

## INTRODUCTION TO THE SYMPOSIUM ON THOMAS FRANCK, “EMERGING RIGHT TO DEMOCRATIC GOVERNANCE” AT 25

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It is a rare piece of scholarship that merits a retrospective twenty-five years later, but Thomas Franck’s 1992 article *The Emerging Right to Democratic Governance* affirmatively demands one.<sup>1</sup> Franck’s claim, that democracy was itself a right, built on themes that he had been exploring for many years, and his timing was excellent. Coming at the end of the Cold War, with its mood of high optimism, the article fit the era perfectly. Bundling a provocative claim with a positive prediction about the future trajectory of the law, the piece was read widely in its time and thereafter, prompting at least two [previous rounds](#) of retrospection, and thousands of citations.<sup>2</sup>

The world has changed a bit since the early 1990s. The “[Third Wave](#)” of democracy, so celebrated at the time, peaked in roughly 2006.<sup>3</sup> Since that year, political scientists who track democracy have noted that the number of democracies has declined. Furthermore, within countries, the [quality of democracy](#) has slipped, with democratic “declines” outnumbering “advances” in each year.<sup>4</sup> Indeed, according to a 2017 Economist Intelligence Unit [report](#), more countries in the world are categorized as autocracies or “hybrid regimes” than are categorized as having some form of democracy.<sup>5</sup> The “Third Wave,” it seems, is receding.<sup>6</sup>

Our era of democratic backsliding invites a retrospective assessment of the “right” to democratic governance. Did Franck’s “emerging” right ever actually crystalize? If so, what precisely is its scope? How has it been enforced? These are the questions that our diverse array of authors tackle in this symposium. In this introduction, I summarize Franck’s argument and introduce the contributions that follow.

### *Franck’s Claims*

Franck first noted the basic fact that, at the time he was writing, the number of governments that relied on the consent of their people had greatly expanded. This spread reflected a conception of democratization as a form of state practice. Franck noted that the spread was accompanied by normative activity at the international level to defend and advance democracy. For example, the 1991 coup in Haiti prompted condemnation from both the Organization of American States and the United Nations General Assembly.<sup>7</sup> Along with increased international

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<sup>1</sup> Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).

<sup>2</sup> [DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW](#) (Gregory H. Fox & Brad Roth eds., 2000); Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22 EUR. J. INT’L L. 507 (2011).

<sup>3</sup> SAMUEL HUNTINGTON, [THE THIRD WAVE: DEMOCRATIZATION IN THE LATE 20TH CENTURY](#) (1991); Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. DEMOC. 141 (2015).

<sup>4</sup> [Freedom in the World: Democracy in Crisis](#), FREEDOM HOUSE (2018).

<sup>5</sup> Economist Intelligence Unit, [Democracy Index 2017](#), ECONOMIST.

<sup>6</sup> Diamond, *supra note 3*.

<sup>7</sup> Franck, *supra note 1*, at 47.

support for election monitoring, these developments suggested to Franck that international law was heading toward a requirement of government based on the consent of the governed.

Franck grounded his right to democratic governance on three separate pillars: the right to self-determination, which dated from the Wilsonian era; rights to freedom of expression and association, embodied in the postwar human rights architecture; and rights to political participation through elections, which he saw being implemented at the time of his writing. Noting that these three pillars emerged in different eras, he argued that they reinforced each other and intertwined to create a new entitlement to democratic governance. Franck structured his article by tracing the genealogy of each prong in international legal texts, regional norms, and the practice of courts and treaty bodies. In doing so, Franck drew on the framework he had developed [in other work](#) on international legal legitimacy, asking whether this emerging entitlement had requisite qualities he called pedigree, determinacy, coherence, and adherence.<sup>8</sup> While he found that many of these aspects were present, he noted that the *coherence* of the new right, in terms of regular practice that fit into existing international norms, needed further development before one could say that the right had fully emerged.<sup>9</sup> “Both textually and in practice,” the article concluded, “the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance. The task is to perfect what has been so wondrously begun.”<sup>10</sup>

### *Assessing Franck*

Our symposium begins with a contribution from [Gregory Fox](#) and [Brad Roth](#), well-known to scholars in this area as the co-editors of the 2000 volume, *Democratic Governance and International Law*. Featuring twenty different essays from a wide range of theoretical perspectives, that collection was a rare instance of an edited volume that came to define a field. It also, it is worth noting, provided a welcome example of what we might call democratic deliberation in scholarship, since Fox and Roth had different positions on the right to democracy. [Fox](#) was more favorable, as his work had carefully traced the development of rights to political participation.<sup>11</sup> He had also examined, [with Georg Nolte](#), the limits on extreme and intolerant political parties imposed by advocates of “militant democracy.”<sup>12</sup> Fox has defended a relatively robust international right to democratic governance, one that incorporates international restrictions on undemocratic parties. [Roth](#), on the other hand, has consistently defended the international arena as one of ideological pluralism, in which a right to democracy could be destabilizing, and in which societies ought to be free to subordinate the democratic entitlement to other collective goals.<sup>13</sup>

In their contribution here, the two scholars join forces again to reflect on the contributions of Franck’s article, drawing attention to the fact that it is seen as a central contribution to post-Cold War triumphalism.<sup>14</sup> They defend Franck against the charge of justifying intervention on behalf of democracy, but also note that Franck’s conception of democracy is relatively underdeveloped.

Several of our other contributors make this point as well and offer alternative views as to what the democratic entitlement ought to entail. [Roberto Gargarella](#), the eminent constitutional scholar from Argentina, argues for a more deliberative conception of democracy, in which collective dialogue and discussion are privileged over mere

<sup>8</sup> THOMAS M. FRANCK, [THE POWER OF LEGITIMACY AMONG NATIONS](#) 19 (1990).

<sup>9</sup> Franck, [supra note 1](#), at 91.

<sup>10</sup> *Id.*

<sup>11</sup> Gregory H. Fox, [The Right to Political Participation in International Law](#), 17 YALE J. INT’L L. (1992).

<sup>12</sup> Gregory H. Fox & Georg Nolte, [Intolerant Democracies](#), 36 HARV. INT’L L.J. 1 (1995).

<sup>13</sup> BRAD ROTH, [SOVEREIGN EQUALITY AND MORAL DISAGREEMENT](#) (2011).

<sup>14</sup> Gregory H. Fox & Brad Roth, [The Dual Lives of “The Emerging Right to Democratic Governance”](#), 112 AJIL UNBOUND 67 (2018).

majority rule or elections.<sup>15</sup> His view is that international actors should be especially deferential to those decisions reached after extensive deliberation. He provides an example in which the Inter-American Court of Human Rights took precisely the opposite tack, suggesting that a right to democracy is imperfectly realized at best, and he implies that deliberation is undermined in such cases.

[Bojan Bugarič](#), of the University of Ljubljana in Slovenia, focuses on what a right to democracy might mean in an era of populism and democratic backsliding.<sup>16</sup> As Bugarič notes, populism is on the rise around the world, but is driven by rhetorical demands for *more* democracy. Bugarič examines the failure of European institutions to effectively discipline the recent rise of populist leaders in Poland and Hungary. Under a thin view of democracy that emphasizes the fact of elections, these countries remain democratic, but they are not liberal. Perhaps Franck's "right" is simultaneously too thin, since it emphasizes elections, and too robust, in that illiberal forms of democracy that might meet the minimalist threshold are now on offer. At the same time, the fact that illiberal regimes seek to clothe their repression in the language and institutions of democracy may suggest that there is a consensus on the form of democracy, if not the substance.

The problem of illiberal political parties was a central part of the original debate that emerged in response to Franck's piece. As noted above, Gregory Fox and Georg Nolte emphasized the need to limit the participation of such parties in democracies.<sup>17</sup> This position is echoed in the contribution of [Khalifa A. Alfadhel](#) of the National Institution for Human Rights in Bahrain, whose approach is informed by the failures of the Arab Spring.<sup>18</sup> Like the others in the symposium, he calls for a richer conception of democracy. Alfadhel focuses on what he calls an instrumental conception of democracy, which views democracy not as an end but as a means for advancing other (not fully articulated) rights and entitlements. To compete in the political arena, he suggests, parties have to accept this thicker notion, and the international community has a role to play that goes beyond mere election monitoring.

[Dobrochna Bach-Golecka](#), from the University of Warsaw, also argues for a richer, more substantive view of democracy.<sup>19</sup> Bach-Golecka's preferred conception is what she calls good governance. She sees this as embodying both process and substance, especially human rights, but also calls for a feminist ethics to be incorporated into the project. Like Alfadhel, she incorporates rights into the basic structure of democracy.

As we can see, each of the authors has a slightly different angle on Franck's thesis, but all agree that it relies on an underspecified conception of democracy. Further, the authors differ in their views as to the obligations of the international community to effectively support the democratic entitlement. These range from fairly concrete proposals for democracy education, as put forward by Alfadhel, to a more amorphous ethics of care promoted by Bach-Golecka, to the restatement of the anti-intervention norm by Fox and Roth. The failure of Europe to respond effectively to democratic backsliding in its own territory, discussed by Bugarič, suggests that the region's constitutional architecture was not designed for an era of backsliding. As Fox and Roth note, some regional organizations in other parts of the world have done a bit better.<sup>20</sup> What is clear is that the machinery emphasized by Franck, namely election monitoring, is unlikely to effectively address the challenges to democracy today. While his particular proposals were only a start, it is clear that Franck's central question is still as relevant today as it was twenty-five years ago: "The question is not whether democracy has swept the boards, but whether global society is ready for an era in which *only* democracy and the rule of law will be capable of validating governance."<sup>21</sup>

<sup>15</sup> Roberto Gargarella, [Democracy's Demands](#), 112 AJIL UNBOUND 73 (2018).

<sup>16</sup> Bojan Bugarič, [The Right to Democracy in a Populist Era](#), 112 AJIL UNBOUND 79 (2018).

<sup>17</sup> Fox & Nolte, [supra note 12](#).

<sup>18</sup> Khalifa A. Alfadhel, [Toward an Instrumental Right to Democracy](#), 112 AJIL UNBOUND 84 (2018).

<sup>19</sup> Dobrochna Bach-Golecka, [The Emerging Right to Good Governance](#), 112 AJIL UNBOUND 89 (2018).

<sup>20</sup> Fox & Roth, [supra note 14](#), at 67.

<sup>21</sup> Franck, [supra note 1](#), at 49.