

# STRATEGIC GLOBALIZATION: INTERNATIONAL LAW AS AN EXTENSION OF DOMESTIC POLITICAL CONFLICT

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## INTRODUCTION

International law binds nation-states, but it is usually politicians who make the crucial decision whether to adopt or enforce international legal commitments. Thus, contrary to conventional wisdom, the logic and efficacy of international law should not be judged exclusively by the elevated yardstick of global cooperation or objective state interest.<sup>1</sup> Rather, support

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<sup>1</sup> For instance, a core claim of the liberal institutionalist school of thought in international relations is that international agreements provide mechanisms for achieving mutually beneficial cooperation

and opposition to international law should also be judged by another compelling yardstick: the desire of politicians to retain power and advance their partisan policy preferences. At some level, both international agreements and customary international law may require politicians to make concessions that restructure the domestic institutional or policy landscape. Sometimes, but not always, such concessions may alter the political leverage of one domestic group in favor of another. Since partisan prospects for staying in power and advancing policy preferences may be affected by international legal commitments, we may anticipate that support for international law will vary across both parties and electoral cycles.

Unfortunately, we still know very little about when or how domestic partisan groups make the adoption and enforcement of international law more likely. This problem is especially pronounced in our analysis of democratic regimes. Though there is now a growing academic consensus that democratic regimes are more likely than their nondemocratic counterparts to engage in international cooperation,<sup>2</sup> there is little analysis of whether the propensity toward embracing international law among such democracies varies across right-leaning and left-leaning governments. To be sure, there is a rich social science literature that explores how interest groups influence international policy by lobbying political officials, but this literature does not usually analyze how this interest group dynamic interacts with domestic partisan politics.<sup>3</sup> Moreover, much of the debate usually focuses on the preferences of domestic interest groups for specific policy outcomes rather than efforts to promote a political party's ideological or electoral fortunes. Even when the role of parties in framing international legal issues is acknowledged, it is usually treated as an exception to the conventional wisdom that politics "stop at the water's edge."<sup>4</sup>

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among nation-states. See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984). This institutionalist approach has been quite influential in international law scholarship attempting to explain why states bind themselves to international agreements. See JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335 (1989); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 *YALE J. INT'L L.* 1 (1999); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CALIF. L. REV.* 1823 (2002); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VA. J. INT'L L.* 1 (2002); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 *AM. J. INT'L L.* 205 (1993).

<sup>2</sup> See Bruce Bueno de Mesquita et al., *An Institutional Explanation of the Democratic Peace*, 93 *AM. POL. SCI. REV.* 791 (1999); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs* (pts. 1 & 2), 12 *PHIL. & PUB. AFF.* 205, 323 (1983); Edward D. Mansfield et al., *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 *INT'L ORG.* 477 (2002).

<sup>3</sup> See *infra* notes 25–35 and accompanying text.

<sup>4</sup> See Joanne Gowa, *Politics at the Water's Edge: Parties, Voters, and the Use of Force Abroad*, 52 *INT'L ORG.* 307, 307 (1998) (finding no effect of the partisan composition of government on the propensity of the United States to use force from 1870 to 1992).

This Article advances a different perspective: that political parties—or partisan elites—will often embrace international legal commitments as a vehicle to overcome domestic obstacles to their policy and electoral objectives. In this picture, an incumbent regime may strategically use international law to extend the scope of partisan conflict across borders in order to isolate the domestic political opposition and increase the influence of foreign groups or states that may be more sympathetic to the regime's political objectives. Alternatively, such a regime may support international legal commitments that it knows are likely to provoke intracoalitional conflict within the political opposition. But just as a governing party may use international law to advance its domestic political objectives, the political opposition may exploit domestic institutions to thwart international legal commitments that strengthen the ruling regime and weaken its own position. Thus, rather than serve as a structure of mutually beneficial cooperation, *international law may often devolve into a zero-sum dynamic that simply reflects an extension of domestic political conflict by other means.*

This perspective assumes that political parties build reputations for addressing certain issues better than others and may seek to use international legal commitments to bolster those issues against the vagaries of domestic politics. In other words, partisan officials may attempt to use international commitments to narrow the scope of future policy to their advantage and thus weaken the ability of a future hostile regime to pursue its preferred policy or electoral objectives. For instance, a right-leaning government may support an international trade agreement that reduces tariff barriers not only because of policy preferences but also because such an agreement is likely to undercut the ability of a future left-leaning government to reward its loyal trade union constituencies. Conversely, since left-leaning governments draw their base of support from labor and minority groups, such governments may be more open to negotiating and ratifying human rights agreements because these agreements are likely to reinforce the power of their loyal constituencies and weaken the power of right-leaning domestic forces opposed to progressive social and economic reform.

By highlighting the fragmented and issue-specific context in which partisan politicians strategically use international law, this Article challenges the commonly held intuition that parties of the left—or left-leaning elites—will tend to favor more international commitments and that parties of the right will tend to favor fewer international commitments.<sup>5</sup> On the

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<sup>5</sup> See DAVID HALLORAN LUMSDAINE, MORAL VISION IN INTERNATIONAL POLITICS: THE FOREIGN AID REGIME, 1949–1989, at 156–57 (1993) (describing left-leaning groups' preference for foreign aid and right-leaning groups' opposition); Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI. J. INT'L L. 291, 297–308 (2000) (discussing conservative criticism of multilateralism within the context of the European Union). Within the legal academy, the growing division between proponents and skeptics of a more robust international legal framework is usually framed in philosophical and not partisan terms. See, e.g., José E. Alvarez, *Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'?*, 24 AM. U. INT'L L. REV. 811, 812 (2009) ("Today's legal academy, par-

contrary, the politicians who accept or oppose international legal constraints on their authority come from all sides of the political spectrum, and they often do so because of the perceived political threats or opportunities arising from such constraints. And although international legal commitments are often framed as institutional arrangements rather than as prescribed policy outcomes, partisan politicians tend to rank these commitments based upon their expectations regarding future policy outcomes. Such expectations may depend on partisan beliefs regarding the likely preferences of other states that are party to the international commitment (or the elites within those states) as well as the preferences of actors who will ultimately have the authority to enforce or interpret such commitments.

Nevertheless, a puzzle still remains. If an incumbent government signs an international commitment that advances its partisan objectives, how can it be sure that the political opposition will honor such a commitment once it eventually comes into power? Put differently, are international commitments that run afoul of the partisan preferences of a successor regime electorally sustainable? The short answer is that they are often not; indeed, international commitments enacted by one partisan coalition are often subsequently sabotaged or undermined by hostile successor governments.<sup>6</sup> But does this mean that international agreements that yield significant distributive partisan consequences are invariably doomed to a short political shelf-life? Not necessarily. The logic of partisan entrenchment suggests that the governments that enact partisan-friendly institutional arrangements will attempt to take measures that reduce the chance of defection by their successors. One such measure, which has been discussed extensively in the social science literature on domestic policy entrenchment, relies on creating political feedback mechanisms that empower a broader coalition of interest groups and powerful elites, who then become vested in protecting the newly created institutional arrangement.<sup>7</sup>

But although such reinforcing feedback mechanisms are undoubtedly important in the international context, they are hardly sufficient. Because international legal commitments are often enacted and implemented in institutional environments that are fragile and highly contested, they are particularly vulnerable to reversal by successor regimes that are hurt by such

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ticularly in the United States, reflects a divide between traditional defenders of international legalism and revisionist upstarts who question the efficacy, or at the very least the democratic legitimacy, of both global treaties negotiated within multilateral institutions and the rules of custom that are backed by the international community.”).

<sup>6</sup> See *infra* notes 70–73 and accompanying text.

<sup>7</sup> See, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 685–91 (2011) (theorizing that political feedback mechanisms encourage commitment to the Constitution); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 262 (2000) (explaining why political actors create institutional constraints on their future choices). For a discussion of how the psychological effect of political endorsement to interest groups also helps entrenchment, see Clayton P. Gillette, *Lock-in Effects in Law and Norms*, 78 B.U. L. REV. 813, 827–28 (1998).

commitments even when those commitments may also benefit a broad coalition of international and domestic interests. More importantly, if a successor government seeks to subvert an unfavorable international legal commitment, it does not necessarily have to exit the commitment formally; it may simply refuse to implement the provisions rigorously. Thus, creating barriers to prevent a state from exiting an international commitment is not enough to guarantee its future efficacy.

On the contrary, for a distributive international legal commitment to be sustainable across multiple electoral periods, it usually has to generate policy outcomes that benefit some politically salient members of the nonenacting coalition. Thus, insofar as a forward-looking incumbent government wants to increase the durability of an international commitment that advances its partisan objectives, it has an incentive to include provisions in the commitment that provide side payments to some members of the political opposition even if such benefits would not be enough to encourage the opposition to seek to adopt the commitment on its own.<sup>8</sup> Such defection-proofing measures, which entail bundling together a diffuse range of issues in a specific international commitment, ensure that the nonenacting coalition is not likely to view the commitment purely as an arrangement that confers one-sided benefits on its political adversaries because all political actors must take the good along with the bad.

Some caveats are in order. This Article is not claiming that domestic support or opposition to international law in the United States is motivated entirely (or even mostly) by redistributive partisan objectives. Indeed, domestic groups—including partisan elites—may oppose or support an international agreement or a customary international law norm because of principled policy preferences largely detached from partisan considerations.<sup>9</sup> Nor is this Article claiming that all international agreements or norms of customary international law have redistributive or zero-sum consequences in which certain domestic groups win and others lose.<sup>10</sup> This Ar-

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<sup>8</sup> There is a literature in political science that discusses the role of the strategic side payments to domestic groups in the context of negotiating international agreements, but that literature tends to focus on domestic factional conflict defined broadly rather than the specific context of partisan conflict between an incumbent regime and the political opposition. See, e.g., Christina L. Davis, *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 AM. POL. SCI. REV. 153, 153 (2004) (arguing that issue linkages in international trade agreements can “counteract[] domestic obstacles to liberalization by broadening the negotiation stakes”); Frederick W. Mayer, *Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side-Payments*, 46 INT’L ORG. 793 (1992) (analyzing the capacity of domestic factions to make side payments to one another in the context of an international negotiation and demonstrating that there is a strategic dimension to these side payments).

<sup>9</sup> For instance, domestic groups may be concerned about enhancing democratic accountability, safeguarding against the centralization of governmental authority, resolving global cooperative or coordination dilemmas, or increasing global economic welfare.

<sup>10</sup> Some international agreements or norms of customary international law may create mutual gains that make all domestic groups better off. See *infra* Part II. Or more plausibly, certain international legal

ticle simply focuses on instrumental partisan motivations in the context of international legal commitments that have distributive consequences because these partisan motivations have been largely ignored or sidelined in the literature.

This Article proceeds as follows. Part I critically evaluates the extant literature on the domestic sources of international law preferences. Part II proposes a theoretical framework for understanding partisan support and opposition to international law. This Part suggests that, contrary to conventional wisdom, international commitments and institutions do not always simply operate as structures for achieving global cooperative outcomes but sometimes operate as structures that enable competing partisan groups to advance their preferred policy and electoral objectives. Part II also explores the calculus of competing partisan groups and identifies the domestic institutional conditions that influence when these groups are likely to support or oppose international law.

Part III uses two case studies from contemporary American history—the controversies surrounding the efforts to ratify human rights treaties in the 1950s and the North American Free Trade Agreement (NAFTA) agreement in 1993—to shed light on how distributive partisan politics can help spawn international law and limit its efficacy and scope.

In the first case, strong opposition by Republicans and conservative Southern Democrats helped doom the ratification of human rights agreements favored by President Truman, a Democrat, and other progressives in the early years after the creation of the United Nations. These draft human rights treaties failed in part because their progressive Democratic supporters did not have much leeway to structure the covenants in a way that would co-opt Republican and Southern Democratic opposition through side payments. Put differently, the veil of ignorance behind these early U.N. human rights treaties was sufficiently thin that key Republicans and conservative Southern Democrats realized that they would become unambiguous losers if such human rights agreements were ratified and became domestically binding in the United States. Eventually, conservative opponents of these post-war treaties in the Senate sought to amend the Constitution in a manner that would make treaty ratification more difficult. By contrast, opposition by Democratic labor constituencies to the adoption of NAFTA in 1993 was partly muted not only by the inclusion of side agreements that benefited other Democratic constituencies but also by the growing probusiness wing of the party. The Republicans, on the other hand, tried to exploit the intrapartisan conflict within the Democratic Party over NAFTA for electoral advantage.

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agreements may help some and hurt others but nonetheless expand the size of the pie. In such cases, the winners may be able to compensate the losers through negotiation and thus reach a Pareto frontier in which everyone is better off.

Part IV critically considers an alternative account of partisan differences over international law that may reflect ideological disagreements over the erosion of sovereignty that fall along a left–right spectrum. The Conclusion briefly discusses some normative and policy implications of the partisan framework for contemporary international law debates.

## I. LITERATURE OVERVIEW

Domestic-level explanations of why states enter into international legal commitments can be broken down loosely into three categories: state-centered, society-centered, and state–society relations approaches.<sup>11</sup> One prominent variant of the state-centered approach, liberal institutionalism, assumes that states enter into international agreements to resolve cooperation and coordination dilemmas inherent in a system of international anarchy.<sup>12</sup> More generally, this approach assumes that international organizations and treaty regimes represent structures of cooperation in which all participants realize mutual gains.<sup>13</sup> Yet a new generation of political science research has called into question some of the basic assumptions of the liberal institutionalist approach. First, some scholars have questioned the notion that multilateral agreements and international institutions tend to represent structures of cooperation that benefit all participants rather than structures of power.<sup>14</sup> For instance, Lloyd Gruber has argued that certain states may join international regimes or institutions even when they expect to be worse off because certain powerful countries have sufficient “go-it-alone” power that they can alter the status quo for less powerful states.<sup>15</sup> In this picture, once powerful states decide to band together to form a new institutional regime, such as an international trade organization, other less

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<sup>11</sup> See Andrew Moravcsik, *Introduction: Integrating International and Domestic Theories of International Bargaining*, in *DOUBLE-EDGED DIPLOMACY* 3, 5–6 (Peter B. Evans et al. eds., 1993). Another level of analysis, which is not discussed here, is that of international explanations that treat states as unitary actors responding to external forces and incentives. See *id.* This Article brackets any discussion of such international explanations not because they are irrelevant but because the focus of this Article is on exploring the domestic sources of state preferences in the international arena.

<sup>12</sup> See KEOHANE, *supra* note 1, at 7–10; Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 717, 730–31 (1995).

<sup>13</sup> Although states play a key role in the liberal institutionalist framework, they are often simply depicted as surrogates for societal preferences. See, e.g., Slaughter, *supra* note 12, at 728 (arguing that state behavior is determined “not by the international balance of power . . . but by the relationship between . . . social actors and the governments representing their interests, in varying degrees of completeness”).

<sup>14</sup> See LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2000); see also Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339 (2002) (arguing that although trade rounds have been launched through law-based bargaining, hard law is generated when a round is closed, and rounds have been closed through power-based bargaining in which the preferences of the United States and the European Community dominate).

<sup>15</sup> See GRUBER, *supra* note 14, at 9–10.

powerful states that oppose such a regime might be faced with a *fait accompli*. These less powerful states then face a choice between what they might view as an unfavorable option (acceding voluntarily to the new regime) and an even worse alternative (facing the costs of being excluded).<sup>16</sup> Second, and more broadly, scholars have also criticized the paradigm's failure to integrate sufficiently the role of domestic distributive politics into the analysis of state motivation at the international level.<sup>17</sup> Here, the argument is not that analyzing states as rational unitary actors is fundamentally defective but that disaggregating the state further into its societal components is sometimes necessary when international legal commitments have domestic distributive implications.<sup>18</sup>

Moving beyond the emphasis on state preferences, several new society-based explanations attempt to understand the evolution of legal norms through the forces that shape the identities and preferences of domestic actors within each state.<sup>19</sup> In these so-called constructivist or sociological accounts,<sup>20</sup> the preferences of such elites regarding specific international legal

<sup>16</sup> *See id.*

<sup>17</sup> For a summary of different approaches to international law as well as criticisms of each approach, see G. John Ikenberry et al., *Introduction: Approaches to Explaining American Foreign Economic Policy*, 42 INT'L ORG. 1 (1988). *See also* Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 502 (2004) ("By focusing primarily on cooperation, the current interdisciplinary approach neglects the domestic policy motivations for forming international agreements. This research agenda needs to be supplemented by an analysis of the domestic and distributional politics of international law.").

<sup>18</sup> For instance, some commentators have attempted to explain international behavior by integrating both domestic and international factors. *See, e.g.*, Nitsan Chorev, *A Fluid Divide: Domestic and International Factors in US Trade Policy Formation*, 14 REV. INT'L POL. ECON. 653 (2007); Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459 (2009) (arguing that domestic courts in liberal democracies can influence outcomes and processes at the international level when they exercise their jurisdiction extraterritorially).

<sup>19</sup> *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 639–46 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656–57 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995), and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practice: Introduction*, in *THE POWER OF HUMAN RIGHTS* 1, 3–5 (Thomas Risse et al. eds., 1999); *see also* Roger P. Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs*, 49 VA. J. INT'L L. 61 (2008) (exploring how Nobel Laureates have played an especially important role as preference-creators in the development of international legal norms). For a good discussion of norm diffusion in an international legal context, see Katerina Linos, *How Can International Organizations Shape National Welfare States?*, 40 COMP. LEGAL STUD. 547 (2007).

<sup>20</sup> Although constructivism is largely a positive theoretical framework that seeks to explain state behavior, it also has strong normative implications. Generally, constructivists tend to be more optimistic about the potential of using international law to achieve desirable policy objectives. As such, some scholars have described constructivism as a subset of a universalist approach to international law. *See* Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT'L L. 1, 1–2 (2007) ("The universalist theory holds that international law has an independent, exogenous [e]ffect on state behavior. Since States obey international law

commitments are rarely fixed and often evolve based on the activities of transnational activists or norm entrepreneurs who use acculturation or persuasion to secure acceptance of specific norms and legal commitments.<sup>21</sup> Thus, rather than take the preferences of individual decisionmakers as given, this approach argues that such decisionmakers will be particularly susceptible to emulating behavioral patterns in others that seem modern or sophisticated.

Although constructivism helps illuminate why certain domestic actors favor the spread of international laws or norms, it is nonetheless incomplete. First, the constructivist account does not sufficiently appreciate the possibility that politicians who are primarily motivated by electoral ambitions or narrow policy objectives may cloak their preferred international legal commitments in the high-minded language of norm diffusion or socialization.<sup>22</sup> Second, constructivists neglect the possibility that partisan ideological considerations may influence the ability of norm entrepreneurs to persuade or acculturate policy makers.<sup>23</sup> In other words, certain normative ideals, such as social and labor rights, may find more fertile ground for reception among certain domestic partisan groups than among others. And even when particular states agree to implement human rights ideals in the

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out of legal obligation, universalists tend to encourage the greater integration of [customary international law] into domestic legal regimes and the use of [customary international law] to improve human rights practices around the world.”)

<sup>21</sup> See Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*, 4 J. INT'L L. & INT'L REL. 151, 179 (2008) (“Several constructivists who elaborate on the notion of persuasion borrow from Habermas’ theory of communicative action. Rather than treating international talk as ‘cheap,’ it is posited that actors may be engaged in deliberation for the purpose of changing the minds of others.” (footnote omitted)). In contrast to persuasion, however, Goodman and Jinks describe a process of norm internalization by acculturation whereby actors mimic the beliefs and behavioral patterns of the surrounding culture. See Goodman & Jinks, *supra* note 19, at 638.

<sup>22</sup> For instance, as Ian Hurd has shown in his treatment of the U.N. sanctions regime against Libya, states can manipulate the legitimacy and norms associated with international institutions to their strategic advantage. See Ian Hurd, *The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003*, 59 INT'L ORG. 495 (2005). More recently, Jelena Subotić has also argued that warring ethnic factions in the former Yugoslavia were likely to invoke the rhetoric of international norms selectively in circumstances where it suited their ambitions to obtain power. See Jelena Subotić, *Hijacked Justice: Domestic Appropriation of International Norms* 34–38 (Human Rights & Human Welfare Working Paper Series, Working Paper No. 28, 2005), available at <http://www.du.edu/korbel/hrhw/workingpapers/2005/28-subotic-2005.pdf>.

<sup>23</sup> For instance, the constructivist framework does not necessarily account for why there would be variation in the internalization of international legal norms among different elite groups across and within democratic states. Indeed, the evidence of how international law norms influence political elites is decidedly mixed with certain studies showing some effect and others showing no effect at all. Compare Liesbet Hooghe, *Several Roads Lead to International Norms, but Few via International Socialization: A Case Study of the European Commission*, 59 INT'L ORG 861 (2005) (finding weak socialization effects), with Risse & Sikink, *supra* note 19, at 3–5 (finding a significant socialization effect).

abstract, it does not necessarily translate to any common understanding by competing partisan groups about what such ideals may mean in practice.<sup>24</sup>

A second society-based account emphasizes the role that domestic interest groups play in influencing international agreements by lobbying state officials. Perhaps nowhere is this approach more evident than in the arena of international trade, which presumably pits domestic groups seeking access to foreign markets against import-competing groups.<sup>25</sup> According to this account, the role of partisanship is somewhat inconsequential because politicians act as passive players who merely supply the trade policies demanded by the most politically influential domestic interest groups.<sup>26</sup> Beyond international trade, such accounts resonate in other circumstances where international agreements differentially affect the economic (or material) interests of various domestic constituencies.<sup>27</sup> In this picture, when

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<sup>24</sup> As a growing amount of literature in social psychology and cognition theory suggests, partisanship often plays a pervasive role in how individuals update their beliefs even when subject to shared experiences of political reality. See Brian J. Gaines et al., *Same Facts, Different Interpretations: Partisan Motivation and Opinion on Iraq*, 69 J. POL. 957 (2007) (observing that although surveyed respondents held similar and fairly accurate beliefs about facts regarding the Iraq war, interpretations of those facts varied across partisan groups in predictable ways); see also Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (describing an empirical study showing that factual beliefs are influenced by cultural identity).

<sup>25</sup> See Gene M. Grossman & Elhanan Helpman, *Electoral Competition and Special Interest Politics*, 63 REV. ECON. STUD. 265, 265 (1996) (stating theory of interactions between interest groups making campaign contributions and political parties setting policies); Alan O. Sykes, *Protectionism as a "Safe-guard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 281–82 (1991) (explaining the existence of escape clauses through interest group theory); see also Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT'L L. 1, 4 (2010) ("[I]nternational cooperation is more likely to emerge when the interests of powerful states align and when concentrated and influential interest groups within those states support the agreement. These factors are often used to explain why international cooperation in a given instance has been successful. Without their presence, the prospects for a WTO agreement—or any other international treaty—are dim."); John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 546–48 (2000) (discussing the role of interest groups in hampering and encouraging international trade); Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 223 (2005) (discussing the role of interest groups in enhancing WTO enforcement). Indeed, some scholars have also argued that interest groups play a key role in government decisions to initiate litigation before the WTO. See, e.g., GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003).

<sup>26</sup> See Helen V. Milner & Benjamin Judkins, *Partisanship, Trade Policy, and Globalization: Is There a Left-Right Divide on Trade Policy?*, 48 INT'L STUD. Q. 95, 99 (2004) (discussing the absence of partisan factors in the interest group account of international trade policymaking).

<sup>27</sup> See Quan Li & Dale L. Smith, *Testing Alternative Explanations of Capital Control Liberalization*, 19 REV. POL'Y RES. 28 (2005). There is also a related literature that suggests that powerful countries will use international economic institutions, such as the International Monetary Fund, to promote the broad material interests of their domestic commercial constituencies. See, e.g., Thomas Oatley & Jason Yackee, *American Interests and IMF Lending*, 41 INT'L POL. 415 (2004). Similarly, there are commentators who suggest that investors are taking advantage of a growing global market for securities regulation at the expense of national securities regulators, such as the Securities and Exchange Commis-

the material benefits are concentrated and the costs diffuse, politically sustainable agreements are more likely.<sup>28</sup> One prominent version of this account explains the proliferation of international trade agreements in the twentieth century as a result of historical forces that increased the political salience of export groups seeking market access relative to import-competing groups.<sup>29</sup>

Another variant of constituency-driven explanations emphasizes the use of international legal agreements as precommitment devices, used to lock in democracy domestically.<sup>30</sup> According to this account, elites or domestic interests who negotiate democratic transitions worry that democratic benefits bargained for today may not endure because they cannot credibly commit future politicians to uphold the deal. To overcome this commitment problem, these elites attempt to entrench such domestic bargains in international legal agreements with the expectation that the agreements cannot easily be undone by future politicians with antidemocratic preferences.<sup>31</sup> This explanation is rooted in the reality of time-inconsistent preferences among political actors in transitional regimes who may be prone to sacrifice important democratic principles in the future either because of weak domestic institutions or the lack of a track record of liberal political values. Thus, this account may not have broad explanatory power across different types of regimes. Indeed, even the leading proponents of this account, Andrew Moravcsik and Tom Ginsburg, concede that the choices faced by political actors in designing international agreements differ fundamentally from those faced by actors in more established democracies.<sup>32</sup>

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sion. See, e.g., Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435, 1435–36 (2008).

<sup>28</sup> Understandably, given that consumers tend to be unorganized compared to industry sectors, they are usually given short shrift in constituency-driven accounts of international trade agreements although, from a normative perspective, free trade is supposed to benefit consumers.

<sup>29</sup> See, e.g., MICHAEL J. GILLIGAN, *EMPOWERING EXPORTERS: RECIPROCITY, DELEGATION, AND COLLECTIVE ACTION IN AMERICAN TRADE POLICY* (1997).

<sup>30</sup> See Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006); Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201; Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 220 (2000); see also Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000) (exploring how international political actors decide whether to use precise, legally binding international agreements or softer, weaker legal arrangements); Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055 (2003) (discussing how distinctions between bona fide precommitments and weaker forms of self-binding by state actors can offer insights of international legal relationships).

<sup>31</sup> See Moravcsik, *supra* note 30, at 220.

<sup>32</sup> See Ginsburg, *supra* note 30, at 712 (“International law, I argue, is a particularly useful device for certain kinds of states, namely those that are undergoing a transition to democracy. By bonding the government’s behavior to international standards and raising the price of deviation, international law commitments in the constitution may help to ‘lock in’ democracy domestically by giving important interest groups more confidence in the regime.”); Moravcsik, *supra* note 30, at 220 (“It follows that ‘self-

There is also a related literature on constitutional diffusion, which argues that there is a positive relationship between economic liberalization and the diffusion of first generation rights, such as free speech and property rights.<sup>33</sup> Yet this latter literature does not focus on the spread or proliferation of international law explicitly but rather on how global migration and investment flows influence the spread of constitutional rights across borders.

Ultimately, these accounts do not usually focus on whether international commitments may be supported or opposed instrumentally by political parties—or partisan elites—to advance their policy or electoral objectives. For the most part, the interest group account is primarily (if not exclusively) concerned with how international agreements affect discrete policy outcomes favored by specific domestic groups rather than how such agreements may affect the policy or electoral goals of major political parties.<sup>34</sup> On the contrary, the conventional wisdom is that domestic politics is radically different from foreign policy and that in international affairs partisanship stops at the “water’s edge.”<sup>35</sup>

Typically, the water’s edge thesis embraces a unitary model of state action in which parties across the political spectrum share a common vision of foreign policy and in which the political opposition does not have much to gain by subverting the foreign policy agenda of the ruling regime.<sup>36</sup> But as many commentators have observed, bipartisan consensus on foreign affairs in the post-Cold War era is becoming less common; indeed, foreign policy is increasingly characterized by the same kinds of ideological or partisan

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binding’ is of most use to *newly established democracies*, which have the greatest interest in further stabilizing the domestic political status quo against nondemocratic threats.”).

<sup>33</sup> See David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L L. 985 (2009).

<sup>34</sup> One notable exception in the literature that explores the role of partisan preferences in shaping the modern free trade regime is Michael A. Bailey et al., *The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade*, 49 WORLD POL. 309 (1997), which argues that the Reciprocal Trade Agreement of 1934 allowed congressional Democrats to satisfy the preferences of reluctant free traders within their party by coupling reductions in U.S. tariffs with the reduction in foreign tariffs. But this account also emphasizes how the institutional preferences of the President and Congress diverge on free trade because of the size of their constituencies. See *id.* at 326. As discussed later in this Article, however, whether such institutional divergence exists systematically is contested. See *infra* notes 165–72 and accompanying text.

<sup>35</sup> See Gowa, *supra* note 4, at 307–08. However, there has been a long political science tradition that explores how political parties have adapted to the forces of economic globalization. See, e.g., GEOFFREY GARETT, *PARTISAN POLITICS IN THE GLOBAL ECONOMY* (1998). But this literature does not necessarily examine whether parties embrace global institutions or international law for instrumental objectives.

<sup>36</sup> See Gowa, *supra* note 4, at 307 (observing that her results “are consistent with the existence of a tacit partisan truce, a self-enforcing agreement between the parties to abstain from using force abroad to prosecute political battles at home”).

disagreements one observes in the domestic policy realm.<sup>37</sup> More recently, a relatively small number of international relations scholars have started to acknowledge the role of partisan groups in influencing both international cooperation and foreign military engagements.<sup>38</sup> For instance, scholars like Helen Milner and Benjamin Judkins have shown empirically that left-leaning parties tend to exhibit weaker support for free trade policies than their right-leaning counterparts.<sup>39</sup> This new literature has observed that the domestic redistributive politics of international legal regimes do not always fit squarely within traditional interest group accounts.<sup>40</sup> But this literature has not provided a coherent theoretical account of when and how political parties are likely to use international law instrumentally.

A key insight of this new wave of constituency-driven accounts is that parties are not simply passive receptacles for the preferences of dominant interest groups. First, the assumption that political parties have a primary interest in securing power suggests that there will often be a conflict between a party's office-seeking and an interest group's policy-seeking objectives.<sup>41</sup> Second, as some commentators have observed, it is perhaps better to think of parties as loyal agents for different societal principals who usually have conflicting or inconsistent preferences.<sup>42</sup> In this framework, interest

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<sup>37</sup> See, e.g., James M. McCormick & Eugene R. Wittkopf, *Bipartisanship, Partisanship, and Ideology in Congressional-Executive Foreign Policy Relations, 1947–1988*, 52 J. POL. 1077, 1097–98 (1990); James M. McCormick et al., *Politics and Bipartisanship at the Water's Edge: A Note on Bush and Clinton*, 30 POLITY 133, 146 (1997); Mark Souva & David Rohde, *Elite Opinion Differences and Partisanship in Congressional Foreign Policy, 1975–1996*, 60 POL. RES. Q. 113, 119–21 (2007).

<sup>38</sup> For instance, in one influential study that responds to Gowa's water's edge thesis with respect to conflict initiation, Howell and Pevehouse show that the strength of the president's party in Congress was positively related to the decision to engage in conflict up until 1973, when the War Powers Act was enacted. See William G. Howell & Jon C. Pevehouse, *Presidents, Congress, and the Use of Force*, 59 INT'L ORG. 209, 228 (2005). Kenneth Anderson has also emphasized the role that international non-governmental organizations (INGOs) play in framing international policy debates, including those that have obvious ideological implications. See Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations*, 2 CHI. J. INT'L L. 371 (2001).

<sup>39</sup> See Joseph M. Grieco et al., *When Preferences and Commitments Collide: The Effect of Relative Partisan Shifts on International Treaty Compliance*, 63 INT'L ORG. 341, 342–43 (2009) ("[O]ther things being equal, a leftward shift in a government's partisan placement is likely to result in a set of official policy views that are less hospitable to an open foreign exchange market, notwithstanding international legal commitments on this matter that were made by a previous government."); Milner & Judkins, *supra* note 26, at 96.

<sup>40</sup> See Milner & Judkins, *supra* note 26, at 98–101 (discussing the interest group account of trade policy preferences and contrasting it with an account that emphasizes partisan factors).

<sup>41</sup> See Thomas L. Brunell, *The Relationship Between Political Parties and Interest Groups: Explaining Patterns of PAC Contributions to Candidates for Congress*, 58 POL. RES. Q. 681 (2005) (discussing how interest groups often fund candidates from both parties to maximize their preferred policy outcomes).

<sup>42</sup> See, e.g., David H. Bearce, *Societal Preferences, Partisan Agents, and Monetary Policy Outcomes*, 57 INT'L ORG. 373, 403–04 (2003) (applying the party as agent framework with respect to exchange rate stability).

groups—or societal principals—are more likely to lobby successfully for their preferred policy goals when their favored partisan agents are in power.<sup>43</sup> Thus, for instance, contrary to the typical pluralist account, which focuses largely on the relative resources of competing interest groups to explain the demand for policy, labor groups seeking more protectionist policies may find themselves largely out of luck when a right-leaning government is in power regardless of the level of resources deployed by such labor groups. Correspondingly, export-oriented groups seeking greater market access may find their ability to influence international trade policy constrained under left-leaning governments. Of course, political parties may sometimes go against the grain and seek to curry favor with interest groups that are not part of their core support network, but this phenomenon is sufficiently uncommon that it may be colloquially associated with the so-called “Nixon Goes to China” effect.<sup>44</sup>

Third, and relatedly, voters often associate parties with specific ideological positions or issues, giving parties little flexibility to change their platforms to suit the policy preferences of certain interest groups without simultaneously sacrificing their political brand and credibility. Politicians who stray away from long-held partisan positions may incur significant costs from their core constituencies.<sup>45</sup> More broadly, as some commentators have observed, parties generally develop reputations for addressing certain issues better than others and have an incentive to emphasize those issues on which they have an electoral advantage.<sup>46</sup> Thus, rather than compete according to a spatial model of voting where each party stakes out different positions on the same issue,<sup>47</sup> parties tend to own issues and then often try to compete by convincing voters that their issues are the most important.<sup>48</sup> As one commentator famously put it, “[P]arties do not debate positions on a single issue, but try instead to make end runs around each other on different issues.”<sup>49</sup> For instance, in the United States, Democrats have cultivated a better reputation for handling social welfare and health issues, whereas Republicans seem to have an electoral advantage in national security, drugs,

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<sup>43</sup> See *id.* at 374–75.

<sup>44</sup> For an insightful discussion of this effect, in which left-leaning politicians have an incentive to pursue right-leaning goals and vice versa, see Robert E. Goodin, *Voting Through the Looking Glass*, 77 AM. POL. SCI. REV. 420 (1983).

<sup>45</sup> See M. Daniel Bernhardt & Daniel E. Ingberman, *Candidate Reputations and the ‘Incumbency Effect,’* 27 J. PUB. ECON. 47, 59 (1985).

<sup>46</sup> Eric Belanger & Bonnie M. Meguid, *Issue Salience, Issue Ownership, and Issue-Based Vote Choice*, 27 ELECTORAL STUD. 477, 478 (2008); John R. Petrocik et al., *Issue Ownership and Presidential Campaigning, 1952–2000*, 118 POL. SCI. Q. 599, 601–02 (2003).

<sup>47</sup> Cf. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (discussing a partisan competition model).

<sup>48</sup> See Petrocik et al., *supra* note 46, at 599–601.

<sup>49</sup> William H. Riker, *Introduction to AGENDA FORMATION* 1, 4 (William H. Riker ed., 1993).

and crime.<sup>50</sup> Generally, the core issues owned by each party tend to remain relatively stable over time.<sup>51</sup> Trespassing on another party's issue, while not uncommon, tends to be fraught with significant political risks.<sup>52</sup> Thus, for instance, the Republican Party may not appear very credible if it announces that it will aggressively pursue a prolabor or prorights agenda because long-standing issue associations are likely going to trump the self-serving statements of elected officials.

The implications of partisan issue ownership for the choice of international legal commitments are significant. The electoral benefits that politicians receive from issue ownership are usually a function of both the saliency of those issues and the opportunities for addressing them. For instance, international commitments or norms can be used to raise the salience of an issue before a domestic audience.<sup>53</sup> In this picture, politicians will seek to make the international concerns associated with the issues they own "the programmatic meaning of the election and the criteria by which voters make their choice."<sup>54</sup> If a party's favored issue becomes enshrined in an international legal commitment or norm, it increases the likelihood that such an issue will remain part of the political agenda across multiple electoral periods.

The next Part builds upon these latter constituency-driven accounts and sketches how certain domestic structural factors in the U.S. political system might encourage partisan elites to use international agreements to overcome domestic barriers to their ideological and electoral objectives. In particular, when the ideological or material preferences are aligned between certain powerful partisan elites and those of foreign states or interpreters of international law, these elites may seek to use international law to entrench their preferred policies against a potentially hostile future government.

<sup>50</sup> See Petrocik et al., *supra* note 46, at 608–09.

<sup>51</sup> See *id.* at 603 ("Constituency pressures within and between the parties, constant party rhetoric, and recurring policy initiatives reinforce issue reputations and keep them intact over long periods of time.").

<sup>52</sup> See Helmut Norpoth & Bruce Buchanan, *Wanted: The Education President: Issue Trespassing by Political Candidates*, 56 PUB. OPINION Q. 87, 98 (1992) (arguing that an issue-trespassing strategy "runs the risk of raising issues where familiar party images strongly favor the opposing party. At best, voters may simply ignore the issue; at worst, they may vote for the opponent.").

<sup>53</sup> See Andrew P. Cortell & James W. Davis, Jr., *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 INT'L STUD. REV. 65, 86 (2000) ("[T]he effects of an international norm cannot be understood independent of the norm's salience in the domestic political discourse."). Goodman and Jinks have also suggested that the exclusion of a state from an international legal regime can further be used to promote issue salience among certain domestic constituencies. See Goodman & Jinks, *supra* note 19, at 666–67. To some extent, politicians do not necessarily have complete control over the saliency of their issues; on the contrary, exogenous events such as an attack by foreign adversaries or changes in global economic conditions may elevate or erode the salience of a party's issues in unanticipated ways.

<sup>54</sup> John R. Petrocik, *Issue Ownership in Presidential Elections, with a 1980 Case Study*, 40 AM. J. POL. SCI. 825, 828 (1996) (emphasis omitted).

## II. THE PARTISAN LOGIC OF INTERNATIONAL LAW PREFERENCES

A. *The Theoretical Foundation*

The notion that partisan struggles influence the domestic demand for international law relies on theories that emphasize the instrumental origins of institutions. According to such theories, most political institutions are “not best explained as a Pareto-superior response to collective goals or benefits but, rather, as a by-product of conflicts over distributional gains.”<sup>55</sup> Anticipating this dynamic, politicians will choose institutional arrangements with an eye to the likely policy and electoral outcomes that will result.<sup>56</sup> In the context of international law, this means that partisan elites may have an incentive to strategically expand the geographical scope of political conflict across borders if they believe it will isolate the domestic political opposition and enhance the influence of foreign actors with whom they share similar political objectives.<sup>57</sup>

Some important implications flow from this basic insight. First, partisan entrenchment through international law is likely going to be most useful to a governing party when it faces significant domestic hurdles to its policy and electoral agenda. In a democratic system with multiple veto points, incumbent regimes that are incapable of influencing policy outcomes directly against a recalcitrant and powerful domestic opposition may resort to inter-

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<sup>55</sup> JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 19 (1992) (emphasis omitted).

<sup>56</sup> The instrumental use of institutions is a very familiar theme in the judicial politics literature. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–68 (2001); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41 (2002); Howard Gillman, *How Political Parties Can Use Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002); see also Karen J. Alter, *The European Union’s Legal System and Domestic Policy: Spillover or Backlash*, 54 INT’L ORG. 489, 496 (2000) (observing that litigants and interest groups may use the EU legal system to promote their preferred policy objectives at the national level); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29 (2004) (discussing Supreme Court intervention in democratic-institutional design). For a discussion of how political actors try to exercise control over courts across different countries, including the transitional regimes in Eastern Europe, see Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC’Y REV. 117 (2001), which develops a model that explores the interaction between politicians and courts in Russia, and Gretchen Helmke, *The Logic of Strategic Defection: Court–Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002).

<sup>57</sup> The notion that governments may strategically seek to pursue their policy objectives at different levels of governance is quite common in the political science literature that explores partisan preferences for policymaking at the state versus national level. See Donald P. Haider-Markel, *Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s*, 1 ST. POL. & POL’Y Q. 5, 5 (2001) (“[W]hen a coalition loses in one political arena, it may try to alter the balance of forces by raising the issue in another, perhaps more favorable, venue.”); see also Jason Sorens, *The Partisan Logic of Decentralization in Europe*, 19 REGIONAL & FED. STUD. 255 (2009) (suggesting that partisan preferences for decentralization often turn on whether the party is more electorally successful at regional rather than national politics).

national agreements or institutions to implement their preferred policy goals. Such a strategy is more likely when the domestic opposition is able to use other domestic institutions or structures to thwart significant policy initiatives by the governing party even when the opposition may be in a minority in both the executive and legislative branches. For instance, in a federalist structure where the opposition has obtained political authority in certain states, the governing party may opt to use international law to sidestep federalist barriers to conventional legislation. Conversely, a party that stands to lose when a specific policy is addressed at the international level may prefer to have the locus of decisionmaking moved to the local or state level. Furthermore, in the context where specific political parties exhibit fluctuating policy preferences over time, elected leaders may also decide to use international law to lock in policy objectives as a hedge against an increasingly insecure and unpredictable domestic policy arena.

Second, international commitments may not only be used to elevate an incumbent government's favored partisan issue but also to constrain the ability of the opposition to promote its favored issues. In other words, effective institutional entrenchment of a policy (or ideological) preference may not only have the effect of insulating that policy issue in the future from the vagaries of electoral politics but may also have the effect of freezing out issues in which the political opposition has an electoral advantage.<sup>58</sup> Voters tend to judge politicians as a bundle of issue possibilities. Where it is unlikely that a politician can act on an issue either because of legal or institutional constraints, then the rational voter will very likely discount the relevance of that issue at the ballot box. Thus, all else being equal, we would expect politicians to prefer international commitments (or other institutional arrangements) that increase the possibilities for locking in those issues in which they have an electoral advantage and international commitments that constrain the possibilities for carrying out issues that favor the opposition.<sup>59</sup>

But certain preconditions have to be in place to make partisan entrenchment through international law appealing to the governing party. First, international commitments will tend to favor those political parties that are

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<sup>58</sup> For instance, political scientists have long claimed that strategic policy entrenchment was a key feature of the New Deal programs. "[T]he goal of progressive politics [during the New Deal]," Steven Teles argues, "was 'depolicitization,' in the sense that it sought to remove from political contention the fundamental normative choices in politics, emancipating professionals to initiate policies to further those choices, and foreclose their reconsideration." Steven M. Teles, *Conservative Mobilization Against Entrenched Liberalism*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 160, 162 (Paul Pierson & Theda Skocpol eds., 2007).

<sup>59</sup> For instance, in the United States, we may expect the Democratic Party—and left-leaning partisan elites—to be more receptive to international commitments that expand the possibilities of dealing with civil rights, labor rights, and environmental concerns. Conversely, we would expect the Republican Party to be more invested in using international commitments to expand the possibilities of dealing with international trade and property rights—issues in which they usually have an electoral advantage.

in a position to find agreeable or friendly transnational partners in either the institutions that interpret or enforce international law or among the governing coalitions (or ruling elites) of other states. As Moravcsik has observed, transnational alliances may emerge when “domestic groups in more than one country agree to cooperate or exchange political assets in order to prevail over other domestic groups or over governmental opposition.”<sup>60</sup> In the United States, for instance, foreign pressure on human and social rights issues may tend to benefit certain left-leaning groups because of a convergence of interests between these groups and European elites who are more sympathetic to the welfare state and a progressive vision of social rights than the median American voter.<sup>61</sup> To the extent that groups across the political spectrum are not disadvantaged in building transnational coalitions for their causes, however, one may expect that one-sided partisan resistance to such coalitions will be blunted.

Second, to make it worthwhile for politicians to use an international legal commitment or regime, the relevant political and institutional conditions underlying it must be stable and resistant to change. Observing that politicians may occasionally use international commitments for partisan purposes tells us very little about its success as a strategy. International commitments may not be of much instrumental value if they can be undone once the political opposition comes into power. Thus, the salient question is whether international commitments are likely to remain binding across multiple electoral cycles regardless of whether the commitment is the result of a negotiated international agreement or customary international law.

To be sure, political entrenchment by partisan actors, whereby a current governing coalition attempts to embed its preferences in ways that constrain its successors, is a fairly common strategy in domestic politics.<sup>62</sup> Just as legislators use super-statutes or other legislative tactics to entrench their preferences,<sup>63</sup> they can use international law as a useful alternative vehicle for entrenching policy goals when uncertain about the commitment of the political opposition to these goals. This strategic use of international law may even be more effective than domestic entrenchment strategies. Recent-

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<sup>60</sup> Moravcsik, *supra* note 11, at 32.

<sup>61</sup> See *infra* notes 143–46 and accompanying text.

<sup>62</sup> The strategic entrenchment of partisan goals through a sympathetic judiciary is a common theme in the judicial politics literature. See Balkin & Levinson, *supra* note 56, at 1066–68; Gillman, *supra* note 56, at 521 (describing nineteenth-century efforts by the Republican Party to entrench its policy goals through courts); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1532 (2007) (“Partisan entrenchments, in which an outgoing coalition attempts to constitutionalize a favored policy to bind the hands of successors, are routine.”).

<sup>63</sup> For analyses of legislative entrenchment, whereby one legislature tries to bind successor legislatures, compare Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670–73 (2002), which defends legislative entrenchment, with John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 419–22 (2003), which criticizes legislative entrenchment. For a discussion of super-statutes, see William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

ly, Rachel Brewster has argued convincingly that reversing international agreements may actually be harder than changing domestic statutes because of the additional costs imposed by an international audience when there is a breach.<sup>64</sup>

In practice, however, governments have often defied international legal commitments that are inconsistent with their partisan preferences. To start, politicians may formally exit treaties or other international commitments that previous regimes had entered into.<sup>65</sup> Of course, one may plausibly argue that governments that exit treaties or fail to comply with their international commitments on one issue may suffer reputational costs in other issue areas.<sup>66</sup> But assuming that a government's partisan orientation and policy preferences are likely to be known in advance to an international audience, it is hard to see how that government's failure to comply with an international agreement that is inconsistent with its preferences would also affect its reputation and willingness to comply with those agreements that do align with its preferences.<sup>67</sup> Simply put, in a fragmented system of international law, there is very little reason to think that a reputation for compliance would be fungible across multiple issue areas.<sup>68</sup>

More broadly, formally withdrawing from or defying an international commitment does not necessarily exhaust the options available to the party that disfavors such a commitment. Many international commitments depend on domestic state actors to secure implementation of the commitment's provisions. In such circumstances, one may reasonably conjecture that there will be variations in the level of implementation of such a com-

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<sup>64</sup> Brewster, *supra* note 17, at 512–13; *see also* Ginsburg, *supra* note 30, at 734–35 (“[I]nternational obligation is not the only means of entrenching policies. However, international law has significant advantages relative to legislative supermajorities, an independent judiciary, or specialized independent regulatory agencies. . . . International legal actors, by contrast, are more difficult to control. International organizations and courts are beyond the control of any single country, even the most powerful.”).

<sup>65</sup> *See* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1581–82 (2005). Yet, as Edward Swaine observes, efforts to unsign treaties negotiated by a previous regime can be a source of controversy, even when such treaties have not been formally ratified. *See* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

<sup>66</sup> For two helpful commentaries of the role of reputation in international law compliance, *see* ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 71–117 (2008), and MICHAEL TOMZ, *REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES* (2007).

<sup>67</sup> Rachel Brewster makes a similar point in another context:

A violation in one issue area, however, need not lead the audience to conclude that a violation in any other area is more likely. In fact, the audience may well think that the government is more likely to comply with [international law] in other issue areas, depending on the cause of non-compliance. For instance, the election of a Green Party to power might indicate that the new government is more likely to abide by environmental treaties but less likely to abide by a trade agreement that restricts environmental regulation.

Rachel Brewster, *The Limits of Reputation on Compliance*, 1 INT'L THEORY 323, 329 (2009).

<sup>68</sup> *See id.* at 328–29 (criticizing the notion that reputational sanctions are effective across multiple issue areas); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002) (same).

mitment depending on the preferences of the governing party.<sup>69</sup> For instance, during the 1990s, U.K. Prime Minister John Major ignored an adverse European Court of Justice ruling on EU Working Time mandates that conflicted with his conservative government's views on labor policies.<sup>70</sup> More broadly, the available evidence regarding cross-national implementation of EU policy directives seems to support the conjecture of partisan-inspired implementation. In one study, Oliver Treib showed that the success or failure in implementing EU Directives across four countries turned largely on whether they corresponded with the partisan objectives of the government in power.<sup>71</sup> Indeed, this study also showed that when the governing party favored any EU Directive for political reasons, it actually tended to overimplement the Directive's provisions.<sup>72</sup>

*B. Conditions Likely to Influence the Electoral Sustainability of International Law*

What, then, are the conditions under which partisan international legal commitments are likely to be sustainable across multiple electoral cycles? Admittedly, it is difficult to answer such a question with any empirical certainty, but one may reasonably speculate that the extended stability of such partisan commitments most likely depends on two factors: the availability of side benefits to the opposition party and the level of fragmentation within the domestic political institutions.

*1. Prospects for Cross-Partisan Issue Bundling.*—The electoral sustainability of an international legal commitment is more likely if it also includes some benefits to coalitions within the nonenacting political opposition. Thus, an agreement is likely to have greater staying power if it is negotiated and ratified behind a thick veil of ignorance.<sup>73</sup> Such a commitment need not include partisan benefits that are symmetric across the enacting incumbent government and the political opposition; on the contrary, it may work as long as the opposition is conflicted enough that it is unable to marshal the will to repeal or refuse implementation of the interna-

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<sup>69</sup> For a theoretical model that supports the notion that compliance should be contingent on the preferences of competing domestic constituents, see Xinyuan Dai, *The Conditional Nature of Democratic Compliance*, 50 J. CONFLICT RESOL. 690 (2006). See also Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127 (2010) (proposing a social scientific theory of compliance with international law that focuses attention on domestic politics).

<sup>70</sup> Oliver Treib, *EU Governance, Misfit, and the Partisan Logic of Domestic Adaptation: An Actor-Centered Perspective on the Transposition of EU Directives 10* (Mar. 27–29, 2003) (published in German as 44 VIERTELJAHRESSCHRIFT 506 (2003)), available at <http://www.ihs.ac.at/publications/pol/TreibPartisanLogic2003.pdf>.

<sup>71</sup> *Id.* at 8–23.

<sup>72</sup> See *id.* at 16–20.

<sup>73</sup> For a concise discussion of the role of the veil of ignorance in institutional design, see Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001).

tional commitment once it obtains power. Simply put, partisan entrenchment is both rational and plausible for an incumbent government if its preferences in favor of the commitment are quite intense, but intraparty conflicts within the political opposition leave the opposition ambivalent about the international commitment. Thus, insofar as a forward-looking enacting coalition wants to increase the durability of an international agreement that advances its partisan objectives, it has an incentive to include provisions in the agreement that offer side payments to a potentially hostile successor government. Although the political opposition often may appear to be losers because certain politically unfavorable issues are embodied in an international legal commitment, they may not be losers in the larger picture because issues that favor them are included in the package.<sup>74</sup> Bundling, in effect, may help diminish the political stakes in adopting an international commitment and ensure that the commitment serves the parties' joint interests, at least partially.

2. *The Fragmentation of Domestic Institutions.*—Second, the ability of partisan elites to entrench their preferences in international commitments will depend significantly on the level of fragmentation within domestic political institutions. All else being equal, the use of international legal commitments for instrumental purposes will remain less likely when restrictive domestic institutions make it too costly to adopt or implement such commitments. Thus, partisans or domestic groups who stand to lose from international law have an incentive to use the existence of multiple veto points or fragmented domestic institutions to their advantage whereas proponents will seek to overcome these institutional barriers through the use of courts or other autonomous bureaucrats. In other words, parties are likely to treat domestic institutions as a set of obstacles to be exploited or to be maneuvered around in pursuit of their partisan political objectives in the international arena.

To be clear, the strategic use of policy veto points for instrumental political goals is a common theme in the political science literature.<sup>75</sup> These accounts, however, do not make explicit the ways through which partisan actors may use veto points to achieve their policy goals. For the most part, the social science commentary tends to treat the existence of veto points as highly inflexible external constraints on policy actors.<sup>76</sup> According to such accounts, the more veto players there are, the more difficult it is for domes-

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<sup>74</sup> For an excellent discussion of how institutions can facilitate compromise among those with competing policy preferences by bundling together multiple policy issues in one package, see Levinson, *supra* note 7, at 34.

<sup>75</sup> See Witold J. Henisz & Edward D. Mansfield, *Votes and Vetoes: The Political Determinants of Commercial Openness*, 50 INT'L STUD. Q. 189, 191–92 (2006); Andrew Moravcsik, *Why Is U.S. Human Rights Policy So Unilateralist?*, in MULTILATERALISM & U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT 345, 358 (Stewart Patrick & Shepard Forman eds., 2002).

<sup>76</sup> See Henisz & Mansfield, *supra* note 75, at 189–92.

tic groups to change the policy status quo.<sup>77</sup> Thus, the feasible range of policy proposals will be necessarily dictated by the preferences of all veto players.

In real life, however, the story is much more complicated. In many circumstances, the actual scope of legal authority of veto players may be ambiguous or ill-defined. Determined partisans, who are aware of this legal landscape, may very well exploit this ambiguity to their electoral or policy advantage. In the United States, for instance, it is somewhat unclear from a constitutional perspective whether international agreements have to be approved exclusively through the Treaty Clause, which requires the approval of two-thirds of the Senate, or through a congressional-executive agreement, which only requires a simple majority of both houses of Congress.<sup>78</sup> Moreover, another recurring but unresolved question is the extent to which treaties should be presumptively treated as self-executing in the absence of subsequent legislation or explicit treaty language.<sup>79</sup> Finally, another recurring question in the literature is the extent to which nonratified international agreements or state practices may be used as evidence of customary international law in the United States and the extent to which customary international law may be federal law that binds the constituent states under the Supremacy Clause.<sup>80</sup>

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<sup>77</sup> See *id.* at 190.

<sup>78</sup> See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 807–13 (1995) (arguing that treaties and congressional-executive agreements are interchangeable); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249–78 (1995) (taking the position that international obligations with such an extensive scope have to be adopted as treaties). For a more detailed analysis of these debates in the literature, see Steve Charnovitz, *Using Framework Statutes to Facilitate U.S. Treaty Making*, 98 AM. J. INT'L L. 696, 702–04 (2004).

<sup>79</sup> See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 371–80 (2d ed. 2006) (discussing the debates regarding treaty self-execution); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) (arguing for a presumption in favor of self-execution). Recently, in *Medellín v. Texas*, the Supreme Court attempted to clarify when courts should treat treaties as self-executing. See 552 U.S. 491, 504–23 (2008). But commentators are still conflicted as to whether the Supreme Court's latest pronouncement has helped resolve the underlying doctrinal confusion regarding self-executing treaties. See John T. Parry, Response, *Rewriting the Roberts Court's Law of Treaties*, 88 TEX. L. REV. SEE ALSO 65, 69 (2010), <http://www.texasrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso65.pdf> (“[T]he Court’s actual reasoning strongly hints at a presumption against self-execution (even as it stops short of actually proclaiming one) . . .”). But see Curtis A. Bradley, *Intent, Presumptions, and Non-self-executing Treaties*, 102 AM. J. INT'L L. 540, 541 (2008) (“To the extent that the Court applied a presumption in *Medellín*, it was a simply a presumption against giving direct effect to decisions of the International Court of Justice . . .”); Ernest A. Young, *Treaties as “Part of Our Law,”* 88 TEX. L. REV. 91, 118 (2009) (arguing that interpreting the *Medellín* decision as creating a presumption against self-execution would be wrong).

<sup>80</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (criticizing the modern position that customary international law has the status of federal common law). But see Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*,

Of course, there is a rich literature in the legal academy that debates the scope of these constitutional constraints.<sup>81</sup> This Article does not attempt to join these normative debates but instead suggests that the resultant constitutional ambiguity is fraught with different strategic considerations for domestic groups seeking to support or oppose international legal commitments. For instance, the ambiguities in the American federal system provide the opposition with the opportunity to exercise considerable political power over regions and then use that power to resist the adoption or implementation of unfavorable international legal commitments. Similarly, proponents of international legal commitments in the United States may attempt to use courts to overcome the obstacles created by domestic fragmentation of power. One plausible aspect of this latter strategy, which has attracted significant controversy in the literature, involves the possibility of using federal courts to enforce customary international norms against the states without prior statutory or treaty authority.<sup>82</sup> In this picture, since customary international law itself does not necessarily require formal legislative action by the political branches, a partisan-friendly court acting as an autonomous policy leader may be able to use customary international law to overcome some of the substantive barriers imposed by federalism and the separation of powers.

But aside from federalism and separation of powers considerations, presidents also have considerable latitude in interpreting the scope of U.S. obligations under existing international legal commitments. In other words, within the matrix of domestic political institutions in the United States, federal courts have routinely deferred to the president's view as to what specific treaties or customary international law obligations require.<sup>83</sup> In this

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66 FORDHAM L. REV. 463 (1997) (defending the modern position); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (same); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997) (same); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997) (same). Of course, there are some commentators who stake out a middle position between these two camps. See Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555 (2002) (stating out the view that that federal courts should treat international law not as federal common law but as "general" common law that would not be preemptive or jurisdictional); Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002).

<sup>81</sup> For examples of this literature, see *supra* notes 79–80.

<sup>82</sup> See Bradley & Goldsmith, *supra* note 80, at 819–21. For a very critical view of judicially enforced customary international law against state actors, see John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007).

<sup>83</sup> There is a rich debate in the literature about to what extent, if any, courts should defer to the president's interpretation of international law. Nonetheless, as a descriptive matter, most commentators agree that courts do accord substantial deference. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 661 (2000); see also Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1752–58 (2007) (examining the practical impact of the deference doctrine); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1236–38 (2007) (examining the contexts in which

picture, presidents have significant leeway to interpret an international legal commitment expansively if it promotes their partisan preferences or to interpret it very narrowly otherwise.

### III. ILLUSTRATIONS

Does categorizing a democratic government by its partisan orientation predict its attitude towards specific international law commitments? To answer that question, and to compare the electoral sustainability of specific kinds of international commitments, I examine Republican and Democratic responses to the negotiation and ratification of human rights treaties in the 1950s and the ratification of NAFTA in 1993.

Admittedly, given the limited scope of these two case studies, the most I can hope to achieve is to show that partisan motivations are a plausible factor in the decision of state actors to either support or oppose international law across a wide range of issue areas. Moreover, the illustrations below have an obvious parochial slant in that they focus exclusively on the partisan dynamics surrounding the adoption and enforcement of international law in the United States. There is reason to think, however, that there is some empirical support for similar strategic political behavior outside the United States, especially with respect to ongoing debates surrounding European integration.<sup>84</sup>

#### A. *Opposing Perceived Partisan Entrenchment: The Postwar Human Rights Treaty Controversies*

The controversy surrounding both the Bricker Amendment and the postwar effort to ratify human rights agreements in the United States is familiar to many international law scholars and is recounted in detail elsewhere.<sup>85</sup> In brief, in the immediate aftermath of World War II, President

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courts will defer to Executive Branch determinations of foreign policy); Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 194–99 (2006) (offering rebuttal to Justice Stevens's opinion in *Hamdan v. Rumsfeld*); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 980 (2004) (exploring the institutional competency of courts with respect to allocations of foreign affairs power); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1175–78 & nn.10–17 (2007) (examining the Executive's power relative to judicial international relations doctrines); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 497–99 (2007) (contrasting the deference to the Executive Branch in the decades before *Hamdan v. Rumsfeld* with the zero-deference approach of courts in the early nineteenth century).

<sup>84</sup> On this point, it is worth noting that a small but growing number of comparative law scholars have started to study the role of partisanship in the implementation and enforcement of EU legal commitments by member states. See Liesbeth Hooghe et al., *Does Left/Right Structure Party Positions on European Integration?*, 35 COMP. POL. STUD. 965 (2002); Treib, *supra* note 70.

<sup>85</sup> See generally DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988) (describing the Bricker Amendment controversy). For a complementary analysis that discusses the Bricker Amendment in terms of the United States' uneasy

Truman was facing mounting political pressure to be more proactive on a range of social policy and civil rights issues.<sup>86</sup> In this political climate, conservatives feared that the United States' growing involvement in the United Nations would have an adverse effect on federal and state control over social and economic policy.<sup>87</sup> Moreover, in a growing number of civil rights claims coming before federal and state courts during this period, plaintiffs often invoked the U.N. Charter, and some courts appeared to be sympathetic to this legal strategy.<sup>88</sup> President Truman subsequently negotiated two U.N. human rights treaties: the Genocide Convention and the Convention on the Political Rights of Women. Underscoring the political contentiousness underlying both of these treaties, neither was ratified during the Truman Administration; indeed, the Genocide Convention was only ratified by the Senate in 1986—forty years after it was first signed.<sup>89</sup> In any event, skepticism regarding these human rights treaties became a key plank of the 1952 and 1956 Republican Party platforms. “We shall see to it,” the 1952

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relationship with human rights treaties, see Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHINESE J. INT'L L. 321, 335–38 (2010).

<sup>86</sup> As one commentator observes, “Franklin Delano Roosevelt understood that civil rights could prove explosive for the Democrats, and he succeeded in keeping them off the table. By 1948, however, Truman could no longer ignore the growing presence of black in northern cities to whom he had to appeal electorally.” Andrea Louise Campbell, *Parties, Electoral Participation, and Shifting Voting Blocs*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM*, *supra* note 58, at 68, 94.

<sup>87</sup> See Arthur H. Dean, *The Bricker Amendment and Authority over Foreign Affairs*, 32 FOREIGN AFF. 1, 16–19 (1953).

<sup>88</sup> See, e.g., *Oyama v. California*, 332 U.S. 633, 649–50 (1948) (Black, J., concurring) (“There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to ‘promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’ How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?” (alteration in original) (footnote omitted) (quoting U.N. Charter arts. 55–56)). For a detailed discussion of how courts and litigants have approached U.N. human rights agreements, see Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).

<sup>89</sup> In his narrative account of his role in supporting the Bricker Amendment, former American Bar Association President Frank Holman provides some insight as to why the Geneva Convention was not ratified under President Truman. See FRANK E. HOLMAN, *STORY OF THE “BRICKER” AMENDMENT 6* (1954) (“It was not ratified—due to the studies and the opposition of the American Bar Association.”); see also NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 37–63* (1990) (discussing the intense and politicized ratification debates over the Genocide Convention). The Senate consented to the U.S. ratification of the Genocide Convention in 1986 but conditioned such ratification on the passage of implementing legislation by Congress. See S. Res. 347, 99th Cong. (1986) (enacted). Congress eventually passed implementing legislation in 1988, see Genocide Convention Implementation Act (Proxmire Act) of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. §§ 1091–1093 (2006)), and the Convention was ratified by President Reagan on November 14, 1988, see U.S. DEP’T OF STATE, *TREATIES IN FORCE* 372 (2010) (entered into force for the United States on February 23, 1989).

platform declared, “that no treaty or agreement with other countries deprives our citizens of the rights guaranteed them by the Federal Constitution.”<sup>90</sup> Leading the Republican charge against the ratification of various human rights treaties was Senator Bricker of Ohio, who sought to introduce a constitutional amendment that would include language stating that “treaties shall only be implemented by legislation ‘which would be valid in the absence of treaty.’”<sup>91</sup>

The legal background to the Bricker Amendment movement involved the 1920 Supreme Court decision in *Missouri v. Holland*, which held that a treaty could empower Congress to pass legislation that, in the absence of the treaty, would be reserved to the exclusive power of the states.<sup>92</sup> In the late 1940s and early 1950s, fears mounted that the Supreme Court’s decision might provide an institutional loophole for bypassing existing constitutional barriers for enacting certain forms of domestic legislation.<sup>93</sup> However, Senator Bricker’s effort to amend the Constitution eventually fizzled after Republican President Eisenhower came to power. His Secretary of State, John Foster Dulles, made it clear that the Administration did not intend to support ratification of any of the U.N. human rights treaties that were at the core of the controversy.<sup>94</sup> In the end, although Senator Bricker’s effort narrowly failed to muster the requisite supermajority in the Senate vote required for the amendment to pass the first constitutional hurdle, it set the stage for the prolonged political resistance to Senate ratification of human rights treaties in the United States that various commentators claim continues to this day.<sup>95</sup>

Much of the scholarship on the Bricker Amendment and the Senate’s postwar opposition to human rights treaties has tended to focus narrowly on

<sup>90</sup> *Republican Party Platforms: Republican Party Platform of 1952*, AM. PRESIDENCY PROJECT (July 7, 1952), <http://www.presidency.ucsb.edu/ws/index.php?pid=25837>. The 1956 platform uses very similar language: “We shall see to it that no treaty or agreement with other countries attempts to deprive our citizens of the rights guaranteed them by the Federal Constitution.” *Republican Party Platforms: Republican Party Platform of 1956*, AM. PRESIDENCY PROJECT (Aug. 20, 1956), <http://www.presidency.ucsb.edu/ws/index.php?pid=25838>.

<sup>91</sup> HOLMAN, *supra* note 89, at 27.

<sup>92</sup> 252 U.S. 416, 434–35 (1920).

<sup>93</sup> See HOLMAN, *supra* note 89, at 8–20.

<sup>94</sup> See *id.* at 36. More specifically, Secretary Dulles stated during congressional hearings:

[W]hile we shall not withhold our counsel from those who seek to draft a treaty or covenant on human rights, we do not ourselves look upon a treaty as the means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty to which this Nation has been dedicated since its inception. We therefore do not intend to become a party to any such covenant or present it as a treaty for consideration by the Senate.

*Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the S. Comm. on the Judiciary*, 83d Cong. 825 (1953) [hereinafter *1953 Hearings*].

<sup>95</sup> See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995); Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309 (1988).

special interest politics, especially the role of Southern segregationists and allied conservative groups.<sup>96</sup> For instance, in their detailed account of the legacy of the Bricker Amendment for the modern human rights movement, Kaufman and Whiteman stress the racially motivated concerns of conservative groups who “took very seriously any discussion of federal action to dismantle segregation within the states.”<sup>97</sup> Although these interest-group-capture accounts have proved quite useful in explaining particular aspects of postwar human rights treaty skepticism, they are nonetheless incomplete.

First, the notion that conflicts over human rights treaties in the United States can be best explained by narrow special interest capture rests on questionable premises. At bottom, the politics underlying international human rights treaty ratification are not best characterized as diffuse costs borne by the majority with concentrated benefits accruing largely to conservative special interest groups.<sup>98</sup> On the contrary, there is usually intense lobbying by ideological groups on both sides of the issue,<sup>99</sup> making dependence on interest-group-capture theories particularly problematic. More broadly, there is no reason to suppose that conservative interest groups either wielded more political clout or had more intense preferences than progressive interest groups on human rights or civil rights issues in the postwar decades. For instance, progressive ideological groups had achieved varying degrees of success in pushing civil rights and social policy reform through either domestic legislation or public impact litigation from the 1950s to the mid-1960s and had managed to do so by overcoming many of the same obstacles supposedly imposed by federalism and separation of powers in the human rights treaty context.<sup>100</sup> As discussed below, the postwar dynamic

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<sup>96</sup> See Henkin, *supra* note 95, at 348 (“The campaign for the Bricker Amendment apparently represented a move by anti-civil-rights and ‘states’ rights’ forces to seek to prevent—in particular—bringing an end to racial discrimination and segregation by international treaty.”); Kaufman & Whiteman, *supra* note 95, at 310; Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 147 (Michael Ignatieff ed., 2005) (describing conservative opposition to human rights treaties in the United States); see also Kaufman, *supra* note 89, at 12–16. To be sure, Kaufman also emphasizes Cold War concerns by conservative groups about the spread of socialist and communist influences, but she finds a link between these Cold War factors and conservative opposition to civil rights. See Kaufman, *supra* note 89, at 14–16.

<sup>97</sup> Kaufman & Whiteman, *supra* note 95, at 310.

<sup>98</sup> In the public choice literature, interest group capture entails the notion that small and concentrated interest groups with a higher stake in policy outcomes will be more effective in attaining benefits in the area of legislation than large and dispersed groups like the public at large. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982). Thus, this literature tends to emphasize the disjuncture between the preferences of a special interest group and the general public, rather than conflict between constituencies or interest groups affiliated with the two major political parties.

<sup>99</sup> Cf. Glendon Austin Schubert, Jr., *Politics and the Constitution: The Bricker Amendment During 1953*, 16 J. POL. 257, 271–72 (1954) (describing the conservative interest groups in favor of the various Bricker Amendment resolutions and the liberal groups in opposition).

<sup>100</sup> For an overview of some of the literature on how progressive politicians were able to overcome the obstacles imposed by federalism, see Keith E. Whittington, “Interpose Your Friendly Hand”: Politi-

with respect to human rights treaties is better understood in terms of competition between partisan interest groups rather than capture by any specific set of interest groups.<sup>101</sup>

Second, the strong emphasis on Southern segregationist influences in the interest group account of the Bricker Amendment is somewhat misleading. To be sure, various Southern senators (and interest groups) were deeply skeptical about the proliferation of human rights treaties in the postwar era, but it is difficult to argue that opposition to civil rights was the driving force behind the Bricker Amendment movement. Take, for instance, the partisan and geographical distribution of the Senate sponsors of the amendment. The key sponsor, Senator Bricker, was a Midwestern politician and the 1944 Republican vice-presidential candidate who had been a longtime foe of President Roosevelt's New Deal initiatives<sup>102</sup> but who otherwise exhibited little or no interest in the postwar civil rights movement.<sup>103</sup> Another sponsor, Republican Senator Robert Taft, also from Ohio and an opponent of the New Deal, happened to be a strong supporter of civil rights. In 1946, Senator Taft had sought to propose legislation that would effectively abolish racial discrimination in the workplace—nearly twenty years before the Civil Rights Act of 1964.<sup>104</sup> More broadly, nineteen out of twenty-four Midwestern senators initially supported the proposed amendment in early 1953.<sup>105</sup> From a partisan stance, the 1953 version of the amendment had sixty-four sponsors in the Senate, which included forty-five out of forty-eight Republican senators, but only thirteen of the nineteen Democratic sponsors in the Senate were from the South.<sup>106</sup> At bottom, the distribution of support and opposition to the various versions of the amendment transcended traditional geographical or ideological lines on issues like segregation,<sup>107</sup> with an overwhelming majority of Republican senators from all regions in the country in favor and a significant majority of Democratic

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*cal Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

<sup>101</sup> See *infra* notes 107–11 and accompanying text.

<sup>102</sup> See RICHARD O. DAVIES, *DEFENDER OF THE OLD GUARD: JOHN BRICKER AND AMERICAN POLITICS*, at x–xi, 32–33 (1993).

<sup>103</sup> See *id.* at 193.

<sup>104</sup> See David Freeman Engstrom, *The Taft Proposal of 1946 & The (Non-) Making of American Fair Employment Law*, 9 GREEN BAG 2D 181, 182 (2006).

<sup>105</sup> See Philip A. Grant, *The Bricker Amendment Controversy*, 15 PRES. STUD. Q. 572, 577 (1985). But as Grant observes, two of these Midwestern pro-amendment senators eventually switched their positions, and in the final roll call votes Midwestern senators voted 17–6 in favor of the amendment. See *id.*

<sup>106</sup> See Schubert, *supra* note 99, at 266.

<sup>107</sup> Indeed, given that the Bricker Amendment movement took place years before the partisan realignment of the 1960s in which Southern whites started to flee the Democratic Party, it seems odd to cast what was ostensibly a Republican proposal as motivated primarily by segregationist impulses. As Engstrom makes clear in his analysis of Senator Taft's role in the civil rights agenda, the partisan loyalty of African-Americans was still up for grabs in the years after World War II. See Engstrom, *supra* note 104, at 186, 189–90.

senators against.<sup>108</sup> Moreover, the array of interest groups in support of the amendment was quite broad, ranging from industry professional groups like the American Medical Association, the United States Chamber of Commerce, and the National Economic Council to ideological or patriotic groups like the Daughters of the American Revolution.<sup>109</sup>

We get more traction if we evaluate the controversy surrounding the postwar efforts to ratify human rights treaties not simply as a disagreement about isolationism versus internationalism, or of special interest politics over desegregation, but as an exercise in distributive partisan politics. In this framework, although both Democratic and Republican Senators in the postwar era might have been subject to lobbying by a wide array of economic and ideological groups on human rights issues, they were responsive to very different groups when they had to choose to support or oppose the ratification of human rights treaties. Politicians from both parties likely sought a very broad base of support for their policies to be elected, but it was the support from the elected official's core constituency (or interest groups) that was often most crucial.<sup>110</sup> Thus, the orientation of any party towards human rights agreements during the postwar era was likely to reflect the preferences of its key supporters.

Applying this partisan logic to the immediate postwar era, we can better understand the impetus for the Bricker Amendment movement and the failure of the postwar efforts to ratify U.N. human rights treaties. In the late 1940s, partisan polarization over the New Deal programs had become quite intense. Among President Truman's supporters, there was a growing concern that Republicans, who had won decisive congressional majorities in the 1946 midterm elections, would muster enough political support to roll back the core pillars of the New Deal if they also won the White House in 1948.<sup>111</sup> In his 1948 State of the Union address, Truman went on the offensive and pushed for a wide-ranging liberal agenda that would substantially cement and expand the New Deal; in sum, he promised not only to establish massive new national health insurance and affordable housing programs but

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<sup>108</sup> See Schubert, *supra* note 99, at 266. The ideological spectrum of the amendment's sponsors in the Senate not only encompassed Southern Dixiecrats but also included isolationists from both sides of the aisle and some Eisenhower Republicans who normally followed President Eisenhower's lead on foreign policy issues but refused to do so on this issue. For a brief description of the political spectrum of the amendment's sponsors in the Senate, see TANANBAUM, *supra* note 85, at 157–63.

<sup>109</sup> For a list of interest groups supporting and opposing the amendment, see Schubert, *supra* note 99, at 271 nn.52–53.

<sup>110</sup> As Bueno de Mesquita and others have observed, politicians have an incentive to focus their efforts on the subset of the electorate that makes up their winning coalition, and in democracies, that winning coalition is not necessarily a majority of the voters but rather a subset that is comprised of the politician's core partisan supporters. See BRUCE BUENO DE MESQUITA ET AL., *THE LOGIC OF POLITICAL SURVIVAL* 277–87 (2003); Edward L. Glaeser et al., *Strategic Extremism: Why Republicans and Democrats Divide on Religious Values*, 120 Q.J. ECON. 1283 (2005); Gábor Virág, *Playing for Your Own Audience: Extremism in Two-Party Elections*, 10 J. PUB. ECON. THEORY 891 (2008).

<sup>111</sup> DAVID MCCULLOUGH, *TRUMAN* 585–86 (1992).

also to almost double the minimum wage (from forty cents to seventy-five cents an hour) and provide more support for education and farmers.<sup>112</sup>

In this contentious political climate, certain groups became concerned that Truman might use the various U.N. Human Rights Conventions to push for positive economic rights and civil rights objectives that his Administration could not otherwise accomplish directly through legislation or unilateral executive action.<sup>113</sup> Bricker crowed, for instance, that the U.N. Covenant for Human Rights “was an ingenious mechanism designed to stifle all criticism of the so-called Fair Deal.”<sup>114</sup> And these concerns were not necessarily without foundation. As Elizabeth Borgwardt points out in her exhaustive study on the effect of the New Deal on globalization, human rights in the postwar era often served as shorthand for an idea that also embraced President Roosevelt’s vision of the Four Freedoms, which included “basic conceptions of economic justice.”<sup>115</sup> With the support of progressive groups, the Committee for Civil Rights established by President Truman had seriously flirted with the idea of using U.N. human rights treaties as a tool for bypassing domestic obstacles to social and economic reform (such as federalism and separation of powers).<sup>116</sup> However, this strategy faced one significant obstacle: many of the relevant U.N. human rights covenants that directly addressed civil rights issues—such as the proposed U.N. Convention on Human Rights and the Genocide Convention—had not been ratified by the U.S. Senate. However, the U.N. Charter had been ratified as a treaty, and at least two of its articles seemed relevant to the civil rights cause.<sup>117</sup> The Truman Committee viewed these Charter provisions as a plausible alternative legal vehicle for advancing progressive civil rights policies, and

<sup>112</sup> *Id.* at 586.

<sup>113</sup> See Duane A. Tananbaum, *The Bricker Amendment Controversy: Its Origins and Eisenhower’s Role*, 9 *DIPLOMATIC HIST.* 73, 80–81 (1985).

<sup>114</sup> TANANBAUM, *supra* note 85, at 28 (internal quotation marks omitted).

<sup>115</sup> ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS* 285 (2005). The Four Freedoms included freedom of speech and expression, freedom to worship God, freedom from want, and freedom from fear. *Id.* at 20–21.

<sup>116</sup> See KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 103–04 (2004).

<sup>117</sup> The relevant articles were Articles 55 and 56. Article 55 of the Charter reads in relevant part:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights . . . the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress living, full employment, and conditions of social progress living and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. Charter art. 55. Article 56 provides: “All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

*Id.* art. 56.

human rights activists and legal academics provided fodder for the notion that the U.N. Charter was legally binding in the United States as a matter of domestic law.<sup>118</sup> Moreover, the favorable political context created by the Truman Administration meant that courts could act with considerable latitude, and many cited the U.N. Charter favorably in the early postwar civil rights cases.<sup>119</sup>

Against this background, the ratification of the U.N. human rights treaties emerged as both a partisan and a sectional cleavage issue for two key reasons. First, Republican senators overwhelmingly disfavored ratification, because none of their party's core constituencies stood to gain much from ratifying the treaties. These treaties did not offer much in the way of cross-partisan bundling opportunities because most (if not all) of the obvious distributive benefits favored groups aligned with the Democratic Party. For instance, the key U.N. human rights covenants included positive economic and social rights, such as access to decent living conditions, affordable housing, education, income, and employment—objectives that, although favored by many groups on the left, were largely anathema to core constituencies favoring the Republican Party.<sup>120</sup> More broadly, the intrapartisan cleavages that sometimes divide right-leaning ideological and business groups were noticeably absent. Indeed, opposition to the human rights treaties cut across almost all of the key interest groups that were traditionally hostile to the Roosevelt–Truman New Deal programs, including patriot

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<sup>118</sup> See Lockwood, *supra* note 88, at 916 (surveying efforts by interest groups to apply the U.N. Charter provisions in state and federal courts in the postwar era); Paul Sayre, *Shelley v. Kraemer and United Nations Law*, 34 IOWA L. REV. 1, 6 (1948) (“[T]he United Nations Charter is now not only part of our Constitution, but by our constitutional act we are part of the United Nations. In so far as the Charter’s provisions justly apply, we are not free to choose in a hit-or-miss way: we are morally and legally bound to give them all full effect all the time.” (footnote omitted)). For a more general discussion of the effort by civil rights groups to appeal to the United Nations, see MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 183–84 (2004).

<sup>119</sup> See Lockwood, *supra* note 88.

<sup>120</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 25, U.N. Doc. A/810 (Dec. 10, 1948) (declaring the right to a sufficient standard of living, including the right to health care). The International Covenant on Civil and Political Rights, which was submitted for signature years later, also protected a range of positive rights. See G.A. Res. 2200A (XXI), U.N. Doc. A/6316, at 52 (Dec. 16, 1966) (recognizing rights to health care, education, and a living wage). The International Covenant on Economic, Social, and Cultural Rights provides the broadest statement yet of a right to health care:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 12, U.N. Doc. A/6316, at 51, 993 U.N.T.S. 3 (Dec. 16, 1966) (signed by the United States on Oct. 5, 1977).

groups like the Daughters of the American Revolution and industry groups like the American Medical Association, the American Bar Association, and the United States Chamber of Commerce.<sup>121</sup> If there was a single ideological or philosophical agenda that united all these various right-leaning constituencies, it was probably antipathy to New Deal progressivism; indeed, these groups ranged from traditional isolationists who disapproved of any meddling by international organizations to Republican internationalists who were suspicious that these U.N. treaties could be used as vehicles to promote socialist ideals and Soviet propaganda.<sup>122</sup> For the most part, however, the industry and professional groups who supported the amendment were concerned that U.N. human rights treaties would be used to entrench more expansive labor regulations and implement socialized health care.<sup>123</sup>

Second, and more important, the postwar U.N. human rights treaties split the Democratic Party's core electoral coalition between Northern liberals and Southern whites who feared such treaties could be used as a ploy to push for domestic civil rights reform. In the late 1940s, strategic electoral considerations had meshed with ideological leanings to convince Truman and other progressive Democrats that the aggressive promotion of civil rights for African-Americans would be a smart political idea. Since the Great Depression, African-Americans, who were once a loyal constituency of the party of Lincoln, had been drifting steadily to the Democratic Party. By the 1946 midterm elections, however, the Democratic Party's hold on

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<sup>121</sup> See Schubert, *supra* note 99, at 271 n.53.

<sup>122</sup> The Republican fears about Soviet influence at the United Nations proved not to be entirely unjustified—recent evidence suggests that the Soviet delegation played a key role in drafting portions of the U.N. Declaration and considered the Declaration a vehicle for promoting its vision of positive social rights. See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 93–96 (1999) (discussing the influence of Communist states in drafting the nondiscrimination provision in the Declaration); see also *id.* at 157–81 (discussing the socialist and Communist influence in drafting the work-related rights provisions). Moreover, the final draft of the Covenant on Human Rights specifically excluded any provision for the protection of private property—an apparent response to the Soviet delegation's strenuous objections to including such a provision. The Chairman of the Human Rights Commission at the eighth session, Charles Malik of Lebanon, complained of disproportionate Soviet influence on a proposed International Convention on Human Rights:

I think a study of our proceedings will reveal that the amendments we adopted to the old texts under examination responded for the most part more to Soviet than to Western promptings. For the second year an unsuccessful attempt was made to include an article on the right to own property. . . . The concept of property and its ownership is at the heart of the great ideological conflict of the present day. It was not only the Communist representatives who riddled this concept with questions and doubts, a goodly portion of the non-Communist world had itself succumbed to these doubts.

HOLMAN, *supra* note 89, at 72 (alteration in original).

<sup>123</sup> See Tananbaum, *supra* note 113, at 80 (“The American medical profession feared that ‘under the present law it would entirely possible for socialized medicine . . . to be foisted upon the American people through ratification by the Senate of treaty commitments made in the United Nations organization.’” (quoting COLUMBUS (OHIO) ACAD. MED. BULL. (Mar. 1953), at 41)); see also Editorials and Comments, *Dangers of Treaty Law Still Exist*, 152 JAMA 823, 823 (1953) (describing concerns of the American Medical Association with human rights treaties).

the African-American vote was becoming increasingly tenuous as Republicans made significant inroads among African-American strongholds in the Northeast.<sup>124</sup> Seeking to reverse this trend, James Rowe, an attorney and leading Democratic operative, drafted a report that was subsequently adopted as a crucial guide for Truman's 1948 election campaign. "[T]he northern Negro voter," the memo concluded, "today holds the balance of the power in Presidential elections for the simple arithmetical reason that the Negroes not only vote in a bloc but are geographically concentrated in the pivotal, large and closely contested electoral states such as New York, Illinois, Pennsylvania, Ohio, and Michigan."<sup>125</sup> Ironically, in what would eventually prove to be a grave political miscalculation, the memo assumed that the loyalty of Southern Democrats could be taken for granted even if civil rights reform became a key part of Truman's electoral agenda.<sup>126</sup>

In any event, Southern Democrats feared that Truman would attempt to use U.N. treaties to shore up his support among both Northern liberals and a more politically assertive African-American base.<sup>127</sup> Moreover, civil rights groups in the United States were increasingly turning to the United Nations as a possible institutional venue for seeking redress against discriminatory Jim Crow policies.<sup>128</sup> For instance, the National Association for the Advancement of Colored People (NAACP) had formally petitioned the United Nations in 1947 to complain about the treatment of African-Americans. The organization claimed that having "failed to find relief from oppression through constitutional appeal, [we] find ourselves forced to bring this vital issue . . . to the attention of this historic body."<sup>129</sup>

All these developments helped trigger the backlash by a coalition of Republicans and Southern Democrats in the Senate who subsequently joined forces to support Senator Bricker's effort to amend the treaty power. But what united this coalition was hardly shared animosity towards the cause of African-Americans. Indeed, as some commentators have observed, certain Republican officials had sought to court the African-American vote in the late 1940s but balked at embracing civil rights legislation in the workplace because Republican-leaning business constituencies were generally opposed to expansion of regulations that would interfere

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<sup>124</sup> See GARY A. DONALDSON, *TRUMAN DEFEATS DEWEY* 11 (1999).

<sup>125</sup> Memorandum from James Rowe for Budget Bureau Dir. James Webb (Sept. 18, 1947), *available at* <http://www.hks.harvard.edu/case/3pt/rowe.html>.

<sup>126</sup> "As always," the memo concluded, "the South can be considered safely Democratic. And in formulating national policy it can be safely ignored." *Id.*

<sup>127</sup> See *supra* notes 113–19, 122–24 and accompanying text.

<sup>128</sup> See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 43–46 (2000).

<sup>129</sup> *Id.* at 44 (quoting NAACP, *AN APPEAL TO THE WORLD* (W.E. Burghardt Du Bois ed., 1947)) (internal quotation mark omitted).

with private commercial interests, including antidiscrimination regulation.<sup>130</sup> In any event, facing an increasingly split Democratic coalition, Truman eventually chose the option of party unity, forgoing a legislative remedy to push his civil rights agenda and instead concentrating on pushing reform through the courts.<sup>131</sup> The human rights treaty controversy nonetheless became part of a larger rift within the Democratic Party that drove many prominent Southern politicians who were part of Roosevelt's coalition to support Eisenhower in the 1952 elections.<sup>132</sup>

To be sure, the hostility that conservative Senators held towards international commitments that might lock in a progressive policy agenda was understandable. That is not the end of the story, however. Why, one might ask, did the Truman Administration not anticipate this unfavorable political dynamic and seek modifications to the U.N. Human Rights Conventions that would stymie the mobilization of opposing, conservative forces? In other words, why did Truman not attempt to co-opt the political opposition composed of Republicans and Southern Democrats through side payments within the framework of these draft U.N. Human Rights Conventions?

The short answer is that the Truman Administration tried but could not get the various other state signatories on board. More specifically, Eleanor Roosevelt, Truman's chief delegate to the United Nations and the first Chair of the U.N. Human Rights Commission, proposed two different modifications to the treaty language that would have made the proposed U.N. Draft Covenant on Human Rights less burdensome to the domestic political opposition.<sup>133</sup> First, she proposed that the Covenant be non-self-executing and exclude any language on social and economic rights.<sup>134</sup> Second, she attempted to include a "states' rights" provision within the Covenant that guaranteed that none of its substantive provisions would apply directly to the states (or federal subdivisions).<sup>135</sup> The other signatories of the proposed Covenant rejected it even though they were aware that rejection would make it unlikely that the Truman Administration would gain the legislative support necessary for ratification.<sup>136</sup> In sum, the various draft U.N. cove-

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<sup>130</sup> See DONALDSON, *supra* note 124, at 11–12 (observing that the Republican Speaker of the House had told an African-American audience that Republican support of fair employment practice legislation would alienate Midwestern and New England industrialists who would likely stop contributing to the Republican Party).

<sup>131</sup> See Whittington, *supra* note 100, at 592–93.

<sup>132</sup> See CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955*, at 212–16 (2003).

<sup>133</sup> The Draft U.N. Convention on Human Rights was the first effort to implement the Universal Declaration of Human Rights. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 195* (2001).

<sup>134</sup> See ANDERSON, *supra* note 132, at 200; GLENDON, *supra* note 133, at 196.

<sup>135</sup> See ANDERSON, *supra* note 132, at 4–5, 200.

<sup>136</sup> In the end, rather than one Human Rights Convention, two separate Conventions were drafted to implement the Declaration—the International Covenant on Civil and Political Rights and the International Covenant on Social, Cultural, and Economic Rights. See GLENDON, *supra* note 133, at 202.

nants did not leave any of the domestic opposition in the United States—Republicans and Southern Democrats—much reason to believe that they would ever benefit from these covenants although they could reasonably expect that their political adversaries would.

Nonetheless, the Bricker Amendment movement still presents a puzzle: given how unfavorable the postwar political climate was to the Senate ratification of human rights treaties, why did Senator Bricker and his legislative allies persist in their quest to pass a constitutional amendment even after the Republicans won the White House in 1952? After all, even though Eisenhower had disfavored the Bricker Amendment as an interference with the Executive Branch's authority in foreign affairs, he shared his co-partisans' antipathy to human rights treaties, which he demonstrated by committing not to negotiate any more such treaties and by appointing a well-known treaty skeptic to replace Eleanor Roosevelt as delegate to the United Nations.<sup>137</sup> One plausible answer is that the postwar Republican leadership had succumbed to both isolationist and Red Scare impulses.<sup>138</sup> But this account suffers from one significant weakness. Although Senator Bricker frequently invoked strident nationalist and anti-Communist rhetoric, he was hardly a diehard isolationist. Indeed, Bricker had voted for the United States participation in NATO in 1949 and for the Marshall Plan in 1947.<sup>139</sup> Also, a relatively stable bipartisan consensus had emerged on foreign policy matters between the Roosevelt and Eisenhower Administrations that formed the basis of U.S. support for postwar multilateral institutions.<sup>140</sup> Thus, the Bricker Amendment was somewhat of an anomaly; it represented one of very few key foreign policy issues in the early 1950s where there was a gap between the views of the Republican and Democratic elites.<sup>141</sup>

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<sup>137</sup> After seeking Eleanor Roosevelt's resignation from the delegation to the United Nations, Eisenhower appointed as a delegate James Byrnes, Truman's former Secretary of State and a committed Southern segregationist, who was a vocal critic of Truman's civil rights and internationalist policies. See ANDERSON, *supra* note 132, at 215, 241–42. Another controversial Eisenhower appointment to the U.S. delegation to the United Nations was Mary Pillsbury Lord—a flour mills heiress. See *id.* at 236–37.

<sup>138</sup> See, e.g., JUSTUS D. DOENECKE, NOT TO THE SWIFT: THE OLD ISOLATIONISTS IN THE COLD WAR ERA 236–37 (1979).

<sup>139</sup> TANANBAUM, *supra* note 85, at 23. Moreover, Wildavsky's famous "two presidents" thesis, which argued that presidents are more likely to gain congressional support for their foreign policy initiatives than their domestic ones, was based largely on political branch interactions in the 1950s. Aaron Wildavsky, *The Two Presidencies*, TRANS-ACTION, Dec. 1966, at 7. For a critical overview of whether the two presidents thesis applies in the modern era, see Richard Fleisher et al., *The Demise of the Two Presidencies*, 28 AM. POL. Q. 3 (2000).

<sup>140</sup> McCormick & Wittkopf, *supra* note 37, at 1078–79.

<sup>141</sup> See OLE R. HOLSTI, PUBLIC OPINION AND AMERICAN FOREIGN POLICY 175 (rev. ed. 2007) (“[T]he occasional Gallup special surveys of *Who's Who in America* biographees suggest some partisan differences on such issues as the Bricker Amendment to restrict executive treaty-making powers and on the admission of communist China to the United Nations.”).

A more promising explanation of the Republican strategy to seek a constitutional amendment under Eisenhower's Administration is that they were hoping to achieve two distinct but related objectives. First, they hoped to dissuade federal and state judges who might otherwise be sympathetic to progressive causes from relying on the already ratified U.N. Charter or other ratified treaties as a source of binding domestic law.<sup>142</sup> Second, they wanted to forestall any future progressive administration from achieving its domestic policy objectives through the treaty power. Thus, the Bricker Amendment movement represented a concerted campaign by Republican-leaning business and ideological constituencies (and Southern Democrats) to confine future political battles over social and economic policy to venues where they were more likely to prevail against their progressive political adversaries. They attempted to do so by increasing constitutional barriers to the President's authority to make binding treaties with foreign countries, especially if there was a risk that such treaties would be self-executing.

The postwar conservative coalition's view that creating additional veto points over the treaty power would hurt the ability of progressives to advance their causes was not without foundation. Given the burgeoning political salience of the civil rights movement and the alignment of that movement's goals with those of labor groups and other New Deal constituencies, it was safe to assume that political and judicial efforts pushing for desegregation would be around in the future. Liberal Democrats in the United States and key European allies began to converge both on core social issues like civil rights and also on an expansive vision of the welfare state. For instance, beyond the Soviet Union's seemingly self-serving rhetoric condemning racial discrimination in the United States, various democratic European allies criticized the civil rights situation in the South.<sup>143</sup> Moreover, in postwar Europe, elites sympathized with the notion of protecting positive economic rights either through human rights treaties or national constitutions.<sup>144</sup> In sum, the pool of potential stakeholders in the proposed

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<sup>142</sup> As Clarence Manion, Dean of Notre Dame Law School, clarified in his testimony in support of the amendment:

[W]e are told that the amendment may have been needed in the past, but both patriotism and sanity have now been restored to our diplomatic counsels and no Constitution-destroying treaties will hereafter be negotiated or ratified. We all can earnestly hope and believe that this prediction is correct. However, testimony now in this record . . . discloses that more than 50 dangerous treaties are presently awaiting ratification . . . . Against these pending treaties we still have a defense in the process of ratification by the Senate. My concern is with the continuing court constructions of treaties and executive agreements already ratified, accepted and now binding upon us all as the supreme law of the land.

1953 Hearings, *supra* note 94, at 814.

<sup>143</sup> See ANDERSON, *supra* note 132, at 108–11. For a more general view of how Europeans reacted towards American treatment of African-Americans, see DUDZIAK, *supra* note 128, at 34–36.

<sup>144</sup> See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 525–26 (1992) (discussing “the attitudes of the post-World War II European constitution-makers who supplemented traditional negative liberties with certain affirmative social and economic rights or obliga-

U.N. human rights agreements was significant and growing, which meant that it might eventually be strong enough to weaken the resolve of conservative forces opposed to progressive social and economic reform.

In the modern era, the issues surrounding the Bricker Amendment continue to play out in debates regarding ratification of the U.N. Convention on the Rights of the Child (CRC), the U.N. Convention on the Rights of Persons with Disabilities (CRPD), and the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>145</sup> For instance, the 2008 Democratic platform endorsed the ratification of CEDAW as well as the Convention on the Rights of Persons with Disabilities.<sup>146</sup> By contrast, the 2008 Republican platform vowed to reject the ratification of both CEDAW and CRC:

Because the UN has no mandate to promote radical social engineering, any effort to address global social problems must respect the fundamental institutions of marriage and family. . . . We reject any treaty or agreement that would violate those values. That includes the UN convention on women's rights . . . and the UN convention on the rights of the child.<sup>147</sup>

For Republicans, these treaties intruded on two issues that are likely to appeal to that party's conservative base: family privacy and reproductive freedom. In some sense, opposition to these two U.N. Conventions accentuates the Republican issue ownership over "family values" in a manner that not only is likely to mobilize the party's traditional base<sup>148</sup> but also may appeal

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tions"); Helen Hershkoff, "Just Words": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010) (observing the pervasive pattern of protection of positive social and economic rights in postwar constitutions). Prominent conservative legal scholars and political scientists have expressed concern that human rights treaties might be susceptible to capture by narrow left-leaning groups aligned with European elites and autocratic states. See John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205 (2000); McGinnis & Somin, *supra* note 82; Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-member States?*, 1 CHI. J. INT'L L. 273, 275–76 (2000).

<sup>145</sup> See Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

<sup>146</sup> See *Democratic Party Platforms: 2008 Democratic Party Platform*, AM. PRESIDENCY PROJECT (Aug. 25, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=78283>. President Obama eventually signed the Convention on the Rights of Persons with Disabilities in 2009. See President Barack Obama, *Remarks by the President on Signing of U.N. Convention on the Rights of Persons with Disabilities Proclamation* (July 24, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing).

<sup>147</sup> *Republican Party Platforms: 2008 Republican Party Platform*, AM. PRESIDENCY PROJECT (Sept. 1, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=78545>.

<sup>148</sup> See William Martin, *The Christian Right and American Foreign Policy*, 114 FOREIGN POL. 66, 66–69 (1999).

to conservative Democratic voters concerned that dominant American cultural values are under attack.<sup>149</sup>

The institutional terrain for contemporary partisan battles over human rights treaties has shifted over the past fifty years. For instance, partisan interest groups rarely invoke the threat of a constitutional amendment to forestall the ratification of an unfavorable human rights treaty, which may lend credence to the criticism that Senator Bricker's effort to amend the Constitution was a form of institutional overkill.<sup>150</sup> Instead, modern debates over human rights treaties tend to center around constitutional ambiguities, such as whether such treaties can ever be self-executing<sup>151</sup> or whether further legislative action is always required.<sup>152</sup> But more broadly, even when human rights treaties are ratified by the Senate, they are invariably inundated with reservations that foreclose direct enforcement of such treaties in domestic courts.<sup>153</sup> Partisan groups on both sides of the issue very likely emerged from the Bricker Amendment controversy more circumspect about how to use institutional arrangements and legislation to advance their respective agendas. For instance, progressives probably realized that a friendly federal judiciary interpreting a robust vision of the Fourteenth

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<sup>149</sup> See DAVID C. LEEGE ET AL., *THE POLITICS OF CULTURAL DIFFERENCES: SOCIAL CHANGE AND VOTER MOBILIZATION STRATEGIES IN THE POST-NEW DEAL PERIOD* 158–66 (2002).

<sup>150</sup> Cf. John B. Whitton & J. Edward Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 AM. J. INT'L L. 23, 23–24 (1954) (“Though no past cases of the abuse of the treaty-making power are proved, and the possibility of Senate approval of any of the allegedly dangerous human rights treaties is admitted to be nil, the constitutional implications of those treaties are considered sufficient warning to justify an attempt to ‘close the barn door before the horse is stolen.’”).

<sup>151</sup> As discussed earlier, despite the Supreme Court's recent pronouncement in *Medellin*, the contours of the doctrine governing self-executing treaties still remain unclear. See *supra* note 79 and accompanying text.

<sup>152</sup> See Henkin, *supra* note 95, at 341–43 (describing recent human rights treaties and discussing the Senate's extensive use of reservations to convey its understanding that such treaties are not self-executing); see also David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-self-execution*, 110 COLUM. L. REV. 2228 (2010) (arguing in favor of a broad notion of treaty non-self-execution); David Sloss, *The Domestication of International Human Rights: Non-self-executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 139–42 (1999) (observing that the United States included declarations of non-self-execution in its instruments of ratification with respect to the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment); Lesley Wexler, *Take the Long Way Home: Sub-federal Integration of Unratified and Non-self-executing Treaty Law*, 28 MICH. J. INT'L L. 1, 2 (2006) (“Even when the United States does join multilateral environmental and human rights treaties, these treaties often languish in Congress without domestic implementing legislation.”).

<sup>153</sup> See Henkin, *supra* note 95, at 341–43. For some of the debates regarding reservations to human rights treaties and their validity, see Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002), which suggests that reservations should be treated as severable. But see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 402 (2000) (arguing that reservations, understandings, and declarations to human rights treaties “reflect a sensible accommodation of competing domestic and international considerations”).

Amendment was a better vehicle for entrenching domestic civil rights policy goals than U.N. international human rights agreements.<sup>154</sup> On the other hand, right-leaning groups realized that they could effectively thwart the domestic enforcement of unfavorable human rights agreements without having to resort to proposals to amend the Constitution.

In sum, although debates regarding human rights treaties and norms are often couched in high-minded or principled language, they often implicate more strategic partisan and electoral calculations. With respect to the post-war human rights treaty controversies, advocacy groups associated with both of the major political parties were seeking to expand or shrink the scope of political conflict over social and economic policy to venues in which they had an advantage. Then, as now, these debates were often not over competing visions of American foreign policy but rather over the role such human rights treaties should play in increasingly polarizing domestic conflicts over cultural and social policy issues.<sup>155</sup>

At bottom, human and social rights treaties may tend to influence the electoral opportunity structure in ways that favor one party over another. First, human rights policies might appeal directly to the needs of electorally relevant constituencies in one party. When Truman first succeeded Franklin Roosevelt, he might not have inherited a mandate to promote civil rights; by the end of his first term, though, he was facing mounting pressure by a well-organized African-American constituency to take a more aggressive stance on desegregation. Championing the progressive social policy goals contained in the various U.N. human rights agreements promised to solidify the support of a group that proved to be important to his electoral success in the 1948 presidential elections and to whom he would undoubtedly turn for support in 1952. On the other hand, Truman's stance alienated the Southern Democrats, who subsequently became vital allies in a Republican-led backlash against the U.N. human rights movement.

Second, human rights issues might tend to raise the profile of issues owned by one party. In the United States, most of the issues covered by U.N. human rights treaties tend to be those in which Democrats are likely to have an electoral advantage, such as discrimination towards women and minority groups, rights of immigrants and refugees, and rights of criminal suspects. Alternatively, these treaties tend to ignore or deemphasize issues on which Republicans have an electoral advantage over Democrats. For example, one commentator has suggested that Americans and Europeans are "farther divided on the question of capital punishment than on any other

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<sup>154</sup> See Whittington, *supra* note 100, at 591–93.

<sup>155</sup> See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 402–03 (1998) (discussing how the proliferation of human rights treaties might affect state control over social issues); Moravcsik, *supra* note 96, at 147–50 (discussing ideological disagreements in the United States over human rights treaties).

morally significant question of government policy.”<sup>156</sup> Ostensibly, the European Union insists that capital punishment offends “human dignity” and that its abolition will lead to “the progressive development of human rights.”<sup>157</sup> But such rhetoric obscures the reality that capital punishment has been a part of the electoral strategy of the Republican Party in the United States for the past four decades, and its abolition could undermine that party’s office-seeking objectives.<sup>158</sup> The redistributive politics of capital punishment stem not only from the reality that core Republican constituencies tend to favor harsher criminal punishment but also from the fact that independents and swing voters tend to trust Republican candidates to be tougher on crime than their Democratic counterparts.<sup>159</sup> Republicans since the Nixon Administration have deliberately cultivated an anticrime image of which unwavering partisan support for capital punishment has been a key component.<sup>160</sup> To a significant degree, this strategy has worked. According to some empirical studies, there is a strong positive relationship between Republican Party strength and the legal existence of the death penalty.<sup>161</sup> Meanwhile, crime has continued to be one of the most electorally salient issues in American politics. As one commentator has observed, “[I]t would not be hyperbolic to conclude that crime has been the central theme in the rhetoric of American electoral politics and in the strategies of elected officials in the decades since 1968.”<sup>162</sup>

Given these political dynamics, it is unsurprising that no modern human rights treaty has ever been ratified while Republicans held a majority in the U.S. Senate; indeed, as Moravcsik has observed, such treaties have only been ratified when the Democrats have held close to a supermajority in the Senate.<sup>163</sup>

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<sup>156</sup> FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 181 (2003).

<sup>157</sup> *Death Has No Appeal*, EUROPEAN COMM’N, [http://ec.europa.eu/europeaid/what/human-rights/death\\_has\\_no\\_appeal\\_en.htm](http://ec.europa.eu/europeaid/what/human-rights/death_has_no_appeal_en.htm) (last visited June 26, 2011).

<sup>158</sup> See David Jacobs & Jason T. Carmichael, *Ideology, Social Threat, and the Death Sentence: Capital Sentences Across Time and Space*, 83 SOC. FORCES 249, 257–58 (2004).

<sup>159</sup> See STEPHEN ANSOLABEHRE & SHANTO IYENGAR, GOING NEGATIVE: HOW POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE 89 (1995) (“People who fear crime gravitate to the Republicans and listen to the Republicans when they speak out on crime.”). *But cf.* David B. Holian, *He’s Stealing My Issues! Clinton’s Crime Rhetoric and the Dynamics of Issue Ownership*, 26 POL. BEHAV. 95 (2004) (footnote omitted) (suggesting that President Clinton successfully trespassed on the crime issue during the 1992 presidential campaign and was able to dilute part of the Republican ownership of the issue).

<sup>160</sup> See Jacobs & Carmichael, *supra* note 158, at 257–58.

<sup>161</sup> See David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 AM. SOC. REV. 109, 114–16 (2002).

<sup>162</sup> EVAN J. MANDERY, *CAPITAL PUNISHMENT: A BALANCED EXAMINATION* 645 (2005).

<sup>163</sup> See Moravcsik, *supra* note 96, at 184.

*B. Promoting Intrapartisan Conflict within the Political Opposition: The Case of NAFTA*

At first blush, the passage of NAFTA in 1993 might seem like an odd illustration of how political parties use international law to secure electoral or ideological advantage. After all, the prevailing account of international trade in the United States is one of well-organized and concentrated interest groups who exercise significant lobbying clout over a Congress that is increasingly wedded to “special interests.”<sup>164</sup> Downplaying any significant role for partisanship, this account suggests that protectionist groups deployed their privileged access to key congressional committees in the early part of the twentieth century to seek policies that raised trade barriers to dangerously high levels. This strong pork-barrel dynamic, the story goes, eventually triggered the disastrous Smoot–Hawley Tariff legislation of the 1930s, which in turn propelled Congress in 1934 to take measures to delegate much of its international trade authority to the President.<sup>165</sup> By turning over more power to a free-trade-oriented Executive Branch that was more accountable to a broader audience, Congress was able to forestall an increasing spiral of protectionism and set the stage for the modern era of free trade.<sup>166</sup> According to this account, the passage of NAFTA, like previous international trade agreements of the twentieth century, was simply another incident where a combination of institutional factors and favorable historical circumstances led to a triumph of public-regarding policies over special interest politics.<sup>167</sup>

But recent scholarship has begun to question this long-standing institutionalist narrative. First, as a growing number of studies have shown, the

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<sup>164</sup> See KENNETH W. DAM, *THE RULES OF THE GLOBAL GAME: A NEW LOOK AT US INTERNATIONAL ECONOMIC POLICYMAKING* 8–18 (2001); I.M. DESTLER, *AMERICAN TRADE POLITICS* 14–16 (4th ed. 2005); Michael A. Bailey et al., *The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade*, 49 *WORLD POL.* 309, 309 (1997); Susanne Lohmann & Sharyn O’Halloran, *Divided Government and U.S. Trade Policy: Theory and Evidence*, 48 *INT’L ORG.* 595, 596 (1994); Karen E. Schnietz, *The Institutional Foundation of U.S. Trade Policy: Revisiting Explanations for the 1934 Reciprocal Trade Agreements Act*, 12 *J. POL’Y HIST.* 417, 418–19 (2000).

<sup>165</sup> See DESTLER, *supra* note 164, at 14–17 (arguing that members of Congress delegated authority in order to “protect[] themselves . . . from the direct, one-sided pressure from producer interests that had led them to make bad trade law”). In 1934, Congress passed the Reciprocal Trade Agreements Act (RTAA), Pub. L. No. 73-316, § 350(a), 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. § 1351(a) (2006)). The RTAA authorized the President “[t]o enter into foreign trade agreements with foreign governments . . . and . . . [t]o proclaim such modifications of existing duties and other import restrictions . . . to carry out any [such] trade agreement.” 19 U.S.C. § 1351(a)(1)(A)–(B).

<sup>166</sup> See, e.g., Bailey et al., *supra* note 164, at 326 (observing that presidents favored low tariffs because the president’s constituency is national while that of a member of Congress is local); Schnietz, *supra* note 164, at 429–32 (same).

<sup>167</sup> See, e.g., DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 223–24 (1999) (arguing that delegation by Congress to the President makes trade agreements like NAFTA feasible); see also ROSS K. BAKER, *HOUSE AND SENATE* 225 (3d ed. 2001) (arguing that senators were more supportive of NAFTA than members of the House were because senators have larger constituencies).

notion that the President is consistently more free-trade-oriented than Congress is suspect. On the contrary, trade policies often seem to track partisan lines rather than the institutional preferences of the political branches. For instance, prior to the 1950s, Republican politicians across both political branches favored more protectionist policies than Democrats<sup>168</sup> whereas, in the modern era, the parties have largely switched positions, with the Republicans becoming the party of free trade.<sup>169</sup> Moreover, the broader claim that the President may be more responsive to a more nationalist (and thus less protectionist) constituency than Congress is undertheorized and lacks empirical support.<sup>170</sup> Second, the notion that Congress would attempt to restrict interest group pressures by delegating international trade authority to the President also seems difficult to reconcile with what we know about legislative behavior. After all, Congress has not forsaken involvement in international trade politics; indeed, interest group lobbying before Congress on trade issues is still quite common.<sup>171</sup> More broadly, if Congress were seeking to protect itself from the effects of special interest politics, why would it restrict its public-mindedness to international trade and not extend it to other areas where special interest lobbying is pervasive, such as tort reform, gun control, or health care reform? Third, the notion that international trade politics in Congress are best characterized as one-sided pork-barrel lobbying in favor of higher trade barriers is misleading; on the contrary, there are well-organized interest groups both for and against reducing trade barriers, and the evidence does not suggest that protectionist groups are consistently more influential than export-oriented industry groups seeking to lower trade barriers.<sup>172</sup>

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<sup>168</sup> See Michael J. Hiscox, *The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization*, 53 INT'L ORG. 669, 677 (1999) ("[T]he notion that any president, by dint of having a larger constituency, must be less protectionist than the median member of Congress, is hopelessly ahistorical.").

<sup>169</sup> See JAMES SHOCH, *TRADING BLOWS: PARTY COMPETITION AND U.S. TRADE POLICY IN A GLOBALIZING ERA* 4–6 (2001); see also Richard Sherman, *Delegation, Ratification, and U.S. Trade Policy: Why Divided Government Causes Lower Tariffs*, 35 COMP. POL. STUD. 1171, 1178–82 (2002) (arguing that in the postwar era Republican presidents tend to be more protectionist than Republican Congresses while Democratic presidents tend to be less protectionist than Democratic Congresses).

<sup>170</sup> See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231–32 (2006). Moreover, the claim that politicians who are elected from a broader audience are more likely to pursue free trade policies is also empirically unsupported. See Sean D. Ehrlich, *Constituency Size and Support for Trade Liberalization: An Analysis of Foreign Economic Policy Preferences in Congress*, 5 FOREIGN POL'Y ANALYSIS 215 (2009) (finding no support for the constituency size or the assumption that presidents have more liberal trade policies); David Karol, *Does Constituency Size Affect Elected Officials' Trade Policy Preferences?*, 69 J. POL. 483 (2007) (finding no empirical support for the notion that larger constituencies render elected officials less protectionist).

<sup>171</sup> See Nzelibe, *supra* note 170, at 1270–71.

<sup>172</sup> In hindsight, a more plausible account of Congress's behavior in the wake of Smoot–Hawley was that it delegated international trade authority to the President because it sought to be more responsive to groups seeking access to foreign markets but lacked the institutional tools to do so. In other words, Congress sought to liberalize, but it could not do so on its own because the President had the exclusive authority to negotiate the reduction of tariffs with other states. See *id.*

In any event, a cursory review of the political dynamics preceding the passage of NAFTA in 1993 suggests that the quest for partisan advantage played a key role. For Democrats seeking to take back the White House in 1992, NAFTA exposed a potentially significant fault line within their core electoral coalition, dividing party centrists such as the moderate and business-oriented Democratic Leadership Council (DLC) from the more traditional Democratic labor constituencies.<sup>173</sup> To Clinton, a self-styled “New Democrat” who was himself a leader of the DLC, the question of a North American regional trade agreement that would include Mexico was potentially a highly divisive issue that threatened to undermine the unity of the coalition he needed to gain victory in 1992. As James Shoch shows in his extensive study of postwar U.S. trade policy, the fight against NAFTA was the most significant lobbying effort undertaken by organized labor since the 1930s.<sup>174</sup> For the most part, organized labor feared that the agreement would precipitate significant capital flight to Mexico and depress blue-collar wages.<sup>175</sup> Thus, unlike the politics surrounding the negotiation of the Uruguay Round in 1994, which did not provoke significant resistance by labor groups in the United States, NAFTA involved the broad liberalization of investment flows.<sup>176</sup> On the other hand, however, centrist Democrats were courting American multinational companies that were hoping to use the agreement to take advantage of Mexico’s vast labor pool.<sup>177</sup> Faced with the possibility of a deeply divided coalition within the Democratic Party, Clinton had an incentive to avoid taking sides during his campaign on an issue that was likely to polarize his base.<sup>178</sup>

Against this background, Republicans had an incentive to lift NAFTA high on the 1992 campaign agenda partly to exploit any resultant infighting among Democrats to their electoral advantage. Initially, the Republicans had made the negotiation of NAFTA a key part of their electoral platform, hoping that focusing on its implications would shore up their support among Hispanic voters and business groups in Southwest states that might prove to be pivotal in a close election.<sup>179</sup> More importantly, however, the Republicans started to realize that international trade would be a wedge is-

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<sup>173</sup> See SHOCH, *supra* note 169, at 147, 180–83; L. Ronald Scheman, *A Pact That Divides Democrats*, WASH. POST, Aug. 27, 1992, at A31.

<sup>174</sup> See SHOCH, *supra* note 169, at 180.

<sup>175</sup> See *id.* at 193.

<sup>176</sup> See *id.* at 146, 192–93.

<sup>177</sup> See *id.* at 145–46, 183; Sandra Masur, *The North American Free Trade Agreement: Why It’s in the Interest of U.S. Business*, 26 COLUM. J. WORLD BUS. 98, 101 (1991) (describing ways that NAFTA will benefit American corporations).

<sup>178</sup> For instance, when Clinton campaigned in the Midwest, then a union stronghold, he expressed doubt as to whether he would be willing to seek legislative ratification of a NAFTA agreement signed by President Bush. See SHOCH, *supra* note 169, at 158.

<sup>179</sup> See *id.* at 158–59.

sue for the Democrats that year.<sup>180</sup> After all, the Democratic primaries had revealed very strong cleavages between two different coalitions in the party, one that was personified by the stridently anti-NAFTA position of Senator Tom Harkin of Iowa and the other by the more moderate and business-friendly Clinton.<sup>181</sup> Later that fall, President Bush turned up the heat and accused his opponent Clinton of waffling on international trade.<sup>182</sup> Indeed, Clinton's ambivalence over NAFTA became a key talking point for the Republicans as to why the Democratic candidate could not be trusted as a decisive leader.<sup>183</sup> Initially, it looked like the Republican divide-and-rule strategy was working as Clinton refused to take a clear position on the issue throughout the summer.<sup>184</sup> He eventually relented a month before the election and said he would accept the signed NAFTA agreement, but only if the final agreement included side agreements on labor standards.<sup>185</sup>

So why did the Republicans push so hard to make NAFTA a significant part of the agenda in an election year? In the end, it is difficult to conclude that NAFTA was an issue on which Republicans believed that they could pick up many swing voters at the expense of Democrats since the passage of NAFTA was hardly a popular issue in the economic climate of late 1992.<sup>186</sup> Moreover, it is not clear that the Republicans thought they could prevail on the NAFTA question if they had won the 1992 presidential election because it was unlikely that they would pick up enough votes from House Democrats to ensure ratification.<sup>187</sup> More plausibly, the Republicans

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<sup>180</sup> See MAXWELL A. CAMERON & BRIAN W. TOMLIN, *THE MAKING OF NAFTA: HOW THE DEAL WAS DONE* 179–80 (2000).

<sup>181</sup> See SHOCH, *supra* note 169, at 158, 180–82.

<sup>182</sup> For instance, Bush claimed that Clinton had “hemmed and hawed [on NAFTA] . . . I guess as a candidate you can be on both sides of every question, but as a president you cannot. You have to make the tough decisions.” David S. Broder, *Bush Assails Clinton on Trade Policy; Plan to Raise Taxes on Foreign Firms Would ‘Destroy Jobs,’* WASH. POST, Aug. 28, 1992, at A1; see also CAMERON & TOMLIN, *supra* note 180, at 180–81 (“Bush . . . accus[ed] Clinton of trying to favor NAFTA and oppose it at the same time . . .”).

<sup>183</sup> In the second presidential debate, for instance, President Bush seemed to hammer home the question of Clinton's indecision on NAFTA for maximum effect:

But the big argument I have with the governor on this is this taking different positions on different issues—trying to be one thing to one person here that's opposing the NAFTA agreement and then for it—what we call waffling. And I do think that you can't turn the White House into the Waffle House. You've got to say what you're for . . .

President George H.W. Bush, Statement at the Second Presidential Debate (Oct. 15, 1992) (transcript available at <http://www.pbs.org/newshour/debatingourdestiny/92debates/2prez1.html>).

<sup>184</sup> See SHOCH, *supra* note 169, at 158–59.

<sup>185</sup> See *id.*; see also CAMERON & TOMLIN, *supra* note 180, at 180–81 (arguing that Clinton used the side agreements to assuage concerns on labor and the environment).

<sup>186</sup> See SHOCH, *supra* note 169, at 159–60.

<sup>187</sup> Indeed, as U.S. Trade Representative Mickey Kantor observed, ratification of NAFTA in 1993 would have been politically difficult under any Republican president. See *id.* at 185; see also CAMERON & TOMLIN, *supra* note 180, at 181 (arguing that NAFTA would have failed if Bush were elected without a Republican majority in Congress).

recognized the political value of using NAFTA to exploit cleavages within the Democratic Party that they believed could make it difficult for Democrats to turn out their trade union base that November.

By the time Clinton took the oath of office in 1993, the question of NAFTA ratification had already been foisted squarely onto the legislative agenda. Since President Bush had already signed the treaty in December 1992, ignoring the issue was no longer an option for Clinton. He had to make a choice either way, and each possible course of action was fraught with the risk of alienating a significant part of his party's base. Nonetheless, Clinton decided to stake much of his political capital in favor of ratification and was personally involved in trying to usher the pact through Congress.<sup>188</sup> But it is probably an exaggeration to attribute Clinton's decision to back NAFTA largely to institutional factors such as the differences of constituencies faced by presidents and members of Congress. In the end, Clinton was already a member of the business-oriented coalition within the Democratic Party before his campaign for the presidency, and his preferences on international trade mirrored those preferred by that coalition. To placate the concerns of the more dominant anti-NAFTA coalition within his own party, however, he worked through the spring of 1993 to include side agreements that would establish commissions authorized to investigate and enforce violations of environmental and labor standards.<sup>189</sup> But a sufficient number of pro-NAFTA Republican senators were intensely opposed to these side agreements and threatened to withhold their support if the agreements were part of the package.<sup>190</sup> Caught between a rock and hard place, the Clinton Administration agreed to water down the power of these proposed commissions to allow them only to inquire and study alleged violations without providing them with any real enforcement authority. That compromise was not enough to satisfy most of the key labor groups, however, and they mounted an intense lobbying campaign against ratification.<sup>191</sup> But despite their opposition, Clinton was able to pick up enough wavering Democrats to ensure the bill's passage.<sup>192</sup>

Ultimately, however, NAFTA ratification was the product of a largely skewed partisan vote in Congress, with a significant majority of Republicans (seventy-five percent) voting in favor and with sixty percent of Democrats against<sup>193</sup> despite Clinton's Democratic leadership from the White House. In many respects, the NAFTA vote seemed to vindicate a traditional parties-as-agent account, with Republicans being more responsive to in-

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<sup>188</sup> See SHOCH, *supra* note 169, at 177.

<sup>189</sup> See *id.* at 175–76.

<sup>190</sup> See *id.* at 176–77.

<sup>191</sup> See *id.* at 176.

<sup>192</sup> See *id.* at 183–85.

<sup>193</sup> The vote breakdown along partisan lines was 132–43 Republicans in favor, while Democrats were against it 102–156. *Id.* at 183–84.

ternationally oriented business groups seeking market access, whereas Democrats were much more responsive to labor interests such as the AFL–CIO. In addition, some Democrats probably jumped ship on NAFTA to avoid handing President Clinton an embarrassing defeat on one of his key legislative initiatives, but these same Democrats might have been less sanguine about supporting NAFTA had it been pushed by a Republican president.<sup>194</sup>

Reeling from their defeat in NAFTA, both the prolabor liberal wing of the Democratic Party and their organized labor constituencies were much better prepared to block the passage of future regional trade agreements during the rest of Clinton’s Administration. For instance, the AFL–CIO proved to be much more influential in thwarting Clinton’s efforts to seek fast-track authority in 1997, with seventy-nine percent of House Democrats opposing an extension of negotiation authority.<sup>195</sup> Furthermore, labor groups affiliated with the Democratic Party scored another decisive victory against the expansion of NAFTA in 1998. This time, however, it was the House Republican leadership that took the initiative to introduce fast-track authority legislation for President Clinton, probably hoping to provoke a division between the House Democrats and the White House during the mid-term elections that year.<sup>196</sup> Again, despite a bill that would ostensibly give the Democratic Clinton more authority in international affairs, opposition by House Democrats was both broad and intense, with only about fifteen percent of Democrats voting in support of the measure.<sup>197</sup> In both of these cases, a significant majority of House Republicans proved to be eager to lend their support to Clinton<sup>198</sup> presumably because they believed that fast-track authority would advance the cause of their favored constituencies and hurt the cause of Democratic-leaning labor constituencies even if the individual occupying the White House belonged to the political opposition.

The politics of intracoalitional conflict might shed some light on why Democrats in Congress were able to forestall new fast-track legislation that would expand NAFTA but have been less successful in repealing or renegotiating NAFTA since then. To put it bluntly, regardless of the party in the White House, the existence of significant Democratic legislative majorities

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<sup>194</sup> See *id.* at 185.

<sup>195</sup> See James Shoch, *Contesting Globalization: Organized Labor, NAFTA, and the 1997 and 1998 Fast-Track Fights*, 28 POL. & SOC’Y 119, 127–30 (2000). For clarification, “fast-track” procedures refer to when Congress provides advance authorization to the President to negotiate trade agreements with other countries, which the President then submits to Congress for approval and implementation. Under such procedures, the President is assured of an up-or-down vote on the implementing legislation that he submits to Congress. For a quick overview of the legal and historical origins of the fast-track procedure, see Steve Charnovitz, Book Review, 10 J. INT’L ECON. L. 153 (2007) (reviewing HAL S. SHAPIRO, *FAST TRACK: A LEGAL, HISTORICAL, AND POLITICAL ANALYSIS* (2006)).

<sup>196</sup> See Shoch, *supra* note 195, at 136–37.

<sup>197</sup> *Id.* at 137.

<sup>198</sup> The Republican vote in favor of extending fast track in 1998 was 151–71. *Id.*

might make it harder for new regional trade agreements to pass because the median House Democrat still appears to be unwilling to ignore the preferences of the party's core labor constituencies.<sup>199</sup> But once such regional international trade agreements pass, Democrats might not necessarily seek to repeal them. One explanation might be that while parties have an incentive not to push policies that are likely to alienate their core supporters, they also have an incentive to avoid pushing a policy agenda that is likely to trigger significant intrapartisan conflict. Even if a Democratic congressional majority were able to muster enough numbers in the House to repeal or renegotiate NAFTA, such an effort would likely set off an intense battle between Democratic centrists and trade unionists and thus undermine the party's effort to win elections and push its policy agenda. In this picture, removing the repeal of NAFTA from the legislative agenda could help both Democratic presidents and party leaders in Congress manage their party's diverse coalitions without sacrificing their ability to push other policy goals in which there might be broader intrapartisan agreement (or at least less intense disagreement) such as health care or financial service reform.<sup>200</sup> Perhaps concerns about intrapartisan conflict might explain why criticism of NAFTA was popular among Democratic presidential candidates campaigning in the rust belt during the 2008 primary election season<sup>201</sup> but the issue of repealing or renegotiating NAFTA quietly receded into the background once President Obama entered the White House in 2009.

In the end, the ratification of NAFTA presented the prospect of cross-coalitional bargaining opportunities in which probusiness Democratic leaders could join forces with Republicans to support an agreement that entrenched their preferences at the expense of prolabor Democrats who nonetheless represented a bigger and stronger coalition within the Democratic Party. But it is precisely this cross-coalitional dynamic that makes agreements like NAFTA politically sustainable across multiple electoral periods. The flip side is that one cannot presume that regional trade agreements like NAFTA will continue to withstand repeal simply because such agreements provide substantial benefits to powerful export-oriented industry groups, especially if such groups cease to play a key role in the intracoa-

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<sup>199</sup> Take the legislative ratification of NAFTA, for instance. Despite significant lobbying by business groups, more Democratic members of Congress appear to have been more responsive to labor concerns than to those of the business wing of the Party.

<sup>200</sup> To be sure, agreements like NAFTA can also help Democratic presidents, who have stronger free trade preferences than the median House Democrat, avoid unpleasant intrapartisan conflicts. With an agreement like NAFTA already in place, for instance, a future business-oriented Democratic president might be able to rationalize painful policy measures that hurt the party's core labor constituents in the name of enforcing the agreement. In such a case, trade unionists within the party might be less willing to withdraw support from a Democratic president in the face of bad policy outcomes.

<sup>201</sup> See Michael Luo, *Despite Nafta Attacks, Clinton and Obama Haven't Been Free Trade Foes*, N.Y. TIMES, Feb. 28, 2008, at A23 ("As they have tussled for votes in economically beleaguered Ohio, Senators Barack Obama and Hillary Rodham Clinton have both excoriated the North American Free Trade Agreement while lobbing accusations against their opponent on the issue.").

litional politics of the Democratic Party. Take, for instance, a scenario where a majority of the probusiness Democrats in Congress lose their seats in a specific election cycle and are replaced by liberal prolabor Democrats or conservative Republicans.<sup>202</sup> In such a scenario where significant intrapartisan conflict can be avoided, a Democratic administration under united government may very well consider repealing, or at least renegotiating, NAFTA, especially the side agreements dealing with the protection of labor and environmental standards.<sup>203</sup>

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To summarize, opportunities for cross-partisan bargaining might help explain the different political trajectories in the United States of the postwar human rights treaties and the passage of NAFTA in 1993. Both kinds of international agreements were plagued by distributive partisan conflicts that tracked the divergent preferences of interest groups associated with both of the major political parties. In the first case, however, the absence of cross-partisan policy-bundling opportunities between Republican- and Democratic-leaning interest groups not only thwarted the possibility of the ratification of the postwar human rights treaties but also provoked a constitutional amendment movement by conservatives who viewed these postwar treaties as vehicles that would provide one-sided benefits to progressive constituencies. In the case of international trade, however, the presence of a cross-partisan coalition uniting the probusiness wing of the Democratic Party and traditional free-market Republicans made NAFTA electorally sustainable, even though it was disfavored by a majority of congressional Democrats and their labor-oriented constituents.

#### IV. AN ALTERNATIVE EXPLANATION—A NATIONALIST VERSUS COSMOPOLITAN DIFFERENCE?

This Article has proposed that a combination of policy-seeking and office-seeking motivations have propelled the Republican and Democratic Parties to take distinct and often conflicting visions on the role and value of both international institutions and international legal commitments. More importantly, it has suggested that some of the motivations for these differences—including the ideological or policy aspects—are rooted in considerations of partisan issue ownership. In other words, each of the major

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<sup>202</sup> For instance, the fact that the House Democratic caucus had become more uniformly prolabor with the 1996 election helped doom Clinton's quest for fast-track authority in 1997. As Shoch observes, many of the centrist Southern Democrats who helped ratify NAFTA in 1993 had either lost their seats or retired. See Shoch, *supra* note 195, at 130.

<sup>203</sup> Indeed, the question of renegotiating the environmental and labor side agreements was a recurring theme during the 2008 presidential election. See Elisabeth Malkin, *Revisiting NAFTA to Cure Manufacturing*, N.Y. TIMES, Apr. 22, 2008, at C7.

parties favors international commitments that highlight or entrench issues they own from an electoral perspective but opposes such commitments that favor issues owned by the political opposition.

An alternative explanation may be that the differences between Republicans and Democrats are best defined by a nationalist–internationalist continuum, with Republicans being more nationalist and inward-looking and Democrats being more internationalist and cosmopolitan. For instance, David Lumsdaine has suggested that left-leaning parties tend to exhibit a more outward international orientation as shown by their greater support for foreign aid programs.<sup>204</sup> Other scholars have suggested a connection between conservative idealism and resistance to international legal institutions.<sup>205</sup> Whereas such considerations may sometimes play a role in understanding partisan preferences for foreign policy, they are hardly sufficient. At bottom, although parties may sometimes couch opposition to international organizations and international legal commitments in terms of the loss of sovereignty, it is not clear they are concerned about the loss of sovereignty for its own sake. Republicans seem to be content with constraining sovereignty through international legal institutions or agreements when doing so favors issues they own, such as free trade and the property rights of investors.<sup>206</sup> Conversely, Democrats seem to be more sanguine about an international legal agreement if it advances issues of primary interest to their core constituents, such as human rights, social welfare, and labor standards, but less so if the agreement advances free trade.<sup>207</sup> Moreover, even when one disaggregates issues that purportedly favor one party, such as human rights, one notices even more fine-grained partisan distinctions. Traditionally, Republicans have tended to sound a cautious note about using American power to promote human rights abroad.<sup>208</sup> Nonetheless, the Republican platforms in 1980 and 1984 accused the Democrats of not being sufficiently solicitous of the human rights of citizens in Soviet Bloc states,<sup>209</sup> and the

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<sup>204</sup> See DAVID HALLORAN LUMSDAINE, *MORAL VISION IN INTERNATIONAL POLITICS: THE FOREIGN AID REGIME, 1949–1989*, at 139, 144 (1993) (observing that parties and elites associated with the left tended to be more open to foreign aid).

<sup>205</sup> See, e.g., Moravcsik, *supra* note 5, at 297–99 (describing “conservative idealism” as the notion that the United States should mount an uncompromising defense of its independence and sovereignty).

<sup>206</sup> See discussion *supra* Part III.B.

<sup>207</sup> See discussion *supra* Part III.A.

<sup>208</sup> See Jerome J. Shestack, *Human Rights in U.S. Foreign Policy: Retrospect and Prospect*, 28 VA. J. INT’L L. 907, 908 (1988) (observing early hostility by the Reagan Administration to Carter’s focus on human rights). But some commentators observed that there was a subsequent turnaround in which the Reagan Administration became more amenable to emphasizing human rights as part of its foreign policy agenda, although such emphasis tended to focus on human rights abuses in communist or leftist regimes. See *id.* at 908–09.

<sup>209</sup> *Republican Party Platforms: Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT (July 15, 1980), <http://www.presidency.ucsb.edu/ws/index.php?pid=25844>; *Republican Party Platforms: Republican Party Platform of 1984*, AM. PRESIDENCY PROJECT (Aug. 20, 1984), <http://www.presidency.ucsb.edu/ws/index.php?pid=25845>.

1996 Republican platform also accused the Clinton Administration of not doing enough to protect the rights of Christians victimized by the Sudanese civil war.<sup>210</sup>

Finally, even within the context of a single international legal regime, one may still observe the evolution of partisan preferences if the emphasis on issues within that regime changes. For example, take British partisan preferences towards the European Community (EC). In the late 1970s and early 1980s, at a time when the core mission of the EC was promoting free trade, the Tories championed a stronger EC. The 1983 Tory manifesto warned that “[w]ithdrawal [from the EC] would be a catastrophe for this country. . . . We would lose the great export advantages and the attraction to overseas investors which membership now gives us.”<sup>211</sup> The Labour Party, though, considered the Treaty of Rome, which established the EC, to be a fundamental mistake and sought immediate withdrawal:

The next Labour government, committed to radical, socialist policies for reviving the British economy, is bound to find continued membership [in the EC] a most serious obstacle to the fulfillment of those policies. . . . For all these reasons, British withdrawal from the Community is the right policy for Britain—to be completed well within the lifetime of the parliament.<sup>212</sup>

But fifteen years later, the parties had switched their positions. By the 1990s, the Tory manifestos were decidedly more Euro-skeptic in tone, and the 1997 manifesto pledged, “We will not accept other changes to the Treaty that would further centralise decision-making, reduce national sovereignty, or remove our right to permanent opt-outs.”<sup>213</sup> Meanwhile, Labour was more sympathetic to a stronger EU that could influence domestic social policies.<sup>214</sup> So what changed? By the 1990s, the EU’s core competence had extended to social and employment policies, especially with the introduction in 1989 of the Community Charter of the Fundamental Social Rights of

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<sup>210</sup> *Republican Party Platforms: Republican Party Platform of 1996*, AM. PRESIDENCY PROJECT (Aug. 12, 1996), <http://www.presidency.ucsb.edu/ws/index.php?pid=25848>.

<sup>211</sup> *British Conservative Party Election Manifesto, 1983: The Challenge of Our Times*, POL. RESOURCES (1983), <http://www.politicsresources.net/area/uk/man/con83.htm>.

<sup>212</sup> *British Labour Party Election Manifesto, 1983: The New Hope for Britain*, POL. RESOURCES (1983), <http://www.politicsresources.net/area/uk/man/lab83.htm>.

<sup>213</sup> *British Conservative Party: Manifesto for 1997 General Election: You Can Only Be Sure With the Conservatives*, POL. RESOURCES (1997), <http://www.politicsresources.net/area/uk/man/con97.htm> [hereinafter *1997 Conservative Manifesto*] (emphasis omitted).

<sup>214</sup> *Labour Party Manifesto, General Election 1997: New Labour Because Britain Deserves Better*, POL. RESOURCES (1997), <http://www.politicsresources.net/area/uk/man/lab97.htm> (“We support too the Social Chapter of the EU, but will deploy our influence in Europe to ensure that it develops so as to promote employability and competitiveness, not inflexibility. . . . A Labour government will strengthen co-operation in the European Union on environmental issues, including climate change and ozone depletion.”).

Workers.<sup>215</sup> Former Prime Minister Margaret Thatcher disparagingly labeled this new key plank of EU social policy as the “Socialist Charter,”<sup>216</sup> and her conservative government refused to sign onto this new key plank of EU social policy.<sup>217</sup> But the Labour Government of Prime Minister Tony Blair reversed course in 1997 when it signed onto the “Social Chapter” provision of the Maastricht Treaty,<sup>218</sup> which incorporated the 1989 Social Charter.<sup>219</sup> In sum, as the competencies of the EU shifted to cover issues that largely favored left-leaning parties, the Tories’ initial enthusiasm for the European integration waned, and nowadays a key plank of the Tory manifestos is linked to resisting EU intrusions on British sovereignty.

One may then pose the following counterfactuals: if the next series of U.N. Human Rights Conventions pledge to protect property rights and promote religious freedom worldwide, will Republican platforms challenge such Conventions as intrusions on American sovereignty and resist ratification by the U.S. Senate? Or conversely, if the U.N. General Assembly passes a resolution recognizing the sanctity of life and urges member states to promote abstinence as a measure to reduce the number of abortions each year, will Democratic platforms still openly endorse the United Nations as an important institution for advancing world peace and justice? Neither of these scenarios seems very likely. What is distinctive about modern international legal institutions and international commitments is that, although they can be couched as solutions to global cooperation or coordination problems, the scope of the underlying issues they address is often highly contested by domestic groups. As a result, political parties will often have intense and conflicting interests in shaping the agenda underlying such issues in their favor.

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<sup>215</sup> Community Charter of Fundamental Social Rights of Workers (adopted Dec. 9, 1989), available at <http://www.aedh.eu/The-Community-Charter-of.html>.

<sup>216</sup> Margaret Thatcher, Speech to Conservative Candidates Conference (Mar. 22, 1992) (transcript available at <http://www.margaretthatcher.org/document/108294>).

<sup>217</sup> See Donald C. Dowling, Jr., *From the Social Charter to the Social Action Program 1995-1997: European Union Employment Law Comes Alive*, 29 CORNELL INT’L L.J. 43, 52–53 (1996) (discussing the legal implications of Britain’s refusal to sign or give enforcement to the Charter). The Conservatives also made opposition to the Social Charter a key plank of their 1997 Manifesto. See *1997 Conservative Manifesto*, *supra* note 213 (“The European social model is not social and not a model for us to follow. But if Britain signed up to the Social Charter it would be used to impose that model on us—destroying British jobs.”).

<sup>218</sup> See John Kampfner, *Minister Backs EU Social Chapter*, FIN. TIMES (Eur. ed.), Nov. 13, 1997, at 8.

<sup>219</sup> The Social Charter was annexed to the Treaty of Maastricht and was included in the 1997 Treaty of Amsterdam. For a detailed description of the history and impact of the Social Charter, see Dowling, *supra* note 217, at 43–45.

## CONCLUSION WITH POLICY AND NORMATIVE IMPLICATIONS

A growing number of studies have suggested that domestic factors influence the preferences of states for international cooperation.<sup>220</sup> This Article has extended that literature by exploring the role of partisanship in framing domestic support and opposition to specific international legal commitments. Specifically, it suggests that if certain conditions hold, international law can be used as a vehicle to advance the partisan objectives of an incumbent government. Alternatively, international legal commitments can be used to impose differential constraints on the ability of parties to campaign on (and carry out) their favored issues and projects. By illuminating the processes underlying the choice of partisan preference for international legal commitments, this insight questions the conventional wisdom that partisan politics stop at the water's edge. And although this Article does not purport to systematically evaluate these claims against the evidence, the logic of the argument is sufficiently plausible and the case studies sufficiently diffuse to make it clear that the partisan calculus will sometimes play a key role in the choice of international legal commitments.

This analysis has broader implications for our understanding of the efficacy of international legal regimes. By demonstrating the importance of partisan politics in the actual choice of international legal commitments, this analysis suggests that whether future or existing international legal regimes will actually work as intended may often depend on whether these regimes are congruent with the preferences of a cross-partisan coalition of domestic actors. The question of efficacy is especially pronounced where domestic actors play a significant role in either implementing or enforcing international legal commitments. Thus, to understand whether the United States (or some other country) will comply effectively with a future global climate change regime, we should focus not only on distributive disputes that occur at the interstate level but also on those that occur at the intrastate level among competing political factions from both major political parties. Moreover, in other contexts where electorally based incentives to renege on an international commitment track partisan preferences, we should be concerned about whether reputation or other external enforcement options may be sufficient to induce compliance.

This Article does not stake out a position on whether this partisan connection to international legal commitments is normatively problematic. Nonetheless, it seems that we can identify, in an admittedly crude way, some grounds for concern. As international legal and regulatory regimes continue to proliferate and touch on sensitive political issues like social rights and capital punishment, it may be inevitable that the distributive consequences of these regimes will have significant effects on domestic politics. But one may nonetheless hope that international legal regimes can be

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<sup>220</sup> See discussion *supra* Part I.

politically sustainable and palatable to domestic audiences in ways that classic power politics arrangements are not. Differential partisan constraints and opportunities across various international regimes, however, may upset these expectations. Viewed this way, the partisan dynamics underlying international legal commitments can be harmful. In the domestic context, John Ferejohn has pointed out some obvious problems that arise when legal regimes and courts become intensely politicized: “It has the effect of . . . making judicial decisions appear to be politically motivated and . . . of reducing the legitimate abilities of the people or their representatives to legislate, and, less often, of provoking crude and heavy-handed electoral responses.”<sup>221</sup>

But beyond those concerns, there is the additional problem that international law partisanship can be a two-way street. Just as one party may sometimes seek to use international law to advance its narrow partisan preferences, another party may also seek to block the adoption of an international legal commitment that happens to provide distributive benefits to its political adversary even if the commitment ostensibly resolves some genuine global cooperation or coordination problem. In this picture, the real casualty will likely be the efficacy of international law as a binding constraint on the behavior of nation-states. Perhaps a plausible institutional path towards depoliticization may be to make sure that international legal commitments enjoy the support of legislative supermajorities; ironically, such an institutional approach—although increasingly criticized and sidestepped in the modern era<sup>222</sup>—already exists in the United States. It is found in the treaty power requirement that two-thirds of the Senate approve an international agreement.<sup>223</sup>

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<sup>221</sup> John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 *LAW & CONTEMP. PROBS.* 41, 65–66 (2002).

<sup>222</sup> See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1280 (2008).

<sup>223</sup> U.S. CONST. art. II, § 2, cl. 2.

