Great Power Politics and the Structure of Foreign Relations Law

Daniel Abebe

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation
Great Power Politics and the Structure of Foreign Relations Law
Daniel Abebe*

I. INTRODUCTION

Foreign relations law serves 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 resolve questions regarding the breadth of the executive’s authority by reference to the Constitution, legal precedent, historical practice, and functional considerations. Though courts generally focus on these domestic factors, they have been historically quite sensitive to the international political implications of their decisions. But we don’t have a clear understanding of how or when courts consider international politics in resolving foreign relations law questions. We lack a framework to begin thinking about the relationship between international politics and the allocation of decisionmaking authority.

This short Article frames foreign relations law as a function of international politics to explore the relationship between the strength of external international political constraints on a state and the levels of judicial deference to the executive in that state. Variation in the structure of international politics—bipolar, multipolar or unipolar—likely produces variation in the strength of external constraints on a state. This approach yields a simple descriptive claim and a related predictive claim. The stronger the external constraints on a state, such as the constraints present in multi-polar or bipolar worlds, the greater the likelihood of judicial deference to the executive on institutional competency grounds. Conversely, the weaker the external constraints on a state, such as the constraints present in a unipolar world, the lesser the likelihood of judicial deference to the executive. If this claim is accurate, it leads to a predictive claim that the rate of judicial deference to the executive will likely decrease as long as

* Assistant Professor, University of Chicago Law School. Thanks to Tom Ginsburg, Jonathan Masur, Nuno Monteiro, and Eric Posner for helpful comments.
the United States is the hegemon of a unipolar world. This approach also provides a clearer picture of the overall level of constraint on the executive, helps describe the impact of external constraints on judicial deference, and explores the effects of international politics on the US's engagement with international law. Consider the following example:

Imagine a state with a constitution that is over two hundred years old. Imagine that the state's constitution rests on a theory of separation of powers and provides a tripartite allocation of foreign relations law authority. 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 initial allocation, often resulting in 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, the executive 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 might stop here. But this provides only a partial picture of the breadth of executive authority. We must turn to examining the strength of external constraints for a 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 internalize the costs that those competing great powers could impose. Therefore, extant 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 hypothetical state has the same allocation between its three branches 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 would no longer serve as a meaningful external constraint on the executive's decisionmaking, effectively leaving the executive with significant freedom from both internal and external constraints. In this
unipolar world, the executive would have greater capacity for unilateral action. The overall level of constraint 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, namely domestic legal rules and great power politics.

It is probably clear that the hypothetical state is the US and the description roughly reflects the allocation of decisionmaking authority among the branches of the American government today. The purpose of this Article is neither to reassign specific foreign relations law powers to certain branches nor to set the optimal level of executive authority. The Article is agnostic on these issues. Rather, the Article aims to show that the strength of external constraints might influence the level of judicial deference to the executive. Section II develops a simple framework for thinking about the relationship between great power politics and the allocation of decisionmaking authority. Section III outlines the descriptive and predictive claims about the specific impact of great power politics on judicial deference. Section IV examines whether the predictive claim is normatively preferable in light of the impact of great power politics on international law. Section V concludes by discussing the possible convergence of American politics, foreign relations law, and US foreign policy.

II. LINKING FOREIGN RELATIONS LAW TO GREAT POWER POLITICS

The phrase “great power politics” 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, great power politics refers to the pursuit of material power by powerful states in the international system to achieve security. But the contemporary meaning of the phrase is perhaps broader than that. In a post-Cold War world, great powers are also concerned with the threats of non-state actors and failed states, and interested in shaping the content, breadth, and reach of international law. Though the exact objects of competition may have changed and the demand for international legal rules may have grown, great power politics still revolves around state competition for power and influence.

In this understanding of the phrase “great power politics,” the focus is on the effects of great power politics along the international dimension. Great

---

1 For purposes of this article, I use the phrases “international politics” and “great power politics” interchangeably.

2 Realism is the most prominent international relations theory focusing on power. For a general discussion of realism and power politics, see John J. Mearsheimer, *The Tragedy of Great Power Politics* (Norton 2001); Kenneth N. Waltz, *Theory of International Politics* (McGraw-Hill 1979).
power politics will always matter—the only change is that the locus of competition has moved from international politics to international law. Though this definition generally reflects state behavior, its narrow focus on the international dimension masks the possible relationship between great power politics and the allocation of foreign relations authority in the domestic sphere. In other words, does the structure of international politics influence the domestic allocation of decisionmaking authority? In the following subsection I begin to answer that question by discussing the structure of US foreign relations law as a system of internal constraints on the executive’s decisionmaking authority.

A. FOREIGN RELATIONS LAW AS AN INTERNAL CONSTRAINT

The Constitution of the US 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,\(^3\) raise and support an army,\(^4\) and define and punish offenses against the law of nations.\(^5\) In Article II, the President has a narrower grant of independent authority—the Commander-in-Chief Clause\(^6\) and the Take Care Clause\(^7\)—and shares concurrent authority with Congress regarding the making of treaties and appointment of ambassadors.\(^8\) Finally, Article III 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.\(^9\) 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 US in the late eighteenth century; and the legacy of the English legal system. But, as the US began engaging 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.

\(^3\) US Const, art I, § 8, cl 11.
\(^4\) Id, art I, § 8, cl 12.
\(^5\) Id, art I, § 8, cl 10.
\(^6\) Id, art II, § 2, cl 1.
\(^7\) Id, art II, § 3.
\(^8\) Id, art II, § 2, cl 2.
\(^9\) US Const, art III, § 2.
For example, Article II has few enumerated grants but includes general grants that lack clear definition. How broad is the Vesting Clause? How should we understand the Commander-in-Chief Clause? Can the President terminate a treaty without congressional approval? Several seemingly important questions regarding the President’s power to determine US foreign policy, commit the US to war without a congressional declaration, acquire territory, and 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 concerns 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. When considering the theoretical basis, courts have looked to the underlying intent of the Framers, the sources of the national government’s foreign relations authority, and the importance of separation of powers concerns. Additionally, 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 theoretical and functional concerns, these concerns 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 in other areas of

10 Id, art II, § 1. For a general discussion, see Saikrishna B. Prakash and Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L.J 231 (2001).

11 US Const, art II, § 2, cl 1.

12 The Constitution enumerated the concurrent Treaty Power that created a procedure for making treaties without providing guidance on treaty termination. US Const, art II, § 2, cl 2.

13 For an example of the role of historical practice, see Dames & Moore v Regan, 453 US 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 . . . .’”).

14 For an examination of functional consideration and institutional competency supporting an expansive use of the political question doctrine in foreign relations law, see generally Jide Nzelibe, The Uniqueness of Foreign Affairs, 89 Iowa L. Rev 941 (2004).
constitutional law, courts are left to use competing interpretive methods to 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 consider the institutional and political consequences of their decisions.

The process of resolving foreign relations law questions occurs under the shadow of the general growth of executive power in foreign relations. As the assumed representative of the US 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 US position on customary international law, and terminating treaties all without specific Article II textual grants. Simultaneously, courts have developed various prudential tools—the political-question doctrine, the act-of-state doctrine, and international comity doctrines, among others—that often result in judicial 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 general growth of the administrative state and federal power, 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. 

15 Curtis A. Bradley and 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.").
16 Consider Goldwater v Carter, 444 US 996 (1979) (refusing on political question grounds to resolve issue regarding the executive branch’s decision to terminate a treaty without congressional consent).
17 See id at 996; Made in the USA Foundation v United States, 242 F3d 1300 (11th Cir 2001).
19 For an example of international comity, see Ungaro-Benages v Dresdner Bank Ag, 379 F3d 1227 (11th Cir 2004).
20 Some might argue that framing foreign relations law as a set of constraints on executive decisionmaking is inaccurate. Foreign relations law could alternatively be conceptualized 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
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.\(^2\) 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 argue for greater judicial review of executive decisionmaking.\(^2\) Are there external variables that might explain when courts are more likely to defer to the executive? The answer requires an examination of the external constraints generated by great power politics.

**B. GREAT POWER POLITICS AS AN EXTERNAL CONSTRAINT**

How are great power politics and foreign relations law linked? For this Article's purposes, 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, in some areas of international politics, concerned with material power.\(^2\) Despite the heterogeneity of national interests, power often enables the achievement of both pragmatic and aspirational state goals,
and power relationships among great powers still play a significant role in explaining state behavior. While power is clearly not the only explanatory variable, it is certainly relevant to understanding international political outcomes.

The presence of competing great powers is a constraint on state decisionmaking. For example, 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 US. These great powers pursue their national interests, at times 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, national history, nationalism, culture, demographics or resource endowment, among other factors.

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

In this example, the executive of the US would operate under a system of internal foreign relations law constraints and the aforementioned external great power politics constraints. Even if internal constraints are weak—for example, limited judicial review of executive decisionmaking—executive authority is still limited by the strength of external constraints. Judicial deference to the executive 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 weak internal constraints constant, let’s assume that one of our four countries—the US—grows in material power by developing an economy and military larger and more potent than the other great powers. The power advantage may have arisen due to better economic policies, technological advancement, improvements in worker productivity or, in some cases, due to the internal economic or political problems facing competing great powers. Whatever the reason, the US has
gained in relative power vis-à-vis Countries A, B, and C. Since the US's growth far outpaces that of the formerly comparable great powers, the US is now a superpower or hegemon. The formerly multipolar international system with four comparable great powers is now a unipolar system, with one great power: the US.

As the new hegemon, the US has 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 US dissipate in a unipolar world. The cost/benefit analysis for the US changes: the benefits from realizing a particular foreign policy goal might now outweigh the potential costs of friction with weaker great powers. The US could pursue foreign policy goals in the unipolar world that would have been much more difficult in the multipolar world previously described. Most importantly, the weak internal constraints on the executive are compounded by the weak external constraints from great power politics.

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 generates external constraints. Though simplistic, framing foreign relations law and great power politics as mutually reinforcing constraints on executive decisionmaking suggests that allocation decisions may very well reflect a combination of internal and external factors.

III. IMPACT OF GREAT POWER POLITICS ON FOREIGN RELATIONS LAW

A. DESCRIPTIVE CLAIM

How is great power politics relevant to understanding the domestic allocation of decisionmaking authority? In bipolar and multipolar worlds, we know that there is no single hegemon and that the great powers will inevitably compete in pursuit of their respective interests. The external constraints on great powers are stronger as each great power must compete with the other great powers—whether friend or foe—to achieve its national interests. The very presence of competing great powers and the costs that they can impose make the achievement of foreign policy goals more difficult in multipolar and bipolar worlds. The executive’s institutional advantages—speed, flexibility, uniformity, secrecy and technical expertise—are essential for the state to pursue its national interests in this complex international political environment.

But the shift from a multipolar or bipolar world to a unipolar world changes the analysis. In a unipolar world, the external constraints on the hegemon are significantly weaker as a consequence of the hegemon’s dominance of international politics. If the US is the hegemon in a unipolar world, it can
pursue its national interests without the substantial costs that the presence of competing great powers could impose. The external constraints created by great power politics do not constrain the US to the same degree. From a position of dominance in international politics, the executive’s institutional advantages are important but might not be critical to achieve the national interest.

If this descriptive claim is correct, we should see higher levels of judicial deference to the executive when the US is one of several competing great powers in a multipolar or bipolar world, and lower levels of judicial deference when the US is the hegemon of a unipolar world. To examine this claim, at a bare minimum one would need to specify the periods of multipolarity and bipolarity; define judicial deference; and determine the degree to which foreign relations law precedent is consistent with the claim. This is clearly beyond the scope of this short article. However, a rough, non-scientific evaluation of the major precedent from these periods appears to support the descriptive claim outlined here.

During the twentieth century, the US was one of several great powers in a multipolar system from roughly the beginning of World War I until the end of World War II, and one of two great powers in a bipolar system from the early 1950s until the collapse of the Soviet Union in 1991. The cases here appear to support the claim. Even if we exclude the World War II precedent, it can be argued that *Curtiss-Wright*, *Baker v Carr*, *Sabbatino*, *Goldwater v Carter*, and

---


26 See *United States v Curtiss-Wright Export Corp*, 299 US 304, 320 (1936) (describing “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . .”).

27 See *Baker v Carr*, 369 US 186, 211 (1962) (“Not only does resolution of [foreign relations] issues frequently turn on standards that defy judicial application, or invoke the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views.”).

28 See *Sabbatino*, 376 US at 432–33 (“When articulating the principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also an advocate of standards it believes desirable for the community of nations and protective of national concerns. In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive branches could hardly be avoided”).

29 See *Goldwater*, 444 US at 996.
United States v Belmont, among other cases, are examples of the judiciary’s willingness both to apply prudential doctrines to avoid reviewing some executive branch decisions and to define broadly executive power in foreign affairs. While certainly not determinative, these cases and their progeny suggest that courts were sensitive to the strong external constraints of multipolar and bipolar worlds in adjudicating foreign relations law cases.

Since the end of the Cold War in the early 1990s, the US has been the hegemon of a unipolar world. Unipolarity generates weaker external constraints for the hegemonic state—the US—than the bipolar and multipolar systems described above. Consistent with the descriptive claim, we should see lower levels of deference as external constraints weaken. This will not occur instantaneously or without exception; the tension between extant foreign relations law precedent and the effect of unipolarity will likely produce inconsistent decisions as courts navigate the new international political environment. Moreover, public disillusionment with the Bush Administration’s handling of the War on Terror and the Iraq invasion might influence the judiciary’s willingness to defer to executive branch determinations, particularly when the case involves restrictions on individual liberty. In other words, there is significant noise that might obscure a long-term trend.

Nonetheless, in only eighteen years we have seen the proliferation of international human rights litigation culminating in the Supreme Court’s decision in Sosa v Alvarez-Machain, in which the Court permitted limited international human rights litigation under the Alien Tort Statute (despite the executive’s arguments that it was simply a jurisdictional statute that did not create a cause of action). In Hamdi, the Court rejected the executive’s claim that it could hold a citizen enemy combatant without trial and concluded that the

30 See United States v Belmont, 301 US 324, 330 (1937) (“Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.”).


32 For a survey of recent international human rights litigation, see generally Beth Stephens, Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation, 17 Harv Hum Rts J 169 (2004).

33 See Sosa v Alvarez-Machain, 542 US 692, 724 (2004) (“The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations . . .”).
government's due process protections were inadequate.\textsuperscript{34} In \textit{Hamdan}, the Court held that the executive's military commissions established to try enemy combatants at Guantanamo Bay were in violation of domestic law and international treaties.\textsuperscript{35} Finally, in \textit{Boumediene}, the Court rejected the executive's contentions that the Detainee Treatment Act was a suitable substitute for habeas corpus review.\textsuperscript{36}

If after further research this descriptive claim proves accurate, what might explain the rough correlation between the strength of external constraints and the level of judicial deference to the executive? In a multipolar or bipolar world, courts might be concerned sub rosa that lower levels of deference through greater review of executive actions combined with the strong external constraints from a multipolar or bipolar world might over-constrain the executive, impeding its ability to pursue the US's foreign policy goals. Moreover, courts might implicitly conclude that higher levels of deference to the executive would be mitigated by the strength of the external constraints from great power politics. In other words, the potential risks from the increased breadth of the executive's expanded decisionmaking authority—for example, an expansive conception of the executive's independent military powers—diminish in light of the costs that competing great powers could impose on the US.

However, if the US is the hegemon of a unipolar world without comparable great powers, courts might be more concerned that the risks related to high levels of deference to the executive would be exacerbated by the weak external constraints from great power politics. Since the unipolar world generates weaker constraints on the US's ability to pursue the national interest, courts might conclude that the benefits of increased judicial review of executive action outweigh the costs of limiting executive decisionmaking authority, particularly in the absence of competing great powers.

This crude analysis suggests that there might be a relationship between the structure of international politics and the level of judicial deference to the executive. As the external constraints from great power politics strengthen, judicial deference to the executive appears to increase. Similarly, as the external constraints weaken, courts appear to be more willing to review executive branch

\textsuperscript{34} See \textit{Hamdi v. Rumsfeld}, 542 US 507, 535-36 (2004) ("[W]e necessarily reject the Government's assertion that separation of power principles mandate a heavily circumscribed role for the courts in such circumstances").

\textsuperscript{35} See \textit{Hamdan v. Rumsfeld}, 548 US 557, 622 (2006) ("[W]e conclude that the 'practicability' determination that the President has made is insufficient to justify variances from the procedures governing courts-martial.").

\textsuperscript{36} See \textit{Boumediene v. Bush}, 128 S Ct 2229, 2277 (2008) ("Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.").
decisionmaking. Although the tentative descriptive claim outlined here requires much more investigation to determine its validity, framing foreign relations law as a function of international politics helps to understand the relationship between international politics and domestic legal decisionmaking.

B. PREDICTIVE CLAIM

The descriptive claim about the effects of great power politics on judicial deference leads to a related predictive claim. If the US remains as the hegemon of a unipolar world, over time we should see a general trend toward lower levels of deference to the executive. With the exception of crises that demand the unique institutional competencies of the executive, courts may be more willing to review executive decisionmaking and consequently reduce the extent of executive authority as they perceive the constraints from great power politics weaken. What are the implications of the descriptive and predictive claims?

Courts are more sensitive to the structure of international politics and the quality of external constraints—extra-constitutional concerns—in determining the allocation of decisionmaking authority than previously thought. Judges appear to consider the potential foreign policy consequences, both explicitly and sub rosa, of their decisions through the use of prudential deference doctrines and the interpretation of legal precedent. Though much more work is necessary to demonstrate the relationship, variation in the external constraints generated by great power politics may very well be salient to the disposition of some foreign relations law issues and, perhaps more controversially, more influential on courts than traditional doctrinal rules.

Great power politics, however, is unlikely to be salient for all foreign relations issues. Variation in the structure of international politics will likely affect questions on the distribution of decisionmaking authority the level of judicial deference to the executive and does not purport to determine the appropriate resolution of narrower, technical questions of foreign relations law. For example, it is more likely that great power politics would be relevant for issues that directly implicate the extent of the executive’s independent military powers; the breadth of Article II’s textual grants; the level of judicial deference

---


to executive determinations; the executive's unilateral termination of defense-related treaties; the extent of US participation in international judicial tribunals or international institutions; and the weight of historical practice and functional considerations in resolving foreign relations law questions.

But is the predictive claim normatively preferable? This depends on assumptions about the relationship between great power politics and international law.

IV. IMPACT OF GREAT POWER POLITICS ON INTERNATIONAL LAW

What is the relationship between great power politics and the US's engagement with international law? Identifying a framework for analysis in this context is more complicated because it depends on existing assumptions about the international relations theory that best explains state behavior; the development and content of international law; the efficacy of international law as a coercive instrument; and the regularity of state compliance with international law. For example, if states are rational, power-seeking, self-interested actors and they operate in a world with no central enforcement mechanism, we might expect compliance with international law when its content is consistent with state interests and non-compliance when its content is inconsistent with those interests. This logic of compliance would apply to great power behavior in bipolar, multipolar and unipolar worlds with one slight modification: the hegemonic state in a unipolar world might be more willing to ignore international law because its dominance of international politics and capacity to internalize the attendant reputational costs that such a course of action would likely generate. The US, as the current hegemon of international politics, likely has a greater capacity than any other state to absorb the costs of violating international law in some issue areas, though this may not be normatively preferable or sustainable over the medium-to-long term. From this perspective, variation in the structure of international politics would likely not

---

39 This is perhaps more reflective of a rational self-interest conception of state compliance with international law. See generally, Kenneth N. Waltz, Structural Realism after the Cold War, in G. John Ikenberry, ed, America Unrivalled: The Future of the Balance of Power 29 (Cornell 2002); Jack L. Goldsmith and Eric A. Posner, The Limits of International Law (Oxford 2005). In contrast, institutionalists begin with the same assumptions but arrive at different conclusion about the capacity of international institutions and international law to encourage compliance through the provision of information, transparency and the reputational costs of non-compliance. See generally, Andrew T. Guzman, How International Law Works: A Rational Choice Theory (Oxford 2008); Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (1984).
have the same impact on the US's engagement with international law as it appears to have on foreign relations law.

Working from this perspective, it is not clear that the executive's institutional competencies are any less important in a unipolar world with weaker external constraints than in a bipolar or multipolar world with stronger external constraints. States are still rational, self-interested actors competing to influence the development of international law, the power of international institutions and the content of international regulatory regimes. In a world of failed states, international terrorism, nuclear proliferation, and the diffusion of weapons technology, the executive's institutional expertise is still critical. Arguably, in a world with increasingly powerful non-state actors and the diffusion of weapons technology, the traditional model of deterrence is no longer applicable; states must be more vigilant in ensuring the safety of its citizens. Though the structure of international politics has changed, the arguments for judicial deference to the executive are still persuasive.

In contrast, a change in the assumptions about international relations theory and international law will lead to a different conception of great power politics and its impact on the US's engagement with international law. Realism is an anachronism, reflecting only the past bipolar and multipolar worlds in which power and self-interest motivated state behavior. In a unipolar world of international institutions, democratic governance and global interdependence, international law encourages state cooperation, diffuses shared norms and promotes international order. As the challenges of interdependence grow—for example, environmental degradation and human trafficking—the demand for multilateral coordinated solutions through international mechanisms also grows. International institutions are the fora for states to address these issues, while international law is the tool to implement solutions and regulate state compliance. International law, not great power politics, is the key to address the issues of the future.

From this perspective, the US's hegemonic status in a unipolar world; its support of democracy, human rights and rule of law; and its historical commitment to international institutions like the United Nations, the World Bank and the International Monetary Fund; provide an opportunity for the US


to create a global legal architecture to legalize international politics.\textsuperscript{42} Achieving these goals requires a greater role for courts to ensure the US's commitment to international law, multilateral treaties and democratic governance. With greater judicial review of executive decisionmaking, the US would likely be more willing to comply with international law, consider the greater integration of international law into the domestic legal system, and expand international human rights litigation.\textsuperscript{43} Assuming that this is the future of international relations, the shift from multipolarity and bipolarity to the current unipolar world privileges the judiciary's institutional competencies over those of the executive and encourages greater participation by courts in foreign affairs. Though the descriptive and predictive claims suggest lower levels of judicial deference to the executive as unipolarity continues, any analysis on whether this is normatively preferable will be driven by underlying assumptions about international relations theory, US foreign policy and international law.

V. CONCLUSION: AMERICAN POLITICS AND FOREIGN RELATIONS LAW

This Article explored the salience of great power politics on the allocation of foreign relations law decisionmaking authority. Examining foreign relations law through a lens of international politics also leads to potentially fruitful avenues of thought on the convergence of American politics, foreign relations law, and international relations theory.

If great power politics is relevant for understanding judicial deference to the executive, 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 international law? Conversely, is the judiciary more likely to interpret treaty terms expansively or encourage the greater integration of international law into

\textsuperscript{42} For a discussion of the US's attempt to create a constitutional order in international politics see generally, G. John Ikenberry, \textit{After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars} (Princeton 2001).

\textsuperscript{43} See \textit{Sosa}, 542 US at 724.
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.

Finally, it might be preferable for courts to engage in an explicit discussion of international politics as they resolve some foreign relations law questions. In an interdependent world, the allocation of foreign relations law authority will increasingly influence US foreign policy, the US's engagement with international law and its participation in international institutions. 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 our thinking about the role of international politics in the interpretation of foreign relations law rules has not quite kept pace.