The Hidden Judicial Springs of U.S. Foreign Policy

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Seen from Foggy Bottom, the Washington, D.C. home of the State Department, today’s geopolitical landscape is considerably more uncertain and hazardous than at the century’s dawn. For one thing, it is no longer unipolar. Twenty years ago, there were no challenges to U.S. hegemony in sight comparable to the present irredentist ambitions of nuclear-armed Russia unconstrained by arms-control agreements, or the remilitarized, economically, and technologically energized Chinese party-state. Rising tensions between the United States and China have shrunk global trade, decoupling technological links between the world’s most powerful nation-states. As unipolarity fades, nation-states are no longer converging toward some form of democratic capitalism buttressed by widely-embraced international-law systems for fomenting trade and reducing geopolitical conflict and economic instability. The halcyon days of a post-Cold War “Pax Americana” are done. Simultaneously, shocks to global order are gathering. Their effects are transmitted with increasing speed thanks to successful globalization—an international trading system linked by “just-in-time” inventory management; the transnational flow of culture and political ideas; the physical migration of bodies; a growing merger of debt, equity, and derivative markets; and—of course—the sheer implausibility of confining epidemic sicknesses to national jurisdiction.

So it should be no surprise that ours should be a moment of anxiety and uncertainty for those making foreign-policy decisions in Foggy Bottom. “Foreign policy” has long been an amorphous and capacious term. It picks out all aspects of state functioning that substantially influence, intentionally or not, the geopolitical context in which the United States operates. It has never been possible to draw a crisp line demarcating foreign from domestic policy. But these new developments add new difficulties to the task. In part, this is because diplomacy and armed conflict, the traditional domains of state-to-state contestation, have been supplemented by new kinds of international contestation, such as cyber conflict and platform-based wars of propaganda and disinformation. And in part, it is because when a nation-state such as the United States makes a seemingly domestic policy determination, its choice often has powerful, unavoidable global spillovers.

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For a survey of these challenges, see William J. Burns, The United States Needs a New Foreign Policy, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (July 1, 2020), https://carnegieendowment.org/2020/07/14/united-states-needs-new-foreign-policy-pub-82295.


Even new populist strains of nationalism are global in The paradoxically global nature of new populist nationalisms is well developed in BENJAMIN R. TEITELBAUM, WAR FOR ETERNITY: THE RETURN OF TRADITIONALISM AND THE RISE OF THE POPULIST RIGHT (2020).
Here is just one example: The 2018 discovery of significant natural gas reserves in the Permian basin in West Texas might seem a question of domestic energy law and policy. Four years later, the U.S. capacity to supply excess national gas to the European market shaped perceptions and strategy respecting the Ukrainian war. This was in stark contrast to the post-world-war period, in which the U.S. offered security guarantees for a Middle Eastern supply to Europe and Japan, while offering its own domestic reserves as a “last resort.”

Energy policy is not an outlier. When the United States makes a domestic policy decision about its public health policy, its regime for patenting new technologies or licensing pharmaceuticals, its intensive regulation of its domestic financial markets, its monetary policy, or the range of speech available on its social media platforms, there are foreign-policy spillovers. Domestic policy choices hence shape the nation’s geopolitical posture. They change the mix of available options for interacting with geopolitical allies and opponents. And they do so with a speed and an uncertainty that would be lacking in a less multipolar, less disordered and fragile, and less tightly concatenated world lacking in the trade, energy, migration, financial, and intellectual flows nurtured by fifty years’ globalization. So it is that what first appears to be a transnational public health threat can rapidly become a domestic financial meltdown, which elicits not just financial but monetary policy changes that reshape both national and the international economic environments. This is to say nothing, of course, of our shared exposure to climatic change and environmental catastrophe. Whether or not the contemporary geopolitical dissolves the distinction between foreign and domestic policy entirely is a matter of reasonable debate. What is clear, however, is that the line has become much harder to draw. Its ambiguities have become more salient.

In this fraught context, the political economy of the Supreme Court has undergone a shift too. New appointments have moved the Court’s ideal point sharply away from the preferences of the average American, and toward that of the average Republican. Especially when confronting policies associated with the Democratic Party, the Court has evinced markedly less deference and has been manifestly more willing to break from precedent or majoritarian sentiment. The result is a more muscular form of judicial review less inhibited by concern for destabilizing repercussions. This newly empowered Court is taking up questions ranging from treatment of migrants at the

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6 Helen Thompson, Disorder: Hard Times in the Twentieth Century 41 (2022).

7 Consider, for example, the interaction between the transnational Covid-19 shock in March 2020 created the prospect of a “horrifying” collapse in the market for U.S. Treasuries. Adam Tooze, Shutdown: How Covid Shock the World’s Economy 119 (2022). The Federal Reserve’s response was to offer “limitless cash,” and hence to “act not just as a lender of last resort, but a market marker.” Id.

8 Even the “adverse impacts of climate change ‘on other countries can have spillover effects on the United States, particularly in the areas of national security, international trade, public health, and humanitarian concerns.” Cass R. Sunstein, Climate Change Cosmopolitanism, 59 Yale J. on Reg. 1012, 1028 (2022) (quotation omitted).


10 One of us has presented evidence to the effect at length in Aziz Z. Huq, The Counter-Democratic Difficulty, 117 Nw. U. L. Rev. 1099 (2023).
Southern border\textsuperscript{11} and ‘war on terror’ detainees\textsuperscript{12}; the power of the federal government to address climate change; the existence and operation of executive branch agencies tasked with key elements of financial-sector oversight\textsuperscript{13}; and, indeed, even the physical siting of natural gas pipelines.\textsuperscript{14} No policy domain seems insulated from its reach. The questions raised in each of these cases (if not their specific resolutions) fall on the newly febrile seam between domestic and foreign policy.

There is, to be sure, a longstanding place for judicial supervision in foreign policy – and even some occasional recognition in business and academic circles that judicial decisions can shape international policy developments.\textsuperscript{15} Indeed, lively debates about where to draw the putative boundary between foreign affairs and public law disputes about domestic policy infuse such architectonic decisions as \textit{Youngstown Sheet and Steel}. Justice Black’s majority opinion rejected an expansive account of the “theater of war” as license for President Truman’s seizure orders.\textsuperscript{16} Chief Justice Vinson’s dissent, in contrast, nested the case in the context of a “terrifying global conflict.”\textsuperscript{17} In effect, majority and dissent disagreed over how to draw the line between foreign and domestic.

Yet recent developments mark a departure from tradition. There is increasingly widespread awareness of the entanglement between the domestic and the international, and also of the growing assertiveness of the U.S. Supreme Court. Under the influence of these factors, the Court’s de facto role in American foreign policy is growing. For two reasons, the changes that the Roberts Court is working to the domestic policy-making environment also contrast with earlier phrase shifts in structural constitutional jurisprudence: First, they are likely to be more consequential in foreign-policy terms. Even when a specific line of cases does not dramatically reengineer the scope or location of regulatory authority, it can seed uncertainty. This alone undermines effective policymaking.

Second, these cases are also a league apart from the prevailing ethos of the Rehnquist Court’s so-called federalism revolution, which had only modest effects on the national policy-
making environment.18 The shifts underway therefore ought to rekindle longstanding debates about institutional choice, especially respecting who should weigh, and who should ignore, the complex implications traced by the repercussions of putatively domestic legal interpretations and policies in the global sphere. How and when this expected judicial role came about constitute the core descriptive questions we set out to answer in this article, before exploring what the resulting recalibration of authority portends geopolitically for the United States, and what costs and dilemmas the country could face as elements of foreign affairs become increasingly judicialized.

Although these questions are not entirely unfamiliar, the increasingly urgent project of mapping answers falls within a persistent gap, one located not only between domains of institutional responsibility anchored at the State Department and the U.S. Supreme Court respectively but also between modes of scholarly analysis of foreign affairs. When scholars and analysts investigate into how decision-makers forge foreign policy in the United States, they generally use one of two disciplinary lenses. These are foreign relations law (FRL) on the one hand, and what could be termed foreign policy analysis (FPA) on the other. The first is essentially a subfield of public law familiar to a sprawling assemblage of law professors, military lawyers, sanctions attorneys, and judges. The second is more familiar to foreign policy practitioners with a scholarly bent and sounds in the key of international relations and political science. Our threshold ambition is to demonstrate that neither FRL nor FPA — at least as presently practiced — captures the role of the Supreme Court as newly configured under Chief Justice Roberts. The resulting lacuna is likely to become more important as the effect of new appointments by President Donald Trump cascades through constitutional and statutory jurisprudence.

In Part I, we describe how the paradigmatic exponents of each field — legal scholars in FRL and political scientists in FPA — tend to define their respective domains. Despite some redeeming value in each perspective, we contend that their collective contributions offer no more than a partially occluded picture of how foreign policy emerges. Part II draws distinctions between three elements of foreign-policy creation — instruments, channels, and foundational resources. Part III, the core of the piece, substantiates our central claim of a meaningful gap in understandings of such policy’s fabrication. We identify four recent lines of recent jurisprudence, all involving meaningful, judicially-driven changes to the law that have substantial foreign affairs implications. These concern legislative delegations; executive-branch centralization; the management of cross-border flows of bodies; and the infrastructure of national democratic self-rule. Across all four lines of cases, recent decisions by the Roberts Court are changing the instruments, channels, or foundational resources of foreign-affairs policy-making. Concluding, Part IV offers brief reflections on the normative implications of recovering this all-too hidden dimension of judicial interventions.

**I. Theorizing the Wellsprings of American Foreign Policy**

Lawmakers and policymakers play their part in setting the country’s foreign policy agenda, broadly defined, within a system subjecting them to a variety of interpretive and practical constraints as they pursue personal or institutional interests. But their actions are also guided by clusters of interrelated ideas shaping how these civic actors make sense of those constraints and interests, how they read from their metaphorical scripts, and indeed, when they start searching for

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entirely new lines to read. Ideas about the sources of American foreign policy are theorized in two different corners of the academy (to a first approximation)—the law school and the political science department. Yet these two approaches—both valuable and important—leave a blind spot.

To map the latter, we start by describing the scope and central questions addressed in these two bodies of scholarship. We then point out a striking gap plainly visible on the map between these approaches.

A. The Canon of Foreign Relations Law

The conventional domain of FRL is illustrated by the scope of the field’s leading casebook. After an introductory chapter on early constitutional history, the leading FRL casebook carves up its topic into three general domains—the role of Congress, the presidency, and the states in relation to other nations; the handling of international law, including treaties, executive agreements, and customary international law; and finally, areas of policy wherein the United States has access to a variety of legal and policy tools—but also faces legal and practical constraints—as it directly confronts violent transnational threats of crime, terrorism, and war. At first blush, this organization of topics seems arbitrary: It tacks between questions of institutional choice, the choice of law, and, specific, narrow policy domains. But its seeming haphazard choice has its own inner logic. It reflects a coherent and defensible pedagogical orientation of the law school curriculum toward the likely professional pathways of graduates. That is, FRL as taught from the casebook offers foundational training for lawyers headed to agencies such as the State and Defense Departments, and perhaps the intelligence community, Treasury, and Commerce. Reasonably, FRL draws attention to issues of professional concern to these lawyers.

The scholarly literature on FRL reflects the same delimited domain. It is organized along two main axes: the division of institutional power between branches (or levels) of government and the effects of various forms of “international law.” Central FRL topics include the scope of exclusive Article II authority over foreign affairs; the choice of international law-making form (and especially the choice between treaties and executive agreements), and the availability of individual redress in domestic courts for violations of international norms. FRL, however, is not

21 Id. at 137-264.
22 Id. at 265-352.
23 Id. at 533-846.
concerned with how the United States influences that larger environment generally. It makes no claim to address all or even most possible pathways by which domestic dynamics influence the geopolitical sphere. Hence, a central FRL question is the scope of deference afforded other branches (or, by extension, states) in the interactions with other states or in matters of war and terrorism in cases that fall within a heartland definition of foreign relations.28 The narrow boundaries of that heartland in FRL likely are as much a testament to the undeniably disruptive potential of war as they are to the role war plays as a kind of Weberian-ideal type proxy for the fragility lurking in notions of national sovereignty underlying most versions of international and domestic law.

To observe that FRL offers a partial account of foreign policy-making is not, to be clear, a criticism. All scholarly taxonomies cut the world up based on pedagogical and disciplinary demands. The descriptive observation we want to stress here, however, is simply that FRL as a subfield of law has been understood and instituted to exclude some potentially important pathways.

B. Foreign Policy Analysis as a Subfield of International Relations

The leading approaches to international relations (“IR”) tend to “envisage[] states as unitary and purposive actors that consider what other states will or might do when they choose foreign policies.”29 A widely-cited theorist writing in the realist tradition of IR, Kenneth Waltz, thus strips away all attributes of states, instead conceiving of them as unitary actors pursuing policies to ensure their own survival.30 Obviously, work in this vein has little to say about the institutional sources of a nation’s foreign policy. But certain broad approaches to foreign policy eschew black-box approaches to explain “why particular states make particular foreign policy moves at particular times.”31 FPA is one such subfield of IR that, drawing from a range of theoretical approaches and empirical agendas, instead interrogates how foreign policy in fact emerges from within the state.

Like IR more generally, FPA encompasses different perspectives about the drivers of foreign policy decisions. It has neoclassical, liberal internationalist, and “bureaucratic politics” strands. We get a general sense of FPA’s scope again by looking at leading textbooks. The main actors in the accounts offered in these textbooks are bureaucracies,32 a diffuse general public,33 and

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31 Fearon, supra note 29, at 295.
33 Alden and Aran, supra note 32, at 34-60; Piers Robinson, The Role of Media and Public Opinion, in Smith et al. supra note 32, at 160-87; Hudson and Day, supra note 32, at 145-150.
intermediating bodies such as parties and unions. FPA scholars offer, for example, detailed accounts of how public opinion generates distinct policy outputs in different countries as a consequence of being filtered through distinct formations of political parties and coalitions.

Our claim is not that scholars agree on every detail or core presumption when they espouse and labor to enhance what we have termed the FPA perspective. Debating the merits of paradigmatic, big-picture perspectives on international politics is table stakes among most international-relations faculties. Generally, too much is made of these abstract debates. But there is no question that classical realists who recognize the relevance of history and internal politics see the world differently from adherents of hyper-rationalism heavily influenced by rational-expectations economics and structural realists who tend to describe global power in the unforgiving terms of a zero-sum game.

When it comes to analyzing applied policy questions or historical episodes, however, scholars interested in understanding the drivers of particular foreign policy decisions — that is, FPA scholars — are often less divided than the vigor of their theoretical debates might imply. This can be seen in three ways. First, whether or not analysts pledge allegiance to particular theoretical camps, they often devote considerable attention to how national governments use tools of diplomacy, economic statecraft, and security to advance a set of national interests. One need not accept that the attempt to advance such interests always results in coherent or normatively defensible positions. It is enough for scholars working on interpreting the behavior of senior officials in the United States and other countries to embrace, as a working presumption, that policymakers and bureaucracies act as though they can formulate reasonable policies to advance shared national concerns.

Second, aside from the strictest adherents to hyper-rationalism and structural realism, scholars of foreign policy are open to the idea that a variety of historical antecedents, societal factors, and economic realities can shape a nation’s priorities as well as its leaders’ ability to advance those priorities.

Third, even scholars interested in how American foreign policy priorities are affected by sources of domestic bureaucratic, political, and economic power spend relatively little attention focused on the judiciary as a distinctive institution: one both putatively defined by values antithetical to conventional partisan or interest group politics yet undeniably entangled with the political process.

To wit: while many exemplars in the FPA literature offers detailed accounts of how bureaucracies, the tides of public opinion, and the vicissitudes of interest-group contestation shape foreign policy, they are largely silent as to the courts. Leading FPA casebooks and scholarly contributions to the field respecting U.S. foreign policy-making include few references to the

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34 Allian and Aran, supra note 32, at 60-61; Hudson and Day, supra note 32, at 146.  
36 Jonathan Kirshner, An Unwritten Future: Realism and Uncertainty in World Politics 2 (2022) (“The almost ritual rehearsal of clashes between realism and liberalism — the nadir of which was the academic ‘paradigm wars of the 1990s’ has been as ubiquitous in IR theory as it has been unproductive.”)
Supreme Court. None of the main textbooks we examined even reference the Court in their indexes.

C. The Gap in Foreign Policy Analysis

The FRL and FPA literatures are both concerned mainly with how policy on geopolitical questions arises through the institutions of national government. Both focus on the production and application of what is formally denominated international law (treaties, executive agreements, or customary international law) as well as foreign policy more generally. FRL tends to take a narrow view of courts. It trains a focus on their role reviewing a quite cabined set of decisions denominated as foreign-affairs. In contrast, FPA is silent about the judicial role.

What, then, is missing? If a nation state takes decisions that influence its geopolitical situation outside the ordinary bureaucratic channels—the State Department, the Defense Department, and the White House—and without overt recourse to a formal instrument of international law, it will likely fall outside the existing parameters of either perspective. Neither FRL nor FPA, that is, accounts for the possibility that institutions and policies uncontroversially denominated as ‘domestic’ could have a large effect on geopolitics, and that their decisions could be subject to judicial review.

II. Mapping Foreign Affairs Policy-Making: A Stylized Taxonomy

In analyzing this gap, it is helpful to rely on a standard vocabulary. But FRL and FPA focus on different actors by and large and advance distinct inquiries. FPA scholarship focuses on how conventional domestic politics, interest-group maneuvering, and “organizational behavior” that produces foreign policy outcomes. It describes “spheres of competence of the actors involved, communication and information flow, and motivations of the various players.” FRL scholarship takes as its basic objects entities envisaged by the Constitution: a legislative, an executive, and the several states. It then aims to deduce legally permissible modes of policy-making by those bodies. That these approaches lack as much as even a common vocabulary is no surprise.

Defining such a shared vocabulary can better help us map and label the space between these literatures, and describe the connections between legal premises and geopolitical effects. This means defining the scope of “foreign affairs” as we use the term, and then picking out three elements involved in its domestic fashioning: instruments, channels, and foundational resources.

We use the term “foreign relations” or “foreign affairs” of the United States to encompass state actions that alter materially the geopolitical environment influencing the United States, without regard to whether such actions are channeled or executed through the State Department,

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Commented [MFC1]: At least in my book, what we’ve broadly labeled “FPA” includes not only the “bureaucratic politics” perspective focusing on, say, organizational interests, norms, and capabilities, but also on electoral and interest-group politics (e.g., how US defense contractors and their employees might be interested in approaching China policy, or how organized labor might play on trade disputes). But if anything, it reinforces our point that even a relatively capacious perspective like that fails to take account of the uniquely Janus-faced institution that are the courts: both apolitical in ideal-type and aspiration, yet powerful catalysts of policy and political action.

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57 Foreign relations law also pays some attention to the several states’ conduct. See, e.g., Daniel Abebe and Aziz Z. Huq, Foreign Affairs Federalism: A Revisionist Approach, 66 VAND. L. REV. 725 (2013).
58 Valerie M. Hudson, Foreign policy analysis: Actor-specific theory and the ground of international relations, 1 FOR. POL. ANALYSIS 1, 6 (2005).
59 Id. at 6.
60 Bradley, Deeks, and Goldsmith, supra note 20, at 137-264.

Electronic copy available at: https://ssrn.com/abstract=4395951
Defense Department, intelligence community, or other agencies.\textsuperscript{41} Our definition is not static. When Robert Kaplan predicted in 2002 that growing environmental degradation would ignite new, violent conflicts around the world,\textsuperscript{42} his claim was both novel and controversial.\textsuperscript{43} Not so much anymore. Even the Director of National Intelligence has recognized time and again in recent years the national-security implications of climate change.\textsuperscript{44} In a similar vein, public health once seemed a parochial matter, an intricate challenge readily addressed through domestic laws and policies. After the Covid-19 pandemic, however, the idea that the determinants of American mortality and morbidity lie solely within national borders seems fanciful.\textsuperscript{45} Even domestic democratic choice has an international dimension. Buttressing the success and stability of American democracy was a material element of American Cold War strategy—though often-cited at the time in the public understanding and imagination.\textsuperscript{46} More recently, authoritarian regimes in Russia and China have been spending considerable resources shaping that putatively domestic discourse.\textsuperscript{47} As a result of these developments, American policymakers are ever more aware that the United States must address “a range of threats, including nonstate actors and nonmilitary and nonhuman threats, such as economic crises, cybersecurity, infectious disease, climate change, transnational crime, and corruption, which are often unmoored from interstate rivalries.”\textsuperscript{48}

This extended account of foreign policy is controversial. Partisan identity predicts a person’s views about the extent and costs of anthropogenic climate change.\textsuperscript{49} The consumption of online misinformation is driven disproportionally, for example, by users with the strongest partisan identifications.\textsuperscript{50} Many of these users would likely resist the idea that they are entangled in a foreign policy matter. A precise definition of “foreign affairs” is hence elusive, or perhaps incorrigibly partisan.

Even with this caveat in mind, it is useful to distinguish three different elements of the process for making foreign policy: instruments, channels, and foundational resources.


\textsuperscript{42} Robert D. Kaplan, The Coming Anarchy: Shattering the Dreams of the Post-Cold War (2002).


\textsuperscript{44} Daniel R. Coats, Office of the Dir. of Nat’l Intelligence (“ODNI”), Statement for the Record: Worldwide Threat Assessment of the U.S. Intelligence Community 21-23 (2019), https://perma.cc/7BFG-N3CN.

\textsuperscript{45} Predictions of future pandemics will likely rely on computational tools commonly called artificial intelligence, or AI. But AI prediction requires large pools of data from which models can be derived. Pooling information to create the necessary training data for global disease surveillance necessarily depends on international cooperation.


\textsuperscript{47} David Sloss, Tyrants on Twitter: Protecting Democracies from Information Warfare 5-112 (2022).


\textsuperscript{50} Mathias Osmundsen et al., Partisan polarization is the primary psychological motivation behind political fake news sharing on Twitter, 115 AM. POL. SCI. REV. 998, 999-1000 (2021).
First, state action does not simply spring from the ether fully-formed in the international system. It is undertaken through specific instruments. These include federal and state laws, agency regulations and decisions; government procurement and funding decisions; judicial opinions; presidential executive orders and horatatory statements from the White House. In the United States, the range of available instruments is determined in part by the Supreme Court’s gloss on the Constitution. Its 1983 decision invalidating the legislative veto, for instance, eliminated one tool. Its 2008 decision restricting the president’s power to direct state courts via a memorandum to comply with a judgment of the International Court of Justice struck out yet another.

Second, the choice of instruments is related to a range of channels through which government policy-making can flow. A channel is a sequence of institutional steps used to deploy a specific instrument. Change to instrument choice reshapes the channels of foreign policy making. Violation of the legislative veto, for instance, eliminated a potential step in the policy-making process. It thus pushed policy-making into a different sequence of institutional venues. Available channels differ because they are characterized by different veto-gates staffed by distinct players. Each channel is associated with a different “win set,” i.e., a different domain of potential policy outcomes agreeable to all veto players. Choice of channel, and concomitant veto-gates drives the choice of legal instrument. Hence, recent scholarship has identified a “heavy reliance” on “ex ante congressional-executive agreement” that skirt around the Senate’s supermajority rule for committees and ex ante public scrutiny of agreed-upon texts. If the Supreme Court were to hold that executive agreements were constitutionally impermissible, that would alter not just the instrument but also the larger channel through which foreign policy can be made.

Finally, we use the term foundational resources to refer to capabilities of a national polity, whether traits of government or of society more generally, that de facto or de jure determine the credibility and the efficacy of a state’s actions in the geopolitical sphere. The quality and existence of a foundational resource turns on both state and nonstate action. Crucially, the absence of a foundational resource can incapacitate the state from advancing its interests internationally.

53 George Tsebelis, Veto Player Theory and Policy Change: An Introduction, in REFORM PROCESSES AND POLICY CHANGE (Thomas Konig, Marc Debus, and George Tsebelis, eds. 2011) (“Policy stability is the effect of a constellation of ‘veto players’… individual or collective actors whose agreement is necessary for the change of the status quo”).
54 Oona A. Hathaway et. al., The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis, 134 HARV. L. REV. 629, 635 (2020); (“The authorization counts as full consent to the agreement prior to the President’s negotiation of it. This means that the President can make and conclude the agreement, and thus render it legally binding on the United States, before Congress or the public even knows of its existence.”).
55 Bradford R. Clark, Domesticating Sole Executive Agreements, 93 VA. L. REV. 1573, 1576 (2007) [rejecting “the conclusion that Article II permits the President to alter preexisting rights under state and federal law simply by making a sole executive agreement”].
56 See, e.g., Kirshner, supra note 36, at 12. Kirshner emphasizes the potential consequences of lost social cohesion for a variety of material and more inchoate (but no less important) foundational resources:

[S]ocieties – even apparent great powers – can rot from within, and… this, even more than the external threat environment, can determine the prospects for their survival. A fearsome-looking, muscle-bound fighter might prove to have a glass jaw, and fetishizing the physique (apparent power) risks overlooking less visible but ultimately decisive vulnerabilities (social cohesion).
The most obvious and salient example of a foundational resource in geopolitics is military or coercive capacity. But in the multipolar context of the early twenty-first century, where plural battlefields are in play, there is more than one kind of relevant coercive authority. The U.S. capacity to supply arms to Ukraine and to credibly commit to NATO partners to respond to Russian military incursions shape outcomes around the Black Sea. In facing China, it is not just the Seventh Fleet’s firepower but relative national competencies in artificial intelligence (“AI”) and quantum computing that will determine the terms of future contestation. Military capacity hence also turns on the pace of domestic scientific development and the creation of new “fabs” on U.S. territory, among other things. It is not just a consequence of what is happening in the State or Defense Departments.

But there are other, more subtle resources a nation might draw upon to act credibly in the geopolitical sphere. One is the scope of executive legal authority to act in emergencies. The greater a state actor’s discretionary authority as a matter of domestic law, the larger their capacity to threaten external action. The executive’s emergency capabilities may not be evenly distributed across policy domains. It might instead be that the government has greater leeway to respond to security threats such as terrorism than in respect to public health threats such as COVID-19. This might follow from the selection of tools in its repertoire, and the range of instruments ranked as ultra vires.

Another potentially salient foundational resource is the systemic robustness of democratic institutions. This might take different forms, as a state might have either shallow or deep democratic institutions. These might be able to channel and sustain public support for a costly foreign affairs policy that would otherwise stand on infirm ground. Trust in government of the sort engendered by democratic choice also operates as a policy-relevant resource because it induces greater compliance with individual-level behavioral adaptations elicited by geopolitical crisis.

A final system-level ‘foundational resource’ pertains to the strength and endurance of the kinds of legal constraints on state power that can support the tacit bargains among people, interests, and institutions underlying the capacity and legitimate authority of the state. Following Lon Fuller, we can call this “legality.” It is the ability of a legal system not just to provide reliable

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57 2022 NATIONAL DEFENSE STRATEGY 2 (Oct. 27, 2022), https://www.defense.gov/National-Defense-Strategy/ (defining Russia and China as threats, but identifying different resources needed to address them).
58 Id. at 6; see also KAI-FU LEE, AI SUPERCOWNS: CHINA, SILICON VALLEY, AND THE NEW WORLD ORDER 228-32 (2018).
60 The idea that democratic threats to use military force are more credible than similar threats from nondemocracies, however, has been cast into doubt. Alexander B. Downes and Todd S. Sechser, The illusion of democratic credibility, 66 INT’L ORGS. 457 (2012).
61 This was true during the Covid-19 pandemic. See Stefano Pagliaro et al., Trust predicts COVID-19 prescribed and discretionary behavioral intentions in 23 countries, 16 PLOS ONE e0248334 (2021) (finding that “considering psychological differences in terms of trust toward different agents—governments, citizens, and science—provide a more informative picture of individuals’ reactions to COVID-19”).
guidance to citizens on the likely legal consequences of their actions, but also its capacity to generate a “particular quality of relationship between the lawgiver and the legal subject,” characterized by “reciprocity.” The salient intuition here is that the existence of that kind of bond between sovereign and citizen allows for a different range of geopolitical actions.

III. Hidden Judicial Springs of Foreign Affairs Policy

The range of available instruments, channels, and foundational resources of U.S. foreign policy turns on constitutional law. And whatever the theorists may say, constitutional law on the ground is in very large part a function of what a particular iteration of the Supreme Court holds. It follows that when the Court changes tack in respect to salient aspects of constitutional law, and its decisions have implications for foreign policy, the instruments, channels, and foundational resources of policymaking will also change.

The last decade has been a period of sharply felt change in constitutional jurisprudence. Recent appointments to the bench have pushed the Court toward the right (in relation to the country as a whole) in dramatic ways. Some of the resulting chapters have explicitly concerned FRL. In 2015, for example, the Roberts Court spoke directly to the scope of the president’s recognition power in respect to foreign states. It has also narrowed substantially the scope of the Alien Tort Statute (“ATS”) in several cases. Because our aim in this piece is to illuminate ‘hidden’ springs of judicial influence on foreign policy, we do not directly address these lines of cases here: They are well covered in the FRL literature.

Instead, we ask how recent shifts in ‘non-foreign-affairs-related’ constitutional law have reshaped the instruments, channels, and the foundational resources upon which the United States’ capabilities in the geopolitical domain rest. By focusing on recent changes, we do not mean to suggest that the Court’s earlier interventions did not influence the path of U.S. foreign relations, or vice versa. One of us has written previously about the influence of early twentieth-century Supreme Court decisions on executive-branch structure informed “the relationship between bureaus carrying out legal responsibilities and sources of external pressure such as the White House, lawmakers, or civil society organizations.” Plainly, the shifting contours of federal regulatory authority in the first decades of the twentieth century shaped American geopolitical power projection both directly and indirectly. Examining a later period of the twentieth century, Mary Dudziak has demonstrated that the Warrant Court’s desegregation decisions were understood by many as a part of Cold War geopolitical contest with Communism. The project

65 Jessee et al., supra note [TK].
66 Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) (recognizing that the Reception Clause provides the president with exclusive authority to determine the sovereign status of foreign countries, regardless of congressional intent).
of juriscentric American constitutionalism has long been nested in causally complex geopolitical dynamics.\textsuperscript{70}

We identify four recent lines of decisions that alter instruments, channels, and the foundational resources in material ways. For each, we start by identifying salient judicial opinions. We then plot the ways in which instruments, channels, or foundational resources of foreign policy have been consequently changed by them. For each line of cases, the change is hard to quantify with precision. We nevertheless posit that the foreign-policy effects of each line of cases rises above the de minimus. It is likely substantial. Over time, we will argue, these decisions seed significant effects on the geopolitical context and choices confronting the United States.

The first concerns the national power to regulate, and changes to the instruments (and hence channels) through which exercising global regulatory leadership. The second pertains to the structure of executive-branch decision-making, and the foundational resource of intragovernmental expertise. A third relates to managing the flow of human bodies across borders—in part what is commonly called immigration law, and treated separately from foreign-relations matters. The fourth and final zone turns on the quality of democratic choice. We conceptualize this as a foundational resource, the corruption of which is significant for both domestic and external-facing reasons.

A. The National Power to Regulate

1. The New Major Questions Doctrine

In three important merits decisions in October Term 2021, the Court invoked the “major questions” doctrine to invalidate regulatory agency actions aimed at addressing novel and arguably profoundly harmful threats to Americans’ health and wellbeing. In the first case, the Court invalidated an Environmental Protection Agency (EPA) regulation that had been crafted to mitigate greenhouse gas emissions.\textsuperscript{71} In a second case, the Court invoked the doctrine to turn aside an Occupational Safety and Health Agency (OSHA) regulation designed to mitigate COVID-19 risk.\textsuperscript{72} In a third case, decided in August 2022, it invalidated a moratorium imposed on evictions by the Centers for Disease Control and Prevention.\textsuperscript{73} In the thirty years prior to the October term 2021, the Court had invoked the doctrine in only five other cases.\textsuperscript{74} In the EPA and OSHA cases, however, the Court reformulated the doctrine into a powerful, anti-regulatory clear statement rule.

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\textsuperscript{71} West Virginia v. Envt’l Protection Agency, 142 S. Ct. 2587 (2022).

\textsuperscript{72} Nat’l Federation of Indep. Bus. v. Dep’t of Labor, 142 S. Ct. 661 (2022).

\textsuperscript{73} Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021). But see Biden v. Missouri, 142 S. Ct. 647, 650 (2022) (per curiam) (upholding a rule to the effect that Medicare and Medicaid funding recipients’ staff, unless exempt for medical or religious reasons, had to be vaccinated against COVID-19).

Any “major” agency policy now requires “clear congressional authorization” as a way of enhancing democracy.75

Formally, the doctrine attempts to shift the channel of policy-making from federal agencies to Congress by ruling out the instrument of regulation and demanding the use of statutory law. Under present conditions of partisan polarization among legislative caucuses, however, it is immensely difficult to enact new law even under conditions of unified government. The recent failure of the Republican Party to repeal the Affordable Care Act illustrates the (quite general) difficulty of legislative change absent cross-party agreement.76 But gridlock is not democracy. To the contrary, the quality of a nation’s democracy depends on its capacity to identify and remedy the latter’s defects and shortfalls.77 A judicially created rule that induces gridlock, indeed, is more likely to undermine than to improve democracy. Gridlock today cannot be justified as a way of protecting some distribution of prepolitical rights (say, to liberty and property). For inaction today benefits those vested interests that benefit from a status quo characterized by previous statutory, regulatory, and judicial action. In effect, it allows present incumbents to shield themselves from challenge. Worse, political scientists since Juan Linz have flagged the peril to democracy implicit in a presidential system mired in gridlock, when a winning popular coalition is “cheated” of its policy preferences.78 By condemning national policy on certain questions to an oubliette of policy paralysis, the Court elicits national drift and inaction. This perverse result follows from a fallacy of composition—i.e., the flawed assumption that for government to be democratic as a whole, discrete policy decisions must have a specific kind of electoral pedigree.

It is no surprise that this new version of the major questions doctrine has been “widely criticized” for its “indeterminacy” and its “counter-democratic allocation of power from agencies to judges.”79 Rather than adding further to these persuasive criticisms, our goal here is to understand the effect that an outsize major questions doctrine has on the formation of foreign policy, and on the United States’ capacity to compete in a global environment

The immediate impact of the opinions issued in the 2021 Term, of course, borne on the U.S. capacity to respond to present and future global threats: The climate-change crisis and the Covid-19 pandemic. By reading statutory authorities respecting environmental law and public health narrowly, the Court cast into doubt not just the regulations being challenged, but also any subsequent regulatory effect to address new environmental or public health challenges with a global reach. Hence, among the proposed rules immediately cast into doubt by the EPA ruling was a March 2022 proposal by the Securities and Exchange Commission to impose new disclosure

75 West Virginia, 141 S. Ct. at 2609.
76 JORDAN M. RAGUSA AND NATE BIRKHEAD, CONGRESS IN REVERSE: REPEALS FROM RECONSTRUCTION TO THE PRESENT (2020).
79 Nathan Richardson, Antideference: Covid, Climate, and the Rise of the Major Questions Canon, 108 VA. L. REV. Online 174, 176 (2022); see also Deacon and Litman, supra note 88, at 32 (arguing that the doctrine will “exacerbate institutional and political pathologies, undermine the ostensible premises of the major questions doctrine, and generate a doctrine that is likely to undermine delegations in the circumstances in which they are more likely to be used and more likely to be effective”); Mila Sohoni, The Major Questions Quartet, 136 HARV. L. REV. 262, 267 (2022) (doubting whether “the Court [c]ould articulate a concrete and specific constitutional value that justifies that rule”).

Electronic copy available at: https://ssrn.com/abstract=4395951
obligations on regulated firms related to climate risk.\textsuperscript{80} It is reasonable to conclude, therefore, that the new major question doctrine’s very first applications have the effect of curtailing significantly the nation’s capacity to respond to climatic harms and new, as-yet-unknown epidemic or pandemic outbreaks. They have, quite directly, removed a foreign-policy tool from the nation’s arsenal. The Court’s decisions, of course, do not obviously rest on any information or expertise in the expected magnitude of these risks. Indeed, there is no reason to think that the Court has any expertise on the consequences to the nation of preventing regulatory responses to novel climatic or viral harms.

The Court, in any event, had been made aware of the geopolitical ramifications of domestic greenhouse-gas regulation. Consider the arguments made by the George W. Bush Administration for limiting EPA authority in respect to greenhouse cases. In its notice of denial of the petition for rulemaking, the Agency asserted that “[t]he international nature of global climate change also has implications for foreign policy, which the President directs.”\textsuperscript{81} The EPA argued that the president's policy “supports vital global climate change research and lays the groundwork for future action by investing in science, technology, and institutions” and that it “emphasizes international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change.”\textsuperscript{82} Invalidating this agency determination, the Court rejected wholesale the relevance of foreign policy consideration.\textsuperscript{83} We think that this element of the Court’s reasoning flawed here.\textsuperscript{84}

2. Foreign Policy-Making After the New Major Questions Doctrine

What of the doctrine’s future application? The three opinions issued in 2022 offered hints on what counted as “major” regulation: The Court looked to whether Congress or the states had been considering a policy question,\textsuperscript{85} and the latter’s novelty.\textsuperscript{86} This doctrinal inflection tracks the doctrine’s deployment by the Department of Justice during the Trump Administration, which “distorted the [past] doctrine by raising whichever factors and metrics it found most helpful in any given case, however devoid of established doctrinal support, often contradicting arguments that it made in other cases.”\textsuperscript{87} As applied now by the Court, this novel version of the new major questions doctrine means that “even broad, otherwise unambiguous delegations of authority are not enough...”\textsuperscript{88}

\textsuperscript{80} Christina Thomas, Andrew Olzem, and Katelyn Merick, Supreme Court Decision Casts Doubt on SEC’s Climate Proposal and Other Regulatory Initiatives, HARV. L. SCH. F. CORP. GOV. (July 12, 2022), https://corpgov.law.harvard.edu/2022/07/12/supreme-court-decision-casts-doubt-on-secs-climate-proposal-and-other-regulatory-initiatives/
\textsuperscript{82} Id. at 52923.
\textsuperscript{83} Massachusetts v. E.P.A., 549 U.S. 497, 534 (2007) (“[W]hile the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws. In the Global Climate Protection Act of 1987, Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate.”).
\textsuperscript{84} Not least, it misses the fact that “so many domains of social and economic regulation now seem populated by numerous agencies, which—to satisfy their missions—must work together cooperatively or live side by side compatibly.” Jody Freeman and Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 HARV. L. REV. 1131, 1130 (2012).
\textsuperscript{85} Id. at 2614; NFIB, 142 S. Ct. at 665.
\textsuperscript{86} West Virginia, 141 S. Ct. at 2612 (invoking novelty of the regulation as an indicia of a major question); NFIB, 142 S. Ct. at 666 (same).
\textsuperscript{87} Natasha Brunstein & Richard L. Revesz, Mangling the Major Questions Doctrine, 74 ADMIN. L. REV. 217, 220 (2022).
to support ‘major’ agency policies. It is thus a putatively ‘targeted’ nondelegation doctrine aimed at reinforcing the democratic credentials of agency action, albeit one guided by the Court’s sensibilities about what is politically important or novel.

Notwithstanding its formal justification as democracy-enhancing, the likely future effect of the new major questions doctrine will be to disable the federal government from action on many important policy questions with geopolitical implications. It seems particularly likely that the new major questions doctrine will tend to have a significant effect on foreign-policy matters when the Court’s policy preferences diverge from those of the executive branch’s. In other words, we anticipate the doctrine will prevent Democratic, but not Republican, Administrations from exploiting broadly worded statutory delegations of authority. In the O.T. 2021, it was applied in challenges to climate and pandemic regulation favored by the Democratic Party. The reach of the new major questions doctrine beyond EPA, OSHA, and like agencies regulating firms remains uncertain. It could also be narrowly construed with carve outs for certain domains of policy-making favored by the Court where business interests do not have the same kind of interests.

To see evidence of this possibility, consider a challenge to a Biden-Administration decision to rescind a Trump-era immigration policy called “Remain in Mexico.” The Court’s result hinged on the “discretionary” character of the statutory language in question. It set aside contrary arguments that no such discretion existed. That is, the majority construed the statute in a way that obviated the question whether the creative exercise of discretionary over cross-border transfers was itself a “major question.” It also highlighted “the foreign affairs consequences of mandating

89 Cass R. Sunstein, There Are Two “Major Questions” Doctrines, 73 ADMIN. L. REV. 475, 491 (2021); see also Blake Emerson, Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation, 102 MINN. L. REV. 2019, 2048 (2018) (“[I]n its best light, the doctrine aims to protect and to strengthen the connection between the people and governmental action by presuming that a popular and deliberative process settles major questions of policy.”).
90 Alexander Bolton, Gridlock, Bureaucratic Control, and Nonstatutory Policymaking in Congress, 66 AM. J. POL. SCI. 238, 238 252 (2022) (arguing that “intrabranch supermajoritarian constraints on passing legislation impair the ability of congressional majorities to influence executive policymaking, particularly in the presence of interbranch preference divergence,” and noting that “[a]s the goals of legislative actors diverge, mastering the support and votes to constrain executive branch actors becomes more challenging.”).
91 See infra notes 71 to 72. The national eviction moratorium invalidated by the Roberts Court, was first imposed by the Trump Administration in September 2020. See Centers for Disease Control and Prevention, Temporary Halt in Residential Evictions: To Prevent the Further Spread of COVID-19, 85 FED. REG. 55292 (2020). By July 2021, however, the measure was supported by a supermajority (82%) of Democrats, and opposed by a majority of Republicans (58%). Kathy Frankovic, Americans approve of extending the eviction moratorium through July, YOUTUBEMERICA (July 6, 2021), https://today.yougov.com/topics/politics/articles-reports/2021/07/06/americans-approve-extending-eviction-moratorium. The Court’s invalidation of the measure is therefore in accord with its broader tendency to take positions close to the median Republican voter, but not the median American.
92 Biden v. Texas, 142 S. Ct. 2520, 2533 (2022) (describing the “Remain in Mexico” program).
93 Id. at 2544.
94 Id. at 2554-55 (Alito, J., dissenting).
95 The Trump-era Remain in Mexico policy was criticized for cruelly exposing migrants to “robbery, assault and other crimes, including kidnappings.” Marisa Limón Garza, The ongoing devastation of Trump’s ‘remain-in-Mexico’ policy, THE HILL (Feb. 4, 2020), https://thehill.com/opinion/immigration/480477-the-ongoing-devastation-of-trumps-remain-in-mexico-policy/. It is possible to imagine a version of the new major questions doctrine that took such human rights violations as a trigger, and asked for specific statutory authorization. The Roberts Court, however, has selected a different set of policy consequences as triggering conditions. Mere human misery does not seem to count.
the exercise of contiguous-territory return” policies. To be sure, these consequences were highlighted in briefing on the “Remain in Mexico” policy, but absent from the Solicitor General’s briefing in the EPA case. Nevertheless, given the breadth of the Court’s capacity to craft opinions based on non-record facts of its own choosing, that difference cannot be understood as a constraint on the Justices.

The Remain in Mexico decision supports two possible inferences about the scope of the new major questions doctrine. First, it does not apply when the policy objection to a regulation rests on humanitarian concerns, as opposed to the effect a policy will have on regulated firms. We doubt that this would ever be enunciated as a formal part of the doctrine. But a varying sensitivity to different sorts of costs seems inherent to the doctrine. This is one way, indeed, in which the Justices’ can flex their substantive policy preferences. Second, it may be that the doctrine has no application when there are direct “foreign affairs” consequences. This would be consistent with an earlier suggestion by Justice Gorsuch that the nondelegation doctrine should not apply in respect to “foreign affairs powers … constitutionally vested in the president under Article II.” But this assumes that the Court has some straightforward way of dividing the foreign from the domestic. It does not. Instead, the Court can discern a “foreign affairs” angle in the sending of a migrant body across the U.S.-Mexico border—but then blink the “foreign affair” consequences of stymying the nation’s effort to address the global problem of climate change.

Nor is Justice Gorsuch’s formulation especially illuminating: If a power is “constitutionally vested” in the president, it is not even clear whether and how Congress would be acting. So does Gorsuch mean to describe a null set? More likely, he means to suggest that there is some class of legislation that acts in aid of Article II foreign affairs powers. But how are the latter defined? Article II does not contain some obvious litmus test for what counts as “foreign affairs” related. If it does, and if Gorsuch believes himself guided by it in the EPA, OSHA, and CDC cases, it has been rendered otiose by the changing geopolitical environment. It is more likely that Article II contains no such theory of the distinction between the foreign and the domestic—and invocation of such a nonexistent theory simply allows judges to inject their own policy preferences into the breach.

Hence, we think that presently available evidence about how the new major questions doctrine is used suggests that it will have a significant “foreign affairs” effect when the (right-of-center) Court objects on policy grounds to a Democratic administration’s efforts to grapple with global problems via regulatory initiatives grounded in interpretations of statutes that would be at least facially plausible but for the major questions doctrine (were it not for its bite against otherwise persuasive interpretations, there would be no point to the doctrine). Such constraints will likely stymie the United States from exercising regulatory leadership through the enactment of regulatory coordination initiatives with major geopolitical resonance such as the Indo-Pacific Economic Framework, path-marking regimes for global problems such as climate change, the regulation of social-media platforms, and responses to public health emergencies.

96 Id. at 2533.
97 Biden v. Texas, 142 S. Ct. at 2533.
Note that even as the United States is handicapped in exercising one kind of leadership, this doctrine leaves the nation with a free hand to pursue a deregulatory ‘race to the bottom.’ The result will be that where a single regulatory regime emerges globally as a matter of de facto conformity, it is more likely to be wrought by other nations or by states. This Roberts Court doctrine hence binds the nation’s hands by eliminating one important instrument for shaping its geopolitical environment even beyond the immediate implications of the EPA case.

Our prediction of an asymmetrical effect is worth explicating. It is a truism that in a globalized economy, the regulatory approach of a nation state as large as the United States necessarily has a spillover effect on other jurisdictions. Only one of these, however, is affected by the new major questions doctrine. First, a nation might compete to offer firms a favorable regulatory climate by weakening mandates or slackening the pace of enforcement. This places pressure on other nations to deregulate in order to remain competitive. Where deregulation has costs to foreign consumers—for instance, in the antitrust context—domestic firms gain an increased ability to impose externalities overseas. The new major questions doctrine does not seriously impede this kind of deregulatory foreign policy. So long as the executive has discretion to temper enforcement—say, in antitrust or securities regulation—then it can push other countries in a deregulatory direction.

But imagine that the United States wants to be a global leader in respect to, say, climate change or platform regulation policy. It might attempt to generate “[u]nilateral regulatory globalization,” which “occurs when a single state is able to externalize its laws and regulations outside its borders through market mechanisms, resulting in the globalization of standards.” The U.S. is well placed to exercise this kind of influence. But the new major questions doctrine prevents it from doing so: Agencies are legally prohibited from articulating such a policy. But under increasingly likely and increasingly persistent scenarios, Congress is politically precluded from doing so.

The resulting gap can be filled from either above or below. The European Union (“EU”), on the one hand, has systematically tried to demonstrate “climate leadership capabilities” and has “adapted its exemplary and diplomatic leadership to maximize impact.” On the other hand, states such as California have strived to fill the vacuum left by an absence of U.S. leadership in respect to environmental regulation. A similar dynamic can be observed in respect to data privacy. The European Union has promulgated a comprehensive data privacy directive that has

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100 Indeed, international law is often designed to minimize the cost of such externalities. Andrew T. Guzman, How International Law Works 132-33 (2008).
102 Id. at 54. Recent empirical studies find evidence for this regulatory “chill,” but also identify states in domestic firms can use higher standards to insulate themselves from competition. Emma Aisbett and Magdalene Silberberger, Tariff liberalization and product standards: Regulatory chill and race to the bottom?, 15 Reg. & Gov. 987, 987-88 (2021). So in practice, a regulatory race to the bottom induces some variance in standard-setting.
extraterritorial effects. The result of internal efforts to “harmonize the data processing practices of EU member states” became over time “a global diffusion story.” Once again, California has followed suit with its own privacy law. EU nations are poised to enact a sweeping new regulation of artificial intelligence (“AI”) in late 2023. With Congress unlikely to enact new legislation to comprehensively regulate AI, the new major question doctrine means that the executive cannot lean on existing privacy and consumer safety laws to step in. As a consequence, the United States is likely to fall behind Europe as a global leader in deciding how AI is used.

A further irony here is that firms and individuals within the United States are not immune from the expansion in non-U.S. regulatory power. Parties in U.S. court “routinely” lean on foreign regulations to shape “thousands of claims every year—even when foreign regulators disagree with U.S. regulators.” And this was prior to the recent shift in the doctrine.

3. The New Major Questions Doctrine and International Negotiation

In addition, the new major questions doctrine is likely to influence the dynamics of international negotiations. To see this, it is useful to return to the FPA scholarship for a model of how the domestic and international spheres interact.

In an influential contribution to the FPA literature, Robert Putnam has construed the interaction between domestic and international politics as a “two-level game” His model comprises separate domestic and international “table[s]” on which interest groups and national governments respectively pursue their interests. Connecting the two levels are national executives conducting a Janus-faced dual bargaining game. On the one hand, they are constrained by their domestic play of political forces. On the other hand, they are bargaining with other states. Sometimes moves that are rational for the executive on the domestic level are “impolitic” at the international level. Two-level models of foreign policy making draw on game theory to draw out implications of different levels of domestic flexibility for international bargaining. Among the intriguing implications of these models is the possibility that greater domestic constraints “reduces the scope for international cooperation” but also “increases the bargaining power of a state.” Yet another possibility is that the “win set” at the first domestic stage has no overlap with the “win set” at the international level.

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112 Id.

113 Id.

114 Id. at 448.

115 Id. at 437-38. In Putnam’s model, a “win set” is the range of possible final terms that a country can accept in an international negotiation and still manage to get the treaty ratified. For a useful overview of the literature after Putnam, see Eugênia da Conceição-Heldt and Patrick Mello, Two-Level Games in Foreign Policy Analysis, in OXFORD
The new iteration of the major questions doctrine shrinks the range of positions to which the executive can commit absent congressional scrutiny. This increases the leverage that the executive has in negotiation. The executive can henceforth more plausibly point to a limit to its freestanding discretion, and the need to secure legislative acquiescence. On the one hand, this means that the executive may be able to obtain greater concessions through international negotiations. On the other hand, the difficult of navigating the congressional channel and its vetoes means that the range of actual policies that can traverse both the domestic and international “table[s]” will be smaller than it otherwise would be. The net result is fewer international agreements. But those agreements that are reached will have better terms for the U.S.

An example of when this effect might arise can be extrapolated from the recent financial crises. During both the 2007-09 financial crisis and the 2020 COVID-19-related crash, the Federal Reserve interpreted its vague and open-textured statutory authorities to purchase assets to engage in extensive lending to non-bank entities, including other sovereign central banks. The statutory provision at issue, Section 13(3) of the Federal Reserve, had “rarely” been used before these crises. In 2008, the provision was deployed to “recast” the central bank’s power and enabled the massive buying of bonds that were unprecedented in scope. Subsequent legislative efforts to constrain this power “narrowed” the Fed’s freedom of maneuver, but nonetheless do not prohibit extraordinary fiscal and monetary interventions.

In March 2020, the Federal Reserve was hence able to respond to the potential collapse of key financial markets by buying billion dollars of bonds per second, hoovering up some five percent of a $20 trillion global market. If there were to be a rerun of these crises, say centered on runs on bank-like institutions such as cryptocurrency exchanges, literal application of the new major questions doctrine would suggest that the central bank could no longer intervene. To be sure, a private suit against the Federal Reserve would face difficult justiciability hurdles. But one can still imagine a future Fed Chair citing the new major questions doctrine in both domestic and global negotiations, and then conjuring the threat of non-intervention, to influence the course of a subsequent financial crisis. In the limit, the new major questions doctrine might end up being the proximate cause of a global depression.

Whatever one’s ultimate position on the wisdom of framing the presidency as the country’s preeminent foreign affairs institution, few serious observers would deny that a strong historical and jurisprudential tradition bolsters the presidency-foreign affairs nexus. Even from a perspective that primarily privileges historically-rooted American legal traditions rather than primarily

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Footnotes:
118. Id. at 181-82; MENAND, supra note 117, at 40-41 and 48 (describing the Fed’s purchase of “trillions of dollars of financial assets” in 2020).
119. TOOZE, supra note 7, at 129.
120. MENAND, supra note 117, at 39, chart 1.2 (documenting scale of foreign lending).
consequentialist concerns, the new major questions doctrine may work best if formally limited by “foreign affairs” concerns writ large. But this boundary is at best enormously fraught and difficult to draw coherently—at least as fraught or perhaps more than the boundary between “major” and non-major questions. In practice, its channel- and instrument-shifting effects have significant consequences for the geopolitical power of the United States. Along one, deregulatory, margin, that power is largely unaffected. But along another, the Court is indirectly shaping the nation’s global footprint based on its own idiosyncratic views of what counts as a “domestic” political question of importance.

B. **The Structure of Executive Policy-Making**

The second major shift in the jurisprudence concerns the structure of the executive branch itself. The Roberts Court has interpreted Article II to preclude legislative protections against the presidential firing of certain officers within the executive branch, and to limit the mechanisms by which certain officers can be appointed. On the one hand, these opinions to date have not destabilized or emasculated the agencies in question—many of which play key roles in the complex federal network of financial regulation. On the other hand, the net substantive result of these changes is uncertain. As we have already seen with respect to the SEC’s climate rule, jurisprudence can cast a pall of uncertainty over regulatory prospects. In addition, the structural constitutional jurisprudence discussed below will likely diminish the availability of expertise within the executive branch in ways that erode the quality of foreign policy decisions. As such, it will corrode the quality of U.S. tools to address international financial crises in particular.

The leading decision on presidential removal authority from the October Term 2021 concerned the head of the Federal Housing Finance Authority (FHFA). The Court held that even “modest restrictions” on the President’s “power” to remove the sole director of a federal agency could not be reconciled with the Constitution.124 It drew on two earlier decisions. The first of these struck down limits on the president’s power to remove the head of Consumer Finance Protection Bureau (CFPB) solely “for inefficiency, neglect, or malfeasance.”125 The second invalidated a two-step removal regime for members of the Public Company Accounting Oversight Board.126 This trio of decisions marks a sharp break from the more accommodating, functionalist approach taken to removal questions during the Rehnquist Court.127 While purportedly justified on originalist grounds,128 the new removal regime has been sharply criticized as inconsistent with a mounting body of historical evidence.129 The Court has addressed this accumulating historical evidence by simply ignoring it.

128 Free Enterprise Fund, 561 U.S. at 492; Seila L. LLC, 140 S. Ct. at 2197.
A second line of cases arises under the Appointment Clause of Article II. The Court in recent cases has enlarged the range of federal officials who must be appointed through presidential nomination followed by Senate approval and diminished the range of officials who can be appointed by channels that do not run through Capitol Hill. More technically, the Court in 2021 held that administrative patent judges are “principal officers” who can be appointed only by the President with the advice and consent of the Senate given those judges’ ability to issue “final decisions” on patents’ validity. Echoing the justifications offered in its removal jurisprudence, the Court has pointed to “legitimacy and accountability” to justify its decisions. At the same time, the Court has resisted broad application of the Appointment Clause when it comes to territorial officials in respect to Puerto Rico. Just as in the regulatory power/delegation context, the Justices appear to check doctrine at the water’s edge.

In both the challenges to the statutory schemes for the FHFA and patent judges, the Court coupled a categorical, formalist rule of decision with a modest remedy. In the first case, the Court declined to rank the agency decision as void, and instead remanded to the lower court to determine whether the constitutional flaw had an implication for how its decision was implemented. In the second case, the Court held that the statutory provision barring agency-head review was unenforceable. It instead bestowed upon the agency head the power to review patent judges’ decisions. If we set aside the “managerial checks” that arise from district-court judges’ “extraordinary ability to force legal and public accountability onto the Executive in suits challenging enforcement lawmaking,” the immediate effect of these rulings for regulated parties appears to be modest: The specific challenged agency actions proceed as before, and the trajectory of administration persists relatively unimpeded.

The same, however, cannot be said, however, of an October 2022 decision by the Fifth Circuit Court of Appeals to strike down the CFPB’s funding mechanism as a violation of the Appropriations Clause. That decision throws into doubt the Bureau’s ability to fund its

130 U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).
133 In a 2020 case, the Court rejected an Appointment Clause challenge to the Financial Oversight and Management Board created by the Puerto Rico Oversight, Management, and Economic Stability Act, on the ground that “primarily local” officers could be appointed without advice and consent. Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1663 (2020). The Court did not evince any sense of the irony of labeling a decision about an offshore as “local.”
134 Collins, 141 S. Ct. at 1788. The challenge to the CFPB’s structure also led to a remand, and a circuit-court ruling that the agency director had “expressly ratified the agency’s earlier decisions.” CFPB v. Seila L. LLC, 997 F.3d 837, 846 (9th Cir. 2021).
135 Arthrex, Inc., 141 S. Ct. at 1966-68.
137 Gundy v. United States, 139 S. Ct. 2116, 2122 (2019) (Congress’s decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution’s structural separation of powers.).
continued operation. It also raises profoundly destabilizing questions about the Federal Reserve’s operation—which, as we have already explained, may well introduce new and profound uncertainty into the foreign policy domain. Of course, the Supreme Court may overrule that decision, but it is striking that the consequentialist reasons for worry triggered by the opinion have played a very small role in recent jurisprudence.

Commentators are predictably calling for more aggressive remedies in these cases that would destabilize regulatory agencies. The possibility of further challenges to executive agencies, especially those with key roles in financial regulation, interacts with uncertainty over remedies to create a friction on agency action. We want to stress a different way in which the Court’s interventions are consequential. For our purposes, what is interesting about the Supreme Court’s opinions is their dynamic effect on the channels through which policy, including in the foreign affairs domain, will be made. The effect of both the removal- and the appointment-related decisions is to funnel more control of the executive branch into the White House, and in particular to subject a greater proportion of officials to partisan rather than professional criteria of evaluation. This increases, among other things, the power of presidents to use “persistent failures to nominate” as an instrument to “prevent an agency from doing the business assigned to it by statute do seem to thwart congressional design.” It also enlarges presidential discretion to “undermine the agency expertise that is foundational to the modern regulatory enterprise.” To be sure, presidents have other instruments at their disposal to control officials short of appointment and removal. But the recent constitutional decisions at minimum increase this discretion at the margin, and prevent the reinstallation of durable expertise-promoting safeguards.

These effects are likely to be pronounced in the foreign affairs domain because of the importance of personnel quality in that domain. Financial agencies such as the SEC already play an important role in promoting “greater cooperation in the cross-border enforcement of securities laws.” A constitutional regime in which experts lack discretion and are at the mercy of partisan winds is one that will not recruit or retain the sort of skilled people needed to navigate the complex international sphere (or even address domestic risk effectively). Political appointees are not likely to be even-handedly responsive to the interests of all sides of the national debate. A 2005 empirical study found that “business may exert the most consistent influence” on foreign policy choices, with public opinion having “little or no” palpable effect.

141 Id. at 616. Freeman and Jacobs focus here on exercises of presidential discretion generally, and not the marginal effect of recent decisions. But their terminology is apt.
142 See Aziz Z. Huq, Removal as a Political Question, 63 STAN. L. REV. 1, 5-6 (2011) (enumerating those instruments).
More generally, White House control has underappreciated costs in the foreign policy domain. Derek Leebeart has argued that U.S. foreign policy has already been seriously undermined through its longstanding reliance on a political appointments system for diplomats. On his account, this system “imposes inexperience, compels urgency, courts risk and foments illusions of being able to manage the ethnic, ideological, and political concerns of other nations.”

Diplomats themselves have lauded mechanisms such as the dissent channel as means to leverage their expertise in the teeth of bad decisions by political appointees. During the Trump presidency, career staff in the military publicly expressed their unwillingness to follow “illegal” orders in another signal of the variable quality of presidential orders. Political nominees from the career military have also played important roles in soothing roiled diplomatic relations.

The Court’s structural jurisprudence does not directly affect either the Foreign Service or the military. But the costs of politicization observed in those fields suggest that these decisions will have costs elsewhere.

It is worth noting, finally, an internal tension in these. In cases perceived as implicating geopolitical considerations, the Court repeatedly genuflects before the competence and superior knowledge of the executive branch. For the Court to be actively engaged in the deconstruction of the very expertise on which it so ostentatiously relies is no small irony.

C. The Flow of Bodies Across Borders

The anti-regulatory disposition of the Roberts Court does not extend across the board. To the contrary, there are important domains in which the Court has substantially loosened the constraints upon governmental action. In the domain of immigration—a question of growing global importance as migration pressures increase as a result of climate change, and a quintessential exemplar of domestic and foreign policy entanglement—the Court has used tools of statutory interpretation and its broad authority over remedies to enlarge the scope of executive branch discretion. Coupled to its handcuffing of the executive when it comes to regulatory pace-setting, these decisions alter the available range of instruments of foreign policy.


Another important example is the resistance to the banning of trans-gender service personnel—although the legal status of that action was contested. See Ellen Mitchell, Military Pushes Back on Trump’s Transgender Ban, HILL (Aug. 13, 2017), http://thehill.com/policy/defense/346261-military-pushes-back-on-trumps-transgender-ban.


The first strand of relevant decisions here is embodied by the Remain in Mexico decision, which ratified presidential discretion to both maintain and to withdraw a minatory regime of temporary exile on the southern border.150 Similarly, in 2018, the Court upheld the ban imposed by President Trump on entrants from several Muslim-majority countries.151 It did so in the teeth of substantial record evidence of unconstitutional bias against Muslims in its creation.152 Deference, though, does not prevail across the board. In a 2020 decision concerning the Obama-era Deferred Action for Childhood Arrivals (DACA) program, for example, the Court held the termination of that program unlawful under the Administrative Procedures Act of 1946 because given insufficient, incomplete reasoning by the Secretary of Homeland Security.153

A second strand of cases concerns remedies for discrete and individual violations of the Constitution or federal statutes though immigration detention. The substance of immigration law defines eligibility for removal in exceptionally sweeping and categorical terms.154 This uniformity in migrants’ legal classification leaves officials with vast discretion. Judicial review of individual cases in consequence has limited scope for disciplining the immigration system. Nevertheless, what remedies obtain have been systematically pared back by the Court. This remedial recession is part of a more general pattern. As one of us has explained, both the Rehnquist and Roberts Courts have rolled back sharply the availability of individual remedies in public law through a wide variety of doctrinal tools.155 In a series of decisions in the October 2021 Term, the Court expanded the ability of the executive branch to use detention as an instrument of policy-making by changing the range of detainees’ remedies. In a first pair of cases, it eliminated the ability of noncitizens held by the federal government on immigration grounds to seek relief on their confinement in a periodic bond hearing.156 In a third case, it extinguished their legal right to obtain class-wide relief on any legal ground.157 These cases all involved legal challenges to the legality of a detention. While the Court has not addressed conditions-focused challenges of late, the dispersion of immigration detainees across private, city, and county-run facilities creates technical and jurisdictional barriers to litigation in many cases.158

Beyond the detention context, the Court has also lowered the expected cost of state coercion, including deadly force, by eliminating remedies in tort for noncitizens and citizens subject to state violence close to the border. For example, in a 2020 decision, it foreclosed damages based

153 Dep’t of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1912 (2020) (noting that the Secretary’s reasoning “treated the Attorney General’s conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation,” and finding this elision arbitrary and capricious).
154 Shalini Bhargava Ray, Immigration law’s Arbitrariness Problem, 121 Colum. L. Rev. 2049 (2021).
156 Johnson v. Areteaga-Martinez, 142 S. Ct. 1827 (2022) (“[T]here is no plausible construction of the text of § 1231(a)(6) that requires the Government to provide bond hearings before immigration judges after six months of detention, with the Government bearing the burden of proving by clear and convincing evidence that a detained noncitizen poses a flight risk or danger to the community.”).
on the fatal shooting of a child by a border agent on the ground that “regulating the conduct of agents at the border unquestionably has national security implications,” and the “risk of undermining border security.”  

Parallel trends can be discerned beyond the strict immigration context. In a 2022 decision in respect to a military detainee who had been subjected to state torture while in U.S. custody, the Court allowed the government to invoke the “state secrets” privilege to prevent two former contractors with the CIA from being compelled to give testimony for a foreign proceedings. Perhaps the most telling sentence in the Court’s opinion was its conclusion that the need of a torture victim to establish a public record of his mistreatment was “not great.” One does not need to have experienced state violence to have some sense of how the trauma of recognized torture can inflict persisting psychological harms of first-order magnitude. Yet the Court’s disregard of the violence inflicted on transient bodies across international borders is in keeping with its approach in immigration cases more generally: The physical harms inflicted on moving (generally non-U.S.) bodies are not a cognizable cost. Bereft of legal relevance, they vanish from view.

We draw attention to these cases because they have a dynamic effect on the toolkit of foreign policy. Judicial enforcement of constitutional and statutory limits operates ordinarily as a “tax, a mechanism for making some activities more expensive relative to their substitute.” The net effect of the decisions canvassed here is to lower that tax in relation to immigration-related coercion and detention. For example, the Court’s novel bar on “class wide” relief means that immigration officials can litigate disputes about the terms of detention on a retail rather than a wholesale basis. It seems likely that this will lead to substantially less pressure to release individuals—especially given the absence of free or subsidized legal aid for indigent immigrants. Even presidential administrations ideologically disposed to ease coercive control of immigration flows are likely to lean into the use of these tools. Such administrations not only face pressure from political forces that frame immigration as violent threat. They also confront internal bureaucratic and public pressure to respond to public perceptions that the state does not have

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160 Hernandez v. Mesa, 140 S. Ct. 735, 747 (2020). This ruling has been extended to cases involving citizen victims of unlawful violence close to a border—again through an invocation of “foreign policy and national security” considerations. Egbert v. Boule, 142 S. Ct. 1793, 1804 (2022).
163 Id. at 971 (“Zubaydah suggested that he did not seek confirmation of the detention site’s Polish location so much as he sought information about what had happened there.”). The Court here purported to rely on a concession of Zubaydah’s counsel. But there was never any doubt that the detainee’s legal action was intended to proceed in the Polish black site. This was less a concession than a statement of the prima facia obvious reason for suit.
165 In January 2023, the Biden Administration turned to a discretionary immigration power called parole to help manage the build-ups of migrants at the southern border. Nick Miroff and Maria Sacchetti, Biden border plan expands use of 1950s-era immigration parole power, WASH. POST, Jan 20, 2023, https://www.washingtonpost.com/nation/2023/01/20/border-migrants-parole/. This is an example of creative use of regulatory tools, although not of coercive ones (as described in the main text).
166 Morawetz, supra note 160, at 770-71 (noting the presence of “anti-immigrant tropes about the ‘criminal alien’ that fueled some of the worst excesses in Congress” in the recent jurisprudence of immigration).
effective control over immigration flows. Increased enforcement is often the path of least resistance even if it is not compatible with an administration’s stated ideological commitments.

The lowered cost of coercive immigration control must be understood against the context of other dimensions of jurisprudence explored here. Changing migration flows into the United States are linked to ongoing climate change, particularly in the areas such as the Northeast and Midwest of the country. Of course, climate change policy and coercive migration control are not anything like perfect substitutes. But the lower the former’s cost, the less political pressure there may be to address the latter. There is hence a subtle way in which the Court’s interventions, when understood in net, are pushing the United States toward some instruments of foreign policy problems, and away from others. By raising the cost of some policy options and by lowering the price of others, the Court is picking and choosing how the United States is responding to a global crisis such as climate change.

D. Democracy as a Foundational Resource in Foreign Policy

When the United States acts in the international sphere, it leverages several background sets of foundational resources. These, as we’ve said, include military capacity, as well as natural resources (such as access to natural gas and human capital (shaped in part by migration policies). Obviously, the availability of most of these resources does not depend on the Court’s actions. There is one important foundational resource, however, that can improve or decline in quality as a consequence of the Court’s actions. This is democracy.

There are many competing definitions of democracy. We focus here on the simple intuition that elected actors should be responsive to the preferences of their constituents for the term to fit. Where an election system leads to results that are invariant to the changing views of the electorate, a legitimating link between the public and their putative representatives is lost. Declines in responsiveness plausibly work as an index of faltering democratic quality. With this in mind, it is possible to pick out an unnervingly wide range of Supreme Court caselaw sharply at odds with this jurisprudence, thereby dismantling the electoral premises of democratic rule. Rather than offering a general canvas of this jurisprudence, we pick out four recent decisions or trends with counter-democratic effects. This suffices to show how a Court that in other domains makes a big fuss about its commitment to democracy is systematically dismantling the electoral premises of democratic rule to the benefit of the political faction with which it is aligned.

We have already observed one way in which the Roberts Court is placing new strains on American democracy: The new major questions doctrine, discussed above, makes it more difficult

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167 See infra text accompanying notes 3 to 6 for more discussion.
169 These points are developed at greater length in Aziz Z. Huq, The Supreme Court and the Dynamics of Democratic Backsliding, 699 ANNALS AM. ACAD. POL. & SOC. SCI. 50 (2022). The general point that the Constitution is by design counter-democratic is explained by Robert A. Dahl, How Democratic is the American Constitution? 41–64 (2001).
for a winning electoral coalition to make policy change over the objections of an entrenched and connected political minority.\textsuperscript{171} In effect, the EPA decision allows a minority employed in legacy coal plants to hold up the majority who experience climate change’s immediate costs. The frustration and dissatisfaction this generates feeds into antisystemic forces and figures who seek power by promising to circumvent the orderly, ordinary processes of democratic choice. By increasing national logjams, increasing public discontent with national governance, the Court is kindling (inadvertently or otherwise) an increased risk of political instability.\textsuperscript{172} It is creating the conditions under which presidentialism, as Linz predicted, is most likely to generate democratic crisis.\textsuperscript{173}

There are three other recent lines of cases that comprise a (non-exclusive) body of counter-democratic effects. First, campaign finance jurisprudence under the First Amendment\textsuperscript{174} prevents the state from moderating the effects of wealth on political choices. It hence strains the linkage between representatives and those who elect them. Money flows from a small number of wealthy districts nationally.\textsuperscript{175} It tends predictably to increase Republican representation in state legislatures, without respect to changes in public preferences.\textsuperscript{176} Especially under conditions of extreme wealth inequality,\textsuperscript{177} this has the effect of selectively enfranchising only a small, wealthy slice of the public. Second, the Court’s decision to permit concededly unconstitutional partisan gerrymanders of legislative districts without federal judicial supervision has the effect of enabling partisan lock-ups of state legislatures and congressional delegations—again, largely to the Republican Party’s benefit.\textsuperscript{178} While the Court is not responsible for the technological advances that enable far more fine-grained and durable lock-ups of political power, its decision to stay its hand contrasts sharply with its aggressive policing of other domains of the electoral process. Third, and relatedly, the Court has interpreted federal laws such as the Voting Rights Act and the National Voter Registration Act, both intended to promote inclusive forms of democracy, so as either to defang them or to transform them into instruments of disenfranchisement.\textsuperscript{179} These three

171 See text accompanying supra notes 88 to Error! Bookmark not defined.
172 This discretion now spills out into violence justified under the banner of constitutional fidelity. See Aziz Z. Huq, On the Origins of Republican Violence, Brennan Center for Justice [June 29, 2021], https://www.brennancenter.org/sites/default/files/2021-06/Huq_final.pdf. The Court’s complex and indirect relation to these emergent forms of political violence is an important topic, raising issues beyond our scope here.
173 Linz, supra note Error! Bookmark not defined., at 66.
174 See, e.g., Fed. Election Comm’n v. Cruz, 142 S. Ct. 1638, 1645 (2022) (invalidating a statutory “limit on the use of post-election funds” to repay a candidate’s personal loans).
177 THOMAS PIKETTY, A BRIEF HISTORY OF EQUALITY 150-51 (2022) (documenting growing inequalities in both the United States and Europe).
lines of decisions limit the responsiveness of elected officials to changing public opinion in increasingly significant ways.

The question here, of course, is how the ensuing loss of democratic responsiveness has affected foreign affairs. In what ways, that is, is democratic democracy a foundational resource in the geopolitical context, and how does its decay shape the nation’s external policy options? We see three possible linkages here. We reject the first, most obvious one. Instead, we emphasize two less expected ways in which the judicial diminution of American democracy corrodes the geopolitical standing of the United States.

The first potential linkage to consider draws on Joseph Nye’s well-known idea of “soft power.” This is the “ability to set the political agenda in a way that shapes the preferences of others.” Such power depends on “values … expressed in our culture, in the policies we follow inside our country” as well as the “way we handle ourselves internationally.”

It would be convenient for our argument if we were able to lean on Nye’s account of soft power. Alas, we are skeptical that it can accomplish much load-bearing work for us. For one thing, it is grounded on an account of the accelerating “diffusion of power away from governments to private actors” that no longer seems plausible. The emergence of a powerful centralized party-state capable of mobilizing surveillance and AI-enabled behavior controls in China suggests that Nye was too optimistic.

Empirical studies of soft power also find limited evidence for a broad reading of Nye’s theory. Rather, the best available empirical evidence suggests that it is the foreign policy views of other countries’ electorates that shape their willingness to cooperate with the United States in the global sphere, not their views of our domestic political arrangements.

We see at least two other pathways, however, that might plausibly matter more. First, the U.S. dollar is “far and away the most important currency for invoicing and settling international transactions,” without regard to where they occur. This generates “considerable” benefits for the United States. These include the reduction in transaction costs of global trade; the elimination of currency risk; the seignorage premium (which comes from the lower cost of acquiring dollars); and the lower interest rate on foreign liabilities. This is the so-called exorbitant

the Help America Vote Act of an Ohio law that “removes registrants only when they have failed to vote and have failed to respond to a change-of-residence notice”).

181 Id. at 11.
182 Id. at 51.
186 Id. at 3.
187 Id. at 3-4
privilege of printing the world’s leading trading and reserve currency. According to the leading academic account, the United States is able to benefit from this so-called exorbitant privilege since it benefits from the “transparency of [its] public institutions, the right to free expression, and an unfettered media,” all of which are necessary for “building confidence.” Such a political “system of open and transparent democracy,” which has the institutional capacity to effectively implement policy and is capable of identifying and correcting its own errors, “is crucial for explaining the confidence that foreign banks and other investors have” in dollar assets. That democratic system, to be sure, has come under stress from many directions in recent years. But the Court’s hostility to democratic responsiveness, and its willingness to tolerate partisan lock-ups, likely adds to the pressure on the structural conditions of the dollar’s role as a reserve currency.

The second pathway of interest pertains to the relationship between domestic democracy and international conflict. A substantial empirical literature in international relations substantiates the idea of a “democratic peace.” This is the idea of a “substantial, robust, and statistically significant association between joint democracy and the absence of militarized conflict.” The democratic peace theory has been subject to a wide range of empirical critiques, and yet remains significant association between joint democracy and the absence of militarized conflict.” This is the idea of a “democratic peace.” The quality of a nation’s democracy is plausibly understood as a foundational resource when it acts in the geopolitical sphere. Although the theoretical and empirical arguments supporting the importance of “soft power” effects may be somewhat weaker than some observers have surmised, we see reason to believe that a weakened democratic foundation will undermine U.S. fiscal power and increase its exposure to international conflict. At a moment of growing

190 Id. at 302. Prasad’s view is not universally shared. Eichengreen, in contrast, identifies monetary stability as key.
192 Håvard Hegre, Michael Bernhard, and Jan Teorell, *Civil society and the democratic peace,* 64 J. CONFLICT RES. 32, 32-34 (2020).
193 See Reşat Bayer and Michael Bernhard, *The operationalization of democracy and the strength of the democratic peace: A test of the relative utility of scalar and dichotomous measures,* 27 CONFLICT MGMT. & PEACE SCI. 85-86 (2010) (proposing that the theory is better operationalized with democracy as a binary).
195 Hegre et al., *supra* note 193, at 34-38 (finding that social mechanisms of constraint—by which “citizen engagement can impose audience costs on leaders between elections, either directly or in anticipation of them” to be the most powerful index of democratic peace).
geopolitical instability, with both Russia and China manifestly discontent with unipolar hegemonic arrangement, this seems a dangerous development.

IV. The Court as a Hidden Source of American Foreign Policy

Nothing compels the court to shape American foreign policy so substantially. The Court picks virtually its entire docket through discretionary choices about which cases to hear, and which to leave unaddressed. The Justices (or at least four of them) make decisions on Article III justiciability grounds. They can intervene either early or late in the litigation process, before or after an evidentiary record has been developed. All these choices shape profoundly the scope and extent of its interventions. And even where the Court decides to grant review and decide a case on the merits, it has considerable leeway in deciding how broadly or narrowly to craft rulings. Various Justices may understand their role in constrained jurisprudential terms — to interpret the statutory text, for example, or apply the original understanding of constitutional provisions — but these do not have a predictable effect on the footprint of their decisions. As a result, the judicial shaping of foreign policy instruments, channels, and foundational resources is a function of choices the Justices make. It is judicial policy developed at the near-unfettered discretion of the bench.

There is a profound irony at work in the Justices’ exercise of this discretion in the cases we have discussed. As we have seen, the Justices commonly invoke their comparative institutional disadvantage on foreign affairs and national security matters in relation to the executive branch. Deference is commonly elaborated in terms of the executive’s greater expertise and informational resources in respect to foreign policy. But while the Court has traditionally taken account of at least some prudential foreign policy and national security concerns in order to limit the scope of its foreign-affairs footprint, it has recently exercised its discretion over its docket to take up cases and questions with profound, and arguably damaging, effects on the geopolitical instruments resources that the United States can marshal at times of international tension. Its recognition of foreign policy implications, indeed, is highly selective in ways that might well be predicted given the partisan affiliation of specific Justices. The Court has also ignored the fact that the argument for humility based on foreign-affairs-related expertise extends far more broadly than is apparent at first blush. At a minimum, this suggests that the present judicially created category of “foreign affairs and national security” matters is underinclusive, malleable, and vulnerable to ideological taint. Its partial nature leads to serious and unnoticed foreign affairs effects of the kind described in Part III. The result is an unprincipled and erratic reshaping of basic geopolitical instruments, channels, and foundational resources.

Resolving what should then be done as a matter of national interest, institutional competence, and the public’s well-being is a challenging enterprise. This is in part because the relevant institutional design criteria do not necessarily converge. The fact of foreign-affairs

196 See cases cited in infra note 149.
197 See, e.g., Boumediene v. Bush, 553 U.S. 723, 797 (2008) (“[N]either the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.”); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

Electronic copy available at: https://ssrn.com/abstract=4395951
externalities is not necessarily sufficient by itself to justify a radical narrowing of the judicial role. In Massachusetts v. EPA,\(^{199}\) for example, the Court might have more productively distinguished the argument that foreign policy consequences should lead to a finding that an agency has a purely discretionary right to not even respond to reasonable arguments about what it may be legally compelled to do, and the quite distinct conclusion (illustrated in the new major questions cases) that an agency lacks authority to ever do something. Nor do we think that federal courts should fail to impose sensible limits on executive assertions of power in the name of foreign affairs, as the Supreme Court did in Youngstown. A prudent Supreme Court also does not need to kowtow to executive branch arguments grounded in foreign affairs when the weight of legal materials cuts decisively against such a position as in Massachusetts v. EPA. Even the more constrained jurisprudential explanations of the court’s role (reasonably interpreted) do not preclude some engagement with the foreign policy implications of decisions.

Rather, the problem of theorizing and critically evaluating the Supreme Court’s early twenty-first century in American foreign policy extends well beyond what can be achieved by rote recitation of formulations in Curtiss-Wright or Youngstown. Thoughtful observers must take seriously the analytical frameworks drawn from both FRL and FPA, and beyond, to interpret American foreign policy. These frameworks need to be enlarged, though, to account for the newly emboldened Court. Such an exercise can do more than merely help scholars narrate changes in the allocation of control over America’s levers of global power. The resulting insights may also help judges, lawyers, and policymakers better understand how to evaluate judicial choices about the role of government power that cast a long shadow on America’s role in the world. Bearing these complexities in mind, we offer the following tentative practical implications.

First, domestic and international observers should at a minimum recognize the pivotal and likely growing role of the Court in shaping the American foreign-policy agenda. Whether they are in think tanks, universities, or government agencies, analysts keen to understand American behavior and capacity on foreign affairs will benefit from an analytic framework with a robust role for the judiciary.

Second, key domestic decision-makers who play a role in setting the agenda of the country’s highest federal court should be mindful of foreign policy considerations when shaping the Supreme Court’s agenda. State attorneys general and federal officials, for example, may find it wise to be wary of triggering Supreme Court review of certain questions affecting democracy or foreign policy, as the country’s geopolitical position may benefit from a degree of ambiguity allowing the executive branch and other key actors to continue mapping the space between domestic and foreign policy. Indeed, we think that the Supreme Court itself should be wary of granting certiorari unnecessarily on issues that could benefit from further percolation and negotiation between the branches, levels of government in the American federal system, and national governments. We realize, however, that such cautions may have little effect on a bench with scant regard for certain consequentialist considerations.

Third, to the extent the Court continues to leave room for deference to the executive branch on foreign affairs issues, in the tradition of Curtiss-Wright, it should be skeptical of under-theorized distinctions between traditional “foreign affairs” and domestic policy domains. There is

\(^{199}\) 549 U.S. 497 (2007); see also infra text accompanying notes 83 to 84.
a threshold question, akin to the “Chevron step-zero” inquiry as to whether the classification offered by a specific executive-branch actor is a plausible one. Should the State Department or the Defense Department get more deference than other agencies? We are skeptical that the traditional cut-point for deference is wise. Arguments for deference merit prima facie consideration whether they concern enemy combatants or international public health cooperation.

But we also think deference is indeed sometimes warranted. Admittedly, the terrain here is complex. There is no cause to “level down” comprehensively. An alternative approach might build on the proposal of influential foreign relations law scholars to install a measured judicial deference when it comes to all (and not just some) matters of geopolitical significance. The scope of such deference, however, may well be set much wider than previously has been appreciated beyond the domain of national security and state-to-state diplomacy. Policymakers, scholars, and the public can also help the courts realize a sensible approach to these opaque or downplayed foreign-affairs effects. Scholars and practitioners should also step up their efforts to use amicus briefs and legal arguments that underscore the cross-cutting foreign policy consequences of court decisions. They should urge judges and Justices to recognize the virtues of reasonable restraint in a wider range of cases. They can also acknowledge a reasonable role of doctrines affording executive branch officials a measure of deference to take account of the country’s broader foreign policy context, while maintaining core protections for human dignity that have the potential to affect perceptions of American values throughout the world.

Fourth, particularly given that foreign affairs deference may apply in domains that were traditionally viewed as domestic, the Supreme Court should leave ample room for a variety of policy considerations to provide an appropriate measure of nuance in assessing the strength of executive branch arguments. That is, it should evince greater willingness to defer in light of the evinced expertise of the executive branch, rather than offering deference based on hypothesized categories of constitutional structure. Against the backdrop of courts’ core focus on the relevant legal materials, some variation in the extent of deference may depend factors such as the extent of executive branch coordination across agencies with relevant jurisdictions, the level of importance an administration assigns to a particular issue across a broader range of other priorities or responsibilities, and the extent to which the relevant statutory and historical context highlights the importance of executive discretion. As with a range of other presumptions, arguments for deference, and rules of construction, such considerations could have a material impact on the

203 One of us has previously expressed doubt about the resolving power of structural constitutional principles in this field. See Aziz Z. Huq, Structural Constitutionalism As Counterterrorism, 100 CAL. L. REV. 887, 890 (2012) (arguing that “abstract structural constitutional theories frequently provide no useful information as to whether a counterterrorism policy is appropriately tailored, justified by a compelling governmental need, or consistent with a statute’s command”).
interpretation of ambiguous legal materials, or offset the court’s willingness to rely on recently-invigorated jurisprudential tools such as the “major questions” doctrine.206

Conclusion

That courts will continue to play a material role at the fertile intersection between domestic and international issues is all but guaranteed by the American civic tradition. To achieve reasonable outcomes, however, policymakers and the public must begin by understanding the stakes of having a less-constrained high court operate increasingly as a kind of surrogate ministry of foreign affairs. It is better, in short, to grasp the hidden judicial springs of foreign policy than to be perplexed about its weird physics. As the United States is navigating a period of exceptional and fraught global turmoil, judges and the public alike should be wary of a court-imposed framework for foreign affairs where restraint falls by the wayside and policymakers end up with fewer tools, friends, and reservoirs of goodwill to leverage at a time when the world depends on vigorous but nuanced American engagement. The fruits of that engagement depend on blending greater candor about the blurred lines between realms that are foreign and domestic with sensible decision-making from key institutional actors capable of being judicious rather than merely judicial.

206 In West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022), the Court wrote that “where there is something extraordinary about the history and breadth of the authority” an agency seeks to deploy or the “economic and political significance” of that assertion, courts should “hesitate before concluding that Congress meant to confer such authority.” Even taking the “major questions” doctrine on the terms embraced by the majority in West Virginia v. EPA, it follows that a carefully-targeted, historically grounded executive branch argument about the relevance of a particular interpretive or regulatory decision to a national foreign affairs function can have a bearing on at least the “political” significance of the executive branch action, or whether there is something “extraordinary” about that action’s history or breadth.