviet Union, and the Soviet Union for the United States . . . .").

[3] Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2630 (1997) ("[After the end of the Cold War] [t]he Soviet Union did a remarkable about-face, first embracing international law, then disintegrating, leaving the United States as 'the world's indispensable nation.'"); *see also* Kenneth W. Abbot, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT'L L. & INT'L REL. 9, 13 (2005).

powerful countries and the realization of the costs they could impose on the U.S. In other words, the agent is less likely to pursue his interests and deviate from those of the principal. Moreover, the President's relative expertise in foreign affairs is more important in a more complex international environment. The agent needs a greater range of action to achieve the principal's goals. Therefore, Congress should lower the level of constraint on the President.

However, if the U.S. is a global superpower and unconstrained externally, strong internal constraints on the President are necessary. Since the U.S. is the world's superpower, the other countries are not powerful enough to constrain the U.S. In this example, the agent has more opportunities to pursue his own interests and deviate from those of the principal. Stronger internal constraints from the principal are now appropriate.

The failure to consider both internal and external constraints and recognize their relationship might result in a principal-agent relationship that either does not provide the President with sufficient freedom to pursue U.S. interests (over-constrained agent), or leaves the President free to act without sufficient judicial oversight (under-constrained agent). This framework explains the conditions under which higher and lower levels of constraints are more preferable and moves us closer to determining the appropriate level of deference to the President.

Perhaps critically, this approach is agnostic about the normative substance of U.S. foreign policy. It avoids the problem that often recurs in the foreign affairs literature, namely that scholars who like one President's policies support lower levels of constraint and, when they dislike a subsequent President's policies, prefer higher levels of constraint. The approach outlined here simply suggests that if we want the U.S. to be successful in the achievement of its national interests—whatever they are or should be—determining the appropriate level of deference requires some consideration of external constraints.

This approach also avoids the ubiquitous baseline problem for deference; since it is extremely hard to determine if the status quo is appropriate, too deferential, or too constraining, normative arguments about where the baseline should be are often driven by policy preferences. But my approach simply says that, wherever the baseline is or should be, external factors must be included in the analysis.

The importance of understanding the relationship between external constraints and the President's foreign affairs authority has grown dramatically in light of the changes in international politics. The rise of China,[4] the emergence of the developing

[4] *See* KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 249 (2004) (China is currently second in the world in purchasing power parity); *id.* at 248 (China has the world's largest foreign capital reserves); Olena Havrylch & Sandra Poncet, *Foreign Direct Investment in China: Reward or Remedy?*, 20 WORLD ECON. 1662, 1662 (2007) (China is a leading destination for foreign direct investment); *see also generally* Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 4 (2006).

world,[5] and the U.S.'s potential decline as a superpower suggest that the pursuit of U.S. interests will be increasingly difficult, making the resolution of deference questions critical for the U.S. to achieve its foreign policy goals. In other words, the need to try to optimize foreign affairs law for the challenges of the twenty-first century is clear. And some of the challenges have been apparent in the buildup to the second Iraq War;[6] the multiple rounds of unsuccessful World Trade Organization negotiations;[7] and the various failed attempts to reach an effective international agreement on climate change.[8] In a more complex international environment, the level of constraints on the President will have greater consequences—both positive and negative—for the pursuit of U.S. interests.

The Article proceeds as follows. Part II discusses internal constraints and their efficacy as tool to limit the President. Part III develops the idea of external constraints, and Part IV provides a metric for measuring them and considers potential alternatives. Part V links internal and external constraints into a framework to help determine the total level of constraint on the President and moves closer to establishing the appropriate level of judicial deference. Part VI examines the implications for foreign affairs law.

II. UNPACKING THE ROLE OF INTERNATIONAL POLITICS IN FOREIGN AFFAIRS

A. The Structure of the Current Debate

Domestic political outcomes are often the product of international causal variables. State interactions with international organizations, courts, and administrative agencies, under certain conditions, shape the internal strategies of domestic actors and influence policy formation. Scholars have noted the two-level structure of negotiations in international trade,[9] the use of international agreements to bind domestic constituencies,[10]

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[5] Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM BUS. L.J. 317, 318 (2006) ("In less than forty years, the BRIC economies collectively will be larger than the G6.").

[6] *See generally* Robert J. Pauly & Tom Lansford, STRATEGIC PREEMPTION: U.S. FOREIGN POLICY AND THE SECOND IRAQ WAR (2005); David S. Meyer & Catherine Corrigall-Brown, *Coalitions and Political Context: U.S. Movements Against War in Iraq*, 10 MOBILIZATION: AN INT'L Q. 327, 333 (2005); Felicity Barringer, *Threats and Responses: The U.N.*, N.Y. TIMES, Feb. 20, 2003, http://www.nytimes.com/2003/02/20/world/threats-responses-un-some-security-council-want-avoid-taking-sides-iraq.html (detailing the varied responses by U.N. members to a war against Iraq).

[7] Kishore Mahbubani, *Can Asia Re-legitimize Global Governance?*, 18 REV. INT'L POL. ECON. 131, 136 (2011) ("The Doha Round is not progressing because many Western countries no longer believe that they will benefit from the talks. There is now a real danger that the Doha Round may be the first round to fail.").

[8] Daniel Abebe & Jonathan S. Masur, *International Agreements, Internal Heterogeneity, and Climate Change: The "Two Chinas" Problem*, 50 VA. J. INT'L L. 325 (2010); Eric A. Posner & David Weisbach, CLIMATE CHANGE JUSTICE (2010); Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565 (2008); Richard B. Stewart & Jonathan B. Weiner, RECONSTRUCTING CLIMATE POLICY: BEYOND KYOTO (2007).

[9] Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 433, 439 (1998). *See generally* DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993); Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881 (1978); Peter Gourevitch, *International*

and the influence of international actors to explain domestic human rights outcomes.[11] The conventional wisdom is that the relationship between states and aggregations of states in international politics resembles a feedback loop: states influence international political outcomes, while international politics often influences domestic state outcomes.

The logic of the feedback loop is also useful for understanding the aspects of U.S. constitutional law that relate to international politics, namely foreign affairs law. Foreign affairs law allocates decision-making authority between the judicial, executive, and legislative branches of the federal government. The authority to commit the U.S. to war, sign treaties, and recognize international law, among other things, are all foreign affairs questions. For example, when the President recognizes one regime as the legitimate government of a foreign state—think Taiwan and China—he is exercising both his constitutional authority and determining U.S. foreign policy. Each has consequences for international politics. At the same time, those domestic decisions are likely to be influenced by the international political environment of the moment, or by assumptions about how that environment might evolve. Understanding foreign affairs outcomes requires some consideration of international political variables.

Despite this seemingly straightforward insight, the scholarship neither focuses on international political variables nor provides a framework to understand the relationship between international politics and foreign affairs outcomes. What scholars have considered is the role of a vaguely defined, under-theorized conception of international politics to understand inter-branch relations in foreign affairs and, by implication, to determine the appropriate level of judicial deference to the President.

For example, the imperial presidency thesis[12] suggests that the dominance of the President in domestic politics is a function of the international political demands on the U.S. and its development into a superpower in the mid-twentieth century. As the U.S. committed itself abroad, developed weapons of mass destruction, and increased its capacity to project power globally, the President assumed powers beyond the Constitution's allocation and historical practice, and the courts began to defer to the executive. The thesis arguably suggests that international politics may have a causal role in the growth of presidential power.

Others have identified the collapse of the Soviet Union and the emergence of the U.S. as a superpower in the early 1990s as the turning point for thinking about deference

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Trade, Domestic Coalitions, and Liberty: Comparative Responses to the Crisis of 1873-1896, 8 J. INTERDISC. HIST. 281 (1977).

[10] Judith L. Goldstein & Richard. H. Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 LAW & CONTEMP. PROBS. 257, 267 (2008) ("The United States . . . remains willing, to delegate to WTO dispute settlement the authority to enforce the WTO 'contract.'").

[11] We particularly see this in the area of human rights. *See* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 371 (1985) ("The UN Charter, having been ratified by the United States, is the supreme law of the land.").

[12] *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

in foreign affairs.[13] The proliferation of international organizations and tribunals,[14] the increasing supply and demand for international law,[15] and the declining utility of classical realist thinking,[16] lead to the conclusion that lower levels of deference to the President and a greater role for courts are preferable. The claim is not always explicit but it suggests that the growth in U.S. power and the rise of international governance require a change in the balance of decision-making authority between the President, Congress, and the courts. In other words, international politics, in a general sense, does and should affect domestic foreign affairs outcomes.

Another group of scholars suggest that the courts should defer to the President on institutional competency grounds[17] and should especially limit judicial review of presidential actions in times of emergencies or crises.[18] The President has substantial recursive and expertise advantages over Congress and the courts and, in times of emergencies or crises, those advantages are uniquely important to ensure U.S. national security. For this group, international politics, in the form of crises or emergencies, should affect domestic judicial behavior and result in higher levels of deference to the President.

Though each of these examples suggests that some conception of international politics has a causal role in explaining foreign affairs outcomes or should be considered in determining the level of deference to the President, none provides a clear, systematic framework for defining and incorporating international political factors into the analysis. Instead, scholars alternatively focus on the demands of U.S. foreign policy; trends in international governance; changes in the structure of the international system; the rise and fall of specific international relations theories; or the occasional emergency or crisis. The international political variables are ad hoc, difficult to interpret, and provide little guidance for congressional or judicial behavior over time. Though most scholars agree that international politics is relevant to explain domestic foreign affairs outcomes, the literature lacks a parsimonious framework to understand what those factors are and when and how those factors should be considered.

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[13] Peter J. Spiro, *Old Wars/New Wars*, 37 WM. & MARY L. REV. 723, 723 (1996) ("With the end of the Cold War, Congress has become increasingly assertive on the foreign policy stage.").

[14] Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 439-40 (2003) ("Not only are there more international courts than ever before, they now have a broader reach.").

[15] Rachel Brewster, *The Domestic Origins of International Agreements*, 43 VA. J. INT'L L. 501, 510 (2004) ("Domestic groups demand international agreements as a source of international and domestic law.").

[16] Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L. J. 87, 158 (2009) ("[T]he classic realist assumptions that support special deference do not reflect the world as it is today.").

[17] Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181 (2004) ("[A]s a matter of institutional competence, the federal judiciary suffers significant disadvantages in [the development and enforcement of customary international law as] compared to the Executive Branch.").

[18] ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007).

The lack of a framework is compounded by a narrow focus on the doctrine in answering deference questions. Despite evidence that international politics influences domestic legal outcomes, traditional approaches apply competing interpretive methods to determine the intent of the Framers, read implied powers from enumerated grants, and weigh functional concerns to determine the proper allocation of authority. But even if we assume that the Constitution's allocation of foreign affairs authority were appropriate for the U.S.'s needs in 1787, it is not clear why that allocation would be helpful or even appropriate for the U.S.'s needs today. The focus is inward, doctrinal, and static, rather than outward, political, and dynamic over time.

These two problems structure the debate regarding the appropriate level of constraint on the President. As presidential power expanded in the late nineteenth and twentieth centuries,[19] the leading view has been that Congress delegates broad authority to the President and the judiciary often defers to the President. In other words, the Congress delegates, the President acts, and the judiciary defers. The level of internal constraints on the President appears relatively low.

Those who view the executive as the more competent branch want courts to refrain from constraining the President.[20] Weak internal constraints on the President based on its functional advantages[21] and historical practice[22] are preferred. Those concerned about the potential of presidential abuse counter that courts should exercise more oversight of the President and employ stronger constraints.[23] They justify the constraint on the basis of the Constitution's initial allocation of the bulk of foreign affairs authority to Congress,[24] the benefits of judicial review,[25] concerns about a concentration

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[19] FAREED ZAKARIA, FROM WEALTH TO POWER: THE UNUSUAL ORIGINS OF AMERICA'S WORLD ROLE 154 (1998) ("Facing weaker structural constraints than those that had dissuaded his predecessors from pursuing an expansionist foreign policy, McKinley could respond easily to international systemic pressures, further closing the gap between America's power and its interests abroad.").

[20] *See* Eric A. Posner & Cass Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204-1207 (2007). For arguments that high levels of deference to the executive in times of crisis or emergencies are appropriate, *see generally* POSNER & VERMEULE, *supra* note 18; RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

[21] *See* Posner & Sunstein, *supra* note 20; POSNER & VERMEULE, *supra* note 18, at 17-18, 30-31 (comparing the competencies of the executive and judiciary and concluding that the executive deserves deference during times of emergency); *cf.* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 201 (Randall Bland et al. eds., 5th ed. 1984) (discussing the institutional advantages of the Executive Branch over Congress).

[22] For an example of the role of historical practice, see *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) ("Past practice does not, by itself, create power, but 'long continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . ."). HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 69 (1990) (noting disapprovingly that, "[a]s it has evolved, the National Security Constitution assigns to the president the predominant role in the process [of making and validating foreign-policy decisions] . . . .").

[23] *See* Derek Jinks & Neal K. Katyal, *Disregarding Foreign Relations Law*, 116 Yale L.J. 1230, 1230 (2007) ("We maintain that increased judicial deference to the executive in the foreign relations domain is inappropriate."); *see also* KOH, *supra* note 22, at 181-84.

[24] KOH, *supra* note 22, at 68 ("Perhaps most striking, the relative balance struck in the Constitution's

of power in the executive,[26] and a belief that the courts are better placed to make some foreign affairs decisions.[27] How do we reconcile these competing views of deference to the President and the optimal level of constraints?

B. Principal-Agent: Congress and the President

One way to gain traction on the constraint question is to frame the relationship between Congress and the President in principal-agent terms. Agency models are perhaps most associated with economic and political science theories of firm organization.[28] The principal might hire an agent to help increase efficiency or take advantage of the agent's specialized skills to achieve the principal's goals.[29] In a perfect world, the agent would faithfully follow the principal's instructions, eliminating concerns about agency costs. But in the real world, the principal realizes that the agent will have his own interests and those interests might diverge from those of the principal. Thus, the principal must develop some mechanisms to monitor the agent and provide him with incentives to stay loyal to the principal's interests.[30] And it must do so with the knowledge that it does not have full information about the agent's activities (information asymmetry) or possess the agent's expertise.

We can use this insight in the context of the relationship between Congress and the President. The conventional wisdom in foreign affairs is that the President is the leading actor in foreign affairs.[31] The President has assumed a leading role in formulating U.S. foreign policy[32] and is considered the chief spokesperson for the U.S. in foreign affairs. While the President's authority comes from enumerated grants in the

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text between the president's few and Congress's many enumerated foreign affairs powers hardly matches our present-day sense of their relative preeminence.").

[25] David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

[26] Jinks & Katyal, *supra* note 23, at 1262 ("We are also induced to reject Posner and Sunstein's proposal to depart from existing antideference law because it risks concentrating too much power in the executive.").

[27] Sloss, *supra* note 25, at 196 ("[A] President who wants to persuade the world that the United States takes its international obligations seriously could advance that goal by encouraging a more active role for the federal judiciary in the implementation of U.S. foreign policy."); *see also* Jinks & Katyal, *supra* note 23, at 1263 ("Presidents are nearsighted in a way that other government actors are not, particularly the judiciary, which tends to be farsighted.").

[28] *See, e.g.*, Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. 324 (1982).

[29] *See, e.g.*, BERNARD SALANIÉ, THE ECONOMICS OF CONTRACTS: A PRIMER (1997).

[30] *See, e.g.*, Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership and Job Design*, 7 J.L. ECON. & ORG. 24 (1991).

[31] Posner & Sunstein, *supra* note 20, at 1202 ("Courts sometimes say that the executive has the primary foreign relations power."); ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 174 (2010) ("Executives have always had the leading role in foreign affairs because of the fast-changing nature of international relations and the importance of secrecy and unity."); KOH, *supra* note 22, at 116. *See generally* SCHLESINGER, *supra* note 12.

[32] CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 176 (Aspen 2d ed. 2006) ("In practice, the Executive Branch exercises a virtual monopoly over formal communications with foreign nations and also plays a lead role in announcing U.S. foreign policy.").

Constitution,[33] judicial interpretation of those grants,[34] historical practice,[35] congressional acquiescence,[36] and perceived institutional competencies in foreign affairs,[37] much of the President's authority comes from Congress's broad statutory delegations of power. In a stylized way, the President pursues Congress's goals under constraints. Congress is therefore the principal and the President is the agent (more about courts later).

In thinking about this relationship in foreign affairs, imagine three simplified interactions between Congress and the President. First, Congress and the President's interests might align in foreign affairs. In other words, the principal and the agent have shared interests. For example, Congress and the President both want to protect U.S. national security and ensure the safety of American citizen. Since the interests of the principal and agent align on this issue, agency costs concerns diminish. Second, Congress might be indifferent about the President's activities. Congress might appropriate money for foreign aid but might not care if the President gives the money to Kenya or Uganda. In this instance, agency costs are still low because Congress doesn't have a strong preference about the identity of the final recipient of the foreign aid.

But third and most important, Congress and the President's interests will conflict. And when Congress and the President conflict, it is often over issues related to the President's war making authority. Since the President has a shorter time horizon and a desire to leave a legacy, the President likely has a greater propensity to take risks to achieve U.S. foreign policy goals. He doesn't fully internalize the costs of some of his foreign affairs decisions. Congress, on the other hand, has a longer time horizon and is often in the position of trying to constrain the President's foreign affairs war making ambitions. This conflict represents a significant subset of the broader array of conflicts between Congress and the President and certainly represent the most significant and potential most costly of all foreign affairs decisions – the decision to go to war, engage in nation-building or participate in lower level hostilities. It is under these conditions—conflict between Congress and the President over war making issues—that the framework best applies.

Of course, this is a simplification of the foreign affairs decision-making process. One might argue the people are the principal and Congress and the President are agents working on the people's behalf. Others might argue that the judiciary is an agent of joint principals, namely Congress and the President, through the advice and consent process.

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[33] *See* Daniel Abebe, *Great Power Politics and the Structure of Foreign Relations Law*, 10 CHI. J. INT'L L. 125 (2009).

[34] *U.S. v. Curtiss-Wright Export Corp*, 299 U.S. 304, 319 (1936) ("The President is the constitutional representative of the United States with regard to foreign nations.").

[35] Posner & Sunstein, *supra* note 20, at 1202 ("[T]he underlying justifications [for deference to the executive in foreign relations] are often less textual than functional, based on traditional practices and understandings.").

[36] *See* Jinks & Katyal, *supra* note 23, at 1252-53.

[37] Posner & Sunstein, *supra* note 20, at 1202 ("They say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively; the other branches cannot.")

But the goal is not to provide a principal-agent theory of American democracy; rather, the purpose is to simplify the relationship between Congress and the President to better understand the role of external constraints and develop a normative claim about the appropriate level of constraint on the President.

For my purposes, Congress delegates authority to the President, its agent, to act in foreign affairs and pursue U.S. interests. Congress looks to the President because it has more expertise in foreign affairs than Congress or the courts. This assumption rests on a story of comparative statics: the President's expertise reflects the executive's tremendous institutional advantages in foreign affairs—the departments of State, Defense, and Homeland Security, the Directorate of National Intelligence, and the National Security Council, among others—the relative dearth of comparable resources in Congress or the courts, and the President's practical first-mover status in foreign affairs. The President is neither the sole actor in foreign affairs nor perfect in its decision-making; the President is simply the leading actor with greater expertise and resources than the other branches. Congress delegates to the President, an agent with specific expertise in foreign affairs, and the President acts in international politics to achieve the principal's goals.

If Congress is the principal and the President is the agent, what is the role of the courts? For a perfectly accurate picture of inter-branch relations in foreign affairs, the model would require some specification of the relationship among the President, Congress, and the courts. For my purposes, the model assumes that the courts are faithful agents of Congress. That is, it assumes that courts will interpret statutes in a manner consistent with congressional wishes.

Of course, this assumption ignores the complexities of inter-branch relations. For example, the President and Congress nominate and confirm judges with full knowledge of their preferences and ideologies, making it unlikely that they will always be faithful to Congress. Moreover, the Supreme Court is a strategic actor with no enforcement capacity so it is likely to be sensitive to politics in striking down or upholding congressional statutes or executive action. But, as noted above, to make progress on the overarching constraint question and develop the normative claim, the model necessarily abstracts away from the descriptive reality.

Since the Constitution designates Congress and the President as the main actors in foreign affairs, the model employed here focuses on their principal-agent relationship. Congress is the principal that can broadly or narrowly delegate authority to the President; the President is the agent with specialized expertise tasked with implementing the principal's goals; and the courts are faithful agents to Congress.

C. Why Constrain the Executive?

Some might argue that the President should be free from all oversight. Since the President has the expertise to determine U.S. interests, it is unlikely that foreign affairs outcomes would be improved by oversight from branches ill-equipped to make foreign

affairs decisions. If oversight cannot improve outcomes, so the argument goes, the necessity for constraint diminishes. In this world, the President would be almost completely unfettered.

Of course, we know that the Constitution does not grant the President complete freedom to act in foreign affairs. The President works under some level of constraints. If we think of these constraints as steps along the spectrum away from complete freedom, it is easier to understand the limits on presidential action. These constraints come in multiple forms and exist on two levels, domestic and international, or, for my purposes, internal and external.

Congress might delegate general foreign affairs authority to the President with respect to international trade and security issues. It might specify certain goals—free trade or military alliances—for the President to achieve. Like any other principal, Congress is concerned with monitoring the President and reducing agency costs. Though the President might have greater expertise, in relative terms, to Congress and the courts, it does not suggest that the President is perfect; like any other actor, the President makes mistakes. We know that the executive, similar to other branches of government, is prone to certain kinds of errors.[38]

What kinds of errors or agency costs are likely in foreign affairs? At the highest level of generality, some errors might relate to foreign policy outcomes, others to process, and still others to policy implementation. Some errors by the President might be only moderately costly for the U.S., while others might have disastrous consequences. For example, when Congress delegates authority to the President, we might think that war,[39] military occupation,[40] nation-building,[41] and humanitarian interventions[42] are the foreign affairs decisions that might generate the most costs for the U.S. if the President errs in planning or executing them. The costs to the principal might be especially high with respect to this set of foreign policy outcomes. However, foreign affairs decisions about whether the U.S. should abide by a decision of the International Court of Justice ("ICJ"),[43] join the International Criminal Court ("ICC"),[44] or delegate decision-making authority to an international organization[45] are unlikely to generate the same error costs.

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[38] *See* POSNER & VERMEULE, *supra* note 31, at 27, 80-88 (observing the executive is prone to suffer from groupthink but also noting the costs of increasing the number of decisionmakers).

[39] An estimated 58,220 soldiers died in the Vietnam War. See ANNE LELAND, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 11 (2010).

[40] Anthony Gregory, *What Price War? Afghanistan, Iraq, and the Costs of Conflict*, THE INDEPENDENT INSTITUTE 9 (2011) (estimating cost of funding war operations in Iraq for fiscal years 2001 – 2011 to be $862.89 billion).

[41] *Id.* (estimating the costs of operations in Afghanistan at $465.82 billion for fiscal years 2001 – 2011).

[42] David Axe, *Somalia Redux: A More Hands-Off Approach*, CATO INSTITUTE 3 (2009) ("Washington is Somalia's biggest sponsor. Annual State Department aid to Somalia averages around $100 million. The United States also helps pay for U.N. operations in Somalia, which cost nearly $500 million annually.")

[43] Ingrid Wuerth, *Medellin: The New, New Formalism?* 13 LEWIS & CLARK L. REV. 1 (2009).

[44] Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

[45] *See generally* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-*

Given the potential for costly errors in foreign policy outcomes, Congress's need for some constraint to prevent the President from dragging the U.S. into war unilaterally, pursuing personal glory through conquest abroad, committing the U.S. to entangling alliances in treaties, or engaging in endless international commitments becomes clearer. Missteps can create serious consequences for the U.S. and, unsurprisingly, the Constitution specifically limits the President's capacity to act in these areas.[46]

These errors are external or international in nature because they are activities abroad that might create domestic costs for the U.S. But we can also imagine the President abusing congressionally delegated authority to expand his decision-making authority domestically, resulting in internal or domestic errors. Violations of civil liberties including limitations on freedom of speech, detention without trial, and warrantless surveillance, among other things, are domestic activities that create costs for the U.S. And, of course, the Constitution provides protections to limit the capacity of the national government and the President to engage in some of those activities.[47]

From the process perspective, we might expect that the executive branch, like any large, modern bureaucracy, might have internal decision-making structures that might be subject to error.[48] Congress might delegate some authority but flawed mechanisms within the executive branch to ensure information sharing and open deliberation, for example, might produce systematic errors in organizational decision-making.[49] Poorly designed incentive structures for key actors might distort the information that the President eventually utilizes to implement the goals of Congress. Finally, political pressures to

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Self-Execution, 55 STAN. L. REV. 1557 (2003); David M. Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697 (2003); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527 (2003).

[46] U.S. CONST. art. I, § 8, cl. 11 (giving Congress the power to declare war); U.S. CONST. art. I, § 8, cl. 12-13 (giving Congress the power to appropriate money for the military); U.S. CONST. art. I, § 8, cl. 14 (giving Congress power to "make Rules for the Government and Regulation of the land and naval Forces"); U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to make treaties with the approval of two-thirds of the Senate).

[47] U.S. CONST. amend. I; U.S. CONST. art. I, § 9, cl. 2; U.S. CONST. amend. IV.

[48] Gregg P. Macey, *Coasean Blind Spots: Charting the Incomplete Institutionalism*, 98 GEO. L.J. 863, 883-84 (2010) ("Institutions entail sunk costs, taken-for-granted cognitive frames, and privileged means of problem solving. Actors inside an organization are subject to pressures to conform to typical practices from their peers, regulators, professions, and other sources. Feedback from these sources constrains problem solving."). Courts often take into consideration the measures taken to avoid errors caused by the decision-making structures of administrative agencies. *See U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality and relative expertness.").

[49] Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 137 (1997) (noting that groups must simplify agendas to make decisions, which forces them to dismiss ambiguous information as unmanageable). Langevoort observes that "[w]hen a member brings up some information that suggests that the group's decisionmaking has failed to consider something troubling, a threatening form of stress is introduced into the environment. Without realizing it, each member is inclined to dismiss or ignore danger signals, leading to less informed decisionmaking that more closely resembles collective rationalization than prudent choice." *Id.* at 138.

generate certain types of information to justify preferred policy initiatives might deter accurate information gathering or discussion of alternative viewpoints.[50] Though it is hard to quantify specifically their effects, process errors in the President's foreign affairs decision-making generate costs for the U.S.

Congress can safely begin with the assumption that the President is not perfect and will commit errors in decision-making. If that is correct, the challenge for Congress becomes how to improve the President's decision-making and reduce errors, but in such a manner that the costs of improvement are not greater than the benefits of the President's expertise in foreign affairs. Improvements might include substantial judicial or congressional oversight[51] or greater transparency in internal decision-making;[52] another might be more radical, like a substantial shift of decision-making authority away from the President to Congress.[53] But we know that while there are costs from the agent's errors, there are also costs from restricting the agent's capacity to act. If we begin with the assumption that the President is most competent in foreign affairs, or at least has a resource advantage and institutional expertise, we would need some confidence that oversight would improve outcomes, namely that foreign affairs decision-making would be improved by additional review. If such review has no effect on the agent's compliance but constrains the agent from achieving the principal's goals, the costs of oversight outweigh the benefits.

D. Foreign Affairs Law as a Constraint

What are the tools available to constrain the President, reduce agency costs, and ensure compliance? Let's begin with internal constraints. ICs broadly defined consist of all the political and legal limitations that prevent the President from exercising complete freedom in foreign affairs. Perhaps the most obvious source of ICs is legal and emanates from the Constitution. The Constitution allocates decision-making authority in foreign affairs between the three branches of government. Congress, not the President, is assigned the bulk of the foreign affairs authority.[54] The Constitution grants Congress the majority of the foreign affairs powers in Article I, including the power to declare war;[55]

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[50] *Id.*

[51] Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35-36 (noting interest groups exert pressure on the political process in part by influencing the information that reaches legislators).

[52] *See* Jinks & Katyal, *supra* note 23, at 1279-80. *See generally* Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

[53] Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 260-63 (2009); KOH, *supra* note 22, at 161-66.

[54] *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 231 n. 5 (2001) (citing David Gray Adler, *Introduction* to THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 1, 3 (David Gray Adler & Larry N. George eds., 1996) (referring to the "Framers' studied decision to vest the bulk of foreign policy powers in Congress")).

[55] U.S. CONST. art I, § 8, cl. 11.

raise and support an army;[56] and define and punish offenses against the law of nations.[57] By comparison, the President has a narrower grant of independent authority in Article II—the Commander-in-Chief Clause[58] and the Take Care Clause[59]—and shares concurrent authority with Congress regarding the making of treaties and appointment of ambassadors.[60] Though the Constitution is incomplete in assigning all the foreign affairs powers necessary for a state to function, it sets the basic framework and informs contemporary debates about the appropriate allocation.

When Congress constrains the President, it does so by drafting more narrow delegations of power to the President and increasing monitoring of presidential action. Congress has, at times, attempted to rein in the President through the use of its appropriations authority,[61] the exercise of investigative and subpoena powers,[62] and by passing foreign affairs legislation.[63] The War Powers Resolution, for example, attempts to limit the President's capacity to commit the U.S. to war without prior congressional authorization and requires that the President provide regular disclosures to Congress.[64] Although there are other tools, these are examples of how Congress attempts to monitor the President's activities. Congress has both delegated the President substantial decision-making authority and demonstrated the willingness and capacity to constrain the President under certain conditions.

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[56] *Id.*, art I, § 8, cl. 12.

[57] *Id.*, art I, § 8, cl. 10.

[58] *Id.*, art II, § 2, cl. 1.

[59] *Id.*, art II, § 3.

[60] *Id.*, art II, § 2, cl. 2.

[61] In one of Congress's first appropriations for use of a militia force, the authorization included an explicit limitation that it would only be in force until the end of the next session. *See* Act of Sept. 29, 1789, ch. 25, 1 Stat. 95 § 6, 1 Stat. 95-96. During the Vietnam War, Congress responded to Nixon's expansion of the military campaign in Cambodia with a provision denying further funds to introduce ground combat troops in Cambodia. Special Foreign Assistance Act of 1971, Pub. L. 91-652, § 7(a), 84 Stat. 1942, 1943. Congress also passed a variety of restrictive laws and amendments during the Iran-Contra controversy to limit the President's ability to intervene. *See, e.g.*, Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983) (limiting funding for the Contras from any source to $24 million).

[62] *See* The 1992-1993 Staff of the Legislative Reference Bureau, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 SYRACUSE J. LEGIS. & POL'Y. 1, 22-24 (1995) (detailing the Senate Select Committee's investigation of Watergate); Louis Fisher, *Congressional Investigations: Subpoenas and Contempt Power*, Report for Congress (April 2, 2003) (surveying past uses of subpoenas and contempt orders and concluding they are effective ways to gain access to executive branch documents).

[63] War Crimes Act of 1996, 18 U.S.C. § 2441 (1996); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 737 (2008) ("The argument for the virtually irrebutable presumption of supremacy of congressional war powers draws force from states such as the one the Court recently articulated in Hamdan that the President 'may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.'"). For examples of the Court upholding Congress's ability to control the type and terms of war see *Little v. Barreme*, 6 U.S. 170 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

[64] War Powers Resolution, 50 U.S.C. §§1541-48 (1973).

Courts also play a role in shaping the ICs on the President. When courts decide to constrain the President, their tool is foreign affairs law. As faithful agents of Congress, courts can interpret congressional delegations and constitutional requirements narrowly to limit the President's ability to act independently or unilaterally. Article III of the Constitution provides the federal courts with jurisdiction over cases arising out of treaties or affecting ambassadors, federal statutes touching upon foreign relations law concerns, and diversity disputes.[65] Over time, the courts have interpreted the Constitution to determine each branch's authority and developed jurisprudence to answer foreign affairs questions that the Constitution does not address. Courts have relied on numerous justifications to determine the level of congressional oversight of the President that the Constitution requires.[66] The courts' jurisprudence in foreign affairs, to the extent that it narrows breadth of presidential decision-making, is an example of an IC.[67]

We might think of these limitations on the President as formal or legal constraints. They are formal in the sense that they emanate from the Constitution. For example, the Constitution provides that treaty ratification requires the advice and consent of a two-thirds majority of the Senate[68] and the designation of ambassadors requires senatorial consent.[69] Similarly, the Constitution assigns the judiciary with the responsibility to interpret the law, including treaties, and provides the Supreme Court with exclusive jurisdiction over certain cases touching on foreign affairs.[70] These formal grants empower Congress as the principal and serve as constitutional limits on the President's capacity to act independently. The limitations are also legal as they reflect judicial precedent and congressional legislation in foreign affairs. The Constitution, congressional legislation, and the courts' foreign affairs jurisprudence limit the President's authority.

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[65] *Id.*, art III, § 2.

[66] *See Dames & Moore*, 453 U.S. at 686 ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'") (citing *U.S. v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-604 (1952) (Frankfurter, J., concurring) (stating the president's foreign relations authority is derived from historical practice combined with Congressional acquiescence); *Curtiss-Wright*, 299 U.S. at 316-18 (noting the federal foreign affairs power of the national government is derived from the laws of nations and national sovereignty); *Ex Parte Merryman*, 17 F. Cas. 144, 148-50 (C.C.D. Md. 1861) (discussing the enumerated grants of authority in the Constitution).

[67] *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944); *Brown v. United States*, 12 U.S. 110, 129 (1814) (finding that the Executive could not confiscate enemy property located within the United States because Congress had not authorized it to do so); *Little*, 6 U.S. at 170 ("A commander of a ship of war of the *United States*, in obeying his instructions from the *United States*, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution.").

[68] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

[69] *Id.* ("[A]nd by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . .").

[70] U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls, to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party . . . ."); U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, . . . the supreme Court shall have original jurisdiction.").

But the President operates under political constraints as well. As a preliminary matter, it is important to note that the distinction between legal and political constraints is often blurred. Congressional hearings, for example, may very well be part of the legitimate exercise of the subpoena power while at the same time a political event designed to embarrass the President, shape public opinion, and create political costs for the pursuit of certain policies. Similarly, the Supreme Court might hold that the President's actions are unconstitutional when he acts alone but leave open the possibility that the same action, when acting with congressional approval, may be constitutional.[71]

Despite the obvious overlap between legal and political constraints, it is possible to distinguish them. The legal constraints derive from the Constitution, the courts, and congressional legislation. Political constraints, however, come more directly from the political process, namely presidential elections, congressional elections for the President's party, and public opinion.

Each of those political constraints can limit the President. Perhaps most obvious, presidents generally want to be re-elected and are loathe to antagonize the electorate with a significant foreign policy blunder. An unpopular and costly war or the failure to negotiate a valuable trade treaty might dampen the President's chances of re-election, forcing the President to consider carefully his foreign policy. Similarly, the President might be pressured from members of his own party to refrain from any foreign affairs adventurism that might hurt their re-election prospects. For example, the party might pressure and eventually force the President to focus on domestic issues rather than engaging in a risky humanitarian intervention, even if the President believes that the intervention would be beneficial for the U.S. Finally, the President may be constrained by public opinion on foreign affairs questions. Since the election cycle does not always correspond with current events—and the public does not always focus on foreign policy when it votes—public opinion could constrain the President as he considers the U.S.'s foreign policy options.

Congress and the courts have tools to constrain the President and ensure that he acts consistently with congressional preferences. The question is how to calibrate those constraints in a manner that maximizes compliance with the principal's interests but allows the agent to use his expertise to achieve the principal's goals. We know that the principal's goals concern the achievement of U.S. interests, whatever they are, in international politics. But the complicating factor is how the external environment, the world of international politics, influences the appropriate level of constraint the principal exercises over the agent.

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[71] *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Kennedy, J., concurring) ("This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority."); *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 516-17 (2004) (refusing to consider whether explicit congressional authorization is required because Congress had already provided authorization for the detention at issue).

III. A THEORY OF EXTERNAL CONSTRAINTS

A. International Politics and the President

When Congress delegates foreign affairs authority to the President or implicitly permits him to develop policy, Congress empowers the President to pursue U.S. interests in international politics. Perhaps the President's most important responsibility is maintaining national security. He might negotiate a military alliance, threaten a hostile state, or send troops to war to preserve U.S. security. He might appeal to the United Nations ("UN"),[72] build coalitions of like-minded allies[73] or refer to international law to achieve the U.S.'s goals.[74] For non-security–related goals, Congress also delegates authority to the President. Subject to congressional oversight, the President represents the U.S. in trade negotiations through the WTO,[75] engages in climate change negotiations through the UN,[76] supports humanitarian relief efforts,[77] and provides foreign aid (from funds appropriated by Congress). In almost every area of foreign policy, the President is the U.S.'s agent in international politics and is tasked by Congress with achieving the U.S.'s national interests.

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[72] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 186 ("[T]he United Nations Security Council gave America and her allies the authorization it needed to 'use all necessary means' to eject Saddam Hussein's forces from Kuwait."); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 233 (2004) ("[T]he 1993 attacks [on Iraq] had the informal approval of the Security Council . . . .").

[73] Hamada Zahawi, Comment, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom,"* 95 CAL. L. REV. 2295, 2296 (2007) ("On March 19, 2003 President George W. Bush proclaimed, 'My fellow citizens, at this hour, American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger.' With those words the United States and its 'Coalition of the Willing' launched Operation Iraqi Freedom."); *see also* ROBERT J. PAULY & TOM LANSFORD, STRATEGIC PREEMPTION: U.S. FOREIGN POLICY AND THE SECOND IRAQ WAR 1 (2005) ("The first anti-Saddam military coalition or 'Grand Coalition' reflected the unparalleled military and diplomatic strength of the United at the dawn of the post-Cold War period.").

[74] Some have argued that the 2003 Iraq War was a result of U.S. enforcement of international law. *See* Murphy, *supra* note 72, at 239 ("[T]he heart of the asserted U.S. legal justification [for the second Iraq War] was enforcement of measures previously ordered by the Security Council, not the rejection by the U.S. of the normative constraints of international law or the authority of the Security Council.").

[75] Okezie Chukwumerije, *Obama's Trade Policy: Trends, Prospects, and Portends*, 16 U.C. DAVIS J. INT'L L. & POL'Y 39, 49 (2009) ("[T]he [Obama] administration has reaffirmed its commitment to the World Trade Organization (WTO) and to 'a rules-based trading system that advances the well being of the citizens of the United States and our trading partners.'").

[76] Jessica L. Powers, Comment, *Reduce, Reuse, Resort to Litigation: Global Warming Lawsuits and What They Mean for Texas*, 40 TEX. TECH L. REV. 123, 141 (2007) ("In 2002, the Bush Administration reaffirmed its dedication to the United Nations Framework Convention on Climate Change (UNFCC) and its goal to stabilize GHG concentrations at levels that will not adversely affect the climate system.").

[77] Joseph W. Younker, Note, *The "U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best-Practices for U.S.-Based Charities": Sawing a Leg Off the Stool of Democracy*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 865, 873 (2004) ("President Bush himself has recognized the strategic value in fighting international poverty by stating that the international community must 'fight against poverty because hope is an answer to terror.'").

We also know the U.S. is not all-powerful and unfettered when it acts abroad. ECs impose costs for the U.S. in achieving its foreign policy goals and limit what the President can do abroad. Most important, once Congress has delegated authority to the President, ECs limit on his foreign affairs decision-making and the resultant foreign policy. For illustrative purposes, we can imagine two simplified versions of foreign policy implementation.

In the first version, Congress delegates foreign affairs authority to the President, and he and his advisors develop a list of all the foreign policy goals the U.S. would like to achieve. Let's assume that one of the goals is preventing genocide through humanitarian intervention. After setting this goal, evidence of an apparent genocide in Sudan comes to the President's attention. In an ideal world with an all powerful U.S., the President would send U.S. troops to intervene and protect the targets of the genocide, consistent with his foreign policy of humanitarian intervention. But in the real world with ECs, the President might consider that China has strong political and economic interests in Sudan and the current regime;[78] he might consider the effects in the Arab world from an intervention into a predominantly Muslim country; and he might have to consider the interests of European allies or other countries that might rely on Sudanese oil. After considering these ECs, the President might decide to modify his foreign policy goal, even if that goal happened to be good for the U.S. In this example, the ECs have constrained the U.S. and the President's ability to act, forcing the U.S. to come up with a second best solution, like sanctions or political pressure, to try to achieve the stated goal of stopping genocide.

In the second version, the President and his advisors develop a series of foreign policy goals in light of the ECs from international politics. Using the example above, the President and his advisors might consider the interests of the Chinese, the Arab states, and European allies *before they formulate* the U.S.'s foreign policy goals. Given these ECs, the U.S. might still set a goal of preventing genocide as a key part of foreign policy, but it might decide that sanctions, not humanitarian intervention, are the only feasible way to achieve the goal. The U.S., through the President, has built the ECs into its foreign policy development. What becomes clear here is that whichever simplified model of foreign policy development you assume, the ECs either cause the U.S. to modify its first-order foreign policy goals or internalize the ECs as it develops foreign policy. In both examples, Congress might carefully delegate authority to constrain the President but will discover that ECs already limit the President's ability to achieve U.S. foreign policy goals.

In some ways the discussion here is too simple. Courts, legislatures, and scholars all recognize that the U.S. operates in international politics under some level of ECs. It is obvious that the U.S., acting through the President, cannot do whatever it wants. However powerful the U.S. is or might have been, it does not have complete freedom of

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[78] *See* Andrew Higgins, *Oil Interests Push China Into Sudanese Mire*, WASH. POST, Dec. 24, 2011, at A01 (detailing China's interests in Sudan).

action in foreign affairs. The gap in the literature is the failure to appreciate that a systematic understanding of the ECs might shed light on the appropriate level of ICs on the President.

B. Which External Constraints?

How can we determine which EC corresponds to a specific foreign policy initiative? And if we can figure that out, how can we measure the strength of ECs on the President? While the analysis in the Sudan example above is simplified, it might be helpful at getting traction on these questions. We might imagine that there are a number of potential ECs that were excluded from the example. The United Nations Security Council ("UNSC") might want to take the issue of genocide and humanitarian intervention under consideration;[79] the International Criminal Court might want to bring genocide charges against the President of Sudan;[80] some states might prefer negotiations in lieu of sanctions;[81] non-governmental organizations like Human Rights Watch or Amnesty International might endorse direct intervention and regime change;[82] the African Union might want an internal, African solution;[83] and the list goes on and on. The number of potentially relevant ECs is enormous.

It is difficult to weigh all the possible ECs on the President. Is the view of the UNSC a stronger constraint than the preferences of our European allies or the Arab states? How sensitive should the U.S. be to the interests of the African Union? Moreover, the relevant EC will likely change from issue to issue, and might even be linked to other ECs; for example, antagonizing China over Sudan might lead to Chinese intransigence

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[79] *See* REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL 3-6 (January 25, 2005) ("[T]he Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and the humanitarian law amounting to crimes under international law."). The U.N. Security Council imposed various sanctions on Sudan including an arms embargo, travel bans, and assets freeze. *See* THE UNITED NATIONS, SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1591 (2005) CONCERNING THE SUDAN, http://www.un.org/sc/committees/1591/.

[80] Roza Pati, *The ICC and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option?*, 15 U.C. DAVIS J. INT'L L. & POL'Y 265, 265 (2009) ("On July 14, 2008, Luis Moreno-Ocampo, the Prosecutor for the International Criminal Court (ICC) . . . applied to the Court's Pre-Trial Chamber III for the issuance of an arrest warrant against the President of the Sudan.").

[81] For a recent example, see Rick Gladstone, *Backers of Iran Sanctions Make an Appeal to China*, N.Y. TIMES, Feb. 14, 2012, at A9 ("While China has said it does not want to see Iran become a nuclear weapons power, it has also been highly critical of the American-led campaign to isolate Iran and has urged a resumption of international talks on Iran's uranium enrichment, which Iran contends is a purely peaceful endeavor.").

[82] *Human Rights Crises: NGO Responses to Military Interventions*, THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY 22 (2002), www.ichrp.org/files/reports/42/115_report.pdf (last visited Sept. 8, 2011) ("Human Rights Watch has spoken out in favour of military intervention by international forces in Bosnia, northern Iraq, Rwanda, and Somalia.").

[83] *See* Press Release, African Union Directorate of Information and Communication, No 066/2011 Partners Engage in Dialogue with AU on Shared Value – Democracy and Governance (June 9, 2011) (calling for "African solutions to African problems").

with respect to WTO and climate change negotiations.[84] These difficulties are exacerbated by the dynamic nature of international politics: regimes change, exogenous shocks trigger rapid modifications in policy, and states vary in power over time. The Arab Spring is an instructive example. In light of these factors, weighing the relevant strengths of ECs combined with the potential for issue-linkages makes calculating the ECs on the President exceedingly complicated.

Given these complications, measuring the ECs on the President might appear futile. There are too many variables, both observable and unobservable, that influence the relative strength of ECs on the President at any given time. First, the sheer number of potential variables from international politics might make any meaningful measurement impossible. At any given time, the President lacks the resources to analyze all of the potentially relevant data that might inform his decision-making and, even if he could, it is unlikely that much of the data would be readily available anyway. Second, given the heterogeneity of states and interests, it would be exceedingly difficult to determine ex ante which variables matter for which issue, and even harder to know what the consequences of one foreign affairs decision might be on the achievement of another. Third, as administrations change and interests evolve, it is difficult to measure the intention of other states or their likely responses to U.S. actions. It is clear that the President operates with some constraints in international politics, but determining the strength of ECs on the President is difficult.

But despite these measurement problems, when the President is exercising delegated authority he still has to make some determination about the strength of ECs when he attempts to achieve U.S. foreign policy goals; the President cannot sit idly by simply because international politics is too complicated or messy. The President cannot throw up his hands and proceed to act in international politics without considering the ECs or the costs that opposing states and international organizations could impose on the U.S. However difficult it may be, the President must calibrate U.S. foreign policy in light of the ECs in international politics; the importance of the particular foreign policy goal; the interests of other states, international organizations, and allies; and the strength of the U.S. Though the final determination might be crude and imprecise, the President must use some metric or tool to analyze the ECs and determine which are most relevant in light of the U.S.'s foreign policy goals.

One way to do this is to develop a hierarchy of ECs on an issue-by-issue basis. For example, if the President is trying to push for increased trade liberalization through the WTO, he might find that the U.S. is constrained by the interests of the EU and China. They might support trade liberalization as well but on terms that the U.S. finds objectionable. Given the size of their respective economies, this state and supranational entity likely present the strongest ECs on the President. Of course, there are other

[84] *See* Ernst B. Hass, *Why Collaborate?: Issue-Linkage and International Regimes*, 32 WORLD POL. 357, 370-75 (1980) (discussing issue-linkages and when they arise).

important states—India, Brazil, Korea, Japan, and Canada—that might object to the U.S.'s agenda and could create additional ECs. But these states might be lower in the hierarchy of ECs on the U.S. because their capacity to limit the U.S. is weaker. The point here is that the President might view the EU and China as posing the biggest obstacles to achieving U.S. interests and thus focus on mollifying their concerns because they represent the strongest and most salient ECs on the U.S.

A similar logic might apply to negotiations to address greenhouse gas emissions and climate change.[85] The U.S. might want a cap on global greenhouse gas emissions based on aggregate emissions,[86] where China is the leading emitter,[87] rather than per-capita emissions, where the U.S. is among the worst emitters.[88] For the same reasons, China, India, and the developing world might be opposed to caps on aggregate emissions because they are still developing their economies;[89] their per-capita emissions are smaller. Given the issue, a different set of ECs might be relevant and the U.S. will have to calibrate its policy goals in light of them.

Another option is to create a hierarchy of ECs in broader issue areas like security or human rights. For security related issues, perhaps the U.S. is most concerned with China and some states in the Middle East. They might pose strong ECs on our policy goals in East Asia and the Middle East respectively. For example, as China grows in economic and military strength,[90] our views about aiding Taiwan from a potential Chinese invasion might evolve. This provides a strong EC on the U.S.

Similarly, the U.S. has to deal with ECs in the Middle East. In a perfect world, the U.S. might want to see democracies and respect for the rule of law throughout the region. In the world we live in, the U.S. might have the same normative goals but is constrained by the fact that democracy and elections could possibly produce anti-US regimes. This concern might explain the Obama Administration's initial hesitancy in supporting the so-

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[85] *See* Abebe & Masur, *supra* note 8, at 379 ("As a matter of pure economic self-interest, China has little reason to support a global climate agreement.").

[86] *See* Posner & Sunstein, *supra* note 8, at 1575, 1608 (explaining the approach of an aggregate cap on emissions to reduce global emissions and noting the burden per-capita emissions regulations place on the United States vis-à-vis China).

[87] *See* Abebe & Masur, *supra* note 8, at 327 ("A near consensus has emerged that the world as a whole would benefit from an international agreement to control greenhouse gas emissions, and that such an agreement would be worthless without the participation of China, now the world's leading emitter of carbon dioxide.").

[88] Emissions of CO2 from energy-related sources only. *See* Posner & Sunstein, *supra* note 8, at 1605; *see also CO2 Emissions from Fuel Combustion Highlights*, INT'L ENERGY AGENCY 24 (2010 Edition), http://www.iea.org/publications/free_new_Desc.asp?PUBS_ID=2143 (last visited Sept. 8, 2011) ("[T]he United States will remain the largest [annual emitter of energy-related CO2 in cumulative and per capita terms] for many years to come.").

[89] *See* Abebe & Masur, *supra* note 8, at 327 ("China's rapidly growing economy has much to lose from emissions limitations . . . .").

[90] OFFICE OF THE SECRETARY OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENT INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 1 (2010) (concluding that China's economic growth and development has enabled China to "embark on a comprehensive transformation of its military").

called "Arab Spring,"[91] especially when the protests challenged allies in Egypt, Saudi Arabia, and Bahrain.[92] Whatever one thinks about the merits of U.S. foreign policy, the U.S. has to navigate the ECs of the region.

This discussion leads to a few conclusions about the role of ECs on the U.S. and, by extension, on the President. First, ECs on the U.S. exist. The President does not have complete freedom of action in pursuing U.S. interests and must internalize the costs of the ECs as he formulates policy. At times, this will force the U.S. to pursue polices that deviate from its first-order preferences. Second, ECs are hard to calculate. The pool of potential ECs is large, the relevant ECs for a specific foreign policy initiative are hard to determine, and the strength of ECs are likely to vary over time. Third, when the U.S. acts in international politics, the President still has to internalize the costs of ECs when he develops and executes foreign policy. Though the process is inexact and more of an art than a science, the President cannot ignore the ECs from international politics. Finally, the only way to make progress on understanding the total level of constraint on the President requires some consideration of the combined effect of ICs and ECs. This requires a clear parsimonious framework to aggregate, analyze, and measure the level of ECs in international politics.

IV. AN EVALUATIVE METRIC FOR EXTERNAL CONSTRAINTS

The normative claim in this Article is that the strength of ICs on the President should vary inversely with the strength of ECs on the U.S. Understanding the strength of ECs and the total level of constraint on the President will assist in getting closer to optimizing the level of ICs on the President. But we need a framework that sufficiently captures the strength of ECs in a parsimonious way, while not including so many variables to make it infeasible or unworkable for the President, courts, or legislatures to apply.

A. Polarity as a Proxy for External Constraints

The answer to this problem is to develop a framework that uses the concept of polarity in the international system as a proxy for ECs. Polarity is a concept generally associated with realism[93] but is also present in the broader international relations

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[91] Anthony H. Cordesman et al., *The Arab Uprisings and U.S. Policy: What is the American National Interest?*, 18 MIDDLE E. POL'Y 1, 1 (2011) ("The Obama administration has been accused of having a hesitant and reactive policy [in regard to the Arab Spring].").

[92] *Id.*

[93] ARTHUR A. STEIN, WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS 11 (1991) ("Indeed, the realists' very distinction between international systems as unipolar, bipolar, and multipolar is drawn from economics."); Alexander E. Wendt, *The Agent-Structure Problem in International Relations Theory*, 41 INT'L ORG. 335, 338 (1987) ("And in fact, although in very different ways, neorealism and world-system theory use…polarity…to explain state behavior.").

literature.[94] Polarity is a term that captures the distribution of power in international politics and the nature of the international system at a specific moment. Polarity is perhaps best explained by illustration. Let's assume that the there are five powerful countries in the world, the U.S. and States A, B, C, and D. They are all comparable in power and significantly more powerful than any other state in the world. Assume further that power is measured in material terms by measuring economic and military strength. Since these states have more power than the others and a disproportionate capacity to influence international politics, they are the "great powers"[95] of the world. One way to describe a world with five great powers is to consider each one as a "pole" in the international system; in other words, one can evaluate the world by counting poles or using the concept of polarity.

A world with five great powers is a multipolar world because there are five or multiple "poles" of power. Similarly, a world with two great powers, for example the U.S. and the Soviet Union during the Cold War, is a bipolar world. Finally, a world with only one great power is a unipolar world. The concept of polarity is simply a methodological tool to help organize information to understand state behavior and analyze international politics.

Before explaining the usefulness of polarity as a proxy for ECs, it is necessary to explain why polarity is a useful tool generally to analyze international politics. First, determining the polarity of the international system—multipolar, bipolar, or unipolar worlds—is not overly complicated. One can roughly analyze the economic and military strength of states to determine which are most powerful. The size of a state's military, the distribution of conventional and nuclear weapons, the level of technological advancement, the frequency of military engagement, and the level of military spending, among other factors, are generally ascertainable. Similarly, the size of a state's economy, the per-capita gross domestic product ("GDP") or purchasing power parity ("PPP"), the level of economic development, the current account deficit, and other factors are also empirically verifiable.[96] While these factors do not produce a perfect measure of material power—no one claims that they do—polarity allows a rough distinction between stronger and weaker states, and helps specify the outliers—the great powers. One can count the

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[94] *See, e.g.*, Edward D. Mansfield, *Concentration, Polarity, and the Distribution of Power*, 37 INT'L STUD. Q. 105 (1993) (arguing that polarity is more useful when combined with an analysis of concentration of power); Joanne Gowa, *Bipolarity, Multipolarity, and Free Trade*, 83 AM. POL. SCI. REV. 4, 1245-1256 (1989).

[95] Daniel Abebe, *Not Just Doctrine*, 29 MICH. J. INT'L L. 1, 20 (2007) ("Few States have the material power . . . . Those states that do—the great powers—are rational, self-interested actors that also enforce international law according to their self-interests.").

[96] In 2011, China's GDP was estimated at $11.3 trillion, with a GDP per-capita of $8,400. The same year, China's budget deficit was 1.8 percent of GDP. In comparison, the United State's GDP was estimated at $15.04 trillion, with a GDP per-capita of $48,100. The United States' budget deficit was 8.9 percent of GDP. THE CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2011), https://www.cia.gov/library/publications/the-world-factbook/.

number of great powers and determine the polarity in international politics. Polarity provides a general metric to separate out the states that are likely to be most influential.

Second, considering polarity permits a focus on the primary actors in international politics, namely the great powers. In a perfect world, the President might have the resource capacity to consider the interests of every state in the world before pursuing a policy. He might also determine the likely behavior of international organizations, non-state actors, and NGOs, and gauge world public opinion. Realistically, however, the President does not have the capacity to engage in such an analysis. The world is too dynamic and complex. Polarity provides a helpful tool to cut through the minutiae of international politics and extract the salient information. The states with the resources, interests, and capacity to shape international politics are generally those with the most material power. For better or worse, those great powers set the terms of debate in international politics.

For example, we can easily name the most influential states in international politics in a number of issue areas, including those that are prominent in international organizations; that contribute most to the development of international law; that are most willing to use military force; that push for trade liberalization; and that promote human rights. Both the casual observer of international politics and the scholar of international relations would probably suggest that the U.S., China, Great Britain, India, and Russia are among the dominant states in the world and the EU (led by Germany and France) is a powerful supranational entity. While not all of these states are great powers, they represent 61 percent of world GDP,[97] 66 percent of world military spending,[98] and 50 percent of world population.[99] They are not equally powerful—and their influence varies depending on the issue area—but each state or supranational entity listed has the capacity to shape the direction of international politics. This capacity also suggests that any of these states can, if necessary, impose costs on a competing state and constrain that state's foreign policy decision-making.

Third, the emphasis on great powers makes the determination of state interests and the measure of ECs more manageable. The President can focus on determining the interests of the great powers and evaluating the ECs that they can impose, rather than painstakingly examining the potential ECs from every state, international organization, and other actor in international politics. In other words, viewing the world through polarity provides a tool to bring order to complexity and generate useful information for the President.

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[97] *Id.* Figure calculated based on 2011 data for the U.S., China, India, Russia, and the EU compared to global GDP.

[98] Calculated using data from the Stockholm International Peace Research Institute for 2010 based on the U.S., China, Great Britain, India, Russia, Germany, and France. *See* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, BACKGROUND PAPER ON SIPRI MILITARY EXPENDITURE DATA (April 11, 2011).

[99] Calculated based on July 2012 global population estimates for the U.S., China, India, Russia, and the EU compared to global population. THE CENTRAL INTELLIGENCE AGENCY, *supra* note 96.

Finally and perhaps most important, polarity can be viewed as a useful proxy for ECs. Let me explain by illustration. Drawing from the earlier example, assume a world with five great powers—States A, B, C, and D, and the U.S. We might assume that each of these great powers has a set of fixed interests, shared interests, and unique interests.

Consider fixed interests. We can assume that each great power—and every state in the world—would like to maintain perfect territorial, political, and economic sovereignty and ensure its national security. Regardless of regime type, each state would want to act within its territory with complete freedom. Such freedom would allow a state to adopt polices that are welfare enhancing, even if such policies produce externalities for other states. This might not be possible in a globalized world, where there are mutual benefits from comprising sovereignty on some issues, but it would be a first-order preference.

The great powers might have overlapping or shared interests. For example, the U.S. and State A might want to promote respect for international human rights, democracy, and rule of law; States B and C might endorse a strong policy of non-intervention in the internal affairs of states; and the U.S. and State D might want free trade and a global climate change agreement. Alternatively, some of the great powers might work together to limit the ability of other great powers to achieve their goals. Since States B and C believe in a policy of non-intervention, they might work together to stunt the U.S. and State A's policy goal of using international law to regulate human rights practices. Or States A, B, and C might work together to oppose the U.S. and State D in their pursuit of a climate change agreement. In a globalized world, we can imagine different coalitions of great powers pursuing their shared interests across different issue areas.

The great powers will also have unique interests, or interests idiosyncratic to each of them. In a heterogeneous world, we would not expect that all states, or even just the great powers, to possess exactly the same interests. Some interests might be unique and benign. For example, State A might want to have the lowest per-capita carbon emissions in the world or provide foreign aid to all needy states. Some interests may be unique and threatening: State B might want to control the world's natural gas resources or recover historically salient "lost" land that is now located within the territory of another sovereign state. The exact source of national interests in the creation of foreign policy is difficult to specify, but we can imagine that they are influenced by heterogeneity among great powers in their domestic politics, geostrategic locations, threat environments, histories, cultures, nationalist sentiments, normative aspirations, and resource endowments, among other factors.

In light of this heterogeneity, it is uncontroversial to suggest that the circumstances of the U.S.'s founding might influence the normative aspirations that the U.S. pursues in international politics—the promotion of democracy, rule of law, and

human rights.[100] Similarly, China's strong support of the principle of non-intervention in the affairs of sovereign states is reflective of the history, domestic politics, and interests of the Chinese Communist Party ("CCP").[101] The European experience in World War I and II might make the EU more reticent about the use of force than other states. India's historical tension with China and Pakistan might shape its national interests,[102] just as the complicated threat environment that Israel faces also influences its foreign policy goals. The takeaway is that heterogeneity in state formation, politics, and culture results in states possessing unique and potentially conflicting interests.

B. Measuring External Constraints

If this is correct, it is easy to conclude that we live in a heterogeneous world in which states have some set of fixed, shared, and unique interests, and the pursuit of those interests will produce varying levels of conflict in international politics. This logic also applies to great powers. We should expect to see friction as great powers interact in pursuit of their national interests. The U.S. may not be able to realize a particular goal because it recognizes that States A and B are opposed. The U.S. might engage in a rough cost/benefit analysis and conclude that the benefits of a goal are outweighed by the costs that States A and B could impose on the U.S. Or it might conclude that the achievement of certain goals necessitates collaboration and difficult compromises with other great powers that the U.S. would not otherwise make. For example, the U.S. might have wanted to protect Georgia's fledgling democracy in its 2008 conflict with Russia,[103] but it realized that the economic, political, and military costs of attempting to do so outweighed the benefit from guaranteeing Georgia's territorial integrity or political sovereignty.[104] The inevitable frictions of international politics create costs for every state and great power as they pursue their foreign policy goals. Those costs are ECs on a state's foreign affairs decision-making; for the U.S., they serve as ECs on the chief actor in foreign affairs, the President.

If the frictions of great power politics create ECs, how can we measure them? We can start by determining the polarity of the international system. For purposes of this

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[100] *See* ANATOL LIEVEN, AMERICA RIGHT OR WRONG 48-51 (2004); WALTER RUSSELL MEAD, SPECIAL PROVIDENCE: AMERICAN FOREIGN POLICY AND HOW IT CHANGED THE WORLD (2002).

[101] *See* PETER HAYS GRIES, CHINA'S NEW NATIONALISM: PRIDE, POLITICS, AND DIPLOMACY 86-115, 136 (2005) (discussing how China's history shapes its diplomatic relations).

[102] Surjit Mansingh, *India-China Relations in the Post-Cold War Era*, 34 ASIAN SURV. 285, 287-88 (1994); Šumit Ganguly, CONFLICT UNENDING: INDIA-PAKISTAN TENSIONS SINCE 1947 (2002).

[103] Michael Abramowitz & Colum Lynch, *Bush, Cheney Increasingly Critical of Russia Over Aggression in Georgia*, WASH. POST, Aug. 11, 2008, at A12.

[104] Anatol Lieven, *The West Shares the Blame for Georgia*, FIN. TIMES, Aug. 13, 2008, at 11 ("Yet all this time, Washington had not the slightest intention of defending Georgia, and knew it. Quite apart from its lack of desire to go to war with Russia over a place almost no American had heard of until last week, with the wars in Iraq and Afghanistan it does not have an army to send to the Caucasus.").

discussion—and the framework outlined later—I will focus on multipolar and unipolar environments.

Let's start with a multipolar world. By definition, in a multipolar world there are more than two great powers of comparable economic and military strength. Just like the earlier example, let's assume that there are five great powers including the U.S. It is not necessary that each great power be exactly equal in material power; rather they should be comparable to one another and each should be significantly more powerful than the other states in the world.

In this multipolar world, the five great powers will each have a set of fixed, shared, and unique interests. Since we know that the great powers will not always have identical interests, at times we would expect friction between them to the extent their interests are directly conflicting or non-complementary. Of course, if the great powers do not have conflicting interests or are able to reach mutually beneficial arrangements in pursuit of their foreign policy goals, we would expect the level of friction to be lower. However, in a heterogeneous world, we would not expect a frictionless international political environment—even allies will have occasion to disagree on some fundamental foreign policy goal. Recent examples might include France and other allies' strong opposition to the second Iraq War[105] or the U.S.'s unwillingness to commit fully to the North Atlantic Treaty Organization's ("NATO") mission in Libya.[106] The frictions, or the costs of certain policy initiatives, are ECs.

A multipolar world represents the condition under which we would expect frictions to be highest and, therefore, the ECs to be strongest. With five great powers, for the U.S. there are at least twenty-four possible two-state dyads per area of interest, and even if we define such areas at the highest level of abstraction (focusing only on trade, security, and the environment) the number jumps to seventy-two. If we define the national interest in each issue area more narrowly—a more realistic approach—the possible permutations increase dramatically. And as they increase, the possibility of friction and disagreement also increases and the level of ECs on any given great power grows stronger.

In a perfect world, the U.S. would want complete freedom from ECs. The U.S. would pursue its preferred foreign policy goals irrespective of the interests of other states. Those goals, while beneficial for the U.S., might impose costs on other countries. The U.S. might want Taiwan to declare its independence regardless of China's preferences and, in a perfect world, the U.S. would be free to pursue that goal. But in a multipolar world, the U.S. has to navigate the complexities of international politics with four other

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[105] Meyer & Corrigall-Brown, *supra* note 6, at 333. ("[M]ajor NATO alliance members, such as Canada, Belgium, Norway, France, and Germany, vigorously opposed the [second Gulf War].").

[106] Jennifer Steinhauer, *House Spurns Obama on Libya, But Does Not Cut Funds*, N.Y. TIMES, June 24, 2011, http://www.nytimes.com/2011/06/25/us/politics/25powers.html ("The United States has handed the leadership of the air war in Libya over to NATO, and has largely played a supporting role, offering things like aerial refueling, surveillance, and signal jamming.").

great powers that are also pursuing their respective national interests. Since a multipolar world includes multiple great powers and creates more opportunities for friction, it is the structure that generates the strongest ECs on the U.S. What is helpful here is that the logic of polarity also permits an understanding of the strength of ECs as the structure of the international system changes.

By now, it is clear that the unipolar world, presents the weakest ECs on the unipolar state or the hegemon of international politics. Let's assume that the U.S. is the hegemon. It far surpasses the material power of the other dominant states in the world. This might be an accurate description of U.S. power in the late twentieth century after the collapse of the Soviet Union.[107] During that period, Great Britain, Russia, or Germany might have been considered among the most powerful and influential states in international politics but both were significantly weaker than the U.S. in material terms. As the hegemon of a unipolar world, the U.S. would enjoy the greatest flexibility in setting and achieving its foreign policy goals. While it would not have complete freedom of action—the U.S. is not all-powerful—it would be free from the frictions and ECs that multipolar and bipolar worlds create. The U.S. still would have to consider the interests of other states, but the costs they could impose would be lower because of the U.S.'s strength and the other states' relative weakness.

C. Alternatives to Polarity

In this way, polarity serves as an effective proxy for the ECs in international politics. Polarity provides a straightforward metric (material power) to determine which states are most influential in the world; parses through the huge number of potentially relevant data to select the most salient to measure ECs; captures variation in ECs over time; and offers a parsimonious framework to understand the operation of ECs. If material power has a causal effect on how states behave—and no one denies that it has some effect—then it will be helpful in measuring ECs.

But despite these strengths, polarity also has several weaknesses. The key, however, is to understand the strengths and weaknesses of polarity as a proxy for ECs in light of the alternative options. In other words, if one agrees that understanding the strength of ECs is vital to calibrate the level of ICs on the President—the central claim of the Article—it is important to evaluate polarity as a metric relative to the next best option, not in absolute terms. When Congress delegates to the President, it is critical that the President understand the level of ECs on the U.S. before formulating and pursuing U.S. foreign policy goals. Even if polarity is not a first-order solution, it is the best metric available for a critical issue of international politics.

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[107] Charles Krauthammer, *The Unipolar Moment*, 70 FOREIGN AFF. 23, 23 (1990/1991) ("The immediate post-Cold War world is not multipolar. It is unipolar. The center of world power is the unchallenged superpower, the United States . . . ."); *cf.* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 247-48 (2002) (describing the bipolar world before the collapse of the Soviet Union).

1. Material Power v. Soft Power

What are the problems with polarity? And what are the potential alternatives? One clear weakness of polarity is also one of its strengths, namely, its parsimony. The use of polarity requires a measurement of the material power of the dominant states in the world, a designation of those states as great powers or poles in international politics, and a determination of the structure of the international system as roughly multipolar or unipolar. From there, the level of ECs correlates with the structure of international politics and the frictions that each structure produces for the great powers. This simplicity makes polarity a useful concept to apply but leaves out numerous factors that might also be relevant in measuring the level of ECs in the world.

First, polarity assumes that material power is the proper metric to determine the capacity of a state to influence international politics. But we know that material power is not the only way to influence other great powers. One example is the concept of soft power,[108] the idea that the power of a state's regime type, way of life, culture, intentions, and values might also be an effective tool to influence other states in international politics.[109] Applied to the U.S., it describes the U.S.'s capacity to influence other states by its democratic values, rule of law, civil liberties, and benign intentions, and by its popular culture, measured through its books, movies, and language.[110] If the instruments of soft power have a causal effect on state behavior, it suggests that polarity's focus on material power is misplaced or at least incomplete.

But soft power presents a greater set of problems than those associated with material power. Second, the definition of soft power is unclear. Using the U.S. as an example, proponents of soft power generally focus on the best attributes of American culture—rule of law, civil liberties, and democracy—as the instruments of power that influence other states.[111] But it is not clear why soft power, as an analytical matter, should not include the less attractive features of American culture like a high incarceration rate, gun violence, income and racial inequality, and other factors. To the extent that the U.S. represents some combination of all of these features, it is not clear that we only project the positive image and that the positive image is the only one that other states receive. Though the example here focuses on the U.S., the underlying logic would apply to the soft power efforts of China, the EU, or India, among others.

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[108] JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS (2004).

[109] Joseph S. Nye, Jr., *Soft Power and American Foreign Policy*, 119 POL. SCI. Q. 255, 256 (2004) ("Soft power is the ability to get what you want through attraction rather than coercion or payments.").

[110] *See id.*

[111] *See, e.g.*, Donald J. Kochan, *The Soft Power and Persuasion of Translations in the War on Terror: Words and Wisdom in the Transformation of Legal* System, 110 W. VA. L. REV. 545, 547-48 (2008) (arguing that American intervention must include the export of ideas and others would benefit from readable translations of our foundational texts).

Third, soft power as concept is plagued by the problem of acoustic dissonance. The image that a state believes it projects is not necessarily what others receive, and a state might send multiple contradictory messages at the same time. For example, the U.S.'s soft power efforts to project an image of benign intentions and respect for Islam are likely completely sublimated by our use of material power, namely by the U.S.'s occupation of Iraq, support of dictatorships in the Arab world,[112] and treatment of Muslim detainees at Guantanamo Bay[113] and Abu Ghraib.[114] The U.S.'s benign soft power message might be contradicted or completely crowded out by its exercise of material power.

Polarity's emphasis on material power is not a perfect measure, but relative to soft power it is generalizable, clearly defined, and empirically verifiable. The problems related to definitional clarity and acoustic dissonance suggests that the concept of soft power is too underdeveloped to determine which states are most influential in international politics. Soft power may very well supplement a focus on material features as measures of power, but it is not an effective replacement of it.

2. The Role of Regime Type

Another problem is that polarity does not capture differences in regime type. Regime type classifies the type of governance system in a state, generally focusing on distinctions between democratic and non-democratic regimes. Polarity emphasizes material power and the structure of the international system and ignores regime type. Why is this problematic? If regime type has a causal effect on state behavior, then it might serve as a better proxy for ECs. For example, democratic peace theory[115] suggests that regime type is correlated with a propensity to go to war. Democracies are less likely

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[112] Abebe, *supra* note 95, at 43 ("[T]he United States has allied itself with dictatorships that share the United States' strategic interests . . . but reject democracy and engage in human rights violations . . . . [T]he United States courted the Musharraf dictatorship in Pakistan . . . . The United States supports autocratic regimes in Algeria, Saudi Arabia, Jordan . . . .").

[113] Zain Pasha, *Torturing America: Securing the American Interest*, 3 CORNELL INT'L AFF. REV. 1, 27 (2010) ("U.S. use of torture undermines U.S. soft power leadership because it diminishes international opinion about the U.S. To be sure, a January 2007 World Public Opinion Poll of 26,000 people across 25 countries revealed that 67 percent of respondents disapproved of the way in which the U.S. treated Guantanamo Bay detainees and 49 percent of respondents (the largest plurality) felt the U.S. had an overall negative impact on the world.").

[114] Benjamin E. Goldsmith & Yusaku Horiuchi, *Spinning the Globe? U.S. Public Diplomacy and Foreign Public Opinion*, 71 J. POL. 863, 866 (2009) ("The situation [with U.S. foreign policy] turned to a noncredible one in 2004. There is room to debate when the turning point was, but we argue that the first significant event came in April 2004, when foreign publics were exposed to disturbing photos and stories of prisoner abuse by U.S. soldiers at the Abu Ghraib Prison in Iraq.").

[115] For a discussion on different aspects of democratic peace theory, see, for example, Michael W. Doyle, *Kant, Liberal Agencies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983); Bruce Russett et al., *The Democratic Peace*, 19 INT'L SEC. 164 (1995); John M. Owen, *How Liberalism Produces Democratic Peace*, 19 INT'L SEC. 87 (1994). *But see* Christopher Layne, *Kant or Cannot: The Myth of the Democratic Peace*, 19 INT'L SEC. 5 (1994); Sebastian Rosato, *The Flawed Logic of Democratic Peace Theory*, 97 AM. POL. SCI. REV. 585 (2003).

to go to war with other democracies than they are with autocratic regimes.[116] If this is correct, it would suggest that consideration of regime type might affect the measurement of ECs on a state.

While this critique is important, it does not by itself suggest that a reliance on polarity is misplaced. First, although studies seem to show that war is unlikely among democracies, it is important to note that defining democracy is not as easy as it might appear.[117] For example, the conflict between Russia and Georgia was ostensibly between two democracies,[118] and skirmishes between India and Pakistan are also hard to define. These might be outliers but they are suggestive that democracy is not a binary determination; democracies likely fall across a spectrum.

Second, democratic peace theory only explains propensity to go to war; it does not apply to myriad other issues that arise between states. It does not suggest that democracies will agree when to go to war with autocracies, will easily reach agreements with respect to international trade issues and climate change, or will share the same views on the content of international law. Third and most important, focusing on regime type does not provide an effective metric of the level of ECs on the U.S. It suggests that disputes between democracies are unlikely to result in war but it does not show that great power competition over other security and non-security issues will necessarily be easier, or that the frictions that create ECs would disappear. While this is helpful, heterogeneous national interests will still produce ECs even among democratic great powers. Democratic peace theory might supplement the use of polarity for thinking about ECs with respect to wars among democracies, but it does not displace it as a measure of ECs in international politics.

3. International Organizations

Polarity also ignores the role of international organizations in measuring the ECs on the U.S. The number of international organizations has increased dramatically during the twentieth century as the demand for international governance has grown.[119] States

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[116] *See* Owen, *supra* note 115, at 87 (1994) ("The proposition that democracies seldom if ever go to war against one another has nearly become a truism . . . . It is 'the closest thing we have to empirical law in the study of international relations,' reports one scholar.").

[117] For a discussion on the weaknesses of popular measures of democracy, see Gerardo L. Munck & Jay Verkuilen, *Conceptualizing and Measuring Democracy: Evaluating Alternative Indices*, 35 COMP. POL. STUD. 5 (2002) (discussing the difficulties of conceptualizing, measuring, and aggregating data on democracy, such as narrow conceptions of democracy, narrow scope, and flaws in conceptual logic).

[118] The Economist Intelligence Unit's Index of Democracy listed Georgia as a hybrid regime in 2011 while Russia was downgraded from a hybrid regime (its status during the conflict) to an authoritarian regime. THE ECONOMIST INTELLIGENCE UNIT'S INDEX OF DEMOCRACY 6-7 (2011).

[119] Martinez, *supra* note 14, at 436-37 ("While international courts are nothing new, they certainly have become more popular in the last decade….The increasing flow across borders of so many things…has increased the interdependence of nations."); Suzannah Linton & Firew K. Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 CHI. J. INT'L L. 407, 410 (2009) ("At one level, the mere existence of such courts and tribunals is an incentive to resort to litigation, rather than to the use of

continuously resort to international organizations and delegate decision-making authority to them in many instances. This, by itself, may very well be evidence that international organizations have a causal effect on state behavior. The bigger question, however, is the extent to which they might constrain the great powers.

One theory of international organizations is that they reflect the interests of the states that create them.[120] When the U.S., China, the EU, or any other state has the power to build an international organization, it is likely to design it in light of its national interest. In this view, international organizations do not have an independent corporate personality; they are tools that constitute their membership.[121] Since there is no global policeman in world politics—no powerful entity above the states that can enforce international law—the great powers that create international organizations dominate them. For example, the U.S. and other states founded the UN for the purpose of preserving peace and security,[122] and created the World Bank and International Monetary Fund ("IMF") to support development and promote stability in exchange rates. Of course, the U.S. ensured that the UN would also have a UNSC where the U.S. can exercise its interests through a veto power,[123] devised the voting arrangements to guarantee influence at the World Bank and the IMF,[124] and established a norm that the leaders of both organizations would be either European or American.[125]

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force, to resolve disputes."); Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC'Y INT'L L. PROC. 60, 160 (2000) ("The past two decades have seen an explosion of new international courts and tribunals.").

[120] John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5 (1994).

[121] *Id.* at 13 ("For realists, the causes of war and peace are mainly a function of the balance of power, and institutions largely mirror the distribution of power in the system.").

[122] STANLEY MEISLER, UNITED NATIONS: THE FIRST FIFTY YEARS 3 (1995) ("The United Nations was mainly an American idea, and its structure today closely follows the plans prepared by American diplomats during World War II . . . . [Franklin] Roosevelt talked often of the need for 'Four Policemen'—the United States, the Soviet Union, Britain, and China—to order the postwar world."); N.D. WHITE, KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 3 (1997) ("The principal function of the United Nations is to maintain international peace and security."). *See generally* L.M. GOODRICH, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY (1974).

[123] *See* N.D. WHITE, *supra* note 122, at 9-10 (noting the "big five" including the United States made it clear there would be no organization without the inclusion of the veto in the voting structure).

[124] Robert Fleck and Christopher Kilby note the United States is the "most influential member of the World Bank, a position maintained by the institution's financial structure, its location in Washington, and the traditional nomination of World Bank Presidents by the U.S." Robert K. Fleck & Christopher Kilby, *World Bank Independence: A Model and Statistical Analysis of U.S. Influence*, 10 REV. DEV. ECON. 224, 224 (2006). They go on to conclude from their statistical analysis that the U.S. has influenced the World Bank in pursuit of its economic and strategic interests. *Id.* at 238. *See also* Axel Dreher, E.T.H. Zurich, & Nathan M. Jensen, *Independent Actor or Agent? An Empirical Analysis of the Impact of U.S. Interests on International Monetary Fund Conditions*, 50 J.L. & ECON. 105, 106-07 (2007) (describing the U.S.'s power within the IMF and its ability to veto any decision based on its voting share).

[125] Fleck & Kilby, *supra* note 124, at 224. MILES KAHLER, LEADERSHIP SELECTION IN THE MAJOR MULTILATERALS vii (2001) ("For the [International Financial Institutions], the United States and Europe have laid exclusive claims to leadership positions since the formation of the institutions.").

With respect to security issues, the UN can only act with the military, intelligence, and power projection resources of its member states; the UN relies on the collective will of its member states to constrain another acting in violation of the UN Charter. This structure makes it particularly susceptible to manipulation by the great powers. The U.S., France, Great Britain, China, and Russia, through their veto power on the UNSC, can block or threaten to block resolutions authorizing actions or condemning the behavior of other members of the UN.[126]

But their power does not stop with the veto: great powers, by definition, are stronger than the other states and also have the capacity to circumvent the UN when necessary. For example, when President Clinton could not get a UNSC resolution for the use of force to protect Kosovar Albanians from the then-Yugoslav government, the U.S. simply ignored the UNSC and the threat of a Russian veto and organized a "coalition of the willing"—otherwise known as NATO—and pursued its desired policy.[127] Similarly, President George W. Bush ignored the UNSC and the threat of a French veto and organized a "coalition of the willing"[128] to overthrow Saddam Hussein and occupy Iraq in the Second Gulf War. In each instance, it is not the UN qua UN that tried and failed to constrain the U.S.; rather it was Russia and France as powerful states with competing interests. These examples simply demonstrate that while the UN and the UNSC do impose some costs on the great powers, they are not always effective ECs. A focus on the great powers captures their interests, whether or not they are pursued through the UN.

All of this does not suggest that the UN or other international organizations have little value. The UN has had significant successes in areas related to peacekeeping, post-conflict nation-building, and health-related endeavors.[129] Many international organizations in the non-security context have been successful. The WTO, for example, has been cited as an example of powerful states sublimating their interests to further trade liberalization. But the formation and structure of international organizations and their dependence on the most powerful states for funding,[130] military capacity[131] and agenda-

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[126] For example, prior to the War in Iraq, France and Russia both indicated they would not sanction a war. Similarly, the United States has used its veto power to regularly protect the Israeli government. Tarik Kafala, *The Veto and How to Use It*, BBC NEWS, Sept. 17, 2003, http://news.bbc.co.uk/2/hi/middle_east/2828985.stm.

[127] *See* MICHAEL J. WILLIAMS, NATO, SECURITY AND RISK MANAGEMENT: FROM KOSOVO TO KHANDAHAR 44-48 (2009).

[128] *See* Kafala, *supra* note 126.

[129] *See* Jim Van de Water, *The United Nations' Success Story*, SAN DIEGO UNION TRIBUNE, Feb. 24, 2005, http://www.signonsandiego.com/uniontrib/20050224/news_lz1e24water.html; Marrack Goulding, *The Evolution of United Nations Peacekeeping* 69 INT'L AFFAIRS 451, 452 (1993) (noting the UN's successes in defusing the Suez crisis, intervening between the Egyptian and Israeli armies in 1973, and controlling the buffer zone between Israel and Syria in 1974).

[130] For instance, the United States, Japan, Germany, Great Britain, and France were the largest contributors to the United Nations budget in 2011. The United States alone contributed more than $580 million, or 22 percent of the budget contributions. Combined the five countries compose more than 54 percent of the budget contributions by Member States. United Nations Secretariat, *Assessment of Member States' Contributions to the United Nations Regular Budget for the Year 2011*, ST/ADM/SET.B/824

setting suggest that international organizations are unlikely to be a regular, continuous, and effective constraint on great powers. Particularly in the security context, polarity helps narrow the focus to powerful states, the chief actors of international politics both inside and outside of international organizations.

4. International Law and Norms

A similar critique applies to international law, shared norms, and world public opinion. International law is the product of treaties and customary international law ("CIL").[132] Treaties are agreements between states, and CIL reflects the custom and practice of states that has become a norm and is followed by states out of legal and moral obligation.[133] It is widely noted that "almost all nations observe almost all principles of international law and almost all their obligations almost all of the time."[134] But this quote does not tell us much without knowing the content of international law.

Treaties or bilateral coordination can ameliorate some constraints on states. Let's imagine a bilateral treaty between two great powers, the U.S. and State A. They will enter into a treaty when they find that they can reach mutually beneficially arrangements on a particular issue. If either state were all-powerful, it would not want to compromise because it wants to achieve its perfect first-order goals. But in the real world the U.S. and State A are constrained and have to reach goals through compromise and accommodation. While treaties serve as a solution to a problem—for example, access to markets and the reduction of protectionism—the treaty's content is unlikely to reflect the first-order preferences of either the U.S. or State A. The key is to realize that the treaty itself is not imposing an EC on the states independent of their self-interests; it is just a tool used to reach an agreement. The EC is the clash between the U.S. and State A's competing interests.

CIL generally reflects the interests of the great powers, the states most likely to develop and enforce international law. In a world without an independent, central enforcement mechanism, powerful states are the only actors with the capacity to enforce

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(December 28, 2010).

[131] For example, the United States, Great Britain, Germany, France, and Italy are the largest contributors of troops to the International Security Assistance Force, the NATO-led security mission in Afghanistan. *International Security Assistance Force (ISAF): Key Facts and Figures* 2 (Jan. 9, 2012).

[132] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (1987) ("'International law,' as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.").

[133] *Id.* at § 102(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."). *But see* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

[134] Koh, *supra* note 3, at 2599 (citing LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979)) (emphasis omitted). Koh notes that empirical work has largely confirmed Henkin's "hedged but optimistic description."

CIL. If CIL generally reflects great power interests,[135] and great powers can enforce CIL on weaker states, we should not be surprised that "almost all nations observe almost all principles of international law and almost all their obligations almost all of the time."[136] Nor should we be surprised to hear that great powers attempt to redefine, circumvent, or even ignore international law as their interests demand. Since CIL is generally not a constraint on great powers, it is not a good measure of ECs in international politics.

Similarly, shared norms are difficult to define and instrumentalize to show a causal effect in constraining state behavior. Of course, it is true that shared norms change over time and that such norms shape the background in which individuals and states act.[137] For example, the emergence of international human rights norms,[138] the rise of international organizations and courts,[139] and the prominence of democratic governance[140] are surely reflective of both shared norms among states and the interests of the states capable of effecting the change. But it is difficult to predict the content of newly shared norms, the likelihood of their emergence, and their causal effect on state behavior. International human rights norms, courts, and organizations have been tools used by the U.S. and the EU to pursue their interests, but it is unclear if the norms are antecedent to or epiphenomenal of great power interests. These problems make shared norms difficult to evaluate and even less helpful as a metric to measure the level of ECs on great powers.

5. NGOs and World Public Opinion

Finally, NGOs and world public opinion generally have limited causal effect. NGOs provide information about the practices of states on myriad issues, ranging from human rights violations to levels of environmental protection.[141] Much of this information exposes states and allows NGOs to "name and shame"[142] violators. While

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[135] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

[136] *Id.* at 165 (quoting HENKIN, *supra* note 134, at 47).

[137] *See generally* ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999); Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992). *But see* Dale C. Copeland, *The Constructivist Challenge to Structural Realism: A Review Essay*, 25 INT'L SEC. 187 (2000).

[138] Koh, *supra* note 3, at 2655-58.

[139] Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 199 (1996) (noting transnational litigation promotes international legal norms in domestic processes and "drive[s] how national governments conduct their international relations").

[140] Discussions of democratic peace theory argue that the increase in democratic governance has resulted in a norm of peacefulness. See generally John R. O'Neal & Bruce M. Russett, *The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885-1992*, 52 WORLD POL. 1 (1994); John M. Owen, *How Liberalism Produces Democratic Peace*, 19 INT'L SEC. 87 (1994).

[141] Human Rights Watch, for example, produces volumes of reports on various human rights abuses, covering issues from health and the environment to business and counterterrorism to name just a few. *Topics*, HUMAN RIGHTS WATCH (2012), http://www.hrw.org/home.

[142] *Id.*

their work brings attention to shameful practices, it is not clear that the NGOs by themselves can regularly effectuate significant change without the support of and pressure from sympathetic states. Though there are certainly successful cases in which states have curbed certain activities due, in part, to NGO pressure, it is hard to disaggregate the effect of the NGO from all the other causal factors that might lead states to stop certain practices, including economic and political pressure from other states and international organizations. Their efforts are laudable, but relative to material power the capacity of NGOs to constrain powerful states is likely limited.

Similarly, world public opinion is reflected in the interests of individual states, making a focus on states generally sufficient to capture its causal effect, if any. World public opinion is a proxy for the views of the powerful states that oppose a policy of another powerful state. Few, if anyone, suggest that public opinion in India and China should or does have any effect on U.S. behavior independent of the sovereign interests of those states. Though there are exceptions, state interests often rest on some element of public opinion within the state and are manifested in the policy preferences of that state. World public opinion is rarely a meaningful, independent EC on states.

Finally, non-state actors do play a role in constraining states. The activities of terrorist groups, for example, have caused states to modify foreign affairs priorities and increased the costs of achieving policy goals. But even the costs that they can impose are far outweighed by those generated by great powers like the old Soviet Union and twenty-first century China. Moreover, terrorist groups are often easily associated with states, namely the states that support, harbor, or protect them. Again, the focus is on states, just as polarity suggests. Of course, non-state actors are not something easily captured by broader, structural approaches, and there will be constraints that a focus on polarity will miss. In the end, this discussion suggests that while polarity is an imperfect tool to measure the ECs that exist in international politics, it is likely the most effective, easiest to apply, and most intuitive of the alternatives. The alternatives focus on an aspect of international politics that might, under certain conditions, provide a modicum of constraint on a state. But each is conceptually unclear and produces significant measurement problems. Moreover, the ECs that the alternative metrics represent are likely captured, in significant part, by examining the interests of the great powers. Polarity is not a panacea but it produces a rough approximation of the ECs in international politics. In the end, polarity must be measured against the virtues of the existing alternatives, not against the non-existent, perfect measure.

V. A Framework of External and Internal Constraints

It is clear that the President engages in foreign affairs under some level of ICs and ECs. Congress provides the internal constraints and the existence of other powerful states in the world provides the external constraints. The combination of ICs and ECs represents the total level of constraint on the President. Once the President has navigated the ICs at

the domestic level, he must also work through the ECs at the international level to achieve U.S. interests. Depending on the arrangement of ICs and ECs, the President might face varying level of constraints in foreign affairs. This suggests that consideration of ECs and the total level of constraint on the President might be useful for trying to optimize the level of ICs.

A. Competing Models of Internal Constraint

Let's imagine that Congress is trying to decide how to calibrate the level of constraint on its agent, the President, and it is doing so without considering the ECs. Congress might come up with different models of constraint, ranging from the maximum constraint model to a minimal constraint model with other mixed models in between. For simplicity's sake, let's focus on the two models of constraint on either end of the spectrum, with the first fully constraining the President and the second providing little constraint.

1. Minimum Constraint Model

Model One, a minimum constraint model, would leave the President nearly unfettered discretion in foreign affairs. Congress would delegate broad authority to the President to formulate and pursue U.S. interests with little oversight. Congress would appropriate monies upon the President's request and with the political branches operating in tandem, the judiciary would have little reason to meddle in foreign affairs. And if the courts were involved, they would interpret the Constitution's explicit grants, implicit grants, or residual "catch-all" clauses to provide the President with broad foreign affairs authority. We can call this minimum constraint model a maximum discretion model for the President.

Model One focuses on the institutional expertise of the executive and the relative inability of the courts and Congress to improve foreign affairs outcomes. Some might feel that this arrangement is ideal for Congress if it wants its agent to be successful. If the President is the most competent actor in foreign affairs—a key assumption of this model—it is not clear that foreign affairs outcomes will improve as a result of greater oversight. Congress should delegate and get out of the way.

2. Maximum Constraint Model

Model Two is the maximum constraint model. Congress would only narrowly delegate authority to the President and would subject him to strict oversight. Congress would aggressively exercise its appropriation power and advice and consent prerogatives, and jealously guard its war making authority. The President would still execute foreign policy but he would be a highly constrained agent of Congress.

Model Two emphasizes congressional constraint on the President. But what are the consequences of this model? We might think that whatever the President's strengths are today, the Constitution envisions a strong role for Congress and the courts to maintain a system of checks and balances. One might argue that power has shifted to the President, weakening the checks and balances and creating a dangerous concentration of power. If Congress exercises only weak constraint over the President, it might lead to foreign affairs errors.[143] Congress should actively review its agent's foreign affairs activities.

One could generate doctrinal arguments supporting each model of judicial behavior from the Constitution, legal precedent, historical practice, and the views of the Founders, among other legal materials. The debate about the constitutionally valid model would look inward, namely to domestic variables. The debate would be resolved on those terms.

While this is a stylized description, both of the models suffer from a conventional baseline problem, namely the level of current practice against which the models apply. If we do not know the baseline, it is difficult to determine where the U.S.'s current practice is along the spectrum between the two models, or how far we need to move along the spectrum toward either of the them. The baseline problem also shapes the debate about the appropriate level of constraint, leaving proponents of each model to look to doctrine, precedent, practice, and expertise to justify their positions rather than specifically determining the conditions under which either model might apply.

B. Model One or Model Two?

Understanding the relationship between ICs and ECs will help determine the conditions under which stronger or weaker constraints might be appropriate. The pertinent question becomes the following: "under what conditions should Congress employ strong or weak ICs over the President?"

To simplify, let's focus on the strong constraints of the multipolar world and the weak constraints of the unipolar world. Congress has to decide which Model to follow in light of the external environment.

As a risk-averse principal, Congress wants to ensure that the President acts as a loyal agent but still has sufficient discretion to use his specialized knowledge. Consider the relationship between Congress and the President in a unipolar world where the U.S. is the superpower. What is unique about this environment? First, as the agent, the President has an expanded range of foreign policy options to pursue because the constraints from

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[143] History is replete with instances of questionable Presidential decision-making. *See generally*, William C. Banks, *While Congress Slept: The Iran-Contra Affair and Institutional Responsibility for Covert Operations*, 14 SYRACUSE J. INT'L L. & COM. 291, 310 (1987) ("In fixing responsibility on the President for the Iran-Contra Affair, the [Report of the Congressional Committees Investigating the Iran-Contra Affair] chastised him for a failure of 'leadership and supervision.'"); Lori F. Damrosch, *War and Uncertainty*, 114 YALE L.J. 1405, 1409 (2005) ("[M]any in Congress came to regret their votes for the Tonkin Gulf Resolution, and several judicial challenges were eventually brought contesting its validity.").

the rest of the world are weak. Thus, given the lack of ECs, the agent has more opportunities to deviate from the principal's wishes. Congress is aware that the U.S. is already dominant in foreign affairs and does not want its agent to engage in activities that might jeopardize this advantage.

Second, the informational asymmetry between the agent and the principal in a unipolar environment decreases. Generally, the agent has some information unavailable to the principal, making monitoring important to gain the agent's compliance. But in a unipolar world, the U.S.'s dominance makes it easier for the Congress, as principal, to extract information from other states about their interests. As a superpower, the U.S.'s ability to monitor and influence the policies of states grows, increasing the amount of information available to both Congress and the President. In such an environment, the principal's need to rely on the agent's provision of information is less pronounced

Third and relatedly, the value of the agent's specialized knowledge—in this case diplomatic skill—decreases. When the U.S. is the superpower, the threat environment changes; states are reluctant to challenge the U.S. The kind of diplomatic skill required to achieve the U.S.'s foreign policy goals in a complex international environment are not as uniquely important in a unipolar world. In such a world, the principal is unlikely to rely as much on the agent's special expertise.

This analysis suggests that in a unipolar world—a world with weak constraints on the U.S.—Congress should employ Model Two with stronger constraints on the President. The absence of ECs provides the agent with more opportunities to deviate from the principal's wishes and reduces the premium on the agent's specialized skill, while providing the principal with greater access to information about the agent's activities.

The situation along each dimension changes in a multipolar world. In a multipolar world, the ECs on the U.S. are strong and limit the range of action for the President. As an agent, the President's opportunities to deviate from the wishes of Congress decrease and, interestingly, the costs of error increase. With many other powerful states in the world, the President will be aware that the cost of deviating from Congress and committing foreign policy blunders will generate significant problems for the U.S. This suggests that the President will act more like a faithful agent in a multipolar than in a unipolar world. In addition, the information asymmetries between the principal and agent grow in a multipolar world. With states competing and concealing information, it is harder for Congress to monitor the activities of its agent and other states, making it more dependent on the agent's provision of information. Finally, strong ECs make the achievement of the principal's goals harder, making the specialized skill of the agent more valuable. Here, Congress will rely upon the agent's skill in the achievement of its foreign policy goals.

In a multipolar world, the Congress should employ Model One and place weak constraints on the President. The strong ECs reduce the likelihood of the agent deviating from the principal's wishes because the agent's range of options is smaller and his

informational and expertise advantages are particularly important in a multipolar world. In effect, the underlying conditions of the international environment—multipolar or bipolar—affect the principal's relationship with its agent. Since agency costs vary as conditions change, Congress should vary the strength of the constraints it uses to limit the President's discretion to act.

A. External Constraints and Agency Costs

1. Substitutability

Based on this analysis, for some foreign affairs law questions the international environment's ECs on the U.S. serve as crude substitutes for the principal's ICs on the agent. If this is correct, then we must determine the specific areas of foreign affairs law in which this logic applies. The substitutability of ECs is most likely for issues upon which Congress is likely to delegate authority to the President, mainly security-related questions. Such issues include congressional delegations that directly implicate the extent of the President's authority: the limitations on the President's exercise of independent military powers;[144] the breadth of Article II's textual grants;[145] the executive's unilateral termination of defense-related treaties;[146] the definition of hostilities;[147] the interrogation of enemy combatants;[148] and the extent of U.S. participation in international institutions.[149] Congress might delegate authority to the President with tightly-drafted, narrow statutory grants. And the courts, as the faithful agents of Congress, might interpret the Constitution and the relevant precedent narrowly to limit the President.[150] Thus, the President as the agent of Congress would be operating under strong ICs with respect to these powers.

However, in a multipolar world the strong ECs already partially deter the President from deviating from the wishes of Congress in those areas, making strong ICs unnecessary. Assume that Congress delegates some authority to the President to develop U.S. foreign policy, but specifically limits the President from sending U.S. troops abroad without the express authorization of Congress. But the President diverges from the wishes of Congress and decides that he wants to send troops to Taiwan to encourage Taiwanese independence; engage in pre-emptive hostilities against Iran and North Korea; send troops to protect Georgia from another Russian invasion; or intervene in Sudan to prevent genocide. Each initiative touches upon an area of foreign affairs law, namely the

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[144] *The Prize Cases*, 67 U.S. 635 (1862).
[145] *Youngstown*, 343 U.S. 579 (1952).
[146] *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979).
[147] *Tingy*, 4 U.S. (4 Dall.) 37 (1800)
[148] *Hamdan*, 548 U.S. 557 (2006).
[149] *Sanchez-Lamas v. Oregon*, 548 U.S. 331 (2006).
[150] Unfettered discretion in the executive can lead to discriminatory enforcement policies or overreaching. *See* Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1916 (2004) (noting overzealous executives may overreach, particularly in wartime conditions).

President's independent or unilateral authority to commit the U.S. to potential hostilities. Congress has already specifically denied its agent, the President, the authority to pursue these initiatives unilaterally. But the President, no matter how much he wants to deviate from the wishes of Congress and act, also realizes that the U.S. is in a multipolar world that includes China, Russia, and the EU.

In such a world, each great power has its own set of interests and actively pursues them. Going back to the example above, Russia might be an ally of the Iranian regime; China might have allies in Sudan and North Korea; and the EU might prefer stability in the Middle East rather than regime change. Given these interests, the President would have to internalize myriad political and military costs of getting involved in Taiwan, Iran, North Korea, and Sudan. The President would realize that these initiatives would interfere directly with the interests of the other great powers and might result in a Russian or Chinese response that could impose serious costs on the U.S. Knowing this, the President is likely to be circumspect about pursuing those goals and, most important, reluctant to deviate from the wishes of Congress. The President would be constrained by the strong ECs of the multipolar world and, if they deter the President from deviating from the wishes of Congress, then the strong ICs are redundant.

2. Costs and Benefits of Redundancy

Despite the apparent redundancy, Congress might find strong ICs on the President in a multipolar world to be unproblematic or even preferable. Why? First, whatever the strength of ECs, Congress might conclude that they are not perfect substitutes for ICs because ICs have a value separate from constraint on the President. They concretize a conception of the normatively preferable governance form, namely tripartite government with meaningful checks and balances. They encourage debate across branches and the generation of information for the public, leading to more informed decisions. ECs may deter the President in some limited contexts but they do not instantiate the value of separation of powers and transparency in foreign affairs.

Second, the complexity of a multipolar world militates against weak ICs on the President. Since a multipolar world is especially complicated and the executive is not perfect, the consequences of agency costs might be particularly high. Even with a strict congressional delegation to the President, a poorly conceived or executed foreign policy by the President might create enormous foreign affairs problems, and this fear justifies additional monitoring of the agent.

This is a tempting but incorrect line of thinking. The claim in this Article is not that ECs perfectly replicate the effect of ICs across all areas of foreign affairs law. Rather, the claim is that there may be some set of questions—especially in the security context—for which strong ECs will serve the same deterrence function as strong ICs. True, the claim focuses on the principal's constraint of its agent with respect to foreign affairs outcomes rather than the process values that ICs might represent. The scope of the

claim is limited: the strength of ICs should vary depending on the level of ECs. In a world with strong ECs, weak ICs might be preferable.

Second, in a multipolar world, the cost of redundancy outweighs the benefits. If the President is more competent in foreign affairs than Congress, it is unlikely that strong ECs and ICs will ensure the President's fidelity to Congress and permit the President to use his specialized knowledge to achieve Congress's goals. In light of this, it is preferable for Congress to free the President to navigate the complicated multipolar world and pursue congressional prerogatives, not to overconstrain him with strong ICs. Since the strong ECs already constrain the U.S. and mimic the effect of the ICs, it is unclear what the principal gains from imposing strong ICs on its agent as well. Strong ECs combined with strong congressional ICs would overconstrain the President.

Still, one might argue that there are no real costs from duplicating strong ECs with strong ICs. If the President is already deterred by ECs, what is the harm of having strong ICs? Building from the previous example, consider the following. The President operates under strong ICs and ECs. Internally, Congress subjects his foreign affairs decision-making to significant legislative oversight and the judiciary interprets the President's independent military powers narrowly, consistent with Congress's preferences. Externally, the President is constrained by the other great powers. Suddenly, the President develops intelligence that the government in Sudan wants to strengthen its relationship with the U.S. and move away from China. But Sudan also specifically requests that the President immediately send troops to prevent any possible Chinese response. The President determines that this course of action would be beneficial for the U.S. and wants to send 10,000 soldiers to Sudan. However, the President realizes that Congress and the courts are likely to want to review the intelligence upon which the President based his decision, debate whether the passage of an authorization for use of military force is necessary, determine the potential costs of the engagement, and so on. The President, concerned that the U.S. will lose the opportunity if it dithers, wants to act unilaterally but cannot because the constraints imposed by Congress are strong. Of course, this is a simplified example but it illustrates the ways in which strong ICs in a world with strong ECs might overconstrain the President. The issue is discussed at greater length below.

3. Over and Under Constraint

This logic also applies to the some of the examples discussed earlier. Strong ICs in a multipolar world are too broad and overconstrain the President: they would not only deter the President from deviating from Congress's wishes in the U.S./Taiwan/China example (good), but also limit the gains from the President's specialized knowledge and expertise in the U.S./Sudan/China example (bad).

One might argue that the examples posed above are unrealistic or that Congress would not prevent the President from acting. But the critique misses the point. Sure, it is

difficult to know in advance how the President and Congress would respond to exogenous shocks from international politics. But we can certainly think about how international politics might affect institutional design in foreign affairs, and how that design might encourage or discourage certain types of behavior. The insight here is that ECs and some ICs are substitutable; that strong ECs and strong ICs can be redundant at times; and that this redundancy reduces the agent's discretion in ways that might limit his ability to achieve the principal's goals.

By viewing both ECs and ICs, we have a better understanding of the total level of constraint on the President. And if we are concerned that there are conditions under which higher or lower levels of constraint might result in costs for Congress, ECs must be included in any analysis. When the U.S. is operating under the strong ECs of a multipolar world, Congress should not impose strong ICs on the President. Under this condition or state of the world, weak ICs are preferred.

The unipolar world presents a different challenge. Let's assume that the U.S. has gained in relative power vis-à-vis Country A, and has become the hegemon or superpower of a unipolar system. The U.S. may have adopted better economic polices, increased worker productivity, committed more monies to the military, or developed new technologies to increase its material power, or alternatively Country A may have made domestic policy errors that led to its decline. Whatever the reason, as a hegemon the U.S. has a tremendous capacity to pursue its national interests because the potential for friction with competing great powers decreases; in some respects the U.S. stands alone in international politics. While hegemonic status certainly does not mean that the U.S. can do anything it wants, it does suggest that the U.S. has the opportunity to define its interests more broadly, pursue policies that were previously implausible, and act more assertively. Since the ECs are weak in a unipolar world, the U.S. could attempt to achieve goals that would have been much more difficult in a multipolar world.

Under unipolarity, the weakness of ECs on the U.S. changes the calculus regarding the appropriate level of constraint that Congress should exercise over the President. Recall that in a multipolar world, the ECs are substitutes for some types of ICs and deter the President. Strong ICs would be redundant. But in a unipolar world, the substitutability point falls away. Weak ECs will not substitute for the weak ICs and deter the President. If both the ECs and ICs are weak, the President will have great discretion in foreign affairs because, along both the internal and external dimensions, he is not constrained by Congress or by the international environment.

This is exactly the condition under which we might expect the agent to deviate from the wishes of the principal. It is not certain that there will be agency costs; the claim is that we can isolate some of the conditions under which the probability of such costs increases and can make the necessary adjustment of ICs. Thus, in a unipolar world, the ICs should be strong. If not, the President would be underconstrained, creating the conditions for deviation from the principal's wishes or pursuit of its own interests.

One might counter that strong ICs in a unipolar world create costs, namely those associated with delaying or preventing the President from using his expertise to achieve Congress's goals. If these costs were problematic in a multipolar world, why would not they create similar issues in a unipolar world as well? In a unipolar world, the U.S. is the hegemon—it has no peer great power competitor and is free from strong ECs. Since the U.S. has this freedom of action, the President has the capacity to achieve the U.S.'s policy goals, even when tightly constrained by Congress. The strong IC has the benefit of ensuring that the agent is loyal, while not stopping the agent from using his expertise to realize the principal's goals. Since the U.S. is a hegemon, Congress gets the benefits of a loyal agent but avoids the costs of missed opportunities. When the President is weakly constrained by ECs, courts should provide stronger ICs.

4. Agency Costs in a Unipolar World

The framework suggests that the President is more prone to deviate from Congress's interests under unipolarity than multi-polarity. On first blush, this might seem curious: some would immediately note that the executive's institutional structure and the President's domestic political incentives remain the same regardless of changes in international politics. But as I will more speculatively suggest below, the U.S.'s hegemonic power in a unipolar system will likely shift the political discourse, making previously untenable, potentially extreme foreign policy preferences more plausible. These preferences tend to be linked to the more nationalistic, American exceptionalist end of the political spectrum. For several reasons, these policy preferences often result in preventative war, occupation, and nation building, among other things. Each of these activities creates a higher probability of error and reflects the ways in which the President, as an agent, might deviate from Congress's wishes.

The exact source of a state's foreign policy preferences is difficult to specify, making predictions about state behavior difficult. Realists look to the structure of the international system, arguing that the lack of a central enforcement mechanism or a global policeman requires states to privilege survival of the regime.[151] Thus, states are primarily concerned with the development of material power. Liberal theorists look to domestic sources to explain foreign policy preferences, namely elite interests and regime type.[152] Foreign policy outcomes are a result of those factors, not the structure of the international system. Social constructivists look to norms and demonstrate that norms can evolve and change—decisions by the individuals that comprise states are made in a specific normative environment.[153] Change the environment, and state preferences might change as well.

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[151] For an overview of the variations on realist theories, see JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

[152] *See, e.g.*, O'Neal & Russett, *supra* note 140.

[153] *See* Koh, *supra* note 139.

The problem with these approaches is that they purport to provide a general theory to explain foreign policy preferences rather than asking, "Under what conditions are these sources more or less influential in the development of a state's foreign policy preferences?" By framing the question this way, we can look at how changes in the strength of ECs might affect preference formation. Let's begin with the U.S. in a multipolar world.

In these worlds, the ECs on the U.S. are stronger than those in a unipolar world. The U.S. is competing with other great powers to achieve its policy preferences. But what are those preferences? If we look to domestic sources like elite preferences, regime type, and norms, we might view the U.S. as a country that believes in its own exceptionalism;[154] wants to spread democracy and American values; encourages free trade and respect for human rights; and wants to ensure its position as the most powerful country in the world.[155] For the sake of classification, I will describe these as normative or aspirational goals. Realists, on the other hand, argue that the international system forces states to seek the same overarching goals, namely ensuring survival through the accumulation of power. For example, the U.S. would likely privilege strategic interests relating to military strength and economic growth over normative concerns like the promotion of democracy; the U.S.'s support of friendly, right-wing dictatorships during the Cold War is often cited as evidence of realist tendencies in U.S. foreign policy.[156] I will characterize these as strategic or expedient goals.

Of course, these preferences do not neatly fit into a dichotomy between those with domestic sources and those derived from the international system. Military strength and economic growth—the components of material power—are likely to be consistent with both domestic sources and those from the international system. Although the lines between strategic and normative are often blurred, we can distinguish between a policy that supports human rights-violating monarchies in Kuwait and Saudi Arabia and one that only supports democracies. We can distinguish a policy that conditions free trade with China on improving human rights with one that de-links the two.[157] With this in mind, the key is to try to understand the conditions under which the U.S. is more likely to privilege the strategic over the normative and vice-versa.

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[154] *See* Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1, 3-7, 35-44 (2011) (arguing that there are qualities that may cause Americans to believe in the country's exceptionalism, but American behavior in international law is not exceptional from a global perspective); LIEVEN, *supra* note 100, at 16 (describing democratic and religious exceptionalism in the United States).

[155] *See* Stephen G. Brooks & William C. Wohlforth, *American Primacy in Perspective*, FOREIGN AFF., July-Aug. 2002, at 20-21; Ian L.G. Wadley, *U.S. and Them: Hubs, Spokes, & Integration with Reference to Transboundary Environment & Resource Issues*, 21 BERKELEY J. INT'L L. 572, 578-79 (2003) (noting American attempts to maintain good state-to-state relationships while preserving its status as a hegemonic state).

[156] DAVID F. SCHMITZ, THE UNITED STATES AND RIGHT-WING DICTATORSHIPS 2 (2006).

[157] Ann Devroy, *Clinton Reverses Course on China; MFN Action Separates Human Rights, Trade*, WASH. POST, May 27, 1994, at A1.

Multipolar worlds have stronger ECs, thereby limiting the U.S.'s capacity to pursue and achieve all of its foreign policy goals. The U.S. might have a set of first-order preferences but the presence of competing great powers will make realizing those preferences difficult. Given these strong constraints, the U.S. would likely focus on the foreign policy preferences essential to preserving its position, and relegate aspirational goals to secondary concerns.

For example, the U.S. might ideally want to support democracy and human rights everywhere but will settle, as it did during the Cold War, for aiding pro-US right-wing regimes in the face of competition with the former Soviet Union.[158] The U.S. might ideally want to support the UN and the UNSC for the resolution of issues related to international peace and security but will circumvent the UN and engage in proxy wars with other great powers to prevent potential threats. In other words, when the ECs are strong, the U.S. will be sensitive to the consequences of a decline in material power and focus on maintaining its relative power vis-à-vis the other great powers. Under these conditions, normative aspirations like spreading democracy and enforcing international human rights law are still important, but remain secondary goals.

However, the U.S.'s calculus changes in a unipolar world. Recall that in a unipolar world the U.S. is the hegemon and its material power far surpasses the other dominant states. The potential for friction with other great powers and the costs that they can impose decrease, putting the U.S. in a position to realize foreign policy preferences that were previously too difficult to achieve. How would this change the balance between the strategic and the normative goals?

The U.S. would be more secure in its capacity to ensure its strategic preferences are met. The potential for conflict with other states is lower and the need to make the difficult compromises and accommodations of the multipolar world—for example, the support of distasteful but pro-US dictatorships—recedes. Thus the U.S. can start to focus on its normative goals and pursue them more aggressively than it could multipolar worlds. The foreign policy preferences that grow from domestic sources begin to supersede traditional realist concerns.

It is under this condition that the President, as the agent of Congress, is more likely to deviate from his principal's interests. Historically, when the U.S. is a unipolar world power or dominant in its region, foreign policy goals tend to reflect American nationalism and exceptionalism: a desire to spread American values, often by force, and a self-congratulatory triumphalism that manifests itself in unilateralism. Of course, these factors are generally present in U.S. foreign policy, whether or not the U.S. is in a unipolar or multipolar world. While this may be true, it misses the salient point—in multipolar worlds, the ECs on the U.S. mitigate the effects of U.S. nationalism on U.S. foreign policy and force the U.S. to be more sensitive to strategic concerns. However, in

[158] *See* SCHMITZ, *supra* note 156, at 2.

the absence of ECs in a unipolar world, nationalistic tendencies grow more prominent in the development of U.S. foreign policy.

There is anecdotal evidence consistent with this hypothesis. For example, in the late nineteenth century, the U.S. became the regional hegemon in North America, the regional unipolar power. It was subject to weak ECs and Congress did not, at least initially, constrain the President. The U.S. fought a war with Spain and assumed control over its former territories, including Cuba, Puerto Rico, the Dominican Republic, and the Philippines.[159] With Spain no longer serving as an EC on the U.S., the U.S. started to exercise its military dominance in the region. The rise in U.S. power contributed to a change in the political discourse: foreign policy goals began to reflect American nationalistic tendencies. "Manifest Destiny,"[160] "White Man's Burden,"[161] and other jingoistic ideologies developed around that time to justify U.S. occupation and governance over the people in newly conquered territories. Claims for military expansion in Latin America and the Philippines that would not have been plausible or dominant in the political discourse while Spain was still a serious presence in the region became more common as the U.S. became the new power in the region. Most important, the benefits of the expansionary policies were questionable; the U.S.'s occupation of the Philippines and meddling in Latin America created material costs in military expenditures, opportunity costs, and casualties[162] and has been noted as one of the factors that might have contributed to the instability of Latin American governments throughout the twentieth century.[163] Perhaps stronger ICs might have mitigated some of these problems.

US foreign policy in the late twentieth and early twenty-first centuries has repeated the same pattern. During this period, with the collapse of the Soviet Union the U.S. became the hegemon of a unipolar world. Like the previous period when the U.S. was the regional hegemon, the U.S.'s nationalistic tendencies assumed a more prominent role in foreign policy. American politicians and scholars characterized the U.S. as the "Indispensable Nation"[164] charged with the self-imposed responsibility to spread democracy and protect human rights around the world. In the early 1990s, the U.S. sent troops to Panama to remove Manuel Noriega and restore democracy and to Somalia in an

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[159] *See* KENNETH B. MOSS, UNDECLARED WAR AND THE FUTURE OF U.S. FOREIGN POLICY (2008) (discussing how U.S. interventions in Central America and the Philippines set the stage for the U.S. as a dominant power).

[160] Julius Pratt, *The Origin of 'Manifest Destiny,'* 32 AM. HIST. REV. 795 (1927).

[161] Rudyard Kipling, *The White Man's Burden*, MCCLURE'S MAGAZINE, Feb. 1899, at 12.

[162] *See* RICHARD E. WELCH, JR., RESPONSE TO IMPERIALISM: THE UNITED STATES AND THE PHILIPPINE-AMERICAN WAR, 1899-1902 151-56 (1979) (describing how the occupation in the Philippines failed to produce the expected benefits and instead created costs for the U.S.)

[163] *See* Manus Midlarsky & Raymond Tanter, *Toward a Theory of Political Instability in Latin America*, 4 J. PEACE RES. 209 (1967) (arguing that the interaction between the U.S. and Latin American nations results in political instability).

[164] *The Inauguration: Transcript of President Clinton's Second Inaugural Address to the Nation*, N.Y. TIMES, Jan. 21, 1997, at A14. *See also* Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 328 (2005).

ill-fated humanitarian mission. A few years later, the U.S. sent troops to support the democratically elected government of Jean Bertrand Aristide in Haiti and later facilitated the departure of the same Aristide after his government was ineffective.

In the late 1990s, the U.S. ignored the UNSC to bomb Serbia to protect Kosovar Albanians.[165] After the attacks of 9/11, the U.S. later occupied Afghanistan to capture Osama Bin Laden[166] and destroy the Taliban, and is currently engaged in an apparently unsuccessful nation-building project. In 2003, the U.S. again ignored the UNSC to invade Iraq during the Second Gulf War, creating another coalition of the willing to support the mission.[167] The U.S. attempted to remake the Middle East in its image, overthrowing Saddam Hussein's regime in Iraq and installing a new government with the belief that it would lead to the collapse of dictatorships across the region.[168] As others have noted:

> "The first two decades of the unipolar era have been anything but peaceful. U.S. forces have been deployed in four interstate wars: Kuwait in 1991, Kosovo in 1999, Afghanistan from 2001 to the present, and Iraq between 2003 and 2010. In all, the United States has been at war for thirteen of the twenty-two years since the end of the Cold War. Put another way, the first two decades of unipolarity, which make up less than 10 percent of U.S. history, account for more than 25 percent of the nation's total time at war."[169] (internal citations omitted).

Though the evidence is anecdotal and merits deeper study, it suggests that the structure of the international system contributes to shaping the domestic sources of U.S. foreign policy. When the ECs are strong, we are likely to see the U.S. focus on strategic interests and deemphasize aspirational concerns, consistent with the view that the structure of the international system shapes state outcomes. However, as a unipolar power, the U.S. is free from some of the security concerns most prominent in multipolar and bipolar worlds and can focus on the aspirational aspects of foreign policy derived from domestic sources: spreading democracy, promoting American values, and pursuing nation-building projects. Such policy goals tend to promote overexpansion, the type of errors that unconstrained Presidents are likely to commit.

VI. THE FRAMEWORK IN OPERATION – IMPLICATIONS FOR FOREIGN AFFAIRS LAW

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[165] Judith Miller, *Crisis in the Balkans: United Nations; Annan Takes Critical Stance on U.S. Actions in Kosovo*, N.Y. TIMES, May 18, 1999, at A11.

[166] Helene Cooper, *Obama Announces Killing of Osama bin Laden*, N.Y. TIMES, May 1, 2011, http://thelede.blogs.nytimes.com/2011/05/01/bin-laden-dead-u-s-official-says/?partner=rss&emc=rss.

[167] Kafala, *supra* note 126.

[168] Michael Dobbs, *For Wolfowitz, A Vision May Be Realized*, WASH. POST, April 7 2003, at A17 (describing Wolfowitz's belief in the "power of the democratic idea" and that Iraq could serve as a democratic inspiration to its neighbors).

[169] Nuno Monteiro, *Unrest Assured*, 36 INT'L SEC. 9 (2011/2012).

To understand how the framework would work in practice, let's loosen the assumption that courts are faithful agents of Congress and consider whether courts are well-placed to make determinations about polarity. Though determining polarity is not traditionally a judicial task, it is not demonstrably different from what courts do regularly in foreign affairs cases. Whether explicitly or implicitly, courts consider the consequences of their decisions on U.S. foreign policy and the potential dangers of interfering with the political branches' foreign affairs prerogatives. Consider the political question doctrine,[170] act-of-state doctrine,[171] and international comity doctrine.[172] Each is a prudential doctrine that permits a court to conclude that it does not have the expertise to adjudicate certain issues properly before it or that the consequence of adjudication might be detrimental to the political branches' ability to conduct foreign policy. For example, when applying the political question doctrine in foreign affairs, a court has to determine whether or not it is competent to adjudicate the foreign affairs question before determining if the doctrine should be applied. In other words, a court must make a self-reflective judgment about whether the issue is within its ambit of expertise or whether the political branches should resolve it, even though courts are purportedly ill-equipped to make that determination.

Second, courts discuss international politics, war, and hostilities when evaluating the international relations consequences of their decisions. In *Sabbatino*, an act-of-state doctrine case, the Supreme Court refers to the tensions with Cuba, differences in the understanding of expropriation under international law between Communist and free market countries, and the potential consequences of a decision on the merits.[173] In *Pink* and *Belmont*,[174] the Supreme Court notes the revolution in the former Soviet Union and the need for the executive to make determinations regarding the settlement of claims. In

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[170] *See Nixon v. United States*, 506 U.S. 224 (1993); *INS v. Chadha*, 462 U.S. 919 (1983); *Goldwater v. Carter*, 444 U.S. 996 (1979); *Baker v. Carr*, 369 U.S. 186 (1962); *Made in the U.S.A Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001).

[171] For the seminal case on the act-of-state doctrine, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

[172] Early on, the Supreme Court described comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

[173] *See Banco Nacional de Cuba*, 376 U.S. at 410 ("Respondents . . . contend that relations between the United States and Cuba manifest such animosity that unfriendliness is clear . . . ."); *id.* at 429 ("There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments [with free market economies] . . . for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision of prompt, adequate, and effective compensation. However, Communist countries . . . commonly recognize no obligation on the part of the taking country."); *id.* at 433 ("Another serious consequence of the exception pressed by respondents would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade.")

[174] *United States v. Pink*, 315 U.S. 203, 227-28 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (noting the Executive had the authority to "speak as the sole organ" of the government and to negotiate for the final settlement of claims between Russia and the United States without the advice and consent of the Senate).

Alien Tort Statute ("ATS")[175] cases, the courts routinely consider submissions by the executive branch regarding the consequences of adjudication on U.S. foreign policy as they balance the interests of the President with those of the litigant-victims of human rights abuses. In each example, courts consider the effects of their decisions on the President in his pursuit of U.S. interests.

Third, determining polarity does not require courts to make specific foreign affairs decisions for which they lack expertise; it just provides a background variable that informs their understanding of the appropriate level of constraint on the President. In this way, courts are simply asked to engage in a threshold determination regarding the strength of ECs before adjudicating the underlying foreign affairs question. Moreover, since the strength of ECs change gradually, courts would not be burdened with determining polarity on an ongoing basis. They would simply engage in the same evaluation of international politics common in foreign affairs cases.

A. Incentives of Congress and the Courts

Given the political incentives and structural weaknesses of both Congress and the courts, it might seem odd to recommend stronger ICs in multipolar worlds. After all, why would Congress or the courts the want to assume an oversight responsibility with no strategic benefits? Interestingly, we do have evidence that Congress grants broader statutory authorization to the President and courts modulate the level of constraint on the President in response to internal and external shocks. During emergencies and crises, courts tend to defer to the President.[176] They move from some unknown, ex ante baseline level of constraint on the President to an ex post, weaker level of constraint in response. This suggests that Congress, or at least the courts, vary the level of constraint on the President under certain conditions.

Further, we know that Congress and the courts do not maintain the weaker constraints on the President indefinitely. Once the crisis or emergency has passed, Congress and the courts return to some ex ante baseline level of constraint. Of course, it is extremely difficult to locate the baseline; the point here is that Congress has calibrated the level of constraint in response to the U.S.'s foreign affairs needs. For the courts, this

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[175] Alien Tort Claims Act (ATS), 28 U.S.C. § 1350 (2000); *see, e.g.*, *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

[176] POSNER & VERMEULE, *supra* note 18, at 16 ("[C]ourts defer heavily to government in times of emergency, either by upholding government's action on the merits, or by ducking hard cases that might require ruling against the government.").

pattern is also apparent in the tax context,[177] protection of civil liberties,[178] and in some of the case law.[179]

Given the willingness of Congress and the courts to adjust the constraint level on the President in response to crises, it is plausible to imagine that Congress could make the same adjustment in response to ECs. In fact, there are reasons to suspect that Congress and the courts might be more willing to do so in this context. When Congress and the courts determine the level of constraint on the President, they gravitate between strong and weak constraint models based on an ad hoc set of factors including past precedent, historical practice, and institutional competencies. Neither level of constraint—strong or weak—is particularly justifiable without a metric of analysis. Each model has strengths and weaknesses but Congress and the courts lack a metric to determine which is best under certain conditions.

In contrast, the framework outlined here provides Congress and the courts with a normative justification for preferring one model to the other and explains the conditions under which each applies. It is an independent basis for oversight that ensures the principal's control over its agent but avoids encumbering the agent with constraints that limit his ability to exploit specialized knowledge. In effect, the framework explains when the weak and strong IC constraint models are most useful and, by extension, provides Congress and the courts with guidance on the appropriate conditions for more significant oversight.

B. Implications for Deference in Foreign Affairs

My framework suggests that Congress and the courts should strengthen ICs as ECs weaken. How? The main tool available to courts is the use of procedural constraints, namely increasing the costs of presidential action by lowering the level of deference to executive determinations,[180] imposing clear statement requirements,[181] and encouraging political branch cooperation, among other things, which will slow the President's ability to act unilaterally and, in some cases, might deter the President from pursuing a particular course of action. Consider deference regimes with respect to executive treaty interpretations. Traditionally, courts have given "great weight"[182] deference to the President's construction of ambiguous treaty terms. Courts have given "respectful

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[177] Thomas Brennan, Lee Epstein, & Nancy Staudt, *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 DUKE L.J. 1191, 1219 (concluding that judicial decisions are more deferential to the government during times of crisis).

[178] *See* Lee Epstein, Daniel E. Ho, Gary King, & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005).

[179] *See Ex Parte Endo*, 323 U.S. 283; *Merryman*, 17 F. Cas. 144.

[180] *See* Posner & Sunstein, *supra* note 20.

[181] *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001); *Kadic*, 70 F.3d 232 (2d Cir. 1995*); Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

[182] *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

consideration"[183] to the President's statements about the consequences of international human rights litigation under the ATS on U.S. foreign policy. These deference regimes are fixed in the sense that they do not vary as U.S. power waxes and wanes or as ECs strengthen or weaken. They are rooted in assumptions about separation of powers, the appropriate roles for each branch of government, and executive prerogatives in foreign affairs: the internal factors only.

But these deference regimes should also be responsive to structural changes in international politics. We can imagine a dynamic model that captures the separation of powers concerns embodied in the Constitution while still moving closer to an optimal level of constraint on the President. For example, courts can vary the level of deference depending on the strength of ECs. Higher levels of deference would be appropriate in a multipolar world, while lower levels of deference might be preferred in a unipolar world. Using the examples above, in a multipolar world "intermediate deference" would become great weight deference and respectful consideration becomes intermediate deference. Since the ECs are high, the ICs should weaken.

Similarly, in a unipolar world, great weight deference becomes intermediate deference; intermediate deference becomes respectful consideration; and respectful consideration results in no deference at all. In this example, the ECs are low and the ICs should strengthen. Neither deviating from its adjudicatory function nor assuming a disproportionate role in foreign affairs, the court could calibrate the level of constraint on the President in light of ECs and stay faithful to the structure of existing deference regimes. It can increase costs on the President's exercise of foreign affairs authority.

The same logic applies to clear statement rules and democracy-enhancing adjudication. The courts can narrowly construe congressional authorizations by requiring clear statements from Congress regarding the President's exercise of authority in a particular area. By doing so, the President is forced to be more explicit in requesting and justifying foreign affairs authority, and Congress is incentivized to consider the costs and benefits of broad or narrow authorizations and specify them accordingly. Courts can also narrowly construe the President's independent foreign affairs authority. For example, courts might hear challenges to the President's capacity to independently commit U.S. troops to hostilities under NATO auspices and conclude that while the President cannot do so independently, he can with congressional authorization. In this way, the President is forced to consult Congress and coordinate before acting.

Some might reject the analysis as too simplistic. For them, deference regimes are effectively meaningless: intermediate deference is an empty concept that allows judges to make determinations based on their own preferences, much like foreseeability, unconscionability or reasonableness standards in other areas of the law. Clear statement rules might appear beneficial in theory but actually increase the cost of legislation—measured by both time and complexity—as the President and Congress have to specify

[183] *Kadic*, 70 F.3d at 250.

every possible exercise of authority. Moreover, clarity is a subjective concept, making clear statement rules susceptible to the same conceptual criticisms applied to deference regimes.

Although each of these critiques has merit, they would not only apply to existing foreign affairs jurisprudence but also to most areas of the law. In that sense, the critiques prove too much; if every standard is susceptible to manipulation and every rule is subject to circumvention, then normative theories that rely upon existing jurisprudence are unhelpful. However problematic deference regimes might be, they are common in foreign affairs law and shape contemporary debates about the appropriate role of the President, Congress, and the courts. My framework takes this structure as given and tries to integrate a normative calculus that can be applied relatively easily without disturbing the existing foreign affairs jurisprudence.

VII. CONCLUSION

The central claim is that determining the appropriate level of deference to the President requires consideration of both internal, domestic constraints and external, international constraints. The framework is a tool for Congress to try and ensure that the President is a faithful agent, while at the same time providing the President with the necessary latitude to achieve Congress's goals.

The framework is also helpful in thinking about other areas of foreign affairs and constitutional law. Consider U.S. delegations of decision-making authority to international institutions. Should Congress be more circumspect about such delegations in a multipolar world, when the U.S. might not be able to influence the decisions of international institutions? Or should Congress be happy to delegate when the U.S. is the unipolar power with the capacity to shape institutional outcomes? The role of external constraints might be particularly important in answering this question. Similarly, are courts more likely to invoke federalism limitations in foreign affairs when the U.S. is a unipolar and the external constraints are weak, and less likely to do so when the external constraints are strong? International delegations and federalism are only two areas in which an evaluation of the external political environment may have consequences for domestic law. At bottom, considering external constraints will likely influence the level of internal constraints on a number of foreign affairs law issues; this Article takes the first step toward understanding this relationship.

Readers with comments may address them to:

Professor Daniel Abebe
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637

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