

Derivative Foreign Relations Law

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ABSTRACT

We treat U.S. foreign relations law as a discrete body of law—and it is. But it is not independent. To the contrary, it relies on the same institutional actors that govern more generally: the President, Congress, the federal judiciary, administrative agencies, and subnational governments. And far from being static, these institutions change radically over time in how they are constituted, in what internal rules they apply, and in what legal outputs they produce. The Trump Administration is a recent and painful example whose legacy continues to loom large, including on the Supreme Court. This symposium contribution considers what these broader institutional changes mean for foreign relations law.

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INTRODUCTION

In the *Book of Daniel*, King Nebuchadnezzar dreams of an enormous statue. It has a head of gold; a body of silver, brass, and iron; and feet made from iron and clay. Then a stone strikes the statue at its weak

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point—the feet. The statue falls to pieces “like the chaff of the summer threshing floors.”¹

The field of foreign relations law occupies itself with the heady topic of how the United States engages with foreign affairs.² How is power over foreign relations distributed among the various branches of our government? When can the President unilaterally use force abroad? What are the roles for the courts? To what extent are individual rights protected in the context of foreign affairs? Sean Murphy and Ed Swaine tackle these questions, and many more, in their valuable and nearly exhaustive book on *The Law of U.S. Foreign Relations*.³ This symposium celebrates their achievement, the work of many years by two experts in the field.

But other questions are keeping me up at night these days. How much foreign affairs power should be entrusted to unscrupulous Presidents elected by a minority of voters? How does the current dynamic in the Senate, with a robust filibuster for most laws but no filibuster for appointments, affect foreign affairs governance? Is Congress ever going to be able to pass the laws needed to deal with the problems of the commons? What can we expect from the current Supreme Court on issues relating to foreign affairs, especially given that three of its members were appointed by President Trump with bare majorities in the Senate? Is our democracy going to survive the month of January 2025?

In other words, I am worried—very worried—about the feet of foreign relations law. I expect that many of you are too. But is this something that foreign relations law scholars must grapple with? In the dream of Nebuchadnezzar, the fact that the feet are partly clay makes the entire statue vulnerable, but there really is nothing that the head can do about this problem. Yet perhaps a better analogy is not a fixed statue but instead a living “organism,” a “being the development of which could not have been foreseen completely by the most gifted of its begetters”⁴ and whose component parts have influence over each other.

This symposium piece explores connections between foreign relations law and the broader U.S. institutions of governance. It takes as a premise that these broader institutions are shifting rather than static, with shifts in recent years that pose challenges to the structure of our

¹ *The Book of Daniel* 2:31–35.

² For shorthand, I use “foreign relations law” here and throughout the Essay to refer specifically to U.S. foreign relations law. For a recent exploration of comparative foreign relations law, see generally THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW (Curtis A. Bradley ed., 2019).

³ See generally SEAN D. MURPHY & EDWARD T. SWAINE, THE LAW OF U.S. FOREIGN RELATIONS (2023).

⁴ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

democracy. These shifts in turn matter for foreign relations law in several important ways.

First, broader institutional changes can be explanatory (looking backward) and predictive (looking forward) of changes in foreign relations law. Professor Murphy and Professor Swaine have provided a valuable snapshot of foreign relations law at the present moment.⁵ But they do not say much about broader trends that have led to this moment or about what the future is likely to hold. To think about these questions, we need to think about our general institutions of governance and about how they relate to the power of our political parties. To think about whether a framework for foreign relations legislation is likely to come out of Congress in the absence of filibuster reform, one needs to recall that the Senate is so partisan that it could not muster even sixty votes to convict former President Trump of obviously impeachable conduct.⁶ To think about what the future holds for individual rights and foreign affairs, one needs to consider that Justice Gorsuch rather than Merrick Garland replaced Justice Scalia,⁷ that Justice Kavanaugh replaced Justice Kennedy,⁸ and that Justice Barrett replaced Justice Ginsburg.⁹

Second, consideration of the broader governance framework is necessary for thinking about what changes (if any) to foreign relations law are presently both desirable and attainable. In the absence of changes to the broader framework, the overlap between “desirable” and “attainable” is modest at best. But incremental improvements are better than no improvements. A valuable interim goal is to do whatever can be done to make the executive branch sufficiently empowered to do the necessary work of foreign affairs governance, yet also expertise driven and accountable.

The remainder of this Essay explores the themes described above. Part I describes important recent shifts in how our country is governed—shifts that have led to lessened democracy, increased presidential control, and the entrenchment of Republican power. Part II considers

⁵ See generally MURPHY & SWAINE, *supra* note 3.

⁶ Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020, 1:59 AM) <https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html> [<https://perma.cc/GF6P-PYFW>].

⁷ Nina Totenberg, *Senate Confirms Gorsuch to Supreme Court*, NPR (Apr. 7, 2017, 2:47 PM), <https://www.npr.org/2017/04/07/522902281/senate-confirms-gorsuch-to-supreme-court> [<https://perma.cc/W7LQ-AJXT>].

⁸ Brian Naylor, *Brett Kavanaugh Sworn in as Newest Supreme Court Justice*, NPR (Oct. 6, 2018, 11:31 PM), <https://www.npr.org/2018/10/06/654409999/final-senate-vote-on-kavanaugh-nomination-expected-saturday> [<https://perma.cc/Y4WF-KZET>].

⁹ Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM) <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> [<https://perma.cc/TGM3-JLER>].

how these broader institutional changes matter for foreign relations law. Part III uses two examples to illustrate how much interplay there can be between foreign relations law and our broader institutional framework. Finally, Part IV reverses direction and asks whether foreign relations law has anything to offer to our current democratic dysfunctions.

Overall, this symposium Essay reflects on the field beyond the field. Foreign relations law is discrete but not independent; it rests on broader institutional foundations (as well as many other things that this Essay does not explore, such as the international landscape and the scope of technological progress). Reflection on these broader connections is complementary to work that stays within the parameters of foreign relations law, of which the book by Professors Murphy and Swaine is a stellar example.¹⁰ The field of foreign relations law needs both *jus ad foreign relations* and *jus in foreign relations*, even if scholars remain uncertain about how to put them together.¹¹

I. CHANGES IN THE INSTITUTIONAL FOUNDATIONS

The United States relies on the same institutions to conduct its domestic and foreign relations. Within the federal government, there is Congress, the President, and the courts—and administrative agencies, although they are often described as part of the President (or combined together into the amorphous “executive branch”). State governments and their various subparts also play a role in foreign relations.¹²

These institutions have held constant names over the course of U.S. constitutional history. This makes it easy to look past how radically their composition, powers, and roles have changed over time. President George Washington and President Joe Biden both fall under the institutional category of “President,” but in the same way that a musket and a long-range missile can both be said to be weapons. And change continues. There have been major developments not only in U.S. foreign relations law in the last few decades, but also in the institutions that make, execute, and interpret both foreign relations law and other kinds of law. Below is a far-from-exhaustive list of four recent developments.

¹⁰ See generally MURPHY & SWAINE, *supra* note 3.

¹¹ I use these terms idiosyncratically to refer to an external versus internal perspective, rather than to refer to two separate bodies of law. In the context of *jus ad bellum* and *jus in bello*—which are separate bodies of law—there is long-standing debate over whether the two should be hermetically sealed from each other or instead intertwined. For discussion, see *The Relationship Between Jus ad Bellum and Jus in Bello: Past, Present, and Future*, 100 AM. SOC'Y INT'L L. PROC. 214, 109–124 (2006) (including the views of Jeff McMahan, Julie Mertus, Karen Engle, and Frédéric Mégret).

¹² See Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2141–51 (2017) (reviewing MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* (2016)). See generally GLENNON & SLOANE, *supra*.

In Congress, partisanship has risen, and Senate rules have made it easier to make appointments without bipartisan support while preserving the filibuster for most types of laws. “[O]n average, Democrats and Republicans [in Congress] are farther apart ideologically today than at any time in the past 50 years,” a Pew Research Center analyst concluded recently.¹³ The parties have less in common; fewer members cross party lines; and there are stark overall demographic differences between members from the two parties.¹⁴ Separate from polarization but also significant as a matter of democratic practice, in recent years, Republicans have been overrepresented in the Senate, and often in the House, relative to the national popular vote.¹⁵

Increased polarization in turn has consequences for all aspects of Congress’s work, including appointments and laws.¹⁶ On the one hand, polarization makes it *easier* for Presidents to pursue appointments or laws perceived as partisan if the relevant chambers are controlled by their party and they need only simple majorities.¹⁷ More polarized members of Congress are more likely to vote the party line. On the other hand, polarization makes it *harder* to pursue appointments or laws with the slightest whiff of controversy where either the President’s party does not control a relevant chamber or where procedural rules require supermajoritarian buy-in.¹⁸

¹³ Drew DeSilver, *The Polarization in Today’s Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> [<https://perma.cc/6YYF-KD8Y>] (drawing on data from 1971 to the present).

¹⁴ *Id.* (noting that there “are now only about two dozen moderate Democrats and Republicans left on Capitol Hill, versus more than 160 in 1971–72” and that House Republicans are especially prevalent in southern states, while House Democrats are considerably more racially diverse). For a broader account of how U.S. politics have nationalized over the decades in ways increasing polarization in Congress, see DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES* 6–11, 19 (2018).

¹⁵ See Laura Bronner & Nathaniel Rakich, *Advantage, GOP: Why Democrats Have to Win Large Majorities in Order to Govern While Republicans Don’t Need Majorities at All*, FIVETHIRTYEIGHT (Apr. 29, 2021), <https://fivethirtyeight.com/features/advantage-gop/> [<https://perma.cc/TBT4-6GQ3>] (discussing how Republican concentration in small-population states increases relative Republican representation in the Senate and how a combination of natural Democratic clustering in cities and gerrymandering frequently increases Republican representation in the House under the single-member district system employed throughout the country).

¹⁶ Polarization, of course, also has consequences for treaties, impeachment, and oversight activities. It makes it even harder to get the supermajorities needed for Article II treaties. This makes it virtually impossible, as seen in 2020 and again in 2021, to get the supermajority needed for conviction following an impeachment. And it increases the stakes for oversight in various ways. See discussion *infra* Sections II.B, III.

¹⁷ See Jennifer McCoy, Tahmina Rahman & Murat Somer, *Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Politics*, 62 AM. BEHAV. SCIENTIST 16, 30–31 (2018).

¹⁸ See *id.*

The Senate has made polarized appointments easier in recent years by abolishing the filibuster for appointments.¹⁹ It has not done the same with laws—at least not yet—although a few categories of laws, including those passed through the budget reconciliation process, are not subject to the filibuster.²⁰ As President Obama put it when reflecting ruefully in his memoir about his failure to enact legislation on climate change or immigration, “on my very first day in office, I hadn’t had the foresight to tell Harry Reid and the rest of the Senate Democrats to revise the chamber rules and get rid of the filibuster once and for all.”²¹ Most legislation remains subject to the filibuster, which in turn increases the likelihood that presidents will try to use unilateral or already delegated powers rather than seeking new legislation from Congress. To the extent that presidents work with Senate-confirmed officials in using unilateral or delegated powers, the abolition of the filibuster for appointments means that these officials are more likely to have been confirmed by narrow, partisan majorities.²²

The Presidency has been filled twice in the twenty-first century by Republican Presidents who received fewer popular votes than their opponents, and one of these Presidents tried to retain power through unlawful means. The twenty-first century has so far produced two Republican Presidents who lost the popular vote but won the Electoral College²³—one with an assist from a 5–4 Supreme Court decision.²⁴ Access to the franchise has changed radically since the Framing, but the thumb on the scale that the Framers placed in favor of states remains intact—in

¹⁹ *About Judicial Nominations: Historical Overview*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/nominations/judicial-nominations-overview.htm> [https://perma.cc/39RQ-B5VR] (describing how the Senate ended the filibuster for all non–Supreme Court judicial nominees in 2013 [under Democratic leadership] and then for Supreme Court nominees in 2017 [under Republican leadership]). The Senate also ended the filibuster for executive branch appointments in 2013. Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013, 8:26 PM), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [https://perma.cc/FY9Y-3J8U].

²⁰ For a discussion of reconciliation, see Barry Friedman & Margaret H. Lemos, *Dysfunction, Deference, and Judicial Review*, 29 GEO. MASON L. REV. 487, 496–97 (2022).

²¹ BARACK OBAMA, *A PROMISED LAND* 594 (2021).

²² The President can also rely heavily on “acting” officials who have not received Senate confirmation. For a discussion of the rising use of this approach and the concerns it raises from a checks-and-balances perspective, see generally P’SHP FOR PUB. SERV., *THE REPLACEMENTS: WHY AND HOW “ACTING” OFFICIALS ARE MAKING SENATE CONFIRMATION OBSOLETE* (Bob Cohen ed., 2020).

²³ *2016 Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM) <https://www.nytimes.com/elections/2016/results/president> [https://perma.cc/5LP9-RYC9]; Ron Elving, *The Florida Recount of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> [https://perma.cc/8MHV-5FCJ].

²⁴ See *Bush v. Gore*, 531 U.S. 98 (2000).

ways that, at least at present, favor white voters over people of color.²⁵ The Framers sidestepped the popular vote, and so gave us Presidents George W. Bush and Donald Trump.

The election of Donald Trump also demonstrates how little we can trust to Alexander Hamilton's prediction that "[t]he process of election affords a moral certainty, that the office of the president, will seldom fall to the lot of any man, who is not in an eminent degree endowed with the requisite qualifications."²⁶ The party system (which postdated Hamilton's prediction)²⁷ may have done valuable work at gatekeeping at some points in U.S. history, but not in 2016. President Trump's utter inexperience, horrific personality, eagerness to use public power for private gain, and total disregard for the rule of law was apparent from the beginning.²⁸ And it only got worse. His efforts to overturn the results of the 2020 election—and the failure of many Republican Senators and many other Republican elites to disown him in response²⁹—has left a brooding question mark over the long-standing U.S. practice of peaceful transitions of power.

Following changes in Senate practice and three nominations filled by President Trump, the Supreme Court has become more partisan. The Supreme Court appointment process has been partisan for a very long time. But it has gotten worse in this last decade,

²⁵ For some recent calculations in the popular press, see John Templon, *Voters of Color Have Less Power in the Electoral College Than White Voters*, BUZZFEED (Oct. 28, 2020, 5:44 PM), <https://www.buzzfeednews.com/article/johntemplon/the-electoral-college-still-favors-white-voters> [<https://perma.cc/EUD4-CULE>] (concluding that for the 2020 election, the Electoral College system effectively left Black, Hispanic, and Asian-American registered voters with, respectively, 87%, 76%, and 60% of the voting power they would have had under a popular-vote system, while non-Hispanic white registered voters had 108% of the voting power they would have had under a popular-vote system); David Leonhardt, Opinion, *The Senate: Affirmative Action for White People*, N.Y. TIMES (Oct. 14, 2018), <https://www.nytimes.com/2018/10/14/opinion/dc-puerto-rico-statehood-senate.html> [<https://perma.cc/X8J9-RYQF>] (calculating that white non-Hispanic Americans have .35 Senators per million people, Black Americans have .26 Senators per million people, and Hispanic Americans have .19 Senators per million people).

²⁶ THE FEDERALIST NO. 68, at 460–61 (Alexander Hamilton) (Jacob Cooke ed., 1961) (adding that “[t]alents for low intrigue and the little arts of popularity [will not] suffice It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue”).

²⁷ See *About Parties and Leadership: Historical Overview*, U.S. SENATE <https://www.senate.gov/about/origins-foundations/parties-leadership/overview.htm> [<https://perma.cc/87PW-SFSQ>].

²⁸ For one of many extensive accounts—this one predating January 6, 2021—see Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 11–105 (2020).

²⁹ See Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack ‘Legitimate Political Discourse’*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html> [<https://perma.cc/2L38-3KNX>]; Jill Colvin, *One Year Ago, Republicans Condemned Jan. 6 Insurrection. Yesterday, Their Response Was Far More Muted.*, PBS (Jan. 7, 2022, 11:07 AM), <https://www.pbs.org/newshour/politics/one-year-ago-republicans-condemned-jan-6-insurrection-yesterday-their-response-was-far-more-muted> [<https://perma.cc/D9A2-HTU5>].

consistent with the rise in congressional polarization mentioned above. The Republican-controlled Senate refused to give Merrick Garland a hearing on the merits in 2016.³⁰ In 2017, following the election of Donald Trump via the Electoral College process, the Republican-controlled Senate changed the rules to eliminate the filibuster for Supreme Court nominees.³¹ President Trump then got appointments for three seats, filling Antonin Scalia's vacant seat with Neil Gorsuch, replacing Anthony Kennedy with Brett Kavanaugh, notwithstanding sexual assault allegations, and getting a late-in-the-cycle opportunity to select Amy Coney Barrett following the death of Ruth Bader Ginsburg.³² President Biden then replaced Steven Breyer with Ketanji Brown Jackson.³³ Unlike Justices Scalia, Kennedy, Ginsburg, and Breyer, all four new nominees who replaced them received fewer than sixty votes in the Senate.³⁴ At present, the Court has only three of the justices who received more than sixty confirmation votes—Chief Justice Roberts, Justice Sotomayor, and Justice Kagan.³⁵

The Supreme Court appointment process correlates to how the justices vote on cases.³⁶ The present Supreme Court consists of nine justices, six appointed by Republican Presidents and three by Democratic ones.³⁷ All were appointed in an era in which candidates are carefully vetted for their likelihood of reaching legal conclusions consistent with the interests of the party of the appointing president.³⁸ This distribution is

³⁰ See Klarman, *supra* note 28, at 247.

³¹ See *About Judicial Nominations*, *supra* note 19.

³² See Totenberg, *supra* note 7; Naylor, *supra* note 8; Sprunt, *supra* note 9.

³³ Eric McDaniel, *The Senate Confirms Ketanji Brown Jackson to the Supreme Court*, NPR (Apr. 7, 2022, 3:39 PM), <https://www.npr.org/2022/04/07/1090973786/ketanji-brown-jackson-first-black-woman-supreme-court> [<https://perma.cc/H96C-7BFQ>].

³⁴ See *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/KV6A-5QVD>].

³⁵ See *id.* Justices Thomas and Alito both received fewer than sixty votes as well but were not filibustered. See *id.*

³⁶ See, e.g., Angie Gou, Ellena Erskine & James Romoser, *STAT PACK for the Supreme Court's 2021–22 Term*, SCOTUSBLOG 7 (July 1, 2022), <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf> [<https://perma.cc/XC8M-AZRP>] (demonstrating that the three Democratic-appointed justices were in the majority for the 2021 term far less often than their Republican-appointed counterparts). The correlation is of course not perfect, but it is significant. We can observe this correlation even if we do not know whether the causal pathway is that the Supreme Court justices are influenced by partisan considerations or instead that they have preexisting conceptions of law aligning closely with partisan preferences. The difference between these two causal pathways will be significant in some cases and is significant as a normative matter, but predictively it will lead to the same outcomes in many cases.

³⁷ See *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/8V5Y-FDK4>].

³⁸ The six-to-three ratio is not the most dramatic in the modern era. For many years, of course, there were seven Republican appointees and two Democratic ones. But unlike with the present Court, the effects of this ratio were blunted by some combination of (1) the selection of

starkly out of proportion to the ratio of Republican administrations to Democratic administrations during the time span in which the current bench was appointed (and even more out of proportion in comparison to the winners of the popular vote). And it is producing results. The five Republican appointees on the Court who received fewer than sixty Senate confirmation votes joined together in the spring of 2022 to overturn *Roe v. Wade*.³⁹

We face a future in which the House of Representatives or state officials may seek to alter Electoral College results achieved via the popular vote. State governments have long sought to affect elections through gerrymandering,⁴⁰ through ballot design and voting rules,⁴¹ and through regulating ease of access to the polls.⁴² These tools can be applied in ways that favor either political party. In the wake of President Trump's efforts to overturn the 2020 presidential elections, some Republicans pursued more drastic steps, such as trying to elect people without integrity to positions in which they would have supervisory power over federal elections.⁴³ These candidates did not succeed in races for key

candidates who could receive the support needed to overcome the filibuster and (2) less reliable vetting for candidate alignment with partisan preferences, either because this was not as important a criterion to earlier presidents or because their vetting was ineffective. In particular, Justice Stevens and Justice Souter were Republican appointees whose votes frequently did not align with the preferences of Republican party leaders. Decades after his presidency, President Ford celebrated his appointment of Justice Stevens as the thing he wanted “history’s judgment of my term in office to rest . . . on” and emphasized Stevens’s “carrying out his judicial duties . . . without partisan political concerns.” Letter from Gerald R. Ford, President, to William Michael Treanor, Dean of Fordham Univ. L. Sch. (Sept. 21, 2005), https://graphics8.nytimes.com/packages/pdf/us/20100410_ford-stevens-letter.pdf [<https://perma.cc/A26V-MP9W>]. The appointment of Justice Souter apparently came about from a combination of thin vetting, a preference by President Bush for Souter as the less obviously partisan candidate of the two under consideration, and the erroneous expectation that he would nonetheless be a conservative “home run.” See David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES MAG., Sept. 25, 1994, <https://www.nytimes.com/1994/09/25/magazine/justice-souter-emerges.html> [<https://perma.cc/HGP3-BMQ6>].

³⁹ 410 U.S. 113 (1973). See generally *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). This is of course far from the only case in which the recently reconstituted Court is making significant changes to the constitutional landscape. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

⁴⁰ See, e.g., Hansi Lo Wang, *Is Drawing a Voting Map That Helps a Political Party Illegal? Only in Some States*, NPR (May 17, 2023, 5:00 AM), <https://www.npr.org/2023/05/17/1173469584/partisan-gerrymandering-explainer-north-carolina> [<https://perma.cc/395P-X7JC>].

⁴¹ See, e.g., Spenser Mestel, *How Bad Ballot Design Can Sway the Result of an Election*, GUARDIAN (Nov. 19, 2019, 2:00 AM), <https://www.theguardian.com/us-news/2019/nov/19/bad-ballot-design-2020-democracy-america> [<https://perma.cc/86AH-XG5E>].

⁴² See, e.g., *Voter ID Laws*, NAT’L CONF. OF STATE LEGISLATURES (Mar. 9, 2023), <https://www.ncsl.org/elections-and-campaigns/voter-id> [<https://perma.cc/V9UT-H8S3>].

⁴³ See Amy Gardner, *Election Deniers March Toward Power in Key 2024 Battlegrounds*, WASH. POST (Aug. 15, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/08/15/election-deniers-march-toward-power-key-2024-battlegrounds/> [<https://perma.cc/8F7Y-U6BS>].

positions in “purple” states in the 2022 midterm elections, although many Republicans elected to national and statewide office do baselessly deny the validity of the 2020 election results.⁴⁴ It remains to be seen whether and how these issues will affect the 2024 election. The Supreme Court’s recent decision in *Moore v. Harper*⁴⁵ limits the ability of state legislatures to override state constitutional protections for voters,⁴⁶ but considerable room remains for interference with the democratic process.

These four shifts do not point in the same direction on every issue. In general, however, they line up in favor of lessened democracy, increased presidential control, and overrepresentation of Republican interests.

II. WHY THESE INSTITUTIONAL SHIFTS MATTER FOR FOREIGN RELATIONS LAW

How do institutional shifts matter for foreign relations law? And more specifically, what do the shifts described above mean for foreign relations law? What should the field of foreign relations law expect and strive for?

In this Part, I answer these questions in two ways. First, I discuss how changes to the composition, powers, and functioning of Congress, the presidency, and the Supreme Court can affect the past and present contours of foreign relations as an empirical reality. These changes—which I refer to as broader institutional shifts—explain some past developments and have predictive power for future ones. The particular shifts described above have already influenced our field, and I expect will do so even more in the future.

Second, and most controversially, I try some normative and instrumental reasoning. Broadly speaking, I ask whether, given these conditions, effective and desirable reforms to foreign relations law can be achieved. The broader institutional backdrop imposes severe restraints. If one thinks—as I do—that the United States needs a strong executive branch to not only operate amid congressional gridlock but also protect against incompetent, corrupt, or despotic presidents, then how can that be achieved? And, especially, how can it be achieved given

⁴⁴ See Karen Yourish, Danielle Ivory, Weiyi Cai & Ashley Wu, *See Which 2020 Election Deniers and Skeptics Won and Lost in the Midterm Elections*, N.Y. TIMES (Nov. 10, 2022, 6:30 PM), <https://www.nytimes.com/interactive/2022/11/09/us/politics/election-misinformation-midterms-results.html> [https://perma.cc/ANF4-DVCY].

⁴⁵ 143 S. Ct. 2065 (2023).

⁴⁶ *Id.* at 2081–88.

the current composition of the Supreme Court? The same institutional shifts that make changes in foreign relations law desirable can also be roadblocks to achieving these changes. But we can try for workarounds.

My focus throughout this Part is on derivative foreign relations law. It is on how institutional shifts can or should affect foreign relations law. It is not on other effects of these shifts and nor is it on what first-order solutions are needed to fix problematic institutional shifts. There is ample literature on first-order problems and first-order solutions.⁴⁷ Yet unless, or until, these solutions are implemented in practice, we need to consider second-order adjustments.

A. *Explanatory and Predictive*

Foreign relations law has evolved for many reasons, with a major one being broader institutional shifts. Consider perhaps the most striking development in foreign relations law: the rise of presidential power, which far exceeds the original expectation.⁴⁸ This shift has multiple causes, but one is the “rise of the party system,” which “has made a significant extraconstitutional supplement to real executive power.”⁴⁹

The shifts described in Part I are comparatively recent, but at least the first two have already had effects on foreign relations law. The first shift described above—the rise of congressional partisanship and the increased challenges of getting legislation through Congress—has already cast a wide shadow on the field. It led to the carefully lawyered yet meaningful expansion of presidential power that occurred relating to international agreements during the Obama Administration.⁵⁰ The rise in partisanship helps explain why recent presidents have read statutes delegating foreign affairs powers to the executive branch so aggressively in recent years. And it is a major reason why we have so far

⁴⁷ For the tip of the iceberg, see, for example, JIMMY BALSER, CONG. RSCH. SERV., LSB10837, RANKED-CHOICE VOTING: LEGAL CHALLENGES AND CONSIDERATIONS FOR CONGRESS (2022) (addressing the prospect of ranked-choice voting); THOMAS H. NEALE, CONG. RSCH. SERV., RL34604, ELECTORAL COLLEGE REFORM: 110TH CONGRESS PROPOSALS, THE NATIONAL POPULAR VOTE CAMPAIGN, AND OTHER ALTERNATIVE DEVELOPMENTS (2009) (discussing the issue of Electoral College reform); see also PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/M72X-KHC5>] (describing various possibilities for changing the composition, jurisdiction, and practices of the Supreme Court). For broader discussion of the relationships between democracy and constitutional law, see generally, for example, TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

⁴⁸ See MURPHY & SWAINE, *supra* note 3, at 5–9.

⁴⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring). For a more recent account, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

⁵⁰ See generally Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1680–82 (2017).

not seen framework legislation in response to the horrors of the Trump Administration, unlike the framework foreign affairs legislation that followed Watergate in the 1970s.⁵¹

The shifts regarding the composition of the presidency have similarly affected foreign relations law. The Electoral College system produced two presidents who took extraordinarily robust views of exclusive executive power in the domains of war (George W. Bush) and control over diplomacy and diplomatic information (Donald Trump).⁵² The presidency of Donald Trump also shone a spotlight on assumptions that we had previously, and fortunately, been able to take largely for granted around norms related to the presidency.⁵³

And if we can look back, we can also look ahead. Thinking about the institutional foundations of foreign relations law provides a window into predicting future trends in the field. In the absence of major institutional reform like the abolition of the filibuster for laws or the addition of more seats on the Supreme Court, then I see the following developments as likely to lie ahead.

First, the trends in foreign relations law described above can be expected to continue. In Congress, new legislation related to foreign affairs law will likely be limited and not get us sweeping framework reform.⁵⁴ We will see few if any major international agreements get through Congress unless they are in response to sudden national emergencies that have triggered widespread popular attention, as with NATO expansion in response to Russia's invasion of Ukraine.⁵⁵

⁵¹ See The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1550 (2012)); Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–1885c). This Essay uses the term “framework legislation” to refer to laws that establish important ground rules for future governance. The Congress of our current era does periodically pass important foreign relations legislation with bipartisan support, especially in response to sudden emergencies (as with the support for Ukraine in the spring of 2022). But such legislation tends to go to the substance of foreign relations rather than to the law governing it.

⁵² See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 704–11 (2008) (regarding the George W. Bush administration); Jean Galbraith, *The Runaway Presidential Power over Diplomacy*, 108 VA. L. REV. 81, 87, 108–109, 112 (2022) (regarding the Trump administration).

⁵³ See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2259 (2018).

⁵⁴ For a discussion of how efforts on this front have faltered so far, see Quinta Jurecic & Andrew Kent, *What Happened to Post-Trump Reform?*, LAWFARE BLOG (Mar. 28, 2022, 11:31 AM), <https://www.lawfareblog.com/what-happened-post-trump-reform> [<https://perma.cc/LF9X-WLAY>] (discussing various attempts and suggesting that the Biden administration has not been sufficiently supportive).

⁵⁵ See 168 CONG. REC. S3900 (daily ed. Aug. 3, 2022). With the fast-track process now expired, we are unlikely to see more new trade agreements get through Congress. It remains to be seen whether the recent global tax deal will receive congressional approval, although it has the advantage of being something that could plausibly be passed through the budget reconciliation process without being subject to the filibuster. See Brian Faler, *Global Tax Deal Imperiled by Manchin's*

Committee powers of investigation and oversight will continue to get robust exercise at times of divided government.⁵⁶ And without more coming out of Congress, presidents will continue to rely heavily on delegated, independent, and assertedly exclusive presidential powers. We can expect the high volume of stark policy shifts between administrations to continue, leaving the United States as a highly unreliable negotiating partner on major issues.⁵⁷

Second, the Supreme Court is likely to affect foreign relations law by issuing decisions that favor presidential control within the executive branch, disfavor most individual rights, and curtail delegated powers outside of areas that the courts consider traditional matters of foreign affairs. With respect to presidential control, the Court is now building up what is called the unitary executive theory.⁵⁸ As to rights, the most significant recent example is the decision upholding the constitutionality of President Trump's thinly disguised "Muslim ban,"⁵⁹ but other recent cases point in this direction as well.⁶⁰ These decisions will disproportionately impact people of color. Concerning delegated powers, the Supreme Court has signaled that it will interpret the authority of regulatory agencies narrowly,⁶¹ which in turn reduced agencies' substantive reach for international cooperation. With respect to military affairs, national security, and immigration, the Supreme Court will likely broadly interpret the scope of presidential power and discretion.⁶²

Balking at Minimum Corporate Levy, POLITICO (July 15, 2022, 6:00 PM), <https://www.politico.com/news/2022/07/15/manchin-rejects-global-tax-plan-00046103> [<https://perma.cc/4R2H-TA8Q>].

⁵⁶ See Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 306 (2008).

⁵⁷ See Steve Charnovitz, *How American Rejectionism Undermines International Economic Law*, 10 TRADE L. & DEV. 226, 231–33 (2018).

⁵⁸ Compare *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2218 (2020), *with id.* at 2245 (Kagan, J., dissenting).

⁵⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2407–09 (2018).

⁶⁰ For a more recent case using procedure to minimize rights, see *Hernandez v. Mesa*, 140 S. Ct. 735, 745–47 (2020) (holding that there is no *Bivens* cause of action for a cross-border shooting). *But see* *Dep't of Homeland Sec. v. Regents*, 140 S. Ct. 1891, 1910–12 (2020) (striking down the Trump Administration's rescission of the Obama-era Deferred Action for Childhood Arrivals policy for failure to comply with APA requirements in a 5–4 decision in which Chief Justice Roberts joined the liberals [prior to Justice Barrett's appointment]).

⁶¹ See *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2610 (2022) (concluding that the Environmental Protection Agency lacked authority to undertake a major climate regulation even though the text of the Clean Air Act appeared to give it this authority on the ground that there should be a presumption against agencies having been granted authority to address "major questions").

⁶² I am thus skeptical that we will see what Ingrid Wuerth and Ganesh Sitaraman have called the "normalization" of foreign relations law, such that the Court "has treated foreign relations issues as if they were run-of-the-mill domestic policy issues." Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1901 (2015). In immigration

Third, the United States is at an increased risk regarding the role of the military in U.S. domestic affairs. The nonpartisanship of the military, the military's noninterference in domestic affairs, and civilian control of the military are all bedrock principles of this country's institutional order.⁶³ With President Trump, however, we saw how an amoral, self-aggrandizing president can pit these different principles against each other. Trump sought, unsuccessfully, to use his civilian control over the military to transform it into a partisan institution that would support his quest to retain office.⁶⁴ Going forward, there is a real risk that future presidents will draw from President Trump's playbook and try to stack key military positions with individuals whose loyalty runs personally to the president rather than more generally to the constitutional order.

B. *Normative and Instrumental*

In general, scholars of foreign relations law probably spend much more time thinking about foreign relations law than about what foreign relations law is for. But all scholars have their normative visions and, at least at high degrees of generality, there is probably a lot of overlap among them. Mine involves a foreign relations law that creates the best conditions for generating foreign policies that keep the United States safe and respected internationally; that reflect democratic preferences; that advance health, human rights, and prosperity both abroad and at home; and that solve the environmental challenges of the global commons.

The institutional developments described above limit what can be done at present. Nevertheless, there are some modest but achievable adjustments to foreign relations law that can enhance the operation of desirable foreign policy under preexisting laws or provide at least a little more protection against presidential malignancy and incompetence. These adjustments can improve the extent to which the President and administrative agencies are empowered, expertise driven, and accountable.

law, at least, exceptionalism runs strong. *See infra* Part III; *see also* Sitaraman & Wuerth, *supra*, at 1951 (noting that “[o]nly time will tell whether immigration exceptionalism will fade”).

⁶³ *See* KATHLEEN J. MCINNIS, CONG. RSCH. SERV., IF11566, CONGRESS, CIVILIAN CONTROL OF THE MILITARY, AND NONPARTISANSHIP (2020).

⁶⁴ *See* Susan B. Glasser & Peter Baker, *Inside the War Between Trump and His Generals*, NEW YORKER (Aug. 8, 2022), <https://www.newyorker.com/magazine/2022/08/15/inside-the-war-between-trump-and-his-generals> [<https://perma.cc/T7XL-2RDG>] (describing some of these struggles); Alan Feuer, Maggie Haberman, Michael S. Schmidt & Luke Broadwater, *Trump Had Role in Weighing Proposals to Seize Voting Machines*, N.Y. TIMES (Jan. 31, 2022) <https://www.nytimes.com/2022/01/31/us/politics/donald-trump-election-results-fraud-voting-machines.html> [<https://perma.cc/FE94-J3RL>] (describing how President Trump considered asking the military to seize certain voting machines following the 2020 elections).

Even achieving limited improvements will be difficult. The Supreme Court as currently constituted is more likely to be a roadblock than an aid, especially with the strong view of the unitary executive advanced by the conservative justices. Congress is unlikely to pass framework legislation because of its dysfunction. Although pursuit of such legislation may have its own intrinsic value, supporters should be realistic in thinking that the best achievable outcome is probably narrow legislation targeting some of the worst executive branch abuses. And the President and administrative agencies are limited both by reflexive concerns about steps that might bind their own hands, and by the challenge of making changes that will be honored by future administrations.

But there are modest steps that can help. With respect to furthering the operation of desirable foreign policy under preexisting laws, one area of significance is international commitments that do not require subsequent congressional approval. The Obama Administration developed some important precedents about how these can be structured in constitutionally permissible manners, including with the Minamata Convention on Mercury, the Paris Agreement, and the Iran deal.⁶⁵

President Trump had the power to withdraw from these commitments and exercised this power with respect to the Paris Agreement and the Iran deal.⁶⁶ But while his withdrawal was destabilizing, these commitments nonetheless had important benefits. First, they were valuable while operational.⁶⁷ Second, although President Trump rolled back the two most politically salient of these commitments, he left others like the Minamata Convention intact, and he did not challenge the presidential authority to make such commitments. Third, even after President Trump triggered withdrawal from the Paris Agreement, other actors in our foreign relations system—states, cities, and tribes—demonstrated commitment to it.⁶⁸ Fourth, at least to date, the use of international commitments has the advantage of being relatively insulated from judicial review and therefore less subject to a Supreme Court staffed by a supermajority of Republican appointees.⁶⁹ Fifth, as I have written elsewhere, and unlike with respect to war powers, the use of such international

⁶⁵ Galbraith, *supra* note 50, at 1702, 1706, 1709.

⁶⁶ See generally *President Trump Withdraws the United States from the Iran Deal and Announces the Reimposition of Sanctions*, 112 AM. J. INT'L L. 514 (2018); *United States Gives Notice of Withdrawal from Paris Agreement on Climate Change*, 114 AM. J. INT'L L. 132 (2020).

⁶⁷ See generally Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; S.C. Res. 2231 (July 20, 2015) (referred to as Joint Comprehensive Plan of Action or Iran Deal).

⁶⁸ See *United States Gives Notice of Withdrawal from Paris Agreement on Climate Change*, *supra* note 66, at 135–36.

⁶⁹ See Galbraith, *supra* note 50, at 1711.

commitments comes with its own sets of constraints that reduce the risks of presidential abuse.⁷⁰

With respect to protecting against presidential abuses of power, there are also modest but important steps that can be taken without the passage of major congressional legislation, even in the face of a Supreme Court that may be hostile to constraints on presidential authority. As a recent example involving targeted legislation, Congress came close to banning future “Schedule F” reforms in the 2023 National Defense Authorization Act.⁷¹ “Schedule F” was an effort by President Trump in 2020 to transform thousands of civil service positions into at-will appointments that could be filled by political appointments, including positions with significant national security implications.⁷² Although Congress did not succeed in passing this narrow provision in 2022, it was within the realm of plausibility. As an example within the Biden White House, the Director of National Intelligence has reportedly been trying to overhaul the process for determining the classification of documents, although it remains to be seen how much this “war on secrecy” will achieve.⁷³ Greater declassification means increased transparency about what the government is doing. As yet another example, the Office of Legal Counsel can now try to issue legal opinions interpreting law in ways that promote presidential accountability and constraint.⁷⁴ And as discussed in the next Part, more can potentially be done in the domain of congressional oversight.

III. EXAMPLES

In this Part, I consider how changes in the institutional foundations of foreign relations law are affecting two specific areas of the field. As

⁷⁰ See generally *id.*

⁷¹ See Erich Wagner, *Sen. Kaine is ‘Optimistic’ an Anti-Schedule F Bill Will Get a Floor Vote This Year*, GOV’T EXEC. (Nov. 2, 2022), <https://www.govexec.com/workforce/2022/11/sen-kaine-optimistic-anti-schedule-f-bill-floor-vote-year/379222/> [<https://perma.cc/CFA9-AHX3>] (noting efforts to include this legislation in the National Defense Authorization Act, as a standalone bill, or in a different spending bill).

⁷² See Loren DeJonge Schulman, *Schedule F: An Unwelcome Resurgence*, LAWFARE (Aug. 12, 2022, 8:01 AM), <https://www.lawfaremedia.org/article/schedule-f-unwelcome-resurgence> [<https://perma.cc/QSP3-S84D>].

⁷³ Bryan Bender, *White House Launches New War on Secrecy*, POLITICO (Aug. 23, 2022, 5:00 AM), <https://www.politico.com/news/2022/08/23/white-house-war-on-secrecy-00053226> [<https://perma.cc/E5EP-MK9B>]; Letter from Avril D. Haines, Dir. of Nat’l Intel., to Sens. Ron Wyden & Jerry Moran (Aug. 19, 2022), <https://www.wyden.senate.gov/imo/media/doc/08.19.22%20Letter%20DNI%20Letter%20to%20Sen%20Wyden%20and%20Moran%20on%20Classification%20Reform.pdf> [<https://perma.cc/QD2E-P8KX>].

⁷⁴ See, e.g., Application of the Anti-Terrorism Act of 1987 to Diplomatic Visit of Palestinian Delegation, 46 Op. O.L.C., slip op. at 1, 6–7 (2022) (using relatively constrained language to describe the scope of exclusive presidential power over diplomacy).

my point of departure, I begin with how these areas in the field are described by Professors Murphy and Swaine. I then ask what else the institutional foundations of foreign relations law suggest about where these areas are going and what improvements might be possible.

A. *Control over Information*

Congressional oversight powers are a major source of contention between Congress and the President. Especially during times of divided government, committee investigations of presidential or administrative practices are likely to occur and unlikely to be welcomed.⁷⁵ As Professors Murphy and Swaine note, presidents have periodically raised claims of “executive privilege” in declining to provide information requested by committees, including on issues of foreign relations.⁷⁶ Professors Murphy and Swaine aptly observe that the Department of Justice’s Office of Legal Counsel has asserted and defended this privilege.⁷⁷ They also note that the Supreme Court indicated in its 2020 *Trump v. Mazars USA*⁷⁸ decision that there needs to be a balancing of interests between the branches of government and emphasized that most such disputes have been worked out in the “hurly-burly, the give-and-take of the political process between the legislative and the executive.”⁷⁹ Professors Murphy and Swain mention various recent circumstances, including the Trump administration’s refusal to respond to subpoenas during the first impeachment proceedings (the one regarding President Trump’s efforts to persuade Ukrainian President Zelenskyy—not yet a household name—to investigate Hunter Biden).⁸⁰ They close their discussion by stating that the “resolution of situations where the privilege is invoked is most likely to occur through interbranch dialogue and accommodation, rather than through the courts.”⁸¹ Overall, their account is largely

⁷⁵ See Kriner & Schwartz, *supra* note 56, at 297.

⁷⁶ See MURPHY & SWAINE, *supra* note 3, at 74–80.

⁷⁷ *Id.* at 77–78.

⁷⁸ 140 S. Ct. 2019 (2020).

⁷⁹ MURPHY & SWAINE, *supra* note 3, at 79 (quoting *Mazars*, 140 S. Ct. at 2029). *Mazars* did not involve either executive privilege or a congressional subpoena directed to the executive branch—instead, it stemmed from efforts by House committees to obtain President Trump’s personal financial records from private third-party companies, assertedly for the purposes that this information would guide legislative reforms in election law and several other domains. See *Mazars*, 140 S. Ct. at 2027–28. In a 7–2 decision, the Court established a “balanced approach” of a multipart standard regarding whether disclosure was warranted without applying the standard to the case at hand—effectively ducking rather than providing a clear outcome. See *id.* at 2035–36. *Mazars* nonetheless appeared to assume in dicta that executive privilege could apply to documents sought by the legislature—although the prior Supreme Court case to which it cited had involved efforts to obtain the Nixon tapes not via congressional subpoena but rather in court proceedings. See *id.* at 2026.

⁸⁰ See MURPHY & SWAINE, *supra* note 3, at 78.

⁸¹ *Id.* at 80.

one of continuity over time: Congress requests information, presidents withhold certain information, the give-and-take kicks in, and the courts get as little involved as possible.

But there are reasons to think that sharp changes in oversight practices have been occurring in recent years. In the examples that Professors Murphy and Swaine give of Clinton-era invocations of executive privilege, there was considerable give-and-take and only limited documents were withheld.⁸² During the Obama administration, there were significant claims of executive privilege—most notably related to Operation Fast and Furious—but also very substantial compliance with intrusive investigations, including the drawn out Benghazi proceedings.⁸³ In the Trump administration, by contrast, the approach once the Democrats took control of the House of Representatives in 2019 was one of stark noncompliance.⁸⁴ The first impeachment proceeding against President Trump exemplifies this. After initially making a few documents public—most notably the notes on President Trump’s infamous call with President Zelenskyy—the White House and the Office of Legal Counsel took the approach of general noncompliance with subpoenas on the basis of dubious legal reasoning.⁸⁵

⁸² See *id.* at 77–79 (discussing documents sought by Congress in relation to Haiti and to the Mexican debt crisis). With respect to Haiti, the Clinton administration disclosed over a thousand documents, held back less than fifty, and came very close in negotiations to further disclosure. See *Administrative Actions and Political Murders in Haiti: Part II: Hearing Before the H. Comm. on Int’l Rels.*, 104th Cong. 9–10 (1996) (remarks of Reps. Hamilton & Gilman, Members, H. Comm. on Int’l Rels.). With respect to Mexico, the administration disclosed a great deal and claimed privilege over only a small number of documents. See Galbraith, *supra* note 50, at 108.

⁸³ For a description of the partial compliance and partial assertion of executive privilege that occurred regarding Operation Fast and Furious, see Comm. on Oversight and Gov’t Reform v. Holder, 979 F. Supp. 2d 1, 5–7 (D.C. Cir. 2013) (describing how the Department of Justice produced thousands of pages of documents but withheld documents from after a certain date as privileged); see also Jonathan David Shaub, *The Executive’s Privilege*, 70 DUKE L.J. 1, 48–52 (2020) (discussing these court proceedings and their outcomes). For a discussion of the scope of executive branch compliance with production requests in the Benghazi proceedings, see H.R. REP. NO. 114-848, at 601–15 (2016).

⁸⁴ Matthew Callahan & Reuben Fischer-Baum, *Where the Trump Administration is Thwarting House Oversight*, WASH. POST (Oct. 11, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-blocking-congress/> [<https://perma.cc/SXN8-L7T4>] (describing how the Trump administration ignored or refused to comply with numerous subpoenas in numerous investigations). As a substantive matter, the Trump administration also broadened its claims of exclusive control over diplomatic information. See Galbraith, *supra* note 50, at 108 (describing how the Trump administration changed its formulation of privilege over diplomatic-related materials by omitting a requirement that nondisclosure be in the public interest).

⁸⁵ House Committees’ Authority to Investigate for Impeachment, 44 Op. O.L.C., slip op. at 1–2, 50–51 (2020), <https://www.justice.gov/olc/file/1236346/download> [<https://perma.cc/NP9R-SZLF>] (concluding that the House had not actually launched an impeachment proceeding at the time it sought subpoenas and further indicating that executive privilege could be invoked). The head of the Office of Legal Counsel had received Senate confirmation by a vote of 5147

The decision of the Trump administration to basically abandon give-and-take led to other consequences. One was that, during the first impeachment proceedings, some executive branch officials were caught between congressional subpoenas and White House orders to disregard these subpoenas. Some made the choice to testify, while others did not.⁸⁶ Another consequence was that the noncompliance led to considerable litigation in the courts (much of it in nonimpeachment investigations), which among other things, resulted in the Supreme Court's first-ever consideration of the enforcement of a congressional subpoena aimed at the investigation of the President.⁸⁷ But notably this litigation did not get the House committees what they wanted in a timely manner, and there is no Supreme Court decision directly addressing subpoenas aimed at the executive branch.⁸⁸

What does this mean going forward? Especially taking account of the broader institutional framework, the President is likely headed away from a give-and-take process and toward a pure noncompliance approach. The rise in partisanship decreases the President's incentives to comply, including by reducing the likelihood that congressional leaders from the President's party will encourage compliance. The absence of a filibuster for appointments increases the likelihood that high-level executive branch officials will be exceptionally partisan and will sign off on noncompliance as both a strategy and a legal position. The court precedents from the Trump era—and a few earlier ones from the Obama era—suggest that, at a minimum, noncompliance buys delay.⁸⁹ And reading the tea leaves, the Court is unlikely to force timely responses to congressional subpoenas (at least during Republican administrations and possibly not during Democratic ones).

With control of the House of Representatives shifting to the Republican Party after the 2022 midterm election, it seems likely that the House will launch endless investigations of the Biden administration,

along almost straight party lines. 163 CONG. REC. S7038 (daily ed. Nov. 7, 2017) (recording that one Democrat voted in favor of his confirmation and one Republican voted against it).

⁸⁶ See H. PERMANENT SELECT COMM. ON INTEL., THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REPORT, H.R. REP. NO. 116-335, at 229–54 (2019) (providing details about which executive branch officials did or did not comply with the subpoenas).

⁸⁷ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (“[F]rom President Washington until now, we have never considered a dispute over a congressional subpoena for the President’s records. And, according to the parties, the appellate courts have addressed such a subpoena only once . . . during the Watergate scandal.”).

⁸⁸ *Mazars* settled well after President Trump left office, as did another important case involving a subpoena of former White House counsel Donald McGahn. Ann E. Marimow, *Biden Administration, House Democrats Reach Agreement in Donald McGahn Subpoena Lawsuit*, WASH. POST (May 11, 2021, 8:05 PM), https://www.washingtonpost.com/local/legal-issues/donald-mcgahn-subpoena-lawsuit-settled/2021/05/11/8c445dfe-b2ab-11eb-ab43-bebdc5a0f65_story.html [https://perma.cc/SRVQ-YAUZ].

⁸⁹ Shaub, *supra* note 83, at 50–54.

whether warranted or not. The Biden administration will thus face a difficult set of choices over whether and how much to cooperate. For the reasons just given, in the absence of changes to the institutional foundations of foreign relations law, Republican administrations are likely to follow the Trump model of noncooperation no matter what the Biden administration does. So, cooperation by the Biden administration rather than that of noncompliance might both cost it more politically and have no future constraining effect. But given the importance of congressional oversight as a tool of democratic governance—and notwithstanding its potential for abuse—I think the wisest approach by the Biden administration would be to nonetheless reimplement the Clinton-era level of compliance and to recognize this compliance as legally mandated. Even if the next administration reverses such legal reasoning and the Supreme Court disregards its significance as acquiescence, this approach could seed a return to give-and-take if, and hopefully when, we get broader institutional reform down the road.

B. *Immigration*

Professors Murphy and Swaine briefly summarize the history of immigration law in the United States. Among other things, they note its racist origins and remark on how early precedents upholding “plainly race-based” policies appear to remain precedential with respect to Congress’s broad powers over the admission, exclusion, and removal of noncitizens.⁹⁰ They go on to say that the “power of the president” over these issues “is also wide-ranging, given the steady delegation of power by Congress and the executive’s day-to-day control over when and how to enforce immigration law.”⁹¹ “Even so,” they note, “as compared with Congress, the president’s power appears more limited” due to review through the Administrative Procedure Act.⁹² They then describe President Obama’s Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parents of U.S. Citizens and Lawful Permanent Residents (“DAPA”) policies, noting that the Fifth Circuit struck down the DAPA policy (and was affirmed by the Supreme Court), and further stating that the Trump administration’s rescission of the DACA policy was in turn struck down by the Supreme Court.⁹³ Professors Murphy and Swaine further discuss other aspects of immigration law,

⁹⁰ MURPHY & SWAINE, *supra* note 3, at 956–57 (describing the plenary power doctrine); *see id.* at 959 (noting that this issue “has not been entirely settled”).

⁹¹ *Id.* at 959.

⁹² *Id.* at 959–60.

⁹³ *Id.* at 960–61. Litigation continues over the DACA policy. *See generally* *Texas v. United States*, 50 F.4th 498 (2022) (upholding a district court decision that found the original DACA policy to exceed statutory authority and remanding for the district court to consider a revised policy recently issued by the Biden administration).

including many policies implemented by the Trump administration and the response of the courts to these policies.⁹⁴

Professors Murphy and Swaine's account is excellent from the *jus in foreign relations* perspective. They discuss the actions of Congress, the President, and the Supreme Court; their coverage goes all the way back into the past and makes it all the way forward into the Biden administration; and they connect foreign relations law to international refugee law and to domestic administrative law. Immigration law is an overwhelming body of law in any circumstance, but they have managed to distill it into forty pages that will be of use to both scholars and practitioners.

Yet from a *jus ad foreign relations law* perspective, there is much more that can be said about where things stand now and what the future may hold. Right now, consider the state of affairs in the political branches. First, Congress has been unable to enact a major immigration law since 1996 due to partisanship and the filibuster.⁹⁵ Second, in aspects of immigration law where a high degree of power is delegated to the President or administrative agencies, there have been very sharp turns in immigration policy between recent administrations.⁹⁶ The Immigration Policy Tracking Project, established by longtime immigration rights advocate Lucas Guttentag, for example, documents several hundred policies put into effect by the Trump administration that have since been rolled back by the Biden administration.⁹⁷ In the current era, the uses of delegated power by presidential administrations disproportionately favor Republican interests relative to the popular vote, as two of the last three Republican presidential terms occurred because the Electoral College picked candidates who had not won the popular vote.

Also significantly, the courts have become active managers of immigration law in ways that correlate closely, though not perfectly, with partisanship. Conservatives favoring harsher immigration policies have developed a playbook of bringing federal court cases in

⁹⁴ MURPHY & SWAINE, *supra* note 3, at 967–88 (summarizing various issues within immigration law and briefly describing recent developments).

⁹⁵ See Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Action*, 50 U. RICH. L. REV. 665, 675–76 (2016).

⁹⁶ See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE. L.J. 458, 464 (2009) (noting that “the inauguration of a new President can bring with it remarkable changes in immigration policy”).

⁹⁷ IMMIGR. POL'Y TRACKING PROJECT, https://immpolicytracking.org/policies/?order=-announced_date&policy_actor=1 [<https://perma.cc/H98R-P8XB>] (noting 308 actions by the Biden administration as of July 30, 2023, in response to Trump administration policies). Guttentag went on to serve in the Biden administration. See Stephanie Ashe, *Stanford Law School's Lucas Guttentag Joins Justice Department to Advise Biden Administration on Immigration Policy*, STANFORD LAW SCHOOL (Sept. 15, 2021), <https://law.stanford.edu/press/stanford-law-schools-lucas-guttentag-joins-justice-department-to-advise-biden-administration-on-immigration-policy/> [<https://perma.cc/5YFQ-QUWT>].

Texas divisions where they are almost guaranteed to appear before Republican-appointed judges who are very willing to issue injunctions against the policies of Democratic administrations.⁹⁸ These appeals run to the conservative Fifth Circuit. Liberal advocates also presumably make instrumental choices about where to file, although they may not have as reliable a path to sympathetic judges. The Supreme Court has taken to using its “shadow docket” more aggressively in general, which among other things offers a pathway to relatively swift supervision of nationwide injunctions.⁹⁹ This brings some national uniformity, but it also puts a significant thumb on the scale in alignment with Republican preferences. Professors Swaine and Murphy note various recent Supreme Court decisions on immigration but do not typically mention that these are often closely contested cases with the votes correlating strongly with whether the justices are Democratic appointees or Republican appointees.¹⁰⁰ In general, the courts have become a vehicle for delaying or blocking presidential immigration policies, with the delays and blockages likely running more heavily against Democratic administrations.

In the absence of change to the institutional foundations, we can expect the continuation of these trends of no new laws, high volatility in presidential administration policies, and a strong judicial thumb on the scale in favor of Republican policies. For those who favor less harsh immigration policies, this is grim. And it is all the more alarming

⁹⁸ See Motion for Leave to File Amicus Curiae Brief and Brief of Stephen I. Vladeck as Amicus Curiae in Support of Applicants at 4, *United States v. Texas*, 143 S. Ct. 51 (2022) (No. 22A17) (noting that of the nineteen federal court cases challenging Biden-administration policies filed by the State of Texas, Republican-appointed judges are presiding in eighteen of these cases because “Texas has intentionally filed its cases in a manner designed to all but foreclose having to appear before judges appointed during Democratic presidencies”) The brief lists these cases in an appendix; at least eight involve issues of immigration law. See *id.* at Appendix A. It remains to be seen how much the Supreme Court’s recent decision in *United States v. Texas* will curtail this practice. In that case, the Supreme Court held that states did not have standing to challenge the executive branch’s immigration enforcement priorities but did not resolve other issues of state standing. See *United States v. Texas*, 143 S. Ct. 1964 (2023).

⁹⁹ For discussion of the Supreme Court’s use of its shadow docket with respect to nationwide injunctions during the Trump administration, see Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 134–44 (2019).

¹⁰⁰ E.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (decided 5–4, with Chief Justice Roberts voting with the four Democratic appointees), cited in MURPHY & SWAINE, *supra* note 3, at 961; *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (decided 7–2 as to outcome, with the five Republican appointees on the opinion of the Court, two Democratic appointees concurring in the judgment on narrow grounds, and two Democratic appointees dissenting), cited in MURPHY & SWAINE, *supra* note 3, at 962–63; *Barton v. Barr*, 140 S. Ct. 1442 (2020) (decided 5–4, with five Republican appointees in the majority and the four Democratic appointees in dissent), cited in MURPHY & SWAINE, *supra* note 3, at 976; *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020) (decided 7–2, with three Republican appointees and four Democratic appointees in the majority, and two Republican appointees in dissent), cited in MURPHY & SWAINE, *supra* note 3, at 978.

because foreign relations law itself offers very little in the way of solutions in the absence of changes to its institutional foundations.

There is little that the Biden administration can do by itself to make sticky changes to foreign relations law. At most, it can pursue immigration policies that it believes lawful, but with the expectation that many of these will be blocked by the courts or rolled back by the next Republican administration or both.

But some changes may be stickier than others. Reducing the number of immigration detention centers, for example, will reduce the infrastructure for the civil immigration detention in ways that practically could take a while for a new administration to reverse.¹⁰¹ International diplomatic efforts to improve living conditions in Central America might also have staying power.¹⁰² Under this approach, the courts are less likely to get involved, the political salience could be relatively low (thus reducing the likelihood of rollback), and in any event rollback might be slowed by the need for international negotiations. There may be no path to achievable and transformative change in immigration law in the absence of congressional reforms that reduce partisanship or remove the current filibuster. But these kinds of steps might nonetheless outlast a change in administrations.

IV. IS FOREIGN RELATIONS LAW GENERATIVE?

Changes in governing institutions affect foreign relations law. But what about the reverse? Can foreign relations law influence the character of these governing institutions? Put in hopeful terms, can it reduce partisanship; can it make the branches of the federal government more representative; can it diminish the likelihood of election subversion; can it orient the government more powerfully toward the common good?

Foreign relations, as distinct from foreign relations law, can of course affect this country's governing institutions. A well-known example is the overall diminution in partisanship in the aftermath of World War II.¹⁰³ We can hope that the global challenges confronting the United States will incentivize voters to seek first-order reforms that reduce dysfunction, incompetence, malignancy, and minority control. Rule-of-law concerns appear to have influenced at least some voters

¹⁰¹ See Eileen Sullivan, *Biden to Ask Congress for 9,000 Fewer Immigration Detention Beds*, N.Y. TIMES (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/us/politics/biden-immigration-detention-beds.html> [<https://perma.cc/7NGS-C343>] (noting that the administration was terminating or limiting its contracts with several private detention facilities).

¹⁰² See generally NAT'L SEC. COUNCIL, U.S. STRATEGY FOR ADDRESSING THE ROOT CAUSES OF MIGRATION IN CENTRAL AMERICA (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf> [<https://perma.cc/DFQ8-P476>].

¹⁰³ See, e.g., Hahrie Han & David W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War*, 37 BRIT. J. POLI. SCI. 505, 509–12 (2007).

in the 2022 midterm elections.¹⁰⁴ Frustration over the failure of the federal government to mount an adequate response to climate change has energized some calls for governance reforms.¹⁰⁵ As drought, fires, hurricanes, and floods increase in their frequency and intensity, such efforts may increase in turn.

But what about foreign relations law? What does this have to offer to U.S. law and governance more generally? Let me suggest three possibilities grounded, respectively, in practice, doctrine, and norms.

Practice. At the most basic level, foreign relations practice must prevent harm. It can—and must—help protect the integrity of U.S. elections. The last two presidential election cycles have shown the extent in foreign governments' interest in manipulating U.S. voters.¹⁰⁶ And even worse, at least one party—the Republican Party—was willing to twice (at least) nominate a candidate who welcomed, and indeed solicited, such manipulation in his favor.¹⁰⁷ We need to get any legislation we feasibly can out of Congress to reduce the risk of foreign interference in elections. Our national security agencies need to do whatever they can to prevent such manipulation. And more generally, the United States should support international efforts aimed at discouraging digital interference in foreign elections.¹⁰⁸

¹⁰⁴ Amy Gardner, Reis Thebault & Robert Klemko, *Election Deniers Lose Races for Key State Offices in Every 2020 Battleground*, WASH. POST (Nov. 13, 2022, 9:29 PM), <https://www.washingtonpost.com/elections/2022/11/13/election-deniers-defeated-state-races/> [<https://perma.cc/H6RA-DXKH>].

¹⁰⁵ By way of example, the need to address climate change is frequently cited in arguments for abolishing the filibuster. *E.g.*, Senator Alex Padilla (@SenAlexPadilla), TWITTER (Mar. 12, 2021, 3:45 PM), <https://twitter.com/senalexpadilla/status/1370476039659515906?lang=en> [<https://perma.cc/BT8B-9DK3>]; Press Release, Chellie Pingree, Congresswoman, House of Representatives, Pingree Joins Nearly 100 House Lawmakers Calling for Filibuster to be Abolished (May 5, 2021), <https://pingree.house.gov/news/documentsingle.aspx?DocumentID=3727> [<https://perma.cc/CA8Z-ZQKA>]; Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1005–06 (2011). In the absence of filibuster reform, the reconciliation process is the only feasible way for climate change legislation. The reconciliation process can deliver significant climate legislation, as with the Inflation Reduction Act of 2022, but procedural limits on this process prevent it from being readily used for regulatory reform as distinct from tax-and-spend policies.

¹⁰⁶ Julian E. Barnes, *Russian Interference in 2020 Included Influencing Trump Associates, Report Says*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/03/16/us/politics/election-interference-russia-2020-assessment.html> [<https://perma.cc/7PRS-N4HS>]; Eric Tucker & Mary Clare Jalonick, *Senate Panel Finds Russia Interfered in the 2016 U.S. Election*, PBS (Aug. 18, 2020, 4:49 AM), <https://www.pbs.org/newshour/politics/senate-panel-finds-russia-interfered-in-the-2016-us-election> [<https://perma.cc/M2FJ-FSY7>].

¹⁰⁷ Fred Wertheimer & Norman Eisen, Opinion, *Trump Illegally Asked Russia to Help Him Win in 2016. He Shouldn't Get Away with It.*, USA TODAY (Jan. 2, 2019, 6:56 PM), <https://www.usatoday.com/story/opinion/2019/01/02/trump-broke-law-russia-clinton-emails-hold-him-accountable-column/2449564002/> [<https://perma.cc/WZY4-TBPG>].

¹⁰⁸ For a set of principles along these lines developed recently by scholars, see Dapo Akande, Antonio Coco, Talita de Souza Dias, Duncan Hollis, Harold Hongju Koh, James O'Brien & Tsvetelina van Benthem, *The Oxford Statement on International Law Protection Against*

Doctrine. Various principles grounded in foreign relations law could potentially influence U.S. law related to democratic governance more generally. The 1962 Supreme Court decision that led to considerably more democratic districting practices, *Baker v. Carr*,¹⁰⁹ discussed numerous foreign affairs precedents.¹¹⁰ And looking to the future, there are a range of possible doctrinal implications that foreign relations law has to offer to election law.¹¹¹

That doctrinal connections exist does not mean that they will be used to advance democratic values. Indeed, the Court in *Baker v. Carr* worked hard to distinguish the issue of democratic districting from issues of foreign relations that might be considered to trigger the political question doctrine.¹¹² And as indicated earlier, we have reason to think that Supreme Court justices may draw upon law as it relates to foreign affairs only when it favors their preferred outcomes in cases of national significance.¹¹³ But it is at least possible that arguments tied to national security doctrine or practice could influence Supreme Court justices in cases involving constitutional law more generally.¹¹⁴

Foreign Electoral Interference Through Digital Means, EJIL:TALK! (Oct. 28, 2020), <https://www.ejiltalk.org/the-oxford-statement-on-international-law-protections-against-foreign-electoral-interference-through-digital-means/> [https://perma.cc/6TVE-7D5N]; see also Harold Hongju Koh, Keynote Address at the George Washington University Law Review Symposium: The Law of U.S. Foreign Relations (Oct. 7, 2022).

¹⁰⁹ 369 U.S. 186, 211 (1962).

¹¹⁰ See *id.* at 211–14.

¹¹¹ As one example, the Guarantee Clause in the Constitution remains a “sleeping giant” whose interpretation, if ever found justiciable, could draw upon principles of foreign relations law. Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 604, 608–12 (2018) (arguing that historical treaty practice should inform the originalist interpretation of this clause).

¹¹² See *Baker*, 369 U.S. at 209–31 (laboriously reshaping the political question doctrine by reconceptualizing sovereignty and trying to tie the application of this doctrine more closely to issues of foreign relations).

¹¹³ As a recent example, Justice Alito has long been on the record that “I don’t think that it’s appropriate or useful to look to foreign law in interpreting the provisions of our Constitution.” *Confirmation Hearing on the Nomination of Samuel A. Alito Jr. to Become an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006). Yet in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), he did exactly that, finding it “telling that other countries almost uniformly eschew” using viability as a line for determining the legality of abortion. *Id.* at 2270 (also expressing concern that *Casey* and *Roe* “allowed the States less freedom to regulate abortion than the majority of western democracies enjoy”).

¹¹⁴ A prominent (though aging) example is an amicus brief submitted by former military officials highlighting the importance of diversity in a 2003 Supreme Court case regarding affirmative action. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); *Grutter*, 539 U.S. at 331 (citing to and discussing this brief); see also Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1905, 1954 (2016) (noting the importance of this brief). By contrast, a major election law case from several years later struck down campaign expenditure limits as unconstitutional without any discussion in the majority-side opinions of practice in comparative law that supported

Core values. Finally, foreign relations law could potentially help connect struggles at home to a broader conception of rights and principles. At least as presently interpreted, the U.S. Constitution can force some ugly outcomes. Someone can become president even if more citizens vote for another candidate;¹¹⁵ someone can become president if the Supreme Court rules in their favor to stop a state recount;¹¹⁶ Senators representing a relatively minor share of the U.S. population can block legislation that is favored by Senators representing a vast majority of the population;¹¹⁷ and the list goes on.

These outcomes may be constitutional, but they are not just. To detach our concepts of justice from our concepts of constitutionality, it is helpful to look to international and comparative law. The Civil Rights movement drew strength from the international human rights movement (and the incentives the United States had to live up to its proclaimed ideals amid the Cold War).¹¹⁸ In this era, we may need to look abroad for ideas and models about how to build democracy, about how to structure elections, and about how to understand the threats of autocracy. Although the usefulness of these tools in litigation is limited, they have considerable potential for policy and for inspiration. Core human rights doctrines speak to the need for “genuine elections which shall be by universal and equal suffrage.”¹¹⁹

At present, foreign relations law serves as both a door and a wall between the United States and international human rights law. The United States has ratified some, though not all, human rights treaties but with the proviso that they are non-self-executing.¹²⁰ These limits in turn are a consequence of the difficulty of getting two-thirds of the U.S.

the use of such limits. Compare *Randall v. Sorrell*, 548 U.S. 230, 235–73 (2006) (not including any citations to comparative practice), with *id.* at 279 n.4 (Stevens, J., dissenting) (citing to comparative practice).

¹¹⁵ See sources cited *supra* note 23.

¹¹⁶ See *Bush v. Gore*, 531 U.S. 98 (2000); cf. Ford Fessenden & John M. Broder, *Examining The Vote: The Overview; Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES (Nov. 12, 2001), <https://www.nytimes.com/2001/11/12/us/examining-vote-overview-study-disputed-florida-ballots-finds-justices-did-not.html> [https://perma.cc/DSW9-SS9E] (finding based on an exhaustive reexamination of ballots in Florida that presidential candidate Al Gore probably won more votes in Florida than Bush, but additionally finding that would have required a more exhaustive review than would have been undertaken under the recount stopped by the Supreme Court).

¹¹⁷ See *supra* note 15.

¹¹⁸ See generally John David Skrentny, *The Effect of the Cold War on African-American Civil Rights: America and the World Audience, 1945–1968*, 27 THEORY & SOC. 237 (1998); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2011).

¹¹⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 21 (Dec. 10, 1984).

¹²⁰ For a longer discussion, see Jean Galbraith, *Human Rights Treaties in and Beyond the Senate: The Spirit of Senator Proxmire*, in FOR THE SAKE OF PRESENT AND FUTURE GENERATIONS: ESSAYS ON INTERNATIONAL LAW, CRIME AND JUSTICE IN HONOR OF ROGER S. CLARK 507 (Suzannah Linton et al. eds., 2015).

Senate to agree on anything. Underlying the theoretical justification for non-self-execution is the idea that the U.S. constitutional system is fully adequate—that it does not really need human rights treaties to be enforceable law because the constitutional system gives all the protections needed. But if the current trends of entrenchment continue—and especially in the horrific event that they bleed over into autocracy—then civil society may need not only to cite to human rights principles, but also to make their incorporation into a normative priority.

CONCLUSION

The tale of Nebuchadnezzar’s dream has led to the expression “feet of clay.”¹²¹ It makes a cleaner story to omit the iron—to forget that the statue’s feet had strength as well as vulnerability. After all, the statue lasted just fine until it was struck by a giant stone.

Our constitutional order has a great deal of iron in it. But we cannot trust complacently in its strength nor assume that it always operates for the good. We need work—a lot of work—to make our government more democratic, more robust, more ethical, and more effective. The alternative is all too grim.

¹²¹ See *Clay*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (giving various examples at 4.c of its definition).