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CHAPTER 1

WHAT IS FOREIGN RELATIONS LAW?

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This first chapter considers what is potentially encompassed by the term “foreign relations law,” and what it might mean to think about it as a distinct field of law that can be compared and contrasted across national jurisdictions. The chapter begins by outlining some differences between foreign relations law and international law. It then describes the development of foreign relations law as a field of study within the United States and considers why, at least until recently, it has not been treated as a field in most other countries. Finally, the chapter highlights a central question for foreign relations law, which is the extent to which it (or at least some parts or elements of it) should be treated differently than other types of domestic law—a debate referred to in the United States as one over “foreign affairs exceptionalism.”

I. FOREIGN RELATIONS LAW AND INTERNATIONAL LAW

Before comparing and contrasting the foreign relations law of various nations, we first need to have a sense of what, precisely, we mean by “foreign relations law.” For purposes of the book, the term is used to encompass the domestic law of each nation that governs how that nation interacts with the rest of the world.¹ These interactions include most centrally those interactions that occur between nations, but they can also encompass interactions between a nation and the citizens or residents of other nations and with international institutions. The law governing these interactions can take a variety of forms, including constitutional law (written and unwritten), statutory law, administrative regulations, and judicial decisions. Because many disputes concerning foreign relations law are addressed outside the courts, a full study of the topic also requires attention to

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¹ As noted below, the European Union, as a supranational institution that in some ways resembles a nation, also has a developed body of foreign relations law.

domestic “conventions” of proper political behavior that may or may not have legal status.

Many issues of foreign relations law concern allocations of authority between political actors, such as the authority to represent the nation in diplomacy, to conclude and terminate international agreements, to recognize foreign governments and their territories, and to initiate or end the use of military force. In federal systems these allocation issues are not only horizontal but also vertical, extending to the relations between national and sub-national institutions. But foreign relations law also encompasses issues relating to the role of the courts in transnational cases, such as whether certain issues are “nonjusticiable” and thus subject entirely to political branch determination, whether courts should take into account considerations of international comity when interpreting and applying domestic law, and whether and to what extent courts can apply international law directly to decide a particular case. Because much of foreign relations law addresses how authority is allocated among governmental actors, its topics are most salient for constitutional democracies that separate power and have independent judiciaries (and such democracies are the principal focus of this book), but the topics also have some relevance to other forms of government.

For the purposes of this book, the term “foreign relations law” is not meant to encompass “pure” questions of international law—that is, a nation’s obligations under treaties and customary international law on the international plane. While such international law governs in part how a nation conducts its foreign relations, it is both too vast, and in many respects too undifferentiated in its application to each nation, to be included in a working definition that will be useful for a study of comparative foreign relations law. So, when this book refers to foreign relations law, it is referring to various forms of domestic law.

To be sure, nations have varying international law obligations, and that fact is of potential comparative interest. Perhaps most obviously, nations have differing treaty commitments. Such differences in commitments can exist even for customary international law, since it is possible that some nations will have opted out of particular rules through persistent objection, or that particular sets of nations are subject to “regional custom.” In addition, even when international law obligations are ostensibly equal, nations may interpret them differently. Given the limits on centralized international adjudication, these differences of interpretation will often persist. While it may be fruitful to study differing national approaches to international law, and there are projects that attempt to do so,² this book involves a different project.

This book recognizes, however, that there are important interconnections between international law and foreign relations law. Some international law is converted into domestic law, either by the courts or through legislative or executive branch directive. Moreover, even when international law is not incorporated into a domestic legal system,

² See, e.g., Anthea Roberts, Paul B. Stephan, Pierre Hugues-Verdier, and Mila Versteeg, *Comparative International Law: Framing the Field*, 109 AM. J. INT’L L. 467 (2014).

courts may construe domestic law in light of international legal obligations, and the executive branch may exercise its discretion in light of such obligations.³ At times, courts may even do the opposite and construe international law in light of domestic law. (A domestic court might presume when construing a treaty, for example, that in making the treaty its government would not have intended to override certain aspects of domestic law.) This book's definition of foreign relations law includes the domestic rules governing these interconnections, but not the substance of the underlying international law.

As illustrations of the distinction between international law and foreign relations law, consider these five examples, involving different countries and different types of domestic law:

- In 2017, the Supreme Court of the United Kingdom held that the UK government was required to obtain authorization from Parliament before it could initiate withdrawal from the European Union.⁴ The Court reasoned that withdrawal would result in “a fundamental change in the constitutional arrangements of the United Kingdom,” and that such a change “must be affected in the only way that the UK constitution recognises, namely by Parliamentary legislation.”⁵ The Court was addressing only UK constitutional law, not the international law governing withdrawal from the EU, which is regulated by Article 50 of the Treaty on European Union.

- In 2010, the Supreme Court of Canada held in *Canada (Prime Minister) v. Khadr* that, although the United States was violating a Canadian citizen's rights by holding him at the Guantánamo Bay detention facility, how Canada should respond to this violation was a matter for determination by the executive branch, not the courts.⁶ The court therefore declined to order the Canadian executive branch to request the citizen's repatriation to Canada. The court based its decision on “the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations.”⁷

- In 2008, the U.S. Supreme Court held in *Medellín v. Texas* that the U.S. obligation under Article 94 of the United Nations Charter to comply with decisions of the International Court of Justice (ICJ) was not “self-executing” in the U.S. legal system and thus that an ICJ decision could not be applied to override domestic law absent

³ In the United States, courts apply the “*Charming Betsy*” canon of construction, whereby federal statutes are construed, where fairly possible, so that they do not violate international law. Many other countries have a similar canon of construction.

⁴ *R v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, at <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>.

⁵ *Id.*, para. 82.

⁶ [2010] 1 SCR 44, at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7842/index.do>.

⁷ *Id.*, para. 2.

congressional implementation of the decision.⁸ The court did not question that the ICJ decision was binding on the United States as a matter of international law.

- In 2005, Germany enacted a Parliamentary Participation Act to regulate the use of its armed forces.⁹ Under the Act, the executive branch is generally required to obtain legislative authorization before deploying armed forces, and the Act specifies in detail the information that the executive must provide to the Bundestag in its requests for authorization. The Act does not address the circumstances under which such deployments are consistent with international law governing the use of force.

- Since 1973, Japan’s executive branch has followed the “Ohira Principles” in deciding whether to seek legislative approval of international agreements, named after the foreign minister who initially promulgated them.¹⁰ Under these principles, which might be viewed as a non-binding “constitutional convention,”¹¹ legislative approval is to be sought in three general circumstances: (1) when new legislation will be needed or existing legislation will have to be maintained in order to comply with the agreement, (2) when the agreement affects fiscal obligations, and (3) when the agreement involves politically important obligations. These principles do not purport to determine whether an agreement is binding on Japan as a matter of international law.

In each of these examples, the relevant domestic law, whether in the form of a statute, judicial doctrine, or constitutional convention, regulates how the nation interacts with the rest of the world, but the law does not itself purport to determine the nation’s international rights or duties. Such law is what this book refers to as foreign relations law. There are important commonalities and variations in this foreign relations law across national jurisdictions, even among developed democracies, and those commonalities and variations are the focus of this book. This book also explores whether there are general trends in foreign relations law—for example, a resurgence of legislative involvement in foreign relations decisionmaking, or an effort by domestic courts to use international law to constrain executive authority.

It is important to note that, even though the focus of foreign relations law is on domestic law rather than international law, there is nothing inherent in such a focus that requires valuing domestic law over international law or resisting the domestic incorporation of international law. Nations vary in the extent to which their foreign relations law places them on the “monist” or “dualist” ends of the spectrum with respect

⁸ 552 U.S. 491, 508-09 (2008).

⁹ For an English translation, see Memorandum by Dr. Katja S. Ziegler, Annex II to *The Model of a “Parliamentary Army” Under the German Constitution*, at <https://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/5120707.htm>.

¹⁰ See Tadaatsu Mori, *The Making and Application of Treaties and Other International Agreements* (discussion paper for Duke-Japan Conference on Comparative Foreign Relations Law).

¹¹ Constitutional conventions are “maxims, beliefs, and principles that guide officials in how they exercise political discretion.” Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860.

to the incorporation of international law. Domestic doctrines that call for the direct incorporation of treaties or customary international law into the domestic legal system, or that give international law primacy over some forms of domestic law, or that look to international law when interpreting domestic law, are themselves part of foreign relations law.

There are many reasons why the content of foreign relations law might vary even among constitutional democracies. Countries have differing constitutional histories. It would not be surprising, for example, to find differences between constitutional arrangements developed after World War II and those developed earlier. Parliamentary and presidential systems may have also somewhat different approaches to questions of the separation of powers.¹² In addition, understandings of the judicial role might differ among countries, including as between civil law and common law countries. The particular domestic politics of a country can also have an important influence on the content of its domestic law, including its foreign relations law. Finally, if foreign relations law is affected by a nation's geopolitical status, this will obviously vary, both among individual countries and over time. Despite these points, differences in foreign relations law also sometimes reflect differences in policy choices, and an awareness of both the existence and potential ramifications of such choices can be illuminating for nations when evaluating their own foreign relations law.

II. FOREIGN RELATIONS LAW AS A “FIELD”

At least until recently, what this book is defining as foreign relations law was not thought of as a “field” of study outside the United States. Instead, in most countries, it was thought that there were various fields of domestic law, such as constitutional law and administrative law, and that these fields sometimes had international components. These domestic fields, in turn, were sharply distinguished from the field of international law, both analytically and in terms of the individuals who focused on them.

Like the character in the Molière play who discovers that he has been speaking prose all his life without realizing it, these nations of course have had foreign relations law even if they did not describe it as a field. Most obviously, foreign relations law as defined by this book encompasses a lot of the law that is practiced, and has long been practiced, by lawyers in foreign ministries. But unlike in the United States, most nations did not treat it as a discrete field of study.¹³

¹² Cf. Miriam Fendius Elman, *Unpacking Democracy: Presidentialism, Parliamentarism, and Theories of Democratic Peace*, 9 SECURITY STUDIES 91, 93 (2000) (discussing “how presidential, coalitional parliamentary, Westminster parliamentary, and semipresidential democratic systems . . . influence the autonomy of foreign policymakers, and pose different sets of constraints and opportunities for foreign security policy making”).

¹³ Germany may be a partial exception. “Staatsrecht [Law of the State] III” encompasses that country’s constitutional law relating to external relations, as well as the incorporation of international law within the German legal system.

That is starting to change. In 2014, Campbell McLachlan—one of the authors for this volume—published an extensive treatise on Commonwealth foreign relations law.¹⁴ This is an important volume, and it was cited in the UK Supreme Court’s decision concerning Brexit. There have also been recent books on the foreign relations law of the European Union, which address issues such as the process for concluding international agreements and the role of federalism that are somewhat comparable to the foreign relations law issues confronted by individual nations.¹⁵ Some non-U.S. universities are also starting to offer courses on foreign relations law.¹⁶

The United States never actually had a monopoly on the field anyway. One substantial component of foreign relations law concerns the role of domestic courts in applying international law and in adjudicating transnational cases that implicate governmental interests. That topic has long received attention outside the United States. In the United Kingdom, for example, F.A. Mann started writing about the topic decades before publishing his important 1986 volume, *Foreign Affairs in English Courts*.¹⁷ There also has been some focus in other countries on how federalism can affect allocations of foreign relations authority.¹⁸

It is not entirely clear why the field of foreign relations law has a much more extensive history in the United States than in other countries. The United States has the oldest written Constitution in the world, and accommodating that Constitution to a radically changed international environment, as well as a substantially different U.S. role in that environment, may present unique challenges. The Constitution’s inclusion of treaties in the Supremacy Clause, which infuses a degree of monism into U.S. constitutional law, may also present particular challenges for U.S. law, especially as

¹⁴ See CAMPBELL MCLACHLAN, *FOREIGN RELATIONS LAW* (2014).

¹⁵ MARISE CREMONA AND BRUNO DE WITTE, *EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS* (2008); ROBERT SCHÜTZE, *FOREIGN AFFAIRS AND THE EU CONSTITUTION* (2014); see also BART VAN VOOREN AND RAMSES A. WESSEL, *EU EXTERNAL RELATIONS LAW: TEXT, CASES AND MATERIALS* (2014).

¹⁶ See, e.g., *Foreign Relations Law in Comparative Perspective* (Roland Portmann), University of St. Gallen, at <http://tools.unisg.ch/Handlers/public/CourseInformationSheet.ashx?Semester=FS17&EventNumber=8,492,1.00>; *Foreign Relations Law* (Prof. McLachlan), Victoria University of Wellington, <http://www.victoria.ac.nz/courses/laws/547/2017/offering?crn=8592>; *Foreign Relations Law* (Prof. Larik), University of Leiden, at <https://studiegids.leidenuniv.nl/courses/show/63049/Foreign-Relations-Law>. Professors Campbell and Larik have both contributed chapters to this volume. For courses on EU Foreign Relations Law, see, for example, University of Amsterdam, at <http://studiegids.uva.nl/web/uva/sgs/en/c/9964.html>; European University Institute, at <http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/Cremona/ConstitutionalFoundationsEUForeignRelationsLaw.asp>.

¹⁷ See, e.g., F.A. Mann, *The Sacrosanctity of the Foreign Act of State*, 59 L.Q. REV. 42 (1943). For a more recent volume concerning international law in British courts, see SHAHEED FATIMA, *USING INTERNATIONAL LAW IN DOMESTIC COURTS* (2005). For a study of international law within the U.S. legal system, see CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (2d ed. 2015). Some comparative studies of aspects of foreign relations law have emerged in recent years. See, e.g., *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* (David Sloss ed., 2009).

¹⁸ See, e.g., *FOREIGN RELATIONS IN FEDERAL COUNTRIES* (Hans Michelmann ed., 2009).

treaty-making has changed over time. In addition, the United States has a unique brand of federalism that tends to generate difficult legal issues as globalization has blurred the line between foreign and domestic affairs. Law schools in the United States also may have a more flexible structure than in many other countries, allowing faculty to more easily cross historic subject matter divides. Finally, many internationally-focused U.S. academics have experience in the Legal Adviser's Office of the State Department, the work of which is often centered around foreign relations law.

Nor is it clear when to date the emergence of such a field in the United States. One might be tempted to date it to Louis Henkin's magisterial treatise, *Foreign Affairs and the Constitution*, the first edition of which was published in 1972.¹⁹ Since then, U.S. casebooks specifically dedicated to the study of foreign relations law emerged: initially the Franck and Glennon casebook, the first edition of which was published in 1987,²⁰ and then the Bradley and Goldsmith casebook, the first edition of which was published in 2002.²¹ There have also been a number of additional monographs on the topic.²²

The timing, however, is more complicated than that. For example, some of Henkin's most important foreign relations law work dates to well before his 1972 book and includes a number of articles from the 1950s and 1960s,²³ as well as a 1958 book that, despite its narrower focus, was in many ways a precursor to his 1972 book.²⁴ Moreover, in 1965, the American Law Institute published the *Restatement (Second) of the Foreign Relations Law of the United States*,²⁵ the work on which began in the mid-1950s.²⁶ Restatements are non-binding but influential efforts by groups of legal experts

¹⁹ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

²⁰ The casebook, with new authors, is currently in its Fourth Edition. See THOMAS FRANCK, MICHAEL GLENNON, SEAN MURPHY, AND EDWARD SWAINE, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS, AND SIMULATIONS* (4th ed. 2011).

²¹ The casebook is now in its Sixth Edition. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (6th ed. 2017).

²² See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1991); THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992); MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* (2007).

²³ See, e.g., Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151 (1956); Louis Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964).

²⁴ See LOUIS HENKIN, *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* (1958). In the Introduction to this book, Henkin described it as "essentially a memorandum of law, an examination of problems which arms control and inspection may raise under the Constitution and laws of the United States." *Id.* at 3. But the study was wide-ranging and included, for example, a consideration of legal issues that might be entailed for the United States of joining an international criminal court. In his 1972 book, Henkin noted that he was drawing on his earlier writings, including the 1958 book. See HENKIN, *supra* note 19, at x.

²⁵ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965).

²⁶ As the Introduction to the *Restatement (Second)* notes, the work on it "was made possible by a grant from the Ford Foundation awarded in 1955, after a preliminary study financed by the Rockefeller

that describe the state of the law in a particular field. The first Restatement of Foreign Relations Law was labeled the *Restatement (Second)* because it was part of the second series of Restatements published by the American Law Institute. A more expansive *Restatement (Third)* was published (in two volumes) in 1987, and Henkin was its Chief Reporter.²⁷ Since 2012, a *Restatement (Fourth)* project has been underway, and materials on treaties, jurisdiction, and immunity have been completed; several of the Reporters for that project are authors in this volume. The key point for present purposes is that foreign relations law has been conceived of as a field within the United States at least since the initial development of the *Restatement (Second)* in the 1950s.

But the field of foreign relations law in the United States also predates the *Restatement* projects. As Henkin made clear in the Preface to his 1972 book, he was writing against the backdrop of earlier generations of work from the late nineteenth and early twentieth centuries, and he noted that he was “much indebted” to Quincy Wright’s book, *The Control of American Foreign Relations*, which was published in 1922.²⁸

Henkin also made several perceptive suggestions about why there had been a long gap in scholarly attention to U.S. foreign relations law, and some of these suggestions may be relevant to why foreign relations law has been less developed as a field outside the United States. First, he observed that the field of constitutional law in the United States had become heavily focused on Supreme Court decisionmaking, and that the Court was not frequently engaging with foreign affairs cases during the post-World War II period.²⁹ Second, he speculated that as both constitutional law and international law had expanded as part of the general growth of public law, they may have “developed into separate expertise of different experts.”³⁰ Finally, he suggested that foreign relations law “fell between the constitutional lawyer and the international lawyer, perhaps nearer to the latter, but his credentials in constitutional law were not universally accepted and he was himself less than wholly comfortable with its matter and manner.”³¹

During the pre-World War II period that Henkin saw as an earlier time of vibrancy in foreign relations law, the United States was emerging as a major world power. Not coincidentally, the presidency was also becoming a more robust institution, including in foreign affairs. In addition, there were efforts in this period to increase the scope and effectiveness of international law and institutions—through, for example, expansions of inter-state arbitration. These developments generated intense discussions

Foundation.” *Id.* at vii. For additional discussion of the genesis of the *Restatement (Second)*, see DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY* 271-80 (2016).

²⁷ Unlike the focus of this *Handbook*, the *Restatement (Second)* and the *Restatement (Third)* defined foreign relations law to include international law, although their coverage of the international law applicable to the United States was very selective.

²⁸ See QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922).

²⁹ HENKIN, *supra* note 19, at vii-viii.

³⁰ *Id.* at viii.

³¹ *Id.*

within the United States about the limits of presidential authority, the extent to which the government could conclude international agreements without obtaining the advice and consent of a supermajority of the Senate, the relevance of federalism to the government's foreign affairs powers, the constitutionality of delegating U.S. "sovereignty" to international institutions, and the proper role of the courts in evaluating the government's foreign affairs decisions and actions.³² There was particular reflection on these issues in the wake of World War I and the Senate's rejection of the Versailles Treaty, and Quincy Wright's book was written against the backdrop of these events.³³

By the end of World War II, by contrast, the central debates in foreign relations law had been at least temporarily resolved.³⁴ The debate between nationalism and federalism had been resolved in favor of nationalism. The debate over executive power had been resolved in favor of the President. The Senate's role in the treaty process was weakened. Courts largely deferred to the political branches. These debates would later reopen, of course—first after Vietnam,³⁵ then after end of the Cold War, and then again after 9/11. Exogenous shocks in international relations, in other words, have tended periodically to revitalize the field of U.S. foreign relations law.

There has been an especially high level of contestation in the field of foreign relations law in the United States during the past several decades, with various "revisionist" challenges to orthodoxy.³⁶ Some of these challenges have pressed for more attention to structural constitutional considerations that may limit or filter the domestic application of international law. The U.S. Supreme Court during this period has been receptive to some of this revisionist thinking.³⁷ Whatever one's views about these critiques and the responses they have generated, this dialogue has helped to give vibrancy to the field of foreign relations law in the United States. Scholars of U.S. foreign relations law today (a number of whom are authors in this volume) vary significantly in their ideological orientation, and the dialogue among them is generally perceived to have strengthened the overall quality of the work in this area.

³² See, e.g., EDWARD S. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917); LOUIS L. JAFFEE, *JUDICIAL ASPECTS OF FOREIGN RELATIONS* (1933); HAROLD W. STOKE, *THE FOREIGN RELATIONS OF THE FEDERAL STATE* (1931).

³³ In the Preface to his book, Wright described the genesis of his thinking that ultimately led him to write the book: "In the winter of 1920, with the Treaty of Versailles still unratified and unrejected by the Senate," he discussed with colleagues "a subject then in the front of everyone's mind—the American system or lack of system for controlling foreign relations." WRIGHT, *supra* note 28, at ix.

³⁴ See generally G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

³⁵ Henkin's treatise was self-consciously written "in the quicksands of Vietnam." HENKIN, *supra* note 19, at viii.

³⁶ Professor Jack Goldsmith and I authored one of the initial challenges, concerning the domestic status of customary international law. See Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

³⁷ See Curtis A. Bradley, *The Supreme Court as a Filter Between International Law and American Constitutionalism*, 104 CAL. L. REV. 1567 (2016).

III. Foreign Affairs Exceptionalism

Early in my academic career, I coined the term “foreign affairs exceptionalism.”³⁸ This term as I used it refers to “the view that the federal government’s foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers.”³⁹ This might mean, to take a few examples, that the federalism constraints that apply to the government’s exercise of domestic authority are weaker in the area of foreign affairs; that the usual separation of powers understandings that apply in the domestic arena (such as the proposition that the President is not a lawmaker) apply less strictly when foreign affairs are implicated; and that the judicial role is more constrained in cases implicating foreign affairs than in cases involving domestic affairs. Debates over whether and to what extent there should be such foreign affairs exceptionalism have been a core part of scholarship relating to U.S. foreign relations law.

Probably no Supreme Court decision reflects this concept of exceptionalism more than *United States v. Curtiss-Wright Export Corporation*.⁴⁰ This case concerned what is known in U.S. law as the “non-delegation doctrine.” The idea is that Congress is not allowed to transfer its legislative authority to the executive branch and thus, when it grants authority to that branch, it must provide sufficient standards to guide the exercise of that authority. The modern Supreme Court does not apply this doctrine vigorously and allows even very broad delegations as long as there is an “intelligible principle” in the legislation.⁴¹ But the Court was enforcing the doctrine more strictly during the 1930s when *Curtiss-Wright* was decided, and the Court invalidated some domestic New Deal legislation on that basis.

At issue in *Curtiss-Wright* was legislation relating to the Chaco War between Bolivia and Paraguay. Congress passed a statute providing that it would be a crime for U.S. citizens and corporations to sell arms or munitions to either of the two countries in the War if the President determined that a ban on such sales “may contribute to the reestablishment of peace between those countries.” President Franklin Roosevelt immediately made such a determination, and the executive branch subsequently sought to

³⁸ See Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104-07 (1999); Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539 n.51, 555-56 (1999); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1582-86 (2003).

³⁹ Bradley, *A New American Foreign Affairs Law?*, *supra* note 38, at 1096. For a slightly different definition, see Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1899, 1900 (2015) (defining it as “the belief that legal issues arising from foreign relations are functionally, doctrinally, and even methodologically distinct from those arising in domestic policy”).

⁴⁰ 299 U.S. 304 (1936).

⁴¹ See, e.g., *Whitman v. Am. Trucking Assn’s*, 531 U.S. 457, 472 (2001).

prosecute the Curtiss-Wright Export Corporation and its officers for selling machine guns to Bolivia. The defendants argued that the statute under which they were being prosecuted was invalid because it delegated too much discretion to the President.

The Supreme Court explained that it was “unnecessary to determine” whether the statute in this case would constitute an unlawful delegation of authority if it “had related solely to internal affairs.”⁴² The Court then proceeded to describe the “fundamental” differences between “the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs.”⁴³ Among other things, it reasoned that, unlike its domestic powers, the federal government’s foreign affairs powers “did not depend upon the affirmative grants of the Constitution” and would in any event have “vested in the federal government as necessary concomitants of nationality.”⁴⁴ As a result, claimed the Court, “[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”⁴⁵

The Court in *Curtiss-Wright* also emphasized the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”⁴⁶ It noted that the President often has access to information relating to foreign affairs that is not available to Congress. As a result, reasoned the Court, it is often necessary for Congress to grant to the President “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”⁴⁷

The author of the Court’s opinion in *Curtiss-Wright* was Justice George Sutherland. Sutherland had been thinking about the distinction between foreign and domestic affairs for many years prior to the decision. In 1909, when serving as a senator from Utah, Sutherland wrote an essay entitled *The Internal and External Powers of the National Government*.⁴⁸ In this article, Sutherland sharply distinguished between the constitutional law of domestic affairs and that of foreign affairs. About a decade later, Sutherland delivered a series of lectures on this topic at Columbia Law School and subsequently published a book based on them.⁴⁹ Like his earlier article, and his later opinion in *Curtiss-Wright*, the book takes the position that “[t]he rules of construction,

⁴² 299 U.S. at 315.

⁴³ *Id.*

⁴⁴ *Id.* at 318.

⁴⁵ *Id.* at 315-16.

⁴⁶ *Id.* at 320.

⁴⁷ *Id.*

⁴⁸ 191 N. AM. REV. 373 (1910). The essay was first printed as a Senate document in 1909. *See* S. Doc. No. 61-417 (1909).

⁴⁹ *See* GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS (1919).

which apply when the government undertakes to deal with *internal* matters, may not apply, in the case of *external* matters, in the same way, or to the same degree, or, conceivably, in some cases, may not apply at all.”⁵⁰ As one commentator observed, Sutherland in *Curtiss-Wright* was “in the happy position of being able to give [his] writings and speeches the status of law.”⁵¹

The analysis in *Curtiss-Wright* has been heavily criticized. Commentators have especially resisted the idea that the foreign relations powers of the government are “extra-constitutional,”⁵² and it seems unlikely that the Supreme Court today would endorse that proposition. But the more general idea of foreign affairs exceptionalism—that is, the idea that legal issues implicating foreign affairs are to be treated differently than legal issues implicating domestic affairs—runs throughout much of U.S. foreign relations law. One way that such exceptionalism has tended to manifest itself is through heightened judicial deference to the executive branch in the foreign affairs area—on issues ranging from treaty interpretation, to foreign official immunity, to predictions about likely diplomatic consequences. Part of the justification for such heightened deference is functional: that the executive branch has more expertise and access to relevant information relating to foreign affairs than the other branches of government and that it is desirable for the United States to speak with “one voice” in foreign affairs where possible.

Some commentators contend that the U.S. Supreme Court has been shifting away from foreign affairs exceptionalism since the end of the Cold War,⁵³ although this claim has been contested.⁵⁴ The Supreme Court’s 2015 decision in *Zivotofsky v. Kerry* suggests that the Court is still attentive to the comparative advantages of the presidency in the foreign affairs arena.⁵⁵ In that case, the Court held that the President had the exclusive authority to determine the U.S. position with respect to the status of Jerusalem and that Congress had unconstitutionally interfered with that authority in attempting to require the State Department to designate in the passports of U.S. citizen children born in Jerusalem that the birthplace was “Israel.” While discounting some of the broad dicta from *Curtiss-Wright*, the Court emphasized that the nation needs to speak with one voice on the issue of recognizing foreign sovereigns and their territories and that “[b]etween the

⁵⁰ *Id.* at 29.

⁵¹ David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467, 476 (1946). For additional discussion of the decision, see, for example, Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973), and H. Jefferson Powell, *The Story of Curtiss-Wright Export Corporation*, in PRESIDENTIAL POWER STORIES 195 (Curtis A. Bradley & Christopher H. Schroeder eds., 2009).

⁵² See, e.g., Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000).

⁵³ See Sitaraman & Wuerth, *supra* note 39.

⁵⁴ See, e.g., Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from “Exceptionalism,”* 128 HARV. L. REV. F. 294 (2015); Carlos M. Vázquez, *The Abiding Exceptionalism of Foreign Relations Doctrine*, 128 HARV. L. REV. F. 305 (2015).

⁵⁵ See 135 S. Ct. 2076 (2015).

two political branches, only the Executive has the characteristic of unity at all times.”⁵⁶ The Court also explained that “[t]he President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition” and that he “is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law.”⁵⁷

Whatever one may think about foreign affairs exceptionalism, it should be kept in mind that it does not mean isolationism or resistance to international law. Indeed, many Supreme Court decisions that seem exceptionalist with respect to federalism or executive power have made it easier for the national government to make and implement international commitments and engage in international relations. For example:

- In *Missouri v. Holland*, the Supreme Court held that the national government is not constrained by the federalism limits that apply to federal legislation when it enters into and implements treaties.⁵⁸ The Court made clear that it did “not mean to imply that there are no qualifications to the treaty-making power,” but it said that “they must be ascertained in a different way.”⁵⁹ For the migratory bird protection treaty at issue in that case, the Court explained that “[h]ere, a national interest of very nearly the first magnitude is involved,” and “[i]t can be protected only by national action in concert with that of another power.”⁶⁰

- In *United States v. Belmont*, the Court (with Justice Sutherland authoring the opinion) upheld President Roosevelt’s use of an executive agreement to settle claims with the Soviet Union as part of his recognition of that government, and it allowed such an agreement to displace otherwise applicable state law.⁶¹ Because of what it described as the national government’s “complete power over international affairs,” the Court reasoned that “all international compacts and agreements” are free from “any curtailment or interference on the part of the several states.”⁶²

- In *Zschemig v. Miller*, the Court held that an Oregon inheritance law was invalid because, by in effect disallowing inheritance of Oregon property by heirs living in Communist countries, it had the potential to “affect[] international relations in a persistent and subtle way.”⁶³ While acknowledging that the states have traditionally

⁵⁶ *Id.* at 2079.

⁵⁷ *Id.* at 2086.

⁵⁸ 252 U.S. 416 (1920).

⁵⁹ *Id.* at 433.

⁶⁰ *Id.* at 435.

⁶¹ 301 U.S. 324 (1937).

⁶² *Id.* at 331.

⁶³ 389 U.S. 429, 440 (1968).

regulated inheritance issues, the Court said that state laws in this area “must give way if they impair the effective exercise of the Nation’s foreign policy.”⁶⁴

Of course, exceptionalism might also cut in the other direction—for example, by limiting the judicial role in a way that reduces enforcement of international law. Perhaps that is how to view *Banco Nacional de Cuba v. Sabbatino*.⁶⁵ In that case, the Court held that, because of the danger of disrupting the executive branch’s management of foreign relations, “the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.”⁶⁶ In dissent, Justice White complained that the Court had “with one broad stroke, declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases.”⁶⁷

Some degree of exceptionalism is probably inevitable, if for no other reason than that the legal materials relating to foreign affairs sometimes have no precise analogue in domestic law. For example, although treaties are similar in some ways to statutes in the U.S. legal system, they are also different in that they are made through a different process, and more importantly, they can create both international law and domestic U.S. law and thus implicate issues of reciprocity not implicated by mere domestic legislation. Similarly, although it is surely an overstatement to suggest that for the purposes of foreign affairs the states “do not exist,”⁶⁸ state actions relating to foreign affairs can create externalities for the entire nation that need to be considered in evaluating the proper application of federalism doctrines. And, while it is an overstatement to suggest that the President is the only important actor for the United States in foreign affairs, the President does possess unique access to information relating to foreign affairs and is able to act more quickly and in a more coordinated way in responding to foreign affairs developments than Congress, which faces both collective action limitations and internal partisan competition.

These observations are certainly not intended to suggest that the legal understandings that apply to domestic affairs have no application to foreign affairs. In many instances, these understandings very likely should apply—for example, with

⁶⁴ *Id.*

⁶⁵ 376 U.S. 398 (1964).

⁶⁶ *Id.* at 428.

⁶⁷ *Id.* at 439 (White, J., dissenting). The Supreme Court’s sovereign immunity decisions prior to the enactment of 1976 Foreign Sovereign Immunities Act may be another example of how foreign affairs exceptionalism will not necessarily promote compliance with or incorporation of international law. *See, e.g., Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945) (“[I]t is the duty of the courts . . . not to enlarge an immunity [of a foreign government] to an extent which the [U.S.] government, although often asked, has not seen fit to recognize.”).

⁶⁸ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 149-50 (2d ed. 1996).

respect to the protection of individual rights within the country. But part of the vibrancy of the field of foreign relations law in the United States stems from the dialogue and contestation over when foreign affairs genuinely merit different legal treatment.

IV. Conclusion

There is a certain amount of arbitrariness in any attempt to define a “field” of legal study. When deciding whether to consider foreign relations law as a field, the ultimate question is whether valuable insights can be obtained by focusing on its particular collection of legal materials and doctrines.⁶⁹ For U.S. scholars, the answer has long been yes, and scholars in other countries are now increasingly finding that such a focus can be useful. This book in turn asks another question: whether valuable insights can be obtained by comparing these bodies of foreign relations law across national jurisdictions, and with organizations like the European Union. The chapters that follow explore that question, both generally and with respect to a variety of specific foreign relations law topics.

Comparative foreign relations law overlaps with comparative constitutional law, although it is broader in some respects and narrower in others. Foreign relations law encompasses a wide range of public law materials, not just constitutional law, but it does not extend to all of the issue areas that fall within the domain of constitutional law. Moreover, the constitutional law relating to foreign relations law tends to be less “judicialized” than other areas of constitutional law, and in part for that reason is often given much less attention than domestic affairs in studies of comparative constitutional law.⁷⁰ As others have noted, doing comparative public law may be more challenging than doing comparative private law, given the significant differences among countries in institutional structures.⁷¹ Nevertheless, there is a rich literature on not only comparative constitutional law, but also comparative administrative law. That literature has become

⁶⁹ Cf. Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 242 (2010) (“At a minimum, a legal field must exhibit two characteristics: commonality and distinctiveness.”); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) (“By working through these examples of law interacting with cyberspace, we will throw into relief a set of general questions about law’s regulation outside of cyberspace.”).

⁷⁰ Only one of the 64 chapters in the *Oxford Handbook of Comparative Constitutional Law* directly concerns an issue of foreign relations law—the chapter by Yasuo Hasebe on war powers—although some of the other chapters touch on the relationship between domestic law and international law. Of the 33 chapters in *Comparative Constitutional Law* (Tom Ginsburg & Rosalind Dixon eds., 2011), only two directly focus on foreign relations law, and on only one aspect of it—national security law. In his 1985 Hague lectures on comparative approaches to international law, W.E. Butler noted that comparative law “has traditionally overlooked this realm” of comparative foreign relations law. 1 *Receuil des Cours* 83 (1986).

⁷¹ See Michel Rosenfeld & András Sajó, *Introduction*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1, 2 (Michel Rosenfeld & András Sajó eds., 2012) (“Traditionally, comparison in private law has been regarded as less problematic than in public law. Thus, where it seems fair to assume that there ought to be great convergence among industrialized democracies over the uses and functions of commercial contracts, that seems far from the case in constitutional law.”).

analytically and methodologically sophisticated, and some of the concepts and approaches developed in that literature may be of value when focusing on comparative foreign relations law.⁷²

⁷² For a description of some of the approaches to comparative constitutional law, see Vicki Jackson, *Comparative Constitutional Law: Methodologies*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 71, at 54-74.