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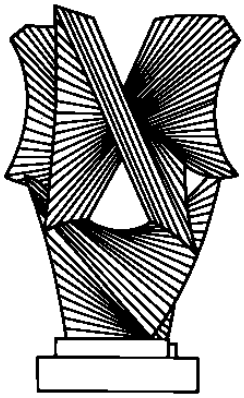

# GREAT POWER POLITICS AND THE STRUCTURE OF FOREIGN RELATIONS LAW

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# GREAT POWER POLITICS AND THE STRUCTURE OF FOREIGN RELATIONS LAW

Symposium on Great Power Politics & International Law

*Chicago Journal of International Law*

Daniel Abebe[†]

## I. INTRODUCTION

Should courts consider great power politics in determining the allocation of foreign relations law authority? Foreign relations law is a set of rules serving as an internal constraint on the unilateral exercise of foreign relations powers through the distribution of authority within the national government. Given the predominance of the executive branch in foreign affairs, courts routinely consider foreign relations law questions about the breadth of the executive's decisionmaking authority. In resolving these questions, courts look to legal precedent, historical practice and functional concerns for guidance. In essence, courts look to solely internal, domestic factors to determine the extent of foreign relations law constraints on the executive.

But the natural focus on internal constraints obscures the increasing importance of external constraints on the executive's exercise of authority. One cannot determine the overall level of constraints on the executive without understanding the relationship between internal constraints produced by foreign relations law and external constraints generated by great power politics. To understand this relationship, this symposium article frames foreign relations law as a function of great power politics, discusses the impact of external constraints on executive decisionmaking, and offers a skeletal theory on the salience of great power politics on the allocation of foreign relations law authority. How is great power politics relevant to answer presumably wholly domestic foreign relations law questions? Consider the following example.

Imagine a state with an over two hundred year-old constitution resting on a theory of separation of powers and providing a tripartite allocation of foreign relations law powers. The initial allocation to the legislative, executive and judicial branches is short and incomplete, leaving many questions regarding the proper constitutional allocation to subsequent political and judicial resolution. Imagine further that the institutional power and influence of one branch—the executive—has grown dramatically since the

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initial allocation, often resulting in the judicial deference to the executive on foreign relations questions because of historical practice, institutional competence, and greater political accountability. If the legislative branch of this state generally follows the executive as well, and the executive has institutional advantages in generating political support for its policies, it could then act in many instances with significant independence from domestic constitutional constraints.

Now one might pause to ask if this particular allocation of foreign relations law authority is problematic. Some might favor stronger internal constraints on executive authority, others weaker. For many, the debate stops here. But this provides only a partial picture of the breadth of executive power. While there is some "optimal" amount of executive branch authority—something more than zero but less than complete authority—it cannot be determined solely by reference to the internal constraints discussed above. We must turn to examining the strength of external constraints for the complete picture.

Our hypothetical state might pursue its interests in a world with two or more competing states of similar economic and military strength—a multipolar world with other great powers. In pursuing their national interests, these other great powers serve as external constraints on the executive; they represent an external disciplining force to moderate the executive's foreign relations decisionmaking. The executive must account for the interests of competing great powers and the costs they could impose. Therefore, internal constraints from foreign relations law are supported by the strength of external constraints from great power politics. The overall level of constraints on the executive is high.

But what happens if our state has the same allocation of foreign relations law authority—with significant judicial deference to the executive—and is also the hegemon of the international system? By definition, the other powerful states are significantly weaker than our state. If so, those states may no longer serve as a meaningful external constraint on the executive's decisionmaking, leaving the executive with significant freedom from both internal and external constraints. In this unipolar world, the executive will certainly have a greater capacity for unilateral action. The overall level of constraints on the executive is lower because the external constraints are weaker. In both examples, the overall quality of constraints on executive decisionmaking is a function of the strength of internal and external factors.

It is probably clear that the hypothetical state is the United States and the description roughly reflects the American foreign relations law allocation of decisionmaking authority. The purpose of this article is neither to reassign specific foreign relations law powers to certain branches nor set the optimal level of executive authority. I am agnostic on these issues. Rather, I aim to move the focus away from a doctrinal analysis of legal rules to consider the overall breadth of executive authority through a lens of internal and external

constraints. Part II develops a simple theory of the relationship between great power politics and the allocation of decisionmaking authority. Part III touches on the complicated issues that emerge from considering great power politics in resolving domestic foreign relations law questions. Part IV concludes with a discussion the implications of the theory for thinking about the convergence of American politics, foreign relations law and U.S. foreign policy.

## II. LINKING FOREIGN RELATIONS LAW TO GREAT POWER POLITICS

The phrase "great power politics" generally evokes images of the powerful nations of the world competing to maximize wealth, territory and military influence across the globe; in international relations theory terms, it refers to the pursuit of material power by powerful states in the international system to achieve security. But its contemporary meaning is broader than that. The issues relevant to the great powers also extend to dealing with the threats of non-state actors and failed states, and the self-interested competition to shape the content, breadth and reach of international law. However this conception, for some, collides with the view of international law as a mechanism to encourage cooperation and promote international order. As the challenges of global interdependence grow—international terrorism, environmental degradation, financial regulation and human trafficking—the demand for coordinated solutions through international mechanisms also grows. International institutions, in this view, are the fora for states to address these issues and international law is the tool to implement solutions and regulate state compliance. In either understanding of the phrase, the focus is on the effects of great power politics along the international dimension. Though important, the narrow focus on interstate relations masks the important relationship between great power politics and the allocation of foreign relations authority. In the following section, I briefly discuss the structure of U.S. foreign relations law as a system of internal constraints on the executive's decisionmaking authority.

### A. Foreign Relations Law as Internal Constraint

The Constitution of the United States provides the initial allocation of foreign relations law powers among the different branches of the national government. The Constitution grants Congress the majority of foreign relations law decisionmaking authority in Article I, including the power to declare war,[1] raise and support an army,[2] and define and punish offenses against the law of nations.[3] In Article II, the President has a narrower grant of independent authority—the Commander in Chief Clause[4] and the Take Care Clause[5]—and shares concurrent authority Congress regarding the making of treaties and appointment of ambassadors. Finally, Article III provides the

[1] U.S. CONST. art. I, § 8, cl. 11
[2] U.S. CONST. art. I, § 8, cl. 12
[3] U.S. CONST. art. I, § 8 cl. 10
[4] U.S. CONST. art. II, § 2
[5] U.S. CONST. art. II, § 3

federal courts with jurisdiction over cases arising out of treaties or affecting ambassadors, federal statutes touching upon foreign relations law concerns, and diversity disputes.[6] From a historical standpoint, the Constitution's allocation was influenced alternatively by the structural and political failings of the Continental Congress; the underlying theory of checks and balances in government; the parochial interests of the several states; the international political challenges of the young United States in the late 18th century; and the legacy of the English legal system. But, as the United States attempted to engage in international politics, it became clear that the initial constitutional allocation was neither comprehensive nor determinative, particularly with respect to the executive's decisionmaking authority.

For example, Article II has few enumerated grants but included general grants that lack a clear definition. How broad is the Vesting Clause?[7] How should we understand the Commander in Chief Clause?[8] The Constitution enumerated certain concurrent powers—the Treaty Power—that created a procedure for making treaties without providing guidance on treaty termination. Can the President terminate a treaty without congressional approval? Several seemingly important questions regarding the President's power to determine U.S. foreign policy, commit the U.S. to war without a congressional declaration, acquire territory, sign executive agreements were left unanswered in the initial allocation. The constitutional design of foreign relations powers was not based solely on the optimal allocation of executive authority; rather the allocation reflected the balance of competing institutional, theoretical and functional factors at a particular historical moment.

Against this background, courts have attempted to resolve some foreign relations law questions for which there are no clear constitutional grants. They have generally considered both the theoretical basis of the Constitution's initial allocation and the functional consequences of distributing decisionmaking authority to one branch over another. They have looked to the underlying intent of the Framers, the sources of the national government's foreign relations authority, and prudential separation of powers concerns. The evaluation of constitutional theory has been supplemented, over time, with functional considerations: an examination of historical practice, institutional competencies and political accountability. Despite judicial attention to both types of concerns, they are not dispositive for the resolution of all foreign relations law questions; rather, they are somewhat indeterminate as there is no clear metric to weigh one concern over another. How broadly should courts frame implied powers drawn from the Constitution's textual grants? Should functional concerns—institutional competencies or historical practice—trump underlying theoretical separation of powers considerations? Should functional concerns circumvent textual grants of power? Like other areas of constitutional law, courts are left to use competing interpretive methods to

[6] U.S. CONST. art. III, § 2
[7] U.S. CONST. art. II, § 1
[8] U.S. CONST. art. II, § 2

determine the intent of the framers, read implied powers from enumerated grants, weigh functional concerns against formal grants, defer to the institutionally competent political branches and, of course, consider the institutional, political and foreign policy consequences of their decisions.

This process occurs under the shadow of the general growth of executive power in foreign relations. As the assumed representative of the United States in international politics the executive has, gradually and incrementally, assumed many of the powers necessary for governance despite often lacking a clear textual grant of authority. For example, the executive has taken the predominant role in formulating American foreign policy, determining the U.S.'s position on customary international law, terminating treaties, and committing the U.S. to international institutions, all without specific Article II textual grants. Simultaneously, courts have developed various prudential tools—the political question doctrine, the act of state doctrine, and comity doctrines, among others—that result in high levels of deference to the executive. If Congress tends to follow the executive on most foreign relations questions, the contemporary breadth of executive power has far surpassed the initial constitutional allocation. Combined with the growth of the administrative state and federal power generally, foreign relations law operates as a set of rules to govern the executive's exercise of decisionmaking authority. Since the executive is generally the "first mover" on foreign relations questions, the domestic set of rules applied and interpreted by the courts are internal constraints on executive decisionmaking.[9]

What should we think of these constraints? Some argue that deference to the executive based on its significant functional advantages, with limited judicial review, is always preferred.[10] Others counter that this is at odds with the initial constitutional allocation and separation of powers, resulting in a potentially dangerous concentration of power in one branch, and

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[9] Some might argue that framing foreign relations law as a set of constraints on executive decisionmaking is inaccurate as it could also be conceptualized alternatively as a system of rules to empower each coordinate branch in specified issue areas or effectuate an underlying separation of powers theory of governance. While those readings are certainly defensible as a theoretical matter, as a practical matter the dramatic increase of executive power in foreign relations law over the last two hundred years years—far beyond the Constitution's textual allocation—and the executive's primacy in exercising foreign relations authority suggest that the rules operate, in their current form, to either empower or limit executive decisionmaking. That the application of these rules by courts is inconsistent and varies based on theoretical and functional considerations does not reject the executive's institutional dominance in foreign relations. Against this background, in many areas foreign relations law operates as a constraint on the executive's exercise of decisionmaking authority.

[10] *See* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170 (2007). For arguments that high levels of deference to the executive in times of crisis or emergencies is appropriate *see generally*, ERIC POSNER & ADRIAN VERMUELE, TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS (2007); RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

argue for greater judicial review of executive decisionmaking.[11] Which view is optimal? Whatever we think of executive power, the answers to this question cannot be determined by examining internal constraints drawn from legal precedent and historical practice. Such a picture would be incomplete because it fails to consider external constraints generated by great power politics. Only after considering both types of constraints can we begin to understand the overall level of constraints on executive authority and perhaps move closer to determining the optimal allocation.

B. Great Power Politics as External Constraint

How are great power politics and foreign relations law linked? As I defined it earlier, the phrase great power politics represents the competition among the most powerful states to influence international politics, pursue their national interests and shape the content of international law. It assumes that states are self-interested and concerned with power.[12] Despite the heterogeneity of national interests, power often enables the achievement of both pragmatic and normative state goals and power relationships among great powers still play a significant role in explaining state behavior. While power is clearly not the only factor, it is certainly relevant in international politics.

The presence of competing great powers is a constraint on state decisionmaking. Let's assume that we live in a multipolar world with four great powers of comparable military and economic strength—Countries A, B, and C and the United States. These great powers pursue their national interests, most prominently seeking security through power but perhaps also spreading democracy, promoting human rights, and developing international law. Beyond thinking about power, the national interests of these great powers will likely vary according to their internal politics, normative aspirations, geopolitics, national history, nationalism, culture, demographics or resource endowment, among other things.

Naturally, in a world with tremendous heterogeneity among states, finite resources and competing national interests, we might expect to see some friction as great powers interact in pursuit of their respective foreign policy goals. The United States may not be able to realize a particular foreign policy goal because it recognizes that Countries A and B have strong competing interests. The United States might conclude that the benefit from achieving the foreign policy goal may be outweighed by the costs that Countries A and B

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[11] *See* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007); *see also* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

[12] Realism is the most prominent international relations theory focusing on power. *See generally*, JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979). It is important to state clearly that one does not have to accept all aspects of realism to understand its potential in linking great power politics to foreign relations law. Though there is much debate within international relations about the importance of power in international politics, even those who might question realist theory do not assert that power never matters.

could impose. Similarly, Country C may not pursue some of its goals for fear of antagonizing another great power. In this environment, each great power is circumscribed in shaping its foreign policy goals and determining the mechanisms to achieve them by the presence of competing great powers. The inevitable frictions of great power politics limit foreign policy goals by imposing costs on the various state actors. Those costs serve as external constraints on a state's foreign relations law decisionmaking.

Focusing on the United States, in this example the executive would operate under a system of internal foreign relations law constraints and external great power politics constraints. Even if internal constraints are weak, executive authority is still limited by the strength of external constraints. Judicial deference to the executive, for some, might not be a problem when the executive's capacity to act unilaterally is restricted by the costs imposed by great power politics. By viewing the complete picture of constraints, we have a better understanding of the true breadth of executive authority.

Starting with the previous example and holding the internal constraints constant, let's assume that one of our four countries—the United States—grows in material power by developing a huge economy and large military projection capacity. This gap may have arisen because of better economic policies, technological advancement, improvements in worker productivity or, in some cases, because of the internal economic or political problems of the other competing great powers. Whatever the reason, the United States has gained in relative power vis-à-vis Countries A, B, and C. Since the U.S.'s growth far outpaces that of the formerly comparable great powers, the United States is now a superpower. The formerly multipolar international system with four comparable great powers is now a unipolar system, with one great power: the United States.

As the new hegemon, the United States has a much greater capacity to pursue its national interests and expand its foreign policy goals. Why? The potential for friction with competing great powers and attendant costs for the United States dissipate in a unipolar world. The cost/benefit analysis for the United States changes: the benefits from realizing a particular foreign policy goal might now outweigh the potential costs of friction with weaker great powers. The United States could pursue foreign policy goals in the unipolar world that would have been much more difficult in the multipolar world described above. Most importantly, the weak internal constraints on the executive are compounded by the weak external constraints from great power politics. The overall picture suggests that the executive has much greater freedom from both types of constraints on its decisionmaking authority.

As we can see, foreign relations law is a set of internal constraints on executive authority. But this is not the only type of constraint. Great power politics also generate external constraints. If courts want to determine the overall level of constraint accurately, they must include both types of constraints in their calculus. Though simplistic, framing foreign relations law

and great power politics as mutually reinforcing constraints on executive decisionmaking suggests that the "optimal" allocation of authority—whatever it is—will likely reflect a combination of internal and external factors.

C. Impact of Great Power Politics on Foreign Relations Law

What does great power politics tell us about the allocation of decisionmaking authority? In bipolar and multipolar worlds (two or more great powers), we know that there is no single hegemon and that the great powers will inevitably compete in pursue their interests. Given the likelihood for friction among them, the external constraints on great powers are stronger as each great power must compete with the other great powers powers—whether friend or foe—to achieve its national interests. The presence of competing great powers makes the achievement of foreign policy goals more difficult in a multipolar or bipolar world.

In the first example above, the United States and Countries A, B, and C are comparable great powers in a multipolar world. The external constraints on the United States are stronger, hindering both the executive's capacity to act and U.S.'s ability to achieve certain foreign policy goals. Therefore, in resolving foreign relations law questions about the internal allocation decisionmaking authority, courts should consider the strength of external constraints on executive authority. Why? By failing to include the strong external constraints in their constraint calculus, courts might systematically err in calibrating the appropriate level of internal and overall constraints on executive decisionmaking.

But, as the theory suggests, the shift from a multipolar to a unipolar world naturally require a reassessment of the overall level of constraints. If the United States is the hegemon in a unipolar world, the external constraints created by great power politics are significantly weaker. The United States has greater freedom of action in the international sphere. Now, in determining the optimal level of constraints, courts should include the weakness of external constraints in their calculus. In fact, since courts cannot control the strength of the external constraints, it becomes even more important to calibrate properly the internal foreign relations law constraints on executive decisionmaking.

The skeletal theory offered here to analyze the relationship between great power politics and foreign relations law suggests a broader point: the optimal allocation of foreign relations law power, whether it consists of high levels of judicial deference or increased judicial review of executive decisionmaking, probably cannot be determined solely by examining the internal constraints within a state. I make no claim about what the optimal level of constraint should be; rather I demonstrate that determining the optimal level also requires consideration of external constraints. The theory leads to the conclusion that the optimal overall level of constraint should vary across time as the strength of external constraints varies. Analyses of the intent of the Framers, two-hundred years of historical practice and legal precedent on foreign relations questions will undoubtedly reflect the domestic debates and

international politics of specific historical moments rather than the optimal allocation for contemporary challenges. Though such analyses can be helpful, they are unlikely to improve the allocation of decisionmaking authority today if they are not understood as reflections of a unique historical context. It does not make sense to defer to historical practice and precedent when the strength of external constraints has dramatically changed.

## III. GREAT POWER POLITICS AS FOREIGN RELATIONS LAW?

Given the short symposium structure, the theory developed here necessarily lacks nuance and leaves several important theoretical and practical questions unanswered. In the space remaining, I will focus on the logic of using international relations theory assumptions to understand the internal allocation of foreign relations law authority.

### A. Courts and International Relations Theory

Endorsing the integration of international relation theory assumptions into foreign relations law necessarily assumes that the judiciary can understand the implications of great power politics in resolving legal issues. Can courts evaluate great power politics, measure the strength of external constraints and calibrate the overall level of constraints accordingly? This is certainly a question that cannot be answered within the confines of this short article. However, it is clear that judges are implicitly using international relations theory assumptions in resolving many foreign relations law questions, and they are doing so often without a framework or theory about state behavior in international politics. Foreign relations law questions about the integration of customary international law (CIL) into the American legal system[13] or the domestic enforcement of decisions by international judicial bodies,[14] for example, implicate underlying theoretical assumptions about the formation and development of CIL[15]; the U.S.'s contribution to its content; and the effect of strategic non-compliance on American foreign policy interests. Judges are not necessarily making foreign policy; rather, their decisions strengthen or weaken the internal constraints on the executive's formulation and execution of foreign policy. And if international relations theory assumptions are actually driving some foreign relations decisions, courts should have a clearer grasp of the relationship between internal legal constraints and external great power politics constraints.

### B. Scope of Claim

The application of great power politics to foreign relations law naturally leads to questions about the scope of my claim. Does the theory apply to all aspects of foreign relations law? Let me respond by stating what

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[13] *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
[14] *See Medellin v. Texas*, 552 U.S. ___ (2008).
[15] For a discussion of the underlying international relations theory assumptions *see*, Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. L. INT'L L.1(2007)

my theory cannot do. Since the theory of external constraints focuses on broader questions of great power politics, it does not purport to determine the appropriate resolution for the technical questions of foreign relations law. For example, the theory will not adequately guide courts on whether a congressional authorization for the use of military force should be read as permitting military tribunals or whether the procedural protections for detainees meet constitutionally required due process standards. Inferences drawn from the machinations of great power politics are unlikely to result in determinative resolutions of such questions. Rather, the theory will be more helpful with foreign relations law questions that directly implicate the extent of the executive's decisionmaking authority: the limitations on the exercise of the president's independent military powers; the breadth of Article II's textual grants; the level of judicial deference to executive determinations, the unilateral termination of defense-related treaties by the executive; the nature of U.S. participation in international judicial tribunals or international institutions; and the weight of historical practice and functional considerations in resolving foreign relations law questions. Great power politics is more likely to influence the resolution of questions about the level of constraints on executive authority rather than the narrower technical interpretations of foreign relations law precedent.

## IV. CONCLUSION: AMERICAN POLITICS, FOREIGN RELATIONS LAW & INTERNATIONAL POLITICS

This brief symposium article explored the salience of great power politics on the allocation of foreign relations law decisionmaking authority. Although the skeletal theory proposed here is tentative, it suggests that great power politics produces certain external constraints on executive authority that interact with the internal constraints that foreign relations law provides. Whatever one's view on the optimal level of constraint on the executive, it cannot be determined without reference to both internal and external constraints. Since the strength of external constraints will continue to evolve, the optimal overall level of constraints will evolve as well; therefore, the Constitution's initial textual grants, the development of legal precedent and the sweep of historical practice will be helpful to the extent that courts interpret them in light of the international political environment and the relevant historical context. By examining the interaction of great power politics and foreign relations law and framing them as potentially complementary systems of constraints, the theory also leads to potentially fruitful avenues of thought on the convergence of American politics, foreign relations law and international relations theory.

If the structure of the international system—great power politics—should be considered in understanding the optimal foreign relations law allocation, it could be argued that the structure of the coordinate branches—domestic institutional politics—is also relevant in thinking about foreign relations law. While scholars have certainly thought about these questions on functional lines with respect to the institutional competencies of the coordinate

branches, it may be fruitful to examine whether institutional cultures or norms generate consistent outcomes on foreign relations law issues. For example, does the organizational structure, decisionmaking processes or political incentives of each branch lead to specific perspectives on foreign relations law or international law more broadly? Is the executive branch, regardless of the political affiliation of its occupant, likely to privilege systematically material power and national security concerns over those associated with legitimacy, social norms and CIL? Conversely, is the judiciary more likely to interpret treaty terms expansively, view CIL as binding law rather than products of politics or encourage the greater integration of CIL into the domestic legal system? Although these are crude dichotomies, understanding the institutional predisposition of the coordinate branches may be relevant for optimizing the allocation of foreign relations law powers. The very allocation of decisionmaking authority to one branch over another may be dispositive for the resolution of some issues, particularly if there is empirical evidence that the branches are predisposed to approach foreign relations law questions from competing perspectives.[16]

Perhaps more controversially, this approach will naturally require courts to engage in a more open and explicit discussion of international politics to resolve some foreign relations law questions. In an interdependent world, the allocation of foreign relations law authority will increasingly shape the nature, type and breadth of the U.S.'s foreign policy behavior and engagement with international law and international institutions. The underlying policy preferences that occasionally drive judicial decisions—often resulting in tortured logic and inconsistent legal outcomes—should be revealed and discussed within a framework for thinking about international politics. The rise of global governance in the social, political and economic aspects of state life; the greater harmonization of legal rules; and the continued salience of international institutions as tools of international politics blur the distinctions between international politics, American foreign policy and foreign relations law questions. The convergence is imminent but perhaps our thinking about the allocation and interpretation of foreign relations law rules has not quite kept pace.

Finally, the theory hints at a comparative foreign relations law application. Not only does the theory suggest that the optimal allocation should vary across time within a state, but it also implies that the optimal allocation should vary across states. Even for states with similar governance systems, the heterogeneity in historical experience, geostrategic importance, military power, economic wealth and demographics suggests that the optimal

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[16] Though this is certainly beyond the scope of this short article, the theory implies that deference to the executive on some foreign affairs questions, for example, might encourage certain types of policies while a greater role for the judiciary might encourage a different set of priorities. Developing this proposition will require an underlying theory about the nature of the different branches.

allocation, if it can be determined, should naturally vary in accordance with the challenges that a state faces. Democracies, for example, differ on certain fundamental constitutional questions—reproductive rights, the death penalty, and gay rights for example—based on the characteristics of their cultural, legal and political histories; it is unclear why we should not see differences in the optimal allocation of decisionmaking authority in foreign relations law as well.

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