Constitutional Formalities, Power Realities, and Comparative Anglophone Responses to Foreign Campaign Meddling

Jacob Eisler, Southampton Law School, j.eisler@soton.ac.uk

 The use of social media by foreign powers to interfere in Western elections synthesizes many novel challenges that face liberal democracy. Through the use of new technology, foreign powers are able to reach across the globe to directly threaten the foundation of democratic decision-making: the attitudes and preferences of voters themselves. Yet foreign meddling only has force because it acts against well-established democratic principles. Freedom to advance and debate diverse political views gives foreign disinformation its point of entry and limits liberal governments from taking overly aggressive countermeasures. Underlying this tension is the real threat posed by foreign campaign interference: it has the capacity to shift citizens’ preferences, and thus impact democratic self-rule. However, the principles of citizen self-determination, democratic right, and state accountability which set the stage for foreign meddling are themselves a matter of perpetual debate and contestation. The necessary conditions for an electorate to truly have autonomy – particularly given the scale of contemporary representative governance – elicit the underlying norms and structures of democracy. As the terms of legitimate democracy and fair electoral process are continuously contested and evolving, foreign meddling does not act against a fixed background. An assessment of foreign meddling speaks not only to the nature of the foreign intervention, but the political system upon which it seeks to effect.

Consequently, democratic states’ diverse reactions to foreign meddling provide a dynamic lens into the general characteristics of governance and elections. It is in this spirit that this article analyzes two of the most notorious contemporary instances of foreign meddling – the Russian social media campaigns to influence the Brexit vote and Donald Trump’s election. It considers the reactions to foreign meddling taken by the targeted states, and enquiries if differing structural features can explain the contrasting U.S. and the U.K. responses. The article observes that the political configurations of both the U.S. and the U.K. blunt the practical impact of foreign campaign meddling, but that these features assume dramatically different forms in the two polities. The visibly robust U.S. reaction – the formal investigation and indictment of the person who benefited from foreign campaign efforts – exemplifies the American reliance on formal constitutional structure to temper relatively populist leadership selection. While the U.K.’s governmental setup has fewer formal defenses against the impact of foreign meddling, it relies upon elite oversight to provide integrity. Thus, the U.K. is characterized by a less openly conflictual and ultimately less visible set of defenses. This article argues for this contrast by a close analysis of the constitutional and political features of the U.S. and U.K. that temper, influence, and react to the effects of foreign meddling.

This article hopes to explain the differing intensity of U.S. and U.K. responses to meddling. The first section briefly reviews the allegations of meddling and their fundamental similarities, and summarizes the differences between the subsequent investigations. It also considers established, summarily dispositive institutional and pragmatic explanations for the difference (such as presidential versus parliamentary democratic setups, and the differing contexts of individual office elections and referendums), and observes that none is wholly sufficient. The next section deepens the puzzle by observing that one would expect the institutional features of the U.K., such as the fused Westminster system and lack of a written constitution, to create *greater* anxiety regarding foreign meddling. Conversely the U.S. has various structures that limit the ability of ‘contaminated’ popular will to wreak immediate policy damage, such as judicial enforcement of a written constitution and firmly separated branches. This consideration of the highest-level institutional features might suggest that the U.K.’s muted response simply reflects greater vulnerability to foreign meddling, and thus the weaker response to foreign meddling is just a political failure.

The third section revisits this conclusion by considering political practice more broadly. Looking beyond narrow constitutional structures reveals alternate approaches to moderating popular self-governance. U.K. practices include significant vetting of candidates by party insiders and a greater role for elites in the selection of the executive. These features reduce the capacity of populist sentiment to immediately influence policy, in contrast to the comparatively rank-and-file driven selection of both primary candidates and general election victors in the U.S. The fourth section extends this contrasting treatment of the franchise to legal doctrine, observing that the U.S. and U.K. supreme courts have adopted differing views of voter vulnerability and subsequently campaign finance regulation. Whereas the U.S. Supreme Court posits a high degree of voter competence and thus concludes that speech directed to voters ought not be constrained, the U.K. Supreme Court has demonstrated greater skepticism of voter competence, and thereby permitted a more robust regulatory regime. This suggests that the difference in elite influence over in party leadership selection are paralleled by the respective country’s judiciaries views of voters in the context of campaign speech. Together, the role of elite gatekeepers and judicial approbation of campaign regulation indicate why the U.K. may have been less alarmed by allegations of foreign campaign interference, despite the fact that it has fewer ‘hard’ institutional barriers against such meddling. The final section synthesizes the contrasts between the U.S. and U.K. systems to draw broader lessons regarding democratic autonomy, as well as to consider future directions for policy and research with regards to foreign meddling.

I. 2016 Anglophone Populism, Foreign Interference, and State Responses

 The Anglo-American watershed political events of 2016 bore many similarities. Both outcomes had seemed nigh-unimaginable: the decision by the U.K. to exit the European Union, and the election of Donald Trump as American president. Both events exemplified the global rise of anti-establishment populism wedded to anti-liberalism and anti-cosmopolitanism. Both reflected the victory of a candidate or position that had seemed marginal, even disreputable, in mainstream politics. And both were subject to a novel but growing presence in contemporary democratic politics: efforts by foreign governments to influence electoral outcomes through the surreptitious campaign interventions, particularly through direct social media appeals to voters. Specifically, Russia (hoping, presumably, to diminish the hegemonic power of the neoliberal West) sought to advance Brexit and Trump. There is now reliable evidence that there were foreign campaigns to obliquely spread (dis)information through informal and social media channels to achieve these ends, though the magnitude and ultimate political effects are unclear.[[1]](#footnote-1) While there were also anxieties regarding back-end manipulation of electoral outcomes through, for example, electronic hacking of vote tallies, such direct hijacking of electoral process remain as of yet unproven in either system.[[2]](#footnote-2)

 Despite these similarities, the backlash from the allegations of foreign meddling in the two events has materially diverged in intensity. In the U.S., the allegations of foreign meddling led to the most direct political challenge to the executive in decades. The Mueller Report and Senate Intelligence Committee investigation into Russian interference and associated malfeasance, the indictment and conviction of a number of Trump affiliates, and Trump’s impeachment were all a direct consequence of investigation of Russian interference.[[3]](#footnote-3) Even if the blowback from the indications of meddling did not ultimately result in Trump’s ouster thanks to a highly partisan vote in the Senate,[[4]](#footnote-4) it still reflected a robust institutional response to interrogate the foreign interference.

 Comparatively, there has been an eerie calm surrounding any allegations of foreign interference in the U.K.’s democratic process. Most conspicuously, while the Intelligence and Security Committee (ISC) – made up of non-cabinet PMs – produced a report in October 2019 on Russian interference in domestic British politics, Boris Johnson elected to withhold it from the public until July 2020.[[5]](#footnote-5) This meant that the report was not available to voters during the December 2019 general election. The snap election was functionally a popular referendum on Johnson’s plan to implement Brexit, and thus would have been the logical point for the polity to react to evidence that the initial Brexit referendum was contaminated by foreign meddling. Yet this seemingly incendiary decision by Downing Street to delay releasing the report until months after the general election generated surprisingly little controversy. While the ISC chairperson, Dominic Grieve, described the failure to release the report in a timely fashion as “jaw-dropping”,[[6]](#footnote-6) the specter of foreign interference has not produced the agitation for investigation and claims of compromised legitimacy – even among Johnson’s opponents – that has characterized the U.S. response.[[7]](#footnote-7) This is especially remarkable given that the choice to delay releasing the report by Johnson might be reasonably characterized as a form of self-dealing, given his national political fortunes were tied to the validity of Brexit. Johnson essentially chose to withhold the report until well after his power was validated by a general election, Brexit had assumed significant momentum as a policy choice, and popular attention had moved on (most notably to the COVID-19 crisis in the spring and summer of 2020). Furthermore, the content of the report, while highly suggestive of a problematic atmosphere, was devoid of inculpating details. The report primarily indicated Russia had almost certainly sought to interfere in the Brexit vote through surreptitious appeals to voters (a fact well established by academic and non-governmental observers well before the report’s release);[[8]](#footnote-8) that no institution in the U.K. government took adequate responsibility for monitoring and countering foreign interference, and that such efforts are generally under-resourced in the U.K. security apparatus;[[9]](#footnote-9) and that Russian influence has broadly infiltrated U.K. political and economic structures.[[10]](#footnote-10) Yet it possessed neither the exhaustiveness nor the specificity of the Mueller Report or the Senate Intelligence Committee reports, and in particular failed to indict (or exonerate) any particular individual or actor within the U.K. government. The vagueness and lack of depth in the report suggests that, compared to the U.S. efforts to address foreign meddling, U.K. efforts were cursory.[[11]](#footnote-11) As the report suggests Russian influence is real and threatening and was, at best, materially neglected during the Brexit referendum, yet neither exonerates nor indicts any actor in the U.K. establishment, its primary indication is for a far more thorough investigation. Thus the content of the report, when belatedly released, only reinforces the lackadaisical reaction within the U.K. to foreign meddling.

 One might query at the outset if the dissimilar reactions reflect general institutional differences between the U.S. and the U.K., rather than characteristics specific to reactions against foreign meddling. Most conspicuously, the U.S. and the U.K. are the “prototypical” instances of, respectively, the presidential and the parliamentary democratic systems.[[12]](#footnote-12) The political independence of the president in the U.S. system certainly yielded a different, and ostensibly more urgent, quality to allegations of corruption by Trump. Conversely, in the U.K., Parliament could presumably handle an allegation of corruption against government leadership by expressing a lack of confidence in the executive. As discussed below, such structural aspects contribute to making sense of the divergent response; yet pointing to such a singular and well-established institutional feature cannot bear the onus of explaining the divergent response. For one, the established incidents of foreign meddling in both the U.S. and U.K. were directly targeted to voters, and fed up to representatives through political channels. Insofar as the unifying concern across the U.S. and U.K. was contamination of the formation and expression popular will, there should be meaningful parallels in the response, even if they are tailored to the particular institutional arrangements. Foreign campaign meddling threatens to undermine the validity of post-election state action, regardless of the institutional setup by which leaders express their accountability to popular will. Secondly, given the traditional concerns surrounding presidential systems (that presidents will use their platform to aggrandize power), the fact that the Mueller Report and Senate Intelligence investigations were vastly more thorough than the Russia Report cuts *against* the predicted narrative. Standard scholarly accounts would anticipate that a parliamentary system would generate greater scrutiny of the executive, not less.[[13]](#footnote-13) Conversely, one could argue that the intensity of the U.S. investigation was a function of a polarized political environment,[[14]](#footnote-14) as Trump’s political opponents sought to use institutional forums to discipline a figure who has been identified as broadly disregarding shared political norms[[15]](#footnote-15) (though given the Republican control of the Senate and its intelligence committee, this suggests that the U.S. investigation evolved into some degree a bipartisan affair). Yet Brexit was also a profoundly polarizing event with a strong partisan valence, and demonstrated features of affective polarization between Brexit factions.[[16]](#footnote-16) While a longer and deeper legacy of polarization may have contributed to the rancor and mutual suspicion that characterized the U.S. investigation, it is impossible to fairly characterize the Brexit vote as an anomalous moment of disagreement by an otherwise unified polity. As such, merely identifying the longer and more thoroughly researched legacy of polarization in the U.S. thus cannot bear the weight for the disparity in response.

More quotidian and granular structural factors may have also played a role in the fiercer U.S. response, but are likewise unable to fully explain the disparity. Campaign support can more readily act as a bribe targeted towards a donor in the context of a personal election than it can in the context of a popular referendum on a political decision. A representative who enjoyed illicit campaign support might have their intentions directly corrupted, and reward their benefactor by taking official action adverse to the public weal.[[17]](#footnote-17) Thus the Russian interference in the U.S. election had a special urgency because of the allegations that foreign agents sought to liaise with one of the candidates – Trump himself, and certainly some of his subordinates. Considering charges of corruption in the classical *quid pro quo* format, even if Trump is exonerated of bribery because there was no *pro* or no *quo* (that is, because he promised no corresponding benefit to his supporters in the form of public action), he still received a functional *quid* via Russian support.[[18]](#footnote-18) This raises direct concerns regarding his prospective gratitude towards a benefactor. Conversely, insofar as there may have been support of a particular Brexit referendum outcome from an undesirable source, the recipient of the given *quid* cannot be as clearly identified. Rather the direct target of such campaign interference was the electorate itself.[[19]](#footnote-19) Even if staunchly pro-Brexit public figures desired foreign support for a particular outcome,[[20]](#footnote-20) the form of the support was wholly filtered through the expression of electoral preference. It is important, however, not to lean on this factor too heavily in comparing interference in support of Trump to Russian meddling in Brexit. Johnson himself was a leading advocate of Brexit when citizens were engaged in deliberation over the referendum,[[21]](#footnote-21) and his own accession to Prime Minister was facilitated, and likely dependent upon, Brexit’s success. Thus, even if the prospective relationship between the campaign support and the benefit to a particular political figure was not as direct, Johnson had a committed interest in the outcome that Russia supported. The optics of this, at least, are exacerbated by Johnson’s discretionary decision not to release the report regarding claims of meddling prior to the general election that was a veritable second referendum on his Brexit policy, and the suggestive but amorphous indications in the report that Russian elites have gained access to the U.K. political infrastructure.[[22]](#footnote-22) This is not to dismiss the material differences between the specifics of U.K. and U.S. meddling, but only to observe that the contrast in the purported interference cannot justify the diametrically different levels of investigation into claims of meddling.

 Solely focusing on the candidate-vs-referendum distinction, moreover, ignores the deeper structural parallel of foreign interference with the ‘natural’ course of electoral decision-making. Regardless of if foreign campaign interference is directed to affect an election or the results of a referendum, the foundational threat is that the foreign interference is somehow able to shift voting.[[23]](#footnote-23) If foreign campaign intervention could not have this effect, it would be of no concern from any angle – even a candidate who desired corrupt benefit would not find it valuable, and it would pose no threat to the integrity of the electorate’s decision-making and thus to governance more broadly. This observation reveals the true concern with foreign meddling in campaigns: it can, prospectively, shift the views of the *electorate* in a manner that diverges from legitimate formation and expression of political preference. If this occurs, a democratically accountable and responsible state will undertake different action than it might have in an electoral environment where the electorate was informed only by legitimate influences.

II. Deepening the Paradox of the Muted U.K. Response: Constitutions, Written and Unwritten, and Popular Self-Rule

 If foreign meddling is ultimately problematic because it can shift democratically responsive governance, the damage such meddling can do is modulated by how popular preference is converted into state action. A comprehensive assessment of foreign meddling would require fully mapping the legitimate formation and measurement of an electorate’s political preferences and its corresponding implementation by the state. The complexities of such a project would be a herculean endeavor. Just one facet of it – how the presence of unequal wealth distribution and its use in campaign funding can distort conduct by voters and representatives – has tied the U.S. Supreme Court, and the American legal scholarship, in knots.[[24]](#footnote-24) Furthermore, it may not even be possible to fully capture the complete decision-making capacity of groups of person by analytic abstraction. Part of the power of democracy is its ability to gather and empower collective wisdom in a manner that no top-down centralized system can match.[[25]](#footnote-25)

Fortunately, there is no need to offer such a comprehensive vision of the electorate’s preference formation, nor of foreign interference’s distortion of it, to address the comparative puzzle that drives this article. The immediate question is, how might the political structures that contextualize the expression of political will moderate the effects of foreign interference? Presuming that foreign attempts to sway voters away from some more natural, legitimate, or organically formed political views might be successful, the broader electoral framework will do much to determine how much damages this distortion can do.

Yet cursory recognition of this relationship only deepens the paradox that the U.K. has had a less vociferous response to claims of foreign meddling. The written constitution of the U.S. entrenches certain structural features of governance, and certain rights that are protected by robust judicial review. Constitutionalism is, of course, a central topic of legal scholarship, and the legitimacy of such institutional features that can obstruct or challenge popular will has been fiercely debated.[[26]](#footnote-26) Yet regardless of the virtues and deficiencies of such structures, they limit the impact of foreign meddling from a single election, and ameliorate how much pathologically altered popular preference alone can shift fundamental state structures. This is not to say that a written constitution has talismanic power or prevents a state from being hijacked by a hostile power. The relevance of a constitution always derives from its application in the political process and its interpretation by judges,[[27]](#footnote-27) and Trump’s disregard for norms has been identified as a nascent but reversible threat to constitutional integrity.[[28]](#footnote-28) Yet as it is currently interpreted and applied, the U.S. constitution clearly has the capacity to blunt some effects of foreign interferences.

This is most saliently demonstrated in the situation at hand by features of the constitution that have come into play in response to the claims of foreign interference. Trump’s impeachment itself depended upon the robust separation of powers ensconced within the American constitutional framework (particularly its formalization of a presidential, rather than parliamentarian, democratic system), along with the different modes of representation that comprise the legislative branch. That the House of Representatives has the authority to perform an impeachment allows a locally chosen, more precisely population-representative, and more frequently re-elected group of democratic agents to police the conduct of a nationally selected executive (whose selection, through the electoral college, explicitly accommodates to the federated nature of the American government). Of course, Trump’s subsequent exoneration by the Senate was reflective not only of intense party polarization, but of the diversity of the forms of representation accommodated by the American constitution. Even if one identified a politicized farce in the occurrence of the at all impeachment (as did Trump and his supporters) or in the limited extent of the investigations and its ultimate conclusion by acquittal (as did leading Democrats), the very occurrence of the impeachment at all reflects the safeguards and built-in structural diversity of the American constitutional structure.

Conversely, the U.K.’s uncodified constitution might appear more vulnerable, or at least to offer fewer hard barriers, to the impact of foreign interference. It is, after all, comprised of an aggregation of principles, statutes, political practices, accumulated common law, and non-legal constitutional conventions. According to some leading contemporary scholars, the U.K. Constitution traditionally has consisted of the entirety of political events – “everything that happens is constitutional,” as J.A.G. Griffith pithily described it.[[29]](#footnote-29) Even if Griffith’s view is extreme in its assertion of the amorphous breadth of the U.K. constitution,[[30]](#footnote-30) it points to the unique risk of undesirable outside influences on democratic process. There is no hardened constitutional framework that, as a procedurally ensconced backstop, will limit or purge the effects of the manipulation of voter preference. Thus as the shifted democratic preferences seep into the system, this no durable framework to resist it.[[31]](#footnote-31) The distortion contained within such preference-shifting will be afforded the same status as politics and lawmaking that flows from any other source, because the absence of codification means it cannot be formally differentiated.

The consolidation of governance under the parliamentarism further exacerbates the vulnerability of the U.K. governance to shifts in popular will effected by foreign meddling. The fused Westminster system means that the executive is drawn from and legitimized along with legislative representatives.[[32]](#footnote-32) Furthermore, the executive, as leader of the party, has significant influence over the legislative agenda. One of the guiding legal principles of the U.K. constitution further intensifies the effects of this fused system. Under the Diceyean orthodoxy,[[33]](#footnote-33) Parliament has the power to make or unmake any law passed by a previous Parliament. As Parliament is a democratically accountable body,[[34]](#footnote-34) this presumably means that any influence that impacts the electorate’s preferences are transmitted to representatives and thence into law. Some relatively recent developments – such as the introduction of the HRA and the emergence of a judiciary perhaps more willing to enforce human rights – may provide some additional barriers or checks against certain types of rapid change, including that given impetus by foreign meddling. But they are not as firm as the formal protections of a written constitution (most notably, it is undisputed that the U.K. courts will yield to explicit assertions of Parliamentary will, and will not examine its underlying legitimacy).[[35]](#footnote-35) The Brexit vote itself was a referendum, not election of Parliamentary representatives. While *Miller I* established that Parliamentary action would be necessary,[[36]](#footnote-36) the ready assent of Parliament to effecting the referendum, and the general lack of entrenchment of any aspects of U.K. governance against expressions of electoral will, together suggest there should much greater sensitivity to the possibility of the electorate’s preferences being distorted.

That the executive could unilaterally obstruct the release of the report on Russian interference in Brexit incisively illustrates how U.K. parliamentarism may be ill-suited to counter foreign meddling. The manner in which the Intelligence and Security Committee produced the report reflects the intimate interactions between legislators and the executive that is typical of Westminster governance.[[37]](#footnote-37) That the executive has the discretion to refuse to release the report until, formally, it is satisfied that the report would have no deleterious impact upon security agencies,[[38]](#footnote-38) means that in practice the Prime Minister has total authority to withhold a report. While Parliament has the formal ability to scrutinize the executive, an adversarial challenge to such an executive decision – which might require the implication of corruption – is unlikely, at least in the absence of a general challenge to leadership. Political pressure to release the report, realized at the ballot box in the last instance, might be taken as the ultimate check upon executive authority. This is, at best, an imprecise tool, and the absence of formally separated oversight eliminates one mechanism for policing the effects of undesirable influences on electoral conduct. Parliament could, of course, deploy its sovereignty to change the statutory features of the act and require immediate publication of the report. But this would likewise comprise a direct attack on the executive. Given the intimate control over the legislative agenda exerted by the prime minister,[[39]](#footnote-39) such parliamentary action could only occur if there were a general crisis in leadership that went beyond this particular episode. In reality, given Johnson’s resounding victory in the 2020 general election, this is unrealistic.

Such Brexit-specific analysis highlights the ostensible structural vulnerability of the U.K. parliamentary system to voter-targeted foreign meddling. The executive and legislature in a parliamentary system are accountable to the same unitary expression of popular will, as voters only select their parliamentary representatives. The result is a strongly unified governance organized around the party,[[40]](#footnote-40) with the party leaders who comprise the executive dominating the legislative agenda and government generally. If voter preference has been ‘contaminated’ by foreign influence which subsequently impacts the selection and policy positions of legislative representatives (and, through knock-on effects, the party’s composition), there is no countervailing, separately accountable institution to check or counterbalance such influence. Ironically, this shows that a feature that is typically identified as a weakness of presidential democratic systems – the direct accountability of the president to voters, potentially reflecting a different majority – can, in the context of foreign meddling, be a strength. Presidential systems have a stronger capacity for conflict between the president and the legislator, which can yield political pathologies such as gridlock.[[41]](#footnote-41) Yet as the Congressional investigations of the 2016 election revealed, in the context of foreign meddling, accountability to different types of constituencies seems to offer interbranch policing in the classic separation of powers mold. In the absence of accountability to differently defined constituencies, only one group of representatives – those who were themselves the product of an election prospectively shaped by foreign meddling – determines state action.

Furthermore, the unwritten U.K. constitution provides few entrenched barriers against the political influence of foreign meddling. While a modern development has been the theory of constitutional statutes,[[42]](#footnote-42) their power continues to derive from Parliament – the very vehicle of democratic accountability. There is thus a unity to both the practice of U.K. governance, and the basis of constitutional authority, such that if foreign meddling infiltrates democratic preferences, there seems to be little formally to obstruct it. In contrast, a codified constitution that establishes competing branches has multiple buffers against the unimpeded impact of foreign meddling.

A final feature that provides America with greater comfort regarding the effects of foreign meddling, though which has not yet been as directly activated by the response to the 2016 episodes, is its robust judicial protection of constitutional rights. The American Supreme Court, shortly after its inception, asserted its ability to opine what the law is.[[43]](#footnote-43) In the past seventy years the Supreme Court has proven especially assertive in doing so in the context of individual rights, though not at times without tremendous controversy regarding both the contexts in which it has done so (and omitted to do so)[[44]](#footnote-44) and the substantive conclusions it has reached. Conversely, in the U.K. parliamentary sovereignty remains the polestar. The UKSC has shown some tentative willingness to defend human rights at common law, and its substantive defense of rights has been greatly bolstered by the legislative imprimatur granted of rights defense granted by the Human Rights Act 1998. But faced with explicit Parliamentary intention, the UKSC will recognize it as authoritative, even if contravenes principles often given significant legal weight.[[45]](#footnote-45)

 Such robust judicial review provides constitutional framework with another safeguard against hijacking of democratic autonomy by foreign meddling. This may contribute to justifying the countermajoritarian quality of judicial review identified by Alexander Bickel:[[46]](#footnote-46) its lack of explicit involvement in the political process allows the Court to provide neutral oversight of the legitimacy of the more politically responsive (and thus, in some ways, vulnerable) branches. The justifications for structural checking of other manifestations of problematic views held by the electorate (such as pathological factionalism)[[47]](#footnote-47) also serve to manage (if not wholly solve) illicit external distortion of the political preferences by foreign interference. Structural checks – such as judicial review – prevent a single instance or dominant wedge block from wholly determining the course of governance. When political process theory was innovated in the middle of the twentieth century, its originators presumably did not have in mind either the modalities of contemporary foreign interference (such as Twitter) or the foreign meddling with elections. But such a justification for judicial review works as well in this case.

 By its own guiding lights, the UKSC is incapable of providing this type of robust countermajoritarianism. The UKSC has the capacity to nibble at the edges while still respecting Parliamentary sovereignty, either by interpreting statutory ambiguity in accordance with non-statutory principles,[[48]](#footnote-48) or by identifying some statutes as ‘constitutional’ and thereby giving them greater weight.[[49]](#footnote-49) Yet so long as Parliamentary sovereignty is respected – and as recent and seminal a case as *Miller I* affirmed it,[[50]](#footnote-50) and *Miller II* appears to demonstrate the Court’s underlying respect for the practical as well as theoretical role of its sovereignty[[51]](#footnote-51) – the lawmaking supremacy of Parliament cannot be bound. As Parliament is guided by the electorally expressed will of the franchise, any influence on the franchise will presumably knock on to parliamentary policymaking.

III. Another Look at the Popular Rule: Where Does Power Rely Lie?

 An assessment of formal constitutional structures alone would indicate that the prospective effects of foreign campaign meddling should be a source of significant anxiety in the U.K. The most salient evidence has an ironic reflexivity – the very features that have obstructed the investigation into Brexit meddling are the same features that make the U.K. vulnerable to such meddling. The centralized state decision-making, the disinclination of the legislature or the judiciary to take independent action, and the lack of formal constitutional safeguards together mean there is no way to force an investigation that the fused Westminster government does not advance.

 If the U.K. does in fact face a greater threat from meddling, it would presumably produce corresponding concern among opposition leaders, the media, and political watchdogs. The U.K. is, by all accounts, still a functioning liberal democracy, accountable to the polity and subject to rule of law; subsequently one would expect correspondence between the reality of the threat posed by foreign meddling and the political response. Yet the general response has been muted. Might there be another explanation for the muted U.K. response to the political consequences of foreign interference? Addressing this query requires looking beyond the formal constitutional structures, and instead consider practices that lie outside the formalities of law and state structure.

Turning to this reveals a number of features that ameliorate the threat of foreign meddling in the U.K., particularly at the point of leadership selection. The U.K. has practices – ‘constitutional’ in the broad sense – that insulate the selection of leadership from popular will. A comparison with the relatively direct means by which popular preference is transformed into leadership selection in the U.S. illuminates this feature, and does much to explain why the U.S. might, in significant respects, be *more* vulnerable to foreign distortion of electoral preference. Furthermore, a comparison of the jurisprudence regarding undue influence on the electorate suggests, despite the presence of free speech protections under both constitutions, a greater willingness to accept assertions of fragility among voters in the U.K. – and thus a legal culture more acclimated to moderating the expression of a prospectively unwise or fragile popular will. Together, these differences suggest that U.K. governance is less directly vulnerable to foreign meddling – albeit in part perhaps because it is less directly accountable popular will.

The differing means of selecting state leadership most explicitly evinces this difference. In both the U.S. and the U.K., modes of selecting leaders have been in flux in the past half-century, with a general lean towards greater democratization.[[52]](#footnote-52) However, looking only at the formal processes in each system, it is apparent that the U.S. system gives the mass of rank-and-file voters more direct say in leadership selection. This is most salient with regards to characteristic difference of the presidential system-parliamentary system comparison in selecting the U.S. president and U.K. prime minister, but the divergence is also apparent in the contrast between selecting members of Congress and members of Parliament. The U.S. system relies largely upon primaries in leader selection.[[53]](#footnote-53) Party candidates – typically after obtaining ballot access through support from smaller groups of rank-and-file voters – are selected through party primaries. These primaries allow large swaths of the electorate to directly select the candidates who proceed to general elections. Admittedly, this system is not wholly immune to manipulation through background rules that can favor certain interests, enacted either by states or by the parties as non-state associations.[[54]](#footnote-54) State parties vary in terms of the ‘openness’ of their primaries (i.e., what party affiliation voters must have to participate in state primaries and under what terms).[[55]](#footnote-55) Both parties and state governments themselves may attempt to arrange their primary elections to have certain systemic effects that elites deem to serve their own interests, though the Supreme Court has identified certain constitutional limits. Furthermore the role of money in U.S. elections may create another screen – albeit informal – that privileges the economic elite.[[56]](#footnote-56) But it seems indisputable that, in comparison to the U.K. system (and most other democracies world-wide),[[57]](#footnote-57) the U.S. system formally provides the mass electorate greater direct opportunity to determine their leaders.

The U.K. system, in contrast, interpolates layers of formal elite decision-making between rank-and-file preference and elected government leadership. Two of these three features relate to internal party leadership selection.[[58]](#footnote-58) The first is the substantially lesser degree to which general selection of leadership by party membership is reflective of the mass of the electorate generally. While each U.K. party affords a significant role to its membership base in the selection of party leadership, the breadth of that base is constrained considerably compared to U.S. primaries (even closed primaries). Selection of a party leader is always, in the U.S. nomenclature, ‘closed’ – only party members may contribute to selecting a new leader.[[59]](#footnote-59) Moreover, far fewer persons are members of U.K. parties than of U.S. parties.[[60]](#footnote-60) This may be largely a function of what party membership entails in the U.K. as opposed to the U.S.: U.K. party membership requires a financial commitment (if just a nominal one) and a specific act of affiliation with that party,[[61]](#footnote-61) whereas minimum U.S. affiliation consists of more casual self-identification during voter registration[[62]](#footnote-62) (and the Supreme Court has variously limited restrictions on switching affiliation).[[63]](#footnote-63) For these reasons – and perhaps merely because of differing cultural and structural expectations regarding party affiliation[[64]](#footnote-64) – the percentage of persons who are party members and thus can contribute to rank-and-file selection of leaders is much smaller in the U.K. than in the U.S. Thus, even where U.K. politics has shifted from leadership selection by elites or insiders to selection by rank-and-file party members, it is still a small percentage of the electorate that is decisive.

The second feature of the U.K. system that diminishes the significance of popular approval is that is that even rank-and-file party members plays a less exclusively decisive role in party leadership selection processes. While each of the parties has its own rules, in each leadership selection has multiple gateways that, as a *formal* matter, make it impossible for a candidate to achieve either leadership or even MP candidate status purely on the basis of popular support. In the Labour party, standing as an MP candidate requires vetting by local party officials at the council level;[[65]](#footnote-65) in the Conservative party, the vetting process for MP candidates is more formalized and centralized.[[66]](#footnote-66) Standing for leadership of the party (and thus potentially achieving leadership of the entire U.K. government), conversely, faces far greater hurdles. A candidate must already be an MP, must be supported by a meaningful number of current MPs, and must ultimately pass through an approval process that results in party elites or interested groups, as well as registered rank-and-file members, playing a decisive role in winnowing the field. For Conservative leadership, current MPs winnow the field down to two candidates before voters even have a say.[[67]](#footnote-67) For Labour leadership, the final vote (after winnowing the slate of candidates via an MP-support process) splits final vote weighting between current MPs (and MEPS), individual party members, and affiliate organizations such as labor unions.[[68]](#footnote-68) In the Liberal Democratic party, the candidate must be nominated by a meaningful minority of Liberal Democrat MPs before standing for party leadership.[[69]](#footnote-69)

Linking the dry technics of American and U.K. party politics and the impact of foreign meddling yields a humble but striking observation: Trump’s meteoric rise through iconoclastic populist appeal and brand name would have been impossible in the U.K. His status as an outsider would have likely resulted in his candidacy being halted at some earlier phase in the process. It is possible that he would have been obstructed from running as an MP, due to his previous history (the major parties functionally run character checks on candidates prior to endorsing candidates to stand). Even had he been able to obtain MP candidacy, he would have had to win a seat in a general election before standing as party leader. He then could have brought a challenge to the existing PM, but the success of such a challenge would depend on the support not only of the electorate, but of other MPs – and indeed the support of MPs would procedurally come *prior* to support from the electorate. Trump was able to win in the U.S. by exploiting the populist nature of the primary system, an opportunity that would be available under the U.K. system only with through a set of events that concomitantly shifted the views or composition of MPs and party elites as well as rank and file voters. If the immediate threat of foreign campaign meddling is a shift in electoral preferences, the U.K. system would bog down the impact of such preference distortion through layers of representative procedure.

A final intermediary in U.K. leadership selection derives from its characteristically parliamentarian fusion of executive and legislature. The selection of the prime minister itself does not reflect a direct vote for the office.[[70]](#footnote-70) Rather, the prime minister’s selection depends upon the success of MPs in their individual elections. Furthermore, the continued viability of the prime minister depends upon the support of MPs as the prime minister advances a particular agenda. Brexit itself provided a remarkably vivid illustration of this fact, with David Cameron and Theresa May resigning as soon as political events demonstrated the non-viability of their agendas. Such non-viability ultimately flows from the Prime Ministers’ relationships with MPs, not with the electorate. The particular circumstances of the exits of Cameron and May illustrate this with some granularity. Cameron called the referendum in order to challenge Eurosceptic MPs within his own party;[[71]](#footnote-71) May resigned after being unable to muster enough parliamentary support for her own Brexit plan.[[72]](#footnote-72) In the U.S. system, conversely, a presidential claim to authority is primarily determined by the president’s level of popular support[[73]](#footnote-73) (even though the differing weight afforded voters in different states through the electoral college means a president can win even without a majority of voter support, as Trump did, the president still achieves victory primarily by appeals directly to the national constituency rather than to representatives in his own party). Moreover, American norms make it virtually inconceivable that a president would resign (or even choose not to stand for re-election) for any reason other than imminent loss of office. In both systems, of course, there is a relationship between the success of individual legislators and the appeal of the party leadership presented by such legislators. The relationship in the U.S. is far weaker (as is most apparent by the typicality of different parties controlling different major branches of government). Conversely in the U.K. a prime minister’s acquisition of leadership is wholly dependent upon the victory of MPs in their individual races, such that a vote for an MP serves as both a direct vote for a representative and a vote for overall state leadership.

The cumulative effect of the U.K. selection system is to insulate leadership selection from popular will at multiple gateways. Elites, party insiders, and tiny slices of the franchise unilaterally determine who is viable for party leadership, and ultimate party leadership selection is indirect at multiple junctures. This, in turn, mitigates the practical *consequences* of foreign meddling, at least insofar as it can immediately convert mass electoral preferences into state action (or expect to corrupt a candidate solely by appealing to the electorate). This can be understood in terms of both the prospective benefit to a candidate from foreign meddling, and the broader risk to the integrity of governance from foreign meddling under typical circumstances (to which the Brexit referendum, of course, might have been an exception). A politician in the U.K. hoping to rely on foreign campaign influence to obtain a position would require that influence to affect not only rank and file support, but also, directly or indirectly, party elites and insiders. These insiders would presumably have more dedicated and entrenched political views and be integrated into political communities, less vulnerable to the types of soft influence available to foreign agents. Or, more cynically stated, by the time foreign agents have developed the capacity to influence all the necessary gateway entities in the U.K. system, the entire framework of public decision-making would be tainted beyond recognition. This can be meaningfully contrasted with the U.S., which has both a long tradition of outsider populist candidates meaningfully influencing politics through viable candidacies,[[74]](#footnote-74) and a set of structures which make it plausible for a candidate not preferred by mainstream party elites to plausibly pursue high office.

 These contrasting modes of leadership selection in the U.S. and U.K. have a softer corollary in the norm-expectations of political leaders. These norms counterbalance the weaker direct electoral accountability in the U.K. Incidentally, they also safeguard against foreign campaign meddling too readily influencing conduct of U.K. leaders, even where such meddling might have influenced public opinion. In the U.K., there is a strong cultural expectation that leaders and representatives are will prioritize the public good. Such norms are exemplified by the Nolan Principles dictating the civic-minded expectations of leadership.[[75]](#footnote-75) Underlying this is a general norm that leaders should prize the welfare of the polity over their political self-interest. This distaste for self-interested conduct appears weaker in the U.S.[[76]](#footnote-76) While the U.S. has robust anti-corruption laws preventing explicit trades of public service for private gain to public servants, its culture its far more lenient regarding *political* self-interest. As a result typical American politics is characterized by transactional, or at least mutually facilitative, interactions at multiple levels – between voters and elected officials,[[77]](#footnote-77) and among representatives themselves as they negotiate to agree on courses of government action.[[78]](#footnote-78) While such self-interested conduct may occur (perhaps with increasing frequency)[[79]](#footnote-79) in the U.K., it is, at least traditionally seen as outside norms of appropriate governance. Indeed, this might indicate a subtle obstacle that Trump would have faced in the U.K.: his blatant defiance of norms of office would have been seen as grossly out of step with expectations of leadership, rather than possessing polarizing anti-establishment appeal.

This expectation of public-mindedness (or at least the appearance of public-mindedness) inversely correlates to the degree to which representatives are directly accountable to the electorate. This is a logical structural parallel. In a system in which leadership is more directly accountable to popular will, the approval of the electorate serves as a stronger check on leaders engaging in politically self-interested behavior that might be openly adverse to the interests of constituents (or at least that constituents perceive as adverse). Indeed, in a system with stronger popular control through the ballot box, politically self-interest conduct by leadership can even be normatively vindicated as an instrument by which the electorate exerts ultimate control over governance.[[80]](#footnote-80) Conversely, where leadership is insulated by various elite gateways from popular control, the significance of norms of public-mindedness rise in importance, because it is harder for the electorate to punish deviations from public-mindedness.

 These differing expectations have direct ramifications for the how a polity ought to manage concerns with foreign campaign interference. If foreign meddling is problematic because it shifts the preferences of the electorate, then a system in which the primary vehicle for protecting norms of public-mindedness is responsiveness to the electorate will be more vulnerable. Conversely, a system which embeds public-mindedness as an intrinsic expectation of leaders (even if that norm is a function of a reduced level of direct democratic accountability) will be more resistant to at least single instances of foreign meddling. The deeper implications of this as a corollary to the nature of leadership selection mechanisms are explored in Section V.

The constitutional linchpin of the U.K. – parliamentary sovereignty – synthesizes the manner in which the consequences of elite leadership selection and high expectations of civic-mindedness mitigate concerns of foreign meddling. The transformation of the U.K. political infrastructure would require corrupting parliament, rather than merely the electorate. Given the democratic foundations of contemporary parliamentary legitimacy and the long-run accountability and responsiveness to the electorate, this could be in principle accomplished by changing the views of the franchise. However, this is not as easy a process as merely advancing the viability of a candidate or candidates who, in the eyes of rank and file voters as a whole, ought to hold office. It would require infiltrating a number of intermediary layers made up of dedicated politicos and elites, and whom, under U.K. cultural expectations, are committed to the public weal. The final instantiation of this is Parliament’s role as the ultimate lawmaker, and thus it offers a final layer of insulation before such disinformation could have an effect.

IV. The Legal Facet: Differing Judicial Expectations of the Polity’s Competence

 Of course, the idea that Trump ascended naturally on the back of popular approval – albeit perhaps aided by foreign appeals to the electorate – must face another challenge: Trump’s campaign did not encounter the need to fundraise faced by most other candidates, but rather the billionaire heir could substantially self-fund, at least to initiate his campaign.[[81]](#footnote-81) If access to virtually limitless campaign cash taints a campaign has been a source extensive attention in the American jurisprudence.[[82]](#footnote-82) After years of fierce partisan struggle, the (bare) majority of the Supreme Court has concluded that, in the absence of a possible *quid pro quo* exchange, money does not legally corrupt a candidate. Underlying this view is a presumption of the cognitive capacity of the electorate that reveals that foreign meddling, if successful, would be a profound attack upon the root of popular decision-making and democratic legitimacy. Conversely, there are hints in the less extensive U.K. jurisprudence that there is less fundamental trust of the U.K. electorate, and thus that, as a normative and structural matter, the possibility of bad foreign media is less of a foundational attack upon the system’s integrity and democratic norms.

 Regulation of campaign speech in the U.S. – and one of the questions upon which it subsides, the degree to which the electorate can have its views undesirably shifted by media – has been fiercely contested in practice and scholarship.[[83]](#footnote-83) For the purposes of this analysis, the critical observation is that following *Citizens United* and *McCutcheon,* any concern that funded media could pose a threat to democracy (or at least enough of a threat to justify First Amendment-activating regulation) has been rejected. This conclusion is based in part on the assertion that the threat to the electorate from government restriction of speech is far greater than that from “too much” speech.[[84]](#footnote-84) This, in turn, requires a classically Millian assumption[[85]](#footnote-85) (or perhaps merely a caricature of this position) regarding voters’ ability to sort enormous amounts of information to reach accurate conclusions. While *Citizens United* and *McCutcheon* were fiercely partisan 5-4 decisions, the foundational assumption that the robust cognitive capacity of the electorate should inform First Amendment campaign finance jurisprudence can be traced back forty years to the logic of *Bellotti* and *Buckley*.[[86]](#footnote-86) The recent jurisprudence, however, has extended this logic to suggest that only explicit transactions can corrupt candidates; presumably voters can adequately police other forms of campaign influence other than bribery (or at least do so well enough where it is less damaging to leave campaign speech to the polity rather than the state to monitor). As Richard Hasen has observed, the raises the incisive question of how the Supreme Court would judge the legality of foreign campaign finance expenditures and contributions, particularly any spending that sought to ‘influence’ but not quite ‘bribe’ a candidate.[[87]](#footnote-87) The logic of the case suggests they should find it an acceptable influence, though the Supreme Court has not yet fully opined on the First Amendment status of foreign spending.[[88]](#footnote-88)

 For the purpose of this analysis, there is a simpler takeaway: the American jurisprudence on campaigns is premised on the capacity of the electorate to choose wisely. It might, of course, seem that this should nullify the effects of foreign meddling through disinformation campaigns. If voters have robust cognitive capacities, they will either identify and discount foreign materials, or synthesize them into a broader matrix of knowledge that leads to the truth. But if disinformation campaigns *are* effective in distorting the electorate’s preferences, then the foundation of the American electoral system (especially as imagined by the Supreme Court)[[89]](#footnote-89) is at risk. The type of legal restrictions that the courts and some prominent scholars[[90]](#footnote-90) prefer are those that can be understood as anti-bribery measures; and insofar as foreign meddling is a direct attempt to sway the preference of the electorate, it cannot be directly understood on anti-bribery terms.

 The contrast with the approach to oversight of campaign advertisements in the U.K. is significant.[[91]](#footnote-91) The U.K. imposes extensive regulation of expenditures by parties and candidates and public support for campaigns, with specific limitations on, for example, political broadcasts[[92]](#footnote-92) (ironically enough, a regime far closer to that initially imagined by the original 1974 Federal Election Campaign Act proposed by the American federal government).[[93]](#footnote-93) Furthermore, in line with its less robust remit for constitutional review and its traditionally less assertive role, the UKSC has been far more tolerant of state oversight of campaign speech.[[94]](#footnote-94) This has included not merely tolerating the campaign finance regime, but more generally accepting robust content restrictions imposed by the government. For example, despite the protections afforded speech under Article 10 of the Human Rights Act, the UKSC has tolerated restrictions on political advertising because it is too graphic, or because the form of the media is too compelling[[95]](#footnote-95) – precisely the types of arguments that would likely fail First Amendment muster, particularly in the campaign context. Through such reasoning the the U.K. courts have implicitly accepted the electorate’s prospective fragility.

 It may seem paradoxical that these paired contrasting view of electoral competence would fit with the U.S. having a *greater* anxiety regarding foreign campaign interference than the U.K. The First Amendment tradition – robustly, even controversially realized, in contemporary campaign finance – functionally posits the ability of the electorate to process and purge some damaging influences. The admittedly less extensively developed treatment of campaign speech in the U.K., conversely, concedes the vulnerability of the electorate to bad speech. However, it is precisely these baselines that explain the stronger response to foreign meddling in the U.S. The fragility of the electorate is posited in the U.K., presence of foreign meddling or not; and thus the benefit or necessity of state intervention to handle such fragility poses no fundamental political dilemma. Conversely, the possibility that foreign electoral interference might be a menace poses a basic dilemma for the assumption of electoral robustness in the U.S. That is, if it is posited that foreign disinformation poses a threat in the U.S., it requires challenging a root assumption about American democracy: that the electorate, without restraint, is the best font of political wisdom. Thus, the stronger American reaction to foreign meddling is, in fact, a reaction to the fact that the very claim foreign dissemination of misinformation is a threat is, in itself, normatively discomforting. The U.K. electoral infrastructure can, as a matter of course, incorporate the possibility of such an exogenous threat without necessarily interrogating its own normative priors.

These differing postures to the electorate’s competence comprise a pendent to the stronger control exerted by elites in leadership selection in the U.K., and the more direct role played by the electorate in the U.S. A democratic system premised on fundamental electoral competence will, as a normative and practical matter, more readily give the mass of voters more direct control over political choices. Conversely, as in the U.K., the weaker assumption of general democratic competence permits more preemptively winnowed, elite-guided electoral process. Foreign meddling will pose a greater existential threat to the U.S. system, because it will challenge both the premise of direct political competence by the electoral *and* the subsequent procedures that attempt to realize that competence.

The UKSC’s decision in *Miller I* synthesizes (with topical irony) the lack of power the Court has allocated to the electorate with the reality of power-holding in the U.K. In declining to allow the government to implement the results of the Brexit referendum without parliamentary legislation, the UKSC vindicated the presence of additional insulation between the expression of popular will and subsequent state action. As Mark Elliot observed, there is an anti-democratic – or at least anti-populist – gloss to the reasoning of *Miller I*.[[96]](#footnote-96) Formally this can be attributed to parliamentary sovereignty, but in practice it affirms that the ability of the electorate to exert its will is limited. More generally, *Miller I* served as a strong – and not uncontroversial – reminder of where state power really lies in U.K. governance. It is Parliament, the MPs who comprise it, and the executive that is drawn by and from it, that is the locus of U.K. government. When one speaks of the U.K. state acting, if the action is legitimate, the font of the action is (almost always)[[97]](#footnote-97) Parliament. Such a constitutional arrangement limits the ability of the electorate to act, and thereby likewise limits the ability of foreign disinformation to directly transform politics.

V. Conclusion: Responses to Foreign Meddling as a Window into Realities of Rule and Forward Directions

 What general lessons can be learned about democratic self-rule from considering the problems of foreign meddling, and how can these lessons be deployed to develop policies that preserve democratic autonomy? This article has shown that the reactions to foreign meddling reflect the totality of circumstances by which systems translate the will of the franchise into governance. It is thus difficult to deem the U.S. or U.K. reaction as superior. But if the goal is to generate more robust practical responses to foreign meddling, it requires considering how both illicit outside interference and attempts by leaders to preserve a ‘right’ condition of popular preference formation elicit tensions for popular autonomy.

 The first concluding point is that despite initial appearance the weaker U.K. response, while visibly less vigorous, does not necessarily reveal inferior capacity to resist foreign attempts to distort policymaking. Parliamentary sovereignty, the fused nature of the Westminster executive, and the elaborate, elite-favoring procedures that select these leaders insulate the direct expression of democratic will and state action in the U.K. This in turn ameliorates what must be the foundational anxiety regarding foreign meddling: that it will reshape the preferences of the electorate in a manner that has a knock-on effect for governance. Foreign efforts to distort U.K. politics would have to not only shift the preferences of the electorate, but of the standing gatekeepers of political power. Such a campaign might be achievable – but it would suggest a political culture so rotten that it is beyond independence or integrity. Conversely the U.S. allows for much readier conversion of popular will into political preferences. To be sure, it is a far from perfect conversion of popular approval to political power, with soft gatekeepers ranging from those who finance campaigns to back room networks of political elites.[[98]](#footnote-98) But it is far easier for a candidate to achieve political prominence, and ultimately political success, with no structural prerequisite other than raw voter approval. The absence of these hard gateways allows an undesirable influence that appeals directly to the electorate to be a direct threat to democratic legitimacy.

Of course, merely because elites are more influential in the U.K. role is no panacea for the problem of distortive foreign influence. Even under the most grimly Schumpeterian vision of democratic politics, elites compete for the approval of the franchise.[[99]](#footnote-99) Prolonged infiltration of a polity’s preferences and political culture by foreign intervention will ultimately force elites to acknowledge and respond to such pressure – though over sufficiently long time scales, it seems like the ominous quality of foreign appeals to the electorate must be softened. At some point (either in the form of the time scale or the nature of the appeals) foreign influence crosses into norm-diffusion that is part of general political development.[[100]](#footnote-100) Linked to this issue is the broader question of democratic competence. Any normative claim to liberal democratic legitimacy requires positing the capacity of the electorate to sort between ideas and reach a conclusion that is valid in terms of sustaining a functional polity, if not, in any deeper sense, true. The claim that foreign influence is a spoiler of democratic process cannot be reconciled with the features an electorate must have if democratic autonomy is to be legitimate.

Disentangling this knot of sovereignty, preference formation by voters, and the appropriate attitude towards campaign speech cuts to roots of democratic rule generally. For the sake of this article, however, it is sufficient to note that the real procedures by which democratic process allocates political power and the effects of foreign meddling seem intertwined. The capacity to directly convert preferences into power shapes how disinformation will have immediate *legal* effects. In the U.K., even a referendum on a policy could not directly change the law without the formal approval of a clique of elites; in the U.S., elites were powerless to stop the rise of a populist whom the party insiders strongly disfavored. Of course, while American procedures for the selection of leadership did not intercept Trump’s populist rise, the subsequent structures identified in Section II have certainly policed and bounded his subsequent leadership. With regards to Johnson, once he decided to gauge the popularity of his policies (primarily his proposed Brexit plan, but also including, by the nature of U.K. constitutional arrangements, his other policies, such as withholding the Russian interference report) via a snap election, there was functionally no check on his policy-making. Popular approval vindicated his course of action.

This suggests that the two contrasting features this article has examined – the entrenched protections of a written constitution in the U.S., and the stronger role of intermediary gateways to rule in the U.K. – may perform parallel functions. Both, in effect, limit the capacity of popular decision-making to impact the terms of governance. In the U.S., this takes the form of erecting barriers to changing certain political structures and formally distributing power. In the U.K., it takes the form of less formal institutions that buffer ultimate leadership selection from popular opinion. Both mitigate the prospective political impact of foreign interference in campaigns, albeit in very different manners. The electoral framework of the U.S. does not interdict the first-order populist effects of such campaigns on electoral outcomes. Rather the constitutional context creates structures that are resistant to immediate change, including crucially structures that facilitate the interrogation of any such meddling. Conversely, the very role of the electorate in U.K. leadership selection is buffered by layers of elite action, thus mitigating the effect of foreign interference.

One microcosm of this difference is in the divergent institutional characters of the U.S. and U.K. investigations into meddling. Both the appointment of the special counsel to head the investigation into prospective Russian interference in the Trump campaign, and the subsequent impeachment proceedings, reflected the role of competing constitutional entities in the federal government.[[101]](#footnote-101) The separation of the legislature and executive, for example, not only provided the context for impeachment proceedings, but allowed for the legislature to generate (bipartisan) pressure for an independent investigation.[[102]](#footnote-102) The role of a special counsel was, by the statutory language, intended to address the possibility that the Attorney General and the Department of Justice might face conflicts. The codified declaration that conflicting interests by high government officers and representatives should result in a formally independent process is a more granular indication of the structural nature of the U.S. safeguards.[[103]](#footnote-103) In short, the various means by which U.S. law (constitutional and statutory) arranged the investigation into foreign meddling reflected the basic principles of the U.S. constitutional setup: agonistic competition between various actors, with differing branches and parties operating to check one another. Compared to the U.K., however, the role of public-regarding norms in the system is relatively small.[[104]](#footnote-104)

 Conversely, the procedural characteristics of the ISC reflects the power allocation of Westminster parliamentarism, the diffusely political nature of the checks in U.K. governance, and the ultimate trust afforded to elites. As Andrew Defty describes, while the ISC was conceived to bring greater accountability to security services through stronger parliamentary oversight, in its original form it was a “constitutional anomaly”[[105]](#footnote-105) which afforded the executive a significant role and did not accord with standard parliamentary procedures. It was not until reforms in 2013 that the ISC was constituted as a parliamentary committee, but even in its new form the executive retains significant and unusual levels of control the committee.[[106]](#footnote-106) The most salient example of this with regards to the investigation into Russian meddling was Downing Street’s ability to withhold the report on Russian interference – but it is not the first such instance.[[107]](#footnote-107) Thus the capacity of the ISC to operate as a truly robust independent agency does not match any of the mechanisms available in the U.S. – either impeachment proceedings or the capacity to appoint a special counsel to perform an independent investigation. This reinforces that the primary means by which integrity over such investigations is maintained in the U.K. are ultimately political. Sufficient parliamentary dissatisfaction with conduct by the PM could result in a challenge to leadership, and sufficient popular dissatisfaction could lead to a shift in electoral approval. But without a purely political reckoning, the structures for policing foreign interference had little teeth – even with the open disapprobation of the head of the relevant committee and the opposition party for the failure to publish the report.[[108]](#footnote-108)

Turning back to the larger world of democratic responsiveness, one can identify parallels to the because these two systems operate on such different principles, the means by which they prevent distortion of electoral preference also differs. Foreign campaigns to shift the electorate’s preferences may have additional impact over longer time scales, both due to persistence of any preference formation and the knock-on effects of political events. It is against such longer-run transformation that the formal entrenchment of the American constitutional may offer greater security; while the U.K. constitution is comprised merely of what happens politically, and thus *necessarily* shifts in its core configuration with the effects of foreign meddling, some durable structures of the U.S. constitution require arguably prohibitive political will to formally alter (though changes in political practice can shift their significance). The U.K.’s practices may be more vulnerable to long run distortions, but the robust role played by elites may prevent immediate shifts in policy in response to foreign meddling with campaigns. Over time, however, the infiltration of foreign ideas and values into a system could shift U.K. practices, and there would be few firm formal barriers to prevent it. The divergent response to concerns of foreign meddling in the U.S. and the U.K. reflect, in part, the degree to which constitutional practices will ameliorate the effects of foreign meddling in the short term. This raises the possibility that the robust U.S. investigations, while they did not remove Trump from power, do illustrate the sensitivity of the U.S. to foreign interference.

 The levels at which such long-run constitutional effects (and the security against them provided by a written constitution) could operate blur the line between illicit foreign meddling and the broader transformation of a political culture. The very capacity of information from outside national boundaries raises questions not of immediate corruption or campaign distortion, but the very capacity of a people to rule itself, and of what broader social conditions render the preference of that people sound or legitimate. The shifting of underlying constitutional procedures – such as constitutional structures (or their realization) in the U.S. or party leadership procedures in the U.K. – might be influenced by foreign actors. It seems, however, unhelpful to categorize such influence as corruption rather than as a systemic weakness in the capacity of a polity to maintain its norms or its political sovereignty. When a type of influence shifts from illicit meddling to merely part of the ecosystem that shapes the views of electoral decision-making is a deep question of legitimate social norm formation.

 Whether the resistance of a state to immediate effects of foreign meddling is a desirable characteristic, given that it comes at the price of immediacy of popular control over democratic outcomes, is contestable. Indeed, both the U.S. and the U.K. constitutional arrangements rely on features to slow the effect of foreign meddling precisely because they *are*, from a certain compelling perspective, anti-democratic. The American constitution confers the discussed beneficial effects ultimately by constraining popular governance, most saliently understood through the ‘dead hand’ problem of the constitution and the countermajoritarian paradox of judicial review.[[109]](#footnote-109) Likewise, the U.K.’s reliance on elite intermediaries to set the context against which the electorate acts can be seen as depriving the polity as a whole of a significant role in determining its own governance. Even if the party and representative elites have placating the electorate as an ultimate goal, and thus are responsive to predicted electoral reactions, the closed nature of the early-stage U.K. candidate selection process, at a minimum, grants the electoral system a highly hierarchical quality.

Whether these constitutional features are anti-democratic or not will ultimately depend on the degree to which democracy is identified with giving effect to immediate expressions of popular will. One potential resolution to these problems is a realist one – functional and legitimate democracy is not mob rule, but relies upon a far more complex set of interactions to transmute electoral preferences into governance.[[110]](#footnote-110) Insofar as constitutional features might prevent disruption from foreign influence, these features might be said to make these political systems *more* democratic, rather than less. Yet this must face the evergreen critique that these features rely in practice on granting institutional power to persons other than the voters who are affected by democratic rule.

Looking at the consequences of investigations in the U.K. and U.S., might suggest the responses to foreign meddling differed primarily in how much they publicized the problem. The more extensive U.S. investigations did not remove Trump for power, nor directly constrain his ability to act. Indeed, to do so would have required Democratic party control of both the House and Senate, suggesting broad-based disapprobation (as expressed through legislative elections) of Trump, which would in turn suggest purely political consequences for his conduct. Insofar as it did practically alter Trump’s position, the investigations so far have primarily served to make his integrity salient in future elections (though voter reaction to the investigations themselves reflects underlying affective polarization).[[111]](#footnote-111) Compared to the minimal attention received by U.K. allegations of such meddling, the U.S. response may have served as a rallying call among Trump’s opponents (both rank-and-file and Democratic elites). Thus, at a minimum, it has further galvanized the opposition, and it may have (albeit only marginally) limited Trump’s ability to act by casting his democratic legitimacy into question. This raises the question of if the main practical bite of policy response to foreign meddling should ultimately be conceived as alerting voters. This has the benefit of minimizing any questions regarding technocratic thwarting of democratic will or use of policing to directly disempower political opponents, but is a relatively diffuse and arguably toothless solution. Yet this critique of toothlessness of investigations-as-publicity is softened by a foundational reality of democratic governance: successful self-rule requires citizen share a commitment to the norms and principles of self-governance. If citizens in a democracy are sufficiently blasé about repeated intrusions by foreign powers, and willing to be swayed by such intrusions, there may be deeper problems. In such a situation, the condition of democracy is dire not because of foreign intervention, but because the commitment to norms of self-governance is so weak that foreign intervention is tolerated and influential.[[112]](#footnote-112) Where robust norms of self-governance are present, investigations that vigorously alert voters that foreign influence is present (particularly with the toleration or even approbation of their own leaders) may provoke a reaction at the ballot box, thus preserving democracy through its native processes of electoral self-rule.

This tension provides guidance to the underlying question that must be addressed for future research and policymaking regarding the problem of foreign meddling. Further determination of optimal institutional arrangements to challenge foreign meddling require a clear conception of what it means for an electorate to generate and express preferences autonomously. There are at least two sets of concerns. With regards to foreign influence, the crucial issue is that a normative evaluation that preference formation among the electorate has shifted from autonomous to heteronomous due to outside influence will in turn determine when foreign interference compromises democratic integrity, and over which time scales. This in turn will inform when a polity is ‘corrupted’ by undue external forces. Reciprocally, the second set of concerns is how an electorate must be able to influence elites and the structure of governance in order to satisfy democratic self-rule, which determines how much actual lawmaking ought to be directly accountable to popular preferences. This will inform the parallel question of what terms of popular autonomy are necessary to provide moral integrity in a democratic system. This article has primarily sought to resolve the puzzle over differing U.K.-U.S. responses to single instances of foreign meddling not by looking at the surface context, but by noting the differing features with regards to this latter question that each constitutional arrangement offers. Any policy responses must adopt a view on these two competing factors, and seek to ensure the integrity of democratic self-determination against both autonomy-depriving external influence and elite domination of the political process.

1. For a review of the intervention in Brexit, see Erik Brattberg and Tim Maurer, *Russian Election Interference: Europe’s Counter to Fake News and Cyber Attacks*, Carnegie Endowment for International Peace, May 2018, at 14; Narayanan et. al., *Russian Involvement and Junk News during Brexit*, Data Memo, The Computational Propaganda Project, Oxford Internet Institute, 19 December 2017, at 2. For a review of impacts on Trump’s election, see Senate Committee on Intelligence, Report on Russian Active Measures, Campaigns and Interverence in the 2016 U.S. Election, Vol. 2., at 43-52; Chris Tenove, et. al., *Digital Threats to Democratic Elections: How Foreign Actors Use Digital Techniques to Undermine Democracy,* University of British Columbia Centre for the Study of Democratic Institutions, January 2018, at 21; Adam Badawy et. al., *Analyzing the Digital Traces of Political Manipulation: The 2016 Russian Interference Twitter Campaign*, 2018 IEEE/ACM International Conference on Advances in Social Networks Analysis and Mining (ASONAM), 258-265 (2018). [↑](#footnote-ref-1)
2. Senate Committee on Intelligence, Report on Russian Active Measures, Campaigns and Interference in the 2016 U.S. Election, Vol. 1., at 5; Brattberg and Maurer, *supra* note 1, at 13-15. [↑](#footnote-ref-2)
3. Robert S. Mueller III, *Report on the Investigation Into Russian Interference In The 2016 Presidential Election*, U.S. Department of Justice, Washington DC (March 2019), at 19 et seq; Select Committee on Intelligence, United States Senate, Report on Russian Active Measures Campaigns and Interference in the 2016 U.S.Election (5 volumes) (2019-2020). [↑](#footnote-ref-3)
4. Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historical Trial*. N. Y. Times, 6 Feb 2020, available at https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html . [↑](#footnote-ref-4)
5. Andrew Defty, *The government’s refusal to release the ‘Russian interference’ report is part of a worrying pattern of obstruction*, Democratic Audit, 7 November 2019, *available at*  http://www.democraticaudit.com/2019/11/07/the-governments-refusal-to-release-the-intelligence-and-security-committees-report-into-russian-activities-against-the-uk-is-part-of-a-worrying-pattern-of-obstruction-and-delay/; Dan Sabbagh and Luke Harding, *PM accused of cover-up over report on Russian meddling in U.K. Politics*, The Guardian, 4 Nov 2019.

The report was ultimately released on 21 July 2020. Intelligence and Security Committee of Parliament, *Russia*, HC 632 (21 July 2020) (hereinafter, ‘Russia Report’). [↑](#footnote-ref-5)
6. Sabbagh and Harding, *supra* note 5. [↑](#footnote-ref-6)
7. Labour leader Jeremy Corbyn, for example, described one allegation of Russian interference as a debunked conspiracy theory; ironically enough this was potentially contested by the conservative wing, who seemingly wished to maintain the possibility that Russian interference might play a role in U.K. elections. Mattha Busby, *Leaked NHS documents controversy is nonsense, says Corbyn*, The Guardian, 7 December 2019. [↑](#footnote-ref-7)
8. See Russia Report, *supra* note 5, at 9; cf. the extensive sources discussed in footnote 1. [↑](#footnote-ref-8)
9. Russia Report, *supra* note 5, at 19-20. [↑](#footnote-ref-9)
10. *Id*. at 15-16. [↑](#footnote-ref-10)
11. For initial reactions to the Russia Report, see, e.g., Amy MacKinnon, *4 Key Takeaways From the British Report on Russian Interference*, Foreign Policy, 21 July 2020; Mark Galeotti, *The Weakness of the Russia Report*, The Spectator, 21 July 2020. [↑](#footnote-ref-11)
12. Jose Antonio Cheibub, Zachary Elkins, and Tom Ginsburg, *Beyond Presidentialism and Parliamentarism*, 44 B. J. Pol. S. 515, 519 (2014). Comparative analysis of presidential and parliamentary systems has been the subject of extensive attention in the social sciences. In one of the seminal works on the topic, Shugart and Carey distinguish presidential systems as those in which the chief executive, as well as the legislature, is elected directly by the franchise, whereas in parliamentary systems the executive is selected by the legislature and expected to serve as its agent. The standard expectation is that presidential systems are likely to allow for greater independence between the executive and legislature, and thus potentially friction between them, as opposed to an executive that serves at the pleasure of the legislature. Matthew Soberg Shugart and John M. Carey, Presidents and Assemblies 1-2 (1992). [↑](#footnote-ref-12)
13. Scholars typically criticize presidential systems as less likely to produce sustainable democracies, Scott Mainwaring, *Presidentialism, Multipartism, and Democracy*, 26 Comp. Pol. Stud. 1998 (1993); Shugart and Carey *infra* at 28; Jose Antonio Cheibub and Fernando Limongi, *Democratic Institutions and Regime Survival*, 5 Ann. Rev. Pol. Sci. 151 (2002), as well as more corrupt under some conditions, Jana Kunicova and Susan Rose-Ackerman, *Electoral Rules and Constitutional Structures as Constraints on Corruption*, 35 B.J. Pol. S. 573, 586 (2005). These features are in no small part attributed to the relative independence, lack of accountability, and demagogic tendencies of a separately elected presidential head of state. [↑](#footnote-ref-13)
14. See Shanto Iyengar et. al., *The Origins and Consequences of Affective Polarization in the United States*, 22 Ann. Rev. P. Sci. 129 (2019) (describing the rise of affective polarization focused on dislike of the other party as characteristic); Alec Tyson, *Views of Mueller’s investigation – and Trump’s handling of the probe – turn more partisan*, Pew Research Center, September 24, 2018 (summarizing rank-and-file responses to Mueller probe as split along partisan lines). [↑](#footnote-ref-14)
15. See, e.g., Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 Ind. L.J. 177 (2018). [↑](#footnote-ref-15)
16. See Bobby Duffy et. al, *Divided Britain? Polarisation and fragmentation trends in the U.K.*, The Policy Institute, King’s College London (Sept. 2019) 7-8 (observing that the Brexit vote generated intense polarization, including affective polarization); Shannon Schumacher, *Brexit divides the U.K., but partisanship and ideology are still key factors*, Pew Research Center, October 28, 2019 (summarizing correlation between party identity and Brexit vote). [↑](#footnote-ref-16)
17. Such conduct can exist on a spectrum, Daniel Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 798-99 (1985), however, and reflects deep complexities regarding norms of public-mindedness, John G. Peters & Susan Welch, *Gradients of Corruption in Perceptions of American Public Life*, *in* Political Corruption: Concepts & Contexts 155-160 (Arnold J. Heidenheimer & Michael Johnston eds., 2002) . [↑](#footnote-ref-17)
18. Even if Trump did not satisfy the *pro* element – that is, he did not transanctionally trade official action for Russian support during the election – his subsequent Ukraine dealings arguably raise the troubling possibility of a reciprocal dealings with Russia. *See* Lowenstein, *supra* note 17, at 819. [↑](#footnote-ref-18)
19. The idea that the campaigning cannot corrupt voters is articulated in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) and, e.g., in Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 Stan. L. Rev. 893, 903 (1998). [↑](#footnote-ref-19)
20. Such allegations may have tarred another prominent Eurosceptic leader, Nigel Farage. Carole Cadwalladr, *Arron Banks, Brexit, and the Russia connection*, The Guardian, 16 June 2018, available at https://www.theguardian.com/uk-news/2018/jun/16/arron-banks-nigel-farage-leave-brexit-russia-connection . [↑](#footnote-ref-20)
21. Nicholas Watt, *Boris Johnson to campaign for Brexit in EU referendum*, The Guardian, 15 March 2016. [↑](#footnote-ref-21)
22. Russia Report, *supra* note 5, at 15-16. [↑](#footnote-ref-22)
23. See, e.g., Savvas Zannettou et. al., *Disinformation Warfare: Understanding State-Sponsored Trolls on Twitter and Their Influence on the Web*, WWW '19: Companion Proceedings of The 2019 World Wide Web Conference (May 2019), pp. 218–226, at 223-225. [↑](#footnote-ref-23)
24. See generally Jacob Eisler, *The Deep Patterns of Campaign Finance Law*, 49 Conn. L. Rev. 57 (2016); Yasmin Dawood, *Campaign Finance and American Democracy*, 18 Ann. Rev. P. Sci 329 (2015); Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, *in* Party Funding and Campaign Finance in International Perspective, 183 (K. D. Ewing & Samuel Issacharoff eds., 2006). [↑](#footnote-ref-24)
25. This idea can be generally identified as an analytic parallel to the distinction drawn in F. A. Hayek, Law, Legislation, and Liberty 35 (1973) between cosmos and taxis. A linguistic formula would be taxis, and the collective wisdom is cosmos. [↑](#footnote-ref-25)
26. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006); Michael J. Klarman, *Antifidelity*, 70 S. Cal. L. Rev. 381 (1997) (describing the struggles with the dead hand problem). Interestingly some reject the dead hand problem through a historicizing understanding of the Constitution, see Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 G. W. L. Rev. 1128, 1135 (1997), but through an analysis that pushes American constitutionalism, in a broad sense, closer to the political constitutionalism advanced by Griffith. [↑](#footnote-ref-26)
27. Anthony King, Does the United Kingdom Still Have a Constitution 3 (2001). [↑](#footnote-ref-27)
28. See Siegel, *supra* note 15, at 190. [↑](#footnote-ref-28)
29. J.A.G. Griffith, *The Political Constitution* 42 Modern L. Rev. 1, 19 (1979). [↑](#footnote-ref-29)
30. Vernon Bogdanor, The New British Constitution (2007). [↑](#footnote-ref-30)
31. This suggests a parallel quality to the “beaut[y]” that Adam Tompkins, Our Republican Constitution, 3 (2005) identifies in the political character of the British constitution through its dependence on democratic politics. [↑](#footnote-ref-31)
32. *The Cabinet Manual*, Cabinet Office, 1st ed. 2011, at 21. [↑](#footnote-ref-32)
33. A. V. Dicey, Introduction to the Study of the Law of the Constitution 23-24 (1959). Of course, the continued accuracy of the Diceyean orthodoxy has been challenged if the basic principle remains preeminent, see e.g., *Jackson v. A.G.* [2005] UKHL 56, at 102 (Lord Steyn). [↑](#footnote-ref-33)
34. *R (Miller) v. Cherry* (*Miller II*) [2019] UKSC 41 at 55; Lori A. Ringhand, *First Amendment (Un)Exceptionalism: A Comparative Taxonomy of Campaign Finance Reform Proposals in the U.S. and U.K.*, forthcoming Ohio St. L. J. at [45] (describing the Neill committee’s articulation of democratic values). [↑](#footnote-ref-34)
35. Perhaps most famously established in *British Railways Board v. Pickin*, [1974] AC 765. [↑](#footnote-ref-35)
36. *R (Miller) v. Secretary of State* [2017] UKSC 5. [↑](#footnote-ref-36)
37. See Andrew Defty, *Coming in from the cold: bringing the Intelligence and Security Committee into Parliament*, 34 Intelligence and National Security 22, 27 (2019). [↑](#footnote-ref-37)
38. Defty, *supra* note 5. [↑](#footnote-ref-38)
39. One leading advocate of this view is R.H. S. Crossman, *Prime Ministerial Government* in Anthony King A. (ed) The British Prime Minister (1985), 175-194. For an overall evaluation see Andrew Le Sueur, “The Nature, Powers, and Accountability of Central Government,” in David Feldman (ed) English Public Law 3.12-3.14 (2009). [↑](#footnote-ref-39)
40. Shugart and Carey, *supra* note 12 at 168; for the authoritative account of why national parties dominate parliamentary governance, see Gary Cox, The Efficient Secret 3 (1987). [↑](#footnote-ref-40)
41. Cheibub and Limongi, *supra* note 12, at 153. [↑](#footnote-ref-41)
42. For authoritative accounts, see Joint Committee on the draft Civil Contingencies Bill, HL Paper 184/HC Paper 1074, para 183 (2003); *Thoburn v. Sunderland City Council* [2002] EWHC 195 at 62 (Laws, LJ). [↑](#footnote-ref-42)
43. Marbury v Madison, 5 U.S. 137 (1803). [↑](#footnote-ref-43)
44. For example, the question of if partisan gerrymandering comprises a constitutional wrong has been fiercely contested (see, e.g., Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship,* 116 Mich. L. Rev. 351 (2017)), and was only narrowly put to rest by the controversial 5-4 vote along partisan lines in *Rucho v. Common Cause,* 139 S. Ct. 2484 (2019). Likewise, the conclusion that the right to privacy protected abortion rights established in *Roe v. Wade*, 410 U.S. 113 (1973) has become a flash point for political as well as legal debate. [↑](#footnote-ref-44)
45. See, e.g., *Jackson* [2005] UKHL 56 at 159 (“the constraints upon what Parliament can do are political and diplomatic rather than constitutional”) (Lady Hale); *R. v. Wilkinson* [2005] UKHL 30 at 17 (Lord Hoffman) (the Court’s authority is still limited to interpretation of what “Parliament would reasonably be understood to have meant by using the actual language of the statute”); [↑](#footnote-ref-45)
46. Alexander Bickel, The Least Dangerous Branch 16 (1986). [↑](#footnote-ref-46)
47. The Federalist No. 10 (James Madison); John Hart Ely, Democracy and Distrust 75-76 (1980). [↑](#footnote-ref-47)
48. *Ex parte Simms* [1999] UKHL 33 at 131 (“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights…The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.”) (Lord Hoffman). [↑](#footnote-ref-48)
49. *Thoburn*. [↑](#footnote-ref-49)
50. *Miller I* at 60 (the condition of EU law becoming law without undergoing typical Parliamentary process “will last only so long as Parliament wishes”) (emphasis added). [↑](#footnote-ref-50)
51. *Miller II* at 41 (“The effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law.”). [↑](#footnote-ref-51)
52. In the U.S., the most visible manifestation of this in the second half of the 20th century has been a broadening of the franchise, particularly with regards to race. See *Smith v. Allwright,*  321 U.S. 649 (1944); *Terry v. Adams,* 345 U.S. 461 (1953) (finding a constitutional violation where primaries or primary-emulating procedures denied primary ballot access for racial minorities); for a scholarly synthesis see Leon Epstein, Political Parties in the American Mold 174-79 (1986). This has also been deployed against other forms of voter suppression, such as districting, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), though the doctrine surrounding that has been fiercely contested, see e.g., Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 110 Cal. L. Rev. 1565 (2013). However, Stephen Gardbaum & Richard H. Pildes, note that increased popular control can also be attributed to the sudden deconstruction of the control of the selection process by party elites in the 1970s. *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 NYU L. Rev. 647, 659 (2018).
In the U.K. this has taken the form of a greater role for rank-and-file party members in deciding leadership. The Conservative party, for example, restricted decisions regarding party leadership wholly to elites until 1965. Thomas Quinn, Electing and Ejecting Party Leaders in Britain 31 (2012). The full details of contemporary U.K. party selection are discussed later. [↑](#footnote-ref-52)
53. See generally Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. Rev. 760 (2001); cf. Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?* 149 U. Pa. L. Rev. 815 (2001). [↑](#footnote-ref-53)
54. Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 Geo. L. J. 1013 (2011) (identifying ‘sore loser’ laws as a means of larger parties maintaining dominance in politics). [↑](#footnote-ref-54)
55. There is an array of options, from entirely closed primaries, see *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986), to open primaries that allow voters to vote for candidates across the slate of offices from one party, but only one party, to blanket primaries that place no restrictions by party or office on where a citizen may cast a vote, *California Democratic Party v. Jones*, 530 U.S. 576, 576 n. 6 (2000), plus variations on these, *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, (2008) (evaluating a so-called “modified blanket” state-imposed primary that allowed candidates to self-identify at the primary stage and then advanced vote-getters regardless of party to the general election). The shared feature of all of these is that at the primary stage it is rank and file voters, party members or not, who decide which candidates stand in the general election. [↑](#footnote-ref-55)
56. The most prominent advocate of this view may be Lawrence Lessig, Republic, Lost (2011), though the descriptive social reality has been identified by others, see e.g., Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. Pa. L. Rev. 73 (2004). [↑](#footnote-ref-56)
57. See Gardbaum & Pildes, *supra* note 52. [↑](#footnote-ref-57)
58. This may be a facet of the general domination of parliamentary politics by parties rather than individual candidates. See Shugart and Carey, *supra* note 12, at 8; Cox, *supra* note 40, at 3. [↑](#footnote-ref-58)
59. Quinn, *supra* note 52, at 62 (Labour); 100 (Conservatives); 134 (Liberal Democrats). [↑](#footnote-ref-59)
60. Cf. Lukas Audickas et. Al, *Membership of U.K. political parties*, U.K. Parliament Commons Briefing Paper SN05125, 9 August 2019, with *Party Affiliation: Trends since 2004*, Gallup, February 2020, available at *https://news.gallup.com/poll/15370/party-affiliation.aspx*. [↑](#footnote-ref-60)
61. *Join Today and Help Us Shape Britain’s Future*, Conservative Party, www.conservatives.com (last accessed 22 February 2020); *Join the Labour Party*, Labour Party, www.labour.org.uk (last accessed 22 February 2020). [↑](#footnote-ref-61)
62. State rules different, with some requiring registration prior to the primary and other allowing a declaration at the polling place. Some, such as those that have state-mandated blanket primaries, do not require party affiliation at all. In all cases, however, party registration, where necessary, typically can occur simultaneously with the process of registering to vote at all. *National Mail Voter Registration Form*, available at https://www.eac.gov/sites/default/files/eac\_assets/1/6/Federal\_Voter\_Registration\_ENG.pdf. [↑](#footnote-ref-62)
63. Cf*. Rosario v. Rockefeller*, 410 U.S. 752 (1973) (state law mandating that voters register with their party 30 days before primary election constitutional) with *Kusper* *v. Pontikes*, 414 U.S. 51 (1973) (statutory 23 month cooldown period before reaffiliation too long). [↑](#footnote-ref-63)
64. Epstein’s claim, *supra* note 52 at 47, that parties are “public utilities” has been much more thoroughly integrated into the culture and logic of the U.S. jurisprudence (though it might be queried if this is a matter of any deep substantive difference in the role of parties in the two systems, or merely the a function of the associational rights being formally protected in the U.S.). [↑](#footnote-ref-64)
65. Paul Upex and Humaira Garasia, *How to stand for elections*, Labour Party, https://labour.org.uk/wp-content/uploads/2019/10/How-to-stand-for-elections\_.pdf (last accessed 17 March 2020). [↑](#footnote-ref-65)
66. Damian Collins and Amanda Sater, *Guide to becoming a Conservative Party Candidate*, Conservatives, https://www.conservatives.com/-/media/CCHQ\_Guide-to-becoming-a-Candidate.ashx (last accessed 17 March 2020). [↑](#footnote-ref-66)
67. Quinn, *supra* note 52, at 100-101. [↑](#footnote-ref-67)
68. Quinn, *supra* note 52, at 62. [↑](#footnote-ref-68)
69. Quinn, *supra* note 52, at 134. [↑](#footnote-ref-69)
70. See David J. Lanoue and Barbara Headrick, *Prime Ministers, Parties, and the Public: The Dynamics of Popularity in Great Britain,* 58 Pub. Opinion Q. 191, 191 (1994); see generally Shugart and Carey, *supra* note 12, at 2-4. Of course, some would point to the electoral college to argue the same of the U.S. See, e.g., Anthony J. Gaughan, *Ramshackle Federalism: American’s Archaic and Dysfunctional Presidential Election System*, 85 Fordham L. Rev. 1021, 1028 (2016); for an analysis of similar critiques and a defense, see Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L. J. 1237 (2012). But the electoral college, while iterating popular vote through the electoral college, is at least a function of popular vote; votes for Congresspersons are a distinct process. In the U.K., the only direct vote is for the individual district representative. [↑](#footnote-ref-70)
71. Heather Stewart et. al., *David Cameron resigns after U.K. votes to leave European Union*, The Guardian, 24 June 2016, available athttps://www.theguardian.com/politics/2016/jun/24/david-cameron-resigns-after-uk-votes-to-leave-european-union [↑](#footnote-ref-71)
72. *Theresa May resigns over Brexit: What happened?* BBC News, 24 May 2019, available at https://www.bbc.co.uk/news/uk-politics-48379730 (observing “squabbling MPs” were those who ultimately failed to lend her support). [↑](#footnote-ref-72)
73. Of course, such claims face their own challenges and complexities, even in the presidential system. See Robert A. Dahl, *Myth of the Presidential Mandate*, 104 Pol. Sci. Q. 355, 362, 368 (both observing how the realities of elections impair the ability to claim a mandate, and observing how early in the history of the American republic the election process became democratized). [↑](#footnote-ref-73)
74. While third party candidates face a challenge due to both principles of electoral choice (eg, Duverger’s Law) and the allocation of votes, see Paul R. Abramson et. al., *Third-Party and Independent Candidates in American Politics: Wallace, Anderson, and Perot*, 110 Pol. S. Q. 349 (1995), they can still impact electoral outcomes. See Daniel J. Lee, *Anticipating Entry: Major Party Positioning and Third Party Threat*, 65 Pol. R. Q. 138 (2012). [↑](#footnote-ref-74)
75. Committee on Standards in Public Life (the Nolan Committee), *First Report*, Cmnd. 2850-51, vol. 1. London: Her Majesty's Stationery Office (1994). The idea that the U.K. has generally high standards for public servants is not a new one, even if concerns that there has been a decline are not altogether novel. See Alan Doig, *From Lynskey to Nolan: The Corruption of British Politics and Public Service?* 23 J. L. 7 Soc’y 36 (1996); Andrew Blick and Peter Hennessy, *Good Chaps No More? Safeguarding the Constitution in Stressful Times,* The Constitution Society (2019). Cf. Lessig, *supra* note 56, 101-124 (describing the history and effects of lobbying in U.S. politics); Dennis F. Thompson, Ethics in Congress 58 (1995). The idea that politics is a fundamentally self-interested exercise of vote and power maximization is also present in the U.S. literature more generally, with the most prominent figures likely being Anthony Downs, An Economic Theory of Democracy (1957) and Robert Dahl, Preface to Democratic Theory 67-71 (2006). [↑](#footnote-ref-75)
76. At the systemic level, this truth is captured by Michael Johnston, Syndromes of Corruption (2005), who classifies the U.K. as “relatively free of corruption”, 33, but the U.S. as an “influence market”, 63-65. One theory for why this difference has developed involves the politicization of the bureaucracy, see Eva Etzioni-Halevy, *Exchanging Material Benefits for Political Support: A Comparative Analysis*, in Political Corruption: Concepts & Contexts 233-250 (Arnold J. Heidenheimer & Michael Johnston eds., 2002). [↑](#footnote-ref-76)
77. See Thompson, *supra* note 74, 84-88 (1995). [↑](#footnote-ref-77)
78. See Thompson, *supra* note 74, at 65-72. [↑](#footnote-ref-78)
79. See Doig, *supra* note 74; Blick and Hennessy, *supra* note 74 at 17 (speculating that Brexit may have led to a breakdown in conduct conforming to constitutional expectations). *Miller II* at 57-60 suggests, if does not conclude, that Johnson’s attempt to execute prorogation was an example of such self-interested conduct. [↑](#footnote-ref-79)
80. Lessig’s complaint about campaign finance is precisely that it prevents this type of control. Lessig, *supra* note 56, at 184. [↑](#footnote-ref-80)
81. Ari Melber, *Forgiving Campaign Loans, Trump Fulfills His Pledge to Self-Fund Primary*, NBC News, 21 July 2016, available athttps://www.nbcnews.com/politics/2016-election/forgiving-campaign-loans-trump-fulfills-his-pledge-self-fund-primary-n613536. This allowed Trump to at least claim to circumvent the problem with campaign finance asserted by Lessig, *supra* note 56, at 245 of being dependent on donors rather than the electorate’s approach. [↑](#footnote-ref-81)
82. The most relevant case to Trump’s own ability to self-fund is *Davis v. FEC*, 554 U.S. 724 (2008), which struck down the so-called ‘millionaire’s amendment’ of the Bipartisan Campaign Reform Act; though the logic of this decision can be traced back to the reasoning of *Bellotti*. However, unlike *Bellotti* (which had the progressives Brennan and Marshall and the conservative Rehnquist both dissent, albeit for different reasons), the composition of the bench in *Davis* already reflected the partisan split that would become especially vivid with *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 572 U.S. 185 (2014). [↑](#footnote-ref-82)
83. For seminal overviews, see Michael S. Kang, *The End of Campaign Finance Law,* 98 Va. L. Rev. 1, 6 (2012); Eisler, *supra* note 24. [↑](#footnote-ref-83)
84. *McConnell v. FEC*, 540 U.S. 93, 258–59 (Scalia, J., dissenting). [↑](#footnote-ref-84)
85. These are summarized in John Stuart Mill, On Liberty and Other Essays 59 (OUP 1998). [↑](#footnote-ref-85)
86. See Eisler, *supra* note 24, at 24. [↑](#footnote-ref-86)
87. Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 Mich. L. Rev. 581, 607 (2011). [↑](#footnote-ref-87)
88. In *Bluman v. FEC*, 565 U.S. 1104 (2012) the Supreme Court summarily affirmed a district court decision, 800 F. Supp. 2d 281 (D. D.C. 2011), that upheld the federal restriction on foreign donations to campaigns. Reconciling *Bluman* with the logic of *Citizens United* has raised significant theoretical and doctrinal difficulties, see Ringhand, *supra* note 34, at [41-42]. [↑](#footnote-ref-88)
89. Cf. the pessimistic vision of electoral capacity articulated by Christopher H. Achen & Larry M. Bartels, Democracy for Realists: Why Elections Do Not Produce Responsive Governance (2016). [↑](#footnote-ref-89)
90. See, e.g., Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1067 (1996). [↑](#footnote-ref-90)
91. The systems have adopted different perspectives, but struggled with similar challenges. See generally Ringhand, *supra* note 34. [↑](#footnote-ref-91)
92. Most relevantly, the Representation of the People Act (RPA) 1983 (ss 72-115), the Bribery Act 2010, the Political Parties, Elections and Referendums Act (PPERA) 2000, and the Communications Act 2003. [↑](#footnote-ref-92)
93. Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-55 (Supp. 2002)). The purpose was to grant the government “complete control over and disclosure of campaign contributions and expenditures in campaigns for Federal elective office”. S. Rep. No. 93-689, at 1. For a more extensive discussion, see Jacob Eisler, *The Unspoken Institutional Battle over Anticorruption:* Citizens United, *Honest Services, and the Legislative-Judicial Divide*, 9 First. Amend. L. Rev. 363, 388-393 (2011). [↑](#footnote-ref-93)
94. The most relevant cases are *R (Animal Defenders) v. Secretary of State* [2008] UKHL 15 (accepting a content restriction on an advertisement on the grounds it comprises a political advertisement, even though, to use the U.S. diction, it is undeniably an issue advertisement); *R (Prolife Alliance) v. BBC* [2004] 1 AC 185 (accepting an offensive materials restriction on a political advert); cf. *Bowman v. United Kingdom* [1998] 26 EHRR 1 (in which the European Court of Human Rights found a violation in the low limit available to self-fund under the RPA 1983).

Scholars have been broadly critical of the U.K. jurisprudence. See, e.g., Eric Barendt, Freedom of Speech 46-47 (2005); Conor Gearty, Civil Liberties 73-74 (2007). [↑](#footnote-ref-94)
95. *Animal Defenders* at 30. [↑](#footnote-ref-95)
96. Mark Elliot, *The Supreme Court’s Judgment in* Miller*: In Search of Constitutional Principle*, 76 Cambridge L.J. 257, 282 (2017). [↑](#footnote-ref-96)
97. The exception is of course the executive prerogative, but *Miller II* is merely the last in a long line of cases to show its limits. [↑](#footnote-ref-97)
98. Marty Cohen et al., The Party Decides 13, 187 (2008) (“invisible primar[ies]” of party elites play a significant role in in selecting candidates). There seems to have been a correlation with Trump’s victory and some scholars bemoaning the weakened state of party. See, e.g., Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeovers of Our Hollowed-Out Political Parties*, 54 Hous. L. Rev. 845, 879 (2017) [↑](#footnote-ref-98)
99. Joseph Schumpeter, Capitalism, Socialism, and Democracy 269. [↑](#footnote-ref-99)
100. Fabrizio Gilardi, *Transnational diffusion: Norms, ideas, and policies*, in Handbook of International Relations, 453–477 (Walter Carlsnaes, Thomas Risse and Beth Simmons eds., 2012). [↑](#footnote-ref-100)
101. This is not to say that the the application of these structures do not come with their own complexities; the question of if an independent counsel that investigates the executive violates separation of power has been contested, most notably in *Morrison v. Olson*, 487 U.S. 654 (1988). For further analysis, see William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 Geo. Wash. L. Rev. 474 (1989). [↑](#footnote-ref-101)
102. Audrey Carlsen et. al. *How Every Lawmaker Has Reacted to Comey’s Firing So Far*, New York Times, 10 October 2017, available at *https://www.nytimes.com/interactive/2017/05/10/us/politics/congress-statements-comey.html* . That the legislature could apply pressure to effect a seemingly executive function might be seen as part of the separation of powers setup itself. See Katy J. Harriger, *Separation of Powers and the Politics of Independent Counsels*, 109 Pol. Sci. Q. 261, 265 (1994). [↑](#footnote-ref-102)
103. “Grounds for appointing a Special Counsel”, 28 CFR § 600.1. [↑](#footnote-ref-103)
104. Note on the role of the Attorney General appointing the Independent Counsel, or recusing himself; what happened with Watergate and Nixon (Saturday Night Massacre) [↑](#footnote-ref-104)
105. Defty, *supra* note 37, at 22. [↑](#footnote-ref-105)
106. Defty, *supra* note 37, at 29. [↑](#footnote-ref-106)
107. Defty, *supra* note 37, at 31. [↑](#footnote-ref-107)
108. Mattha Busby, *Dominic Grieve calls for release of report on Russian meddling*, The Guardian, 2 Nov 2019, available at https://www.theguardian.com/politics/2019/nov/02/dominic-grieve-calls-for-release-of-report-on-russian-meddling-in-uk . [↑](#footnote-ref-108)
109. See *supra* note 26. [↑](#footnote-ref-109)
110. See generally Tom Ginsburg and Aziz K. Huq, How to Save a Constitutional Democracy 10-11 (identifying the meaningful presence of free and fair elections, expressive rights, and rule of law as the minimum requirements of a functional liberal democracy). [↑](#footnote-ref-110)
111. See Burt Monroe, Eric Plutzer, and Michael Berkman, *Kaepernick, Kavanaugh, and Mueller join Trump as*

*most polarizing figures in run-up to the midterm elections*, Mood of the Nation Pool, McCourtney Institute for Democracy, The Pennsylvania State University, *available at https://democracy.psu.edu/research/mood-of-the-nation-poll-1/poll-report-archive/additional-resources/Polarizing\_Figures\_Poll\_Report.pdf*. [↑](#footnote-ref-111)
112. This may be understood as a family relation of Waldron’s observation about rights – that judicial enforcement of rights can only operate in a society where there is a broad commitment to them. Much as courts cannot protect rights in the absence of normative commitment to them, investigations will likely not be sufficient to ‘save’ democracy where citizens are passively tolerant of foreign meddling. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1364-5, 1378 (2006). [↑](#footnote-ref-112)