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

Jide Nzelibe*

Traditional accounts in both the international law and international relations literature largely assume that great powers like the United States enter into international legal commitments in order to resolve global cooperative problems or to advance objective state interests. Contrary to these accounts, this Article suggests that an incumbent regime (or partisan elites within the regime) may often seek to use international legal commitments to overcome domestic obstacles to their narrow policy and electoral objectives. In this picture, an incumbent regime may deploy international law to expand the geographical scope of political conflict across borders in order to isolate the domestic political opposition and increase the influence of foreign groups or governments sympathetic to the regime's objectives. The political opposition may in turn seek to exploit the existence of a fragmented system of domestic institutions to thwart both the adoption and enforcement of any international law that strengthens the ruling regime and weakens its own position. Finally, this Article sketches a framework for predicting when distributive international legal commitments are likely to be sustainable across electoral cycles and when they are not. More specifically, the framework suggests that an international legal commitment is likely to be electorally sustainable when the veil of ignorance underlying the commitment is sufficiently thick; in other words, an international commitment entered into by a partisan regime has more staying power if it produces policy outcomes that are favored by some salient groups in the political opposition. The Article uses examples from the United States experience with human rights and international trade to illustrate how partisan dynamics between Republicans and Democrats has helped spawn and restrict the scope of international legal commitments.

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.¹ Rather, support and

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¹ 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 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 Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Jeffrey L. Dunoff & Joel P. Trachtman,

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 implementation 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 non-democratic counterparts to engage in international cooperation,² 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.³ 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."⁴

This Essay advances a different perspective: that political parties—or partisan elites—will often embrace international legal commitments as a vehicle to overcome domestic structural 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. Put differently, political parties will often try to extend or shrink the scope of partisan conflict to venues in which they are likely to have an advantage over the political opposition. Alternatively, an incumbent regime may also support international legal commitments that it knows are likely to provoke intra-coalitional conflict within the political opposition. But just as partisan incumbents may use international law to advance their domestic partisan objectives, the political opposition may exploit domestic institutions to thwart international legal commitments that strengthen the ruling regime and weaken its own

Economic Analysis of International Law, 24 YALE J. INT'L L. 1 (1999); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008).

² See Bruce Bueno de Mesquita, et al, *An Institutional Explanation of the Democratic Peace*, 93 AM. POL. SC. REV. 791 (1999); Edward D Mansfield et al, *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 INT'L ORG. 477 (2002); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHILOSOPHY AND PUBLIC AFFAIRS 205 (1983).

³ See discussion in text at *infra* note ____.

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

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 parties build reputations for addressing certain issues better than others and may seek to use international legal commitments to lock in 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 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 governments of the left 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 Essay 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 less.⁵ On the 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, political parties 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

⁵ DONALD H LUMSDAINE, MORAL VISION IN INTERNATIONAL POLITICS: THE FOREIGN AID REGIME 1949-1989 156-57(1993) (describing preference for left-leaning groups for foreign aid and opposition by right leaning groups); see also Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI J INT'L L 291 (2000). Within the scholarly confines of the legal academy, the growing division between proponents of a more robust international legal framework and skeptics is usually framed in philosophical and not partisan terms. See, e.g., Jose Alvarez, *Contemporary International Law: An 'Empire of Law' or the Law of Empire*, 24 AMER. U. L REV. 811, 812 (2009) ("Today's legal academy, particularly 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.")

commitments enacted by one partisan coalition are often subsequently sabotaged or undermined by hostile successor governments.⁶ 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.⁷

But while such reinforcing feedback mechanisms are undoubtedly important in the international context, they are hardly sufficient. Since 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 commitments even when such 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 exit an international commitment are 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 non-enacting 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. Such defection-proofing measures, which entail bundling together a diffuse range of issues in a specific international commitment, ensure that the non-enacting coalition is not likely to view the commitment purely as an arrangement that confers one-sided benefits on its political adversaries since all political actors must take the good along with the bad.

Some caveats are in order. This Essay 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

⁶ See discussion in text at *infra* notes ____

⁷ See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment* (March 24, 2010), available at SSRN: <http://ssrn.com/abstract=1577749>; Paul Pierson, *Increasing returns, path dependence, and the study of politics*, AM. POL. SC. REV. 251 (2000). For a discussion of how the psychological effect of political endowment to interest groups also helps entrenchment, see Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813827-28 (1998).

preferences largely detached from partisan considerations.⁸ Nor is this Essay 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.⁹ This Essay simply focuses on instrumental partisan motivations in the context of international legal commitments that have distributive consequences because such motivations have been largely ignored or sidelined in the literature.

This Essay 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. Contrary to conventional wisdom, this Part suggests that 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. This Part also explores the calculus of competing partisan groups and identifies the domestic institutional conditions that influence when they are likely to support or oppose international law.

Part III uses two case studies from contemporary American history—the controversy surrounding the efforts to ratify human rights treaties in the 1950s and the 1993 NAFTA agreement—to shed some light on how distributive partisan politics can help spawn and limit the efficacy and scope of international law. 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 these covenants in a way that would co-opt Republicans and Southern Democratic opposition through side payments. Put differently, the veil of ignorance behind these early UN 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. By contrast, opposition by Democratic labor constituencies to the adoption of NAFTA in 1993 was partly muted not only through the inclusion of side agreements that benefited other Democratic constituencies, but also by the growing pro-business wing of the party. The Republicans, on the other hand, tried to exploit the intra-partisan conflict within the Democratic Party over NAFTA for electoral advantage.

I. Literature Overview

⁸ For instance, they 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.

⁹ As observed in part II, *infra*, some international agreements or norms of customary international law may create mutual gains that make all domestic groups better off. Or more plausibly, certain international legal agreements may help some and hurt other 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 where everyone is better off.

Domestic-level explanations of why states enter into international legal commitments can be broken down loosely into three categories: state centered, society centered, or state-society relations approaches.¹⁰ One prominent variant of the state-centered approach, liberal institutionalism, assumes that states enter into international agreements in order to resolve cooperation and coordination dilemmas inherent in a system of international anarchy.¹¹ More generally, this approach assumes that international organizations and treaty regimes represent structures of cooperation in which all participants realize mutual gains. And while states play a key role in this framework, they are often simply depicted as surrogates for societal preferences.¹² However, a new generation of political science research has called into question some of the basic assumptions of the liberal institutionalist approach. First, certain 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. 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 alone” power that they can alter the status quo for less powerful states.¹³ In this picture, once powerful states decide to band together to form a new institutional regime, such as an international trade organization, other less 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).¹⁴ 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.¹⁵ 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.¹⁶

¹⁰ See Andrew Moravcsik, *Introduction: Integrating International and Domestic Levels of International Bargaining*, in DOUBLE-EDGED DIPLOMACY (PETER B EVANS ET AL. ED., 1993) 5-6. Another level of analysis, which is not discussed here, are international explanations which treat states as unitary actors responding to external forces and incentives. See *id.* This paper brackets any discussion of such international explanations, not because they are irrelevant, but because the focus of this paper is on exploring the domestic sources of state preferences in the international arena.

¹¹ See Keohane, *supra* note 1; see also Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 717, 731 (1995).

¹² Slaughter, *Liberal International Relations*, *supra* note __, at 727, 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”).

¹³ See LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2000).

¹⁴ See *id.* at 9-10.

¹⁵ See Gruber, *supra* note __ at 9. For a summary of the different approaches to international law as well as criticisms of each approach, see John G. Ikenberry et al, *Introduction: Approaches to Explaining American Foreign Policy*, 42 INT’L ORG. 1 (1988); see also Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT’L L. 501, 512-13 (2004);

¹⁶ For instance, some commentators have attempted to explain international behavior by integrating both domestic and international factors. See Nitsan Chorev, *A fluid divide: Domestic and international factors in US trade policy formation*, 14 REV. INT’L POL. ECON. 653 (2007).

Moving beyond the emphasis on state preferences, a new wave of society-based explanations attempts to understand the evolution of legal norms through the forces that shape the identities and preferences of dominant elites within each state.¹⁷ In these so-called constructivist or sociological accounts, the preferences of such elites regarding specific international legal commitments are rarely fixed, but evolve based on the activities of transnational activists or norm entrepreneurs who use persuasion to secure acceptance of specific norms and legal commitments. Thus, rather than take the preferences of individual decision-makers as given, this approach argues that such decision-makers will be particularly susceptible to emulating behavioral patterns in others that seem modern or sophisticated.

While 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.¹⁸ Second, constructivists neglect the possibility that partisan ideological considerations may influence the ability of norm entrepreneurs to persuade;¹⁹ in other words, certain normative ideals—such as social and labor rights—may find more fertile ground for reception among certain domestic partisan groups and not others. And even when particular states agree to implement human rights ideals in the abstract, it does not necessarily translate to any common understanding by competing partisan groups about what such ideals may mean in practice. This latter concern is especially pronounced in circumstances where motivated reasoning precludes partisans from even agreeing upon the existence of politically relevant events. .²⁰

¹⁷ See Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices* in *THE POWER OF HUMAN RIGHTS* 1, 3 (Thomas Risse et al. eds., 1999); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); see also Roger P. Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs*, 49 VA. J. INT'L L. 61 (2008). For a good discussion of norm diffusion in an international legal context, see Katerina Linos, *How Can International Organizations Shape National Welfare States?*, 40 COMPARATIVE LEG. STUD. 547 (2007).

¹⁸ For instance, as Ian Hurd has shown in his treatment of the UN 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, 497 (2003). More recently, Jelena Subotic 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 Subotic, *Hijacked Justice: Domestic Appropriation of International Norms*, Human Rights & Human Welfare Working Papers series, available at www.du.edu/gsis/hrhw/working/2005/28-subotic-2005.pdf.

¹⁹ 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. Cf. Liesbet Hooghe, *Several Roads Lead to International Norms, but Few via International Socialization*, 59 INT'L ORG. 861 (2005) (finding no effect) with Risse and Sikkink, *supra* note ___, at 3-4 (finding a significant effect).

²⁰ 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 James N. Druckman & Arthur Lupia, *Preference Formation*, 3 ANNUAL REVIEW OF POLITICAL SCIENCE 1

A second society-based account emphasizes the role 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.²¹ 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.²² Beyond international trade, such accounts resonate in other circumstances where international agreements differentially affect the economic (or material) interests of various domestic constituencies.²³ In this picture, when the material benefits are concentrated and the costs diffuse, politically sustainable agreements are more likely.²⁴ 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.²⁵

Another variant of constituency-driven explanations emphasizes the use of international legal agreements as pre-commitment devices, used to lock in democracy domestically.²⁶ According

(2000); see also Dan Kahan, David Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

²¹ 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 "Safeguard": 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 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); John O. McGinnis & Mark Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 546-47 (2000) (discussing the role of interest groups in hampering and encouraging international trade). Indeed, some scholars have also argued that interest groups play a key role in government decisions to initiate litigation before the WTO. See GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003).

²² See Helen V. Milner and 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).

²³ See Quan Li and Dale L. Smith, *Testing Alternative Theories of Capital Control Liberalization*, 19 REV. POL. RESEARCH 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 Thomas Oatley & Jason Yackee, *American Interests and IMF Lending*, 41 INT'L POL. 415 (2004).

²⁴ 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.

²⁵ See, e.g., MICHAEL J. GILLIGAN, *EMPOWERING EXPORTERS: RECIPROCITY, DELEGATION, AND COLLECTIVE ACTION IN AMERICAN TRADE POLICY* (1997).

²⁶ See Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201; Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006); 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,

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 such agreements cannot easily be undone by future politicians who may have anti-democratic preferences.²⁷ 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 regime types. 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.²⁸ There is also a related literature on constitutional diffusion which argues that there is positive relationship between economic liberalization and the diffusion of first generation rights, such as free speech and property rights.²⁹ But this latter literature does not focus on the spread or proliferation of international law explicitly, but on how global migration and investment flows influence the spread of constitutional rights across borders.

Ultimately, none of these accounts take seriously the possibility that international commitments may be supported or opposed instrumentally by political parties—or partisan elites—to advance their policy or electoral objectives. To an extent, 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. 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.”³⁰

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

Hard and Soft Law in International Governance, 54 INT’L ORG. 421 (2000); Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055 (2003).

²⁷ See Moravcsik, *The Origins of Human Rights Regimes*, *supra* note __ at 220.

²⁸ See *id.* at 220 (“It follows that ‘self-binding’ is of most to newly established democracies, which have the greatest interest in further stabilizing the domestic political status quo against democratic threats.”); Ginsburg, *Locking in Democracy*, *supra* note __ 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.”)

²⁹ 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 VJ. INT’L L 985 (2008).

³⁰ See Gowa, *supra* note __ 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 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.

regime.³¹ But as many commentators have observed, bipartisan consensus on foreign affairs in the post-cold war era is becoming less common and there is increasing similarity in how partisan elites approach both domestic and foreign policy issues.³² 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.³³ 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.³⁴ This new literature has observed that the domestic redistributive politics of international legal regimes do not always fit squarely within traditional interest group accounts. But this literature has not provided a coherent theoretical account of when and how political parties are likely to use international law instrumentally.

Significantly, 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.³⁵ More broadly, as some commentators have observed, it is perhaps better to think as parties as loyal agents for different societal principals who usually have conflicting or inconsistent preferences.³⁶ In this framework, interest groups—or societal principals—are more likely to lobby successfully for their preferred policy goals when their favored partisan agents are in power.³⁷ Thus, for instance, contrary to the typical pluralist account which focuses largely on either the

³¹ See Gowa, *supra* note __ at 307-09.

³² See, e.g., Mark Souva & David Rohde, *Elite Opinion Differences and Partisanship in Congressional Foreign Policy, 1975-1996*, 60 POL. RES. Q. 113 (2007); James M. McCormick et al, *Politics and Bipartisanship at the Water's Edge: A Note on Bush and Clinton*, 30 POLITY 133 (1997); James M. McCormick & Eugene R Wittkopf, *Bipartisanship, Partisanship, and Ideology in Congressional-Executive Policy Relations, 1947-1988*, 52 J. POL. 1077 (1990).

³³ For instance, in one influential study that respond 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 is 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 (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 Non-Governmental Organizations*, 2 CHI. J. INT'L L 371 (2001).

³⁴ See Helen V. Milner and Benjamin Judkins, *Partisanship, Trade Policy, and Globalization: Is There a Left-Right Divide on Trade Policy?*, 48 INT'L STUD. Q. 95 (2004); see also Joseph M Grieco et al, *When Preferences and Commitment Collide: The Effect of Partisan Shifts on International Treaty Compliance*, 63 INT'L ORG. 341 (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 by a previous government.").

³⁵ See Thomas L Brunell, *The Relationship between Political Parties and Interest Groups: Explaining the Patterns of PAC Contributions to candidates for Congress*, 58 Pol. Res. Q. 681 (2005) (discussing the competing goals of parties seeking power and interest groups seeking to maximize their preferred policy outcomes).

³⁶ See, e.g., David H Bearce, *Societal Preferences, Partisan Agents, and Monetary Policy Outcomes*, 57 INT' ORG. 373 (2003) (applying the party as agent framework with respect to exchange rate stability).

³⁷ See *id.* at 374.

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.³⁸

Second, 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 simply stray away from long-held partisan positions may incur significant costs from their core-constituencies.³⁹ More broadly, as some commentators have observed,⁴⁰ 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. Thus, rather than compete according to a spatial model of voting where each party stakes out different positions on the same issue,⁴¹ parties tend to own issues and then often try to compete by convincing voters that their issues are the most important.⁴² 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.”⁴³ 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, and crime.⁴⁴ Generally, the core issues owned by each party tend to remain relatively stable over time. Trespassing on another party’s issue, while not uncommon, tends to be fraught with significant political risks. Thus, for instance, the Republican Party may not be very credible if it announces that it will pursue aggressively a pro-labor or rights agenda because longstanding 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 will usually be a function of both the saliency of those issues and the opportunities for carrying them out. For instance, international commitments can be used to raise the salience of an issue

³⁸ For an insightful discussion of this effect in which parties left-politicians have an incentive to pursue right leaning goals, and vice versa, see Robert Goodin, *Voting Through the Looking Glass*, 77 AM. POL. SC. REV. 420 (1983).

³⁹ See M. Daniel Berhardt & Daniel E. Ingberman, *Candidate reputations and the ‘incumbency effect*, 27 J POL. ECON. 47 (1985).

⁴⁰ John R Petrocik, *Issue Ownership and Presidential Campaigning, 1952-2000*, 118 POL S Q 599 (2003); Eric Belanger et al, *Issue salience, issue ownership, and issue-based vote choice*, 27 Electoral Stud. 477 (2008).

⁴¹ See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957) (discussing the spatial model of partisan competition).

⁴² See Petrocik, *supra* note __ at 599-601.

⁴³ William H. Riker, *Introduction*, in *AGENDA FORMATION 4* (William Riker ed. 1993).

⁴⁴ See Petrocik, *supra* note __ at 608-09.

before a domestic audience.⁴⁵ 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.”⁴⁶ If a party’s favored issue becomes enshrined in an international legal commitment, it increases the likelihood that such an issue will remain part of the political agenda across multiple electoral periods.

The next section builds upon these latter constituency-driven accounts and sketches how certain domestic structural factors in the United States 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 between certain powerful partisan elites and those of foreign states and/or interpreters of international law are aligned, such elites may seek to use international law to entrench their preferred policies against a potentially hostile future government.

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 superior response to collective goals or benefits, *but, rather, as a by-product of conflicts over distributional gains.*”⁴⁷ Anticipating this dynamic, politicians will choose institutional arrangements with an eye to the likely policy and electoral outcomes that will result.⁴⁸ 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.⁴⁹

⁴⁵ See SHANTO IYENGAR AND DONALD R. KINDER, *NEWS THAT MATTERS* (1987). 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 issue in unanticipated ways.

⁴⁶ John R. Petrocik, *Issue Ownership in Presidential Elections, with a 1980 Case Study*, 40 AMER. J. POL. SC. 825, 828 (1996).

⁴⁷ JACK KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* 19 (1992) (emphasis added).

⁴⁸ The instrumental use of institutions is a very familiar theme in the judicial politics literature. See e.g., Howard Gillman, *How Political Parties can Use Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SC. REV. 511 (2002); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41 (2002); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001); see also Richard H. Pildes, *The Supreme Court, 2003 Term: Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29 (2004). For a discussion of how political actors try to exercise control over courts across different countries, including the transitional regimes in Eastern Europe see Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002); 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) (developing a model that explores the interaction between politicians and courts in Russia).

⁴⁹ 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

Some 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 international 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 decision-making 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 elect to use international law to lock in policy objectives goals 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 also freezing out issues in which the political opposition has an electoral advantage.⁵⁰ 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 that constrain the possibilities for carrying out those issues that favor the opposition.⁵¹

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 1960s*, 1 STATE POL. & POL. Q 5, 5 (2001) ("[W]hen a coalition loses in one political arena, it may try to later 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 AND FEDERAL STUD. 255 (2009) (suggesting that partisan preferences for federalism often turn on whether the party is more electorally successful at regional rather than national politics).

⁵⁰ For instance, political scientists have long claimed that strategic policy entrenchment was a key feature of the New Deal programs. "The goal of progressive politics [during the New Deal]," Steve Teles argues, "was 'depolticization,' 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." Steve Teles, *Conservative Mobilization against Entrenched Liberalism*, in THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM 162 (Paul Pierson & Theda Skocpol ed., 2007).

⁵¹ 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 Republicans to be more vested in using international

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 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 against other groups or over government opposition.”⁵² 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 the European elites who may be more sympathetic to the welfare state and a progressive vision of social rights than the median American voter.⁵³ To the extent groups across the political spectrum are not disadvantaged in building transnational coalitions for their causes, however, the redistributive effect of creating such coalitions will become more ambiguous and one-sided partisan resistance will likely be blunted.

Second, the relevant political and institutional conditions underlying an international legal commitment or regime have to be stable and resistant to change to make it worthwhile for politicians seeking to use it to entrench their policy preferences. 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.⁵⁴ Just as legislators use super-statutes or other legislative tactics to entrench their preferences,⁵⁵ they can use international law as a useful alternative vehicle for entrenching

commitments to expand the possibilities of dealing with international trade and property rights—issues in which they usually have an electoral advantage.

⁵² Moravcsik, *Introduction*, in *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* 32 (Peter B. Evans et al. ed. 1993).

⁵³ See discussion in text at *infra* notes __.

⁵⁴ The strategic entrenchment of partisan goals through a sympathetic judiciary is a common theme in the judicial politics literature. See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 521 (2002) (describing 19th century efforts by the Republican Party to entrench its policy goals through courts); Balkin & Stanford, *supra* note __ at 1066; Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason* 107 COLUM. L. REV. 1482, 1512 (2007) (“Partisan entrenchments, in which an outgoing coalition attempts to constitutionalize a favored policy to bind the hands of successors, are routine”).

⁵⁵ For a discussion of legislative entrenchment, whereby one legislature tries to bind successor legislatures see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670–73

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. Recently, 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.⁵⁶

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 entered into by previous regimes.⁵⁷ 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.⁵⁸ 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 should also affect its reputation and willingness to comply with those agreements that align with its preferences.⁵⁹ 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.⁶⁰

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

(2002) (defending legislative entrenchment); see also John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 419-22 (2003) (criticizing legislative entrenchment).

⁵⁶ See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 512-13 (2004); see also Ginsburg, *Locking in Democracy*, *supra* note ___ at 735-36 ("[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.").

⁵⁷ See Larry Helfer, *Exiting Treaties*, 91 VA L REV. 1579 (2005). Although, 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 STANFORD L REV. 2061 (2003).

⁵⁸ 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* (2008) and MICHAEL TOMZ, *REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THE CENTURIES* (2007).

⁵⁹ 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 IL 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)

⁶⁰ See Brewster, *The Limits of Reputation on Compliance*, at 328-29 (criticizing the notion that reputational sanctions are effective across multiple issue areas); see also George W. Downs & M. A Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002) (same).

variations in the level of implementation of such a commitment depending on the preferences of the governing party.⁶¹ For instance, during the 1990s, British 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.⁶² 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 to implement EU Directives across four countries turned largely on whether it corresponded with the partisan objectives of the government in power.⁶³ Indeed, this study also shows that when the governing party favored any EU Directive for political reasons, it actually tended to over-implement the Directive's provisions.⁶⁴

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.

i. 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 non-enacting political opposition. Thus, an agreement is likely to have greater staying power if it is negotiated and ratified behind a thick veil of ignorance.⁶⁵ 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 international 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 intra-party 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. While the political opposition may often be losers because certain politically unfavorable issues are embodied in an international

⁶¹ 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 RES. 690 (2006).

⁶² Oliver Treib, *EU Governance, Misfit and the Partisan Logic of Domestic Adaptation: An Actor-Centered Perspective on the Transposition of EU Directives*, available at <http://www.mpi-fg-koeln.mpg.ed/socialeurope>

⁶³ Oliver Treib, *EU Governance, Misfit and the Partisan Logic of Domestic Adaptation: An Actor-Centered Perspective on the Transposition of EU Directives*, available at <http://www.mpi-fg-koeln.mpg.ed/socialeurope>

⁶⁴ See *id.*

⁶⁵ For a concise discussion of the role of the veil of ignorance in institutional design, please see Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE LJ 399 (2001).

legal commitment, they are not always losers in the larger picture because issues that favor them are also part of the package.⁶⁶ 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.

ii. 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, while 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.⁶⁷ 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 exogenous constraints on policy actors.⁶⁸ According to such accounts, as the supposed number of veto players increases, the more difficult it will be for domestic groups to change the policy status quo. Thus, the feasible range 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.⁶⁹

⁶⁶ For an excellent discussion of how institutions can facilitate compromise among by bundling together multiple policy issues in one package, see Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment* (March 24, 2010), available at SSRN: <http://ssrn.com/abstract=1577749>

⁶⁷ See Witfold J. Henisz & Edward D. Mansfield, *Votes and Vetoes: The Political Determinants of Commercial Openness*, 50 INT'L STUD. Q. 189 (2006); see also Moravcsik, *Why is U.S. Human Rights So Unilateralist*, *supra* note __ at 358.

⁶⁸ See Henisz & Mansfield, *supra* note __ at 189-92.

⁶⁹ 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 had to be adopted as treaties).

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.⁷⁰ Finally, another recurring question in the literature is the extent to which non-ratified 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.⁷¹

Of course, there is a rich literature in the legal academy that debates the scope of these constitutional constraints. 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.⁷² In this picture, since customary international law itself does not

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).

⁷⁰ See 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); CURTIS A. BRADLEY AND JACK L GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 371-80 (2d ed, 2006) (discussing the debates regarding treaty self execution). Recently, in *Medellin v. Texas*, the Supreme Court attempted to clarify when courts should treat treaties as self-executing. See *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (holding that while a “treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be self-executing and is ratified on these terms” (quotations omitted) (en banc)). 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, *Rewriting the Robert Court’s Law of Treaties*, 88 TEX. L. REV. 65, 69 (2010) (“The Court’s actual reasoning strongly hints at a presumption against self-execution.”); but cf 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 *Medellin*, 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 *Medellin* decision as creating a presumption against self execution would be wrong).

⁷¹ See Curtis Bradley & Jack 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 cf Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (defending the modern position); Ryan Goodman & Derek Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997) (same); Gerald 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, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 342-61 (2007).

⁷² See Bradley & Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, supra note __ at 815-18. For a very critical view of judicially enforced customary international law against

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 United States 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.⁷³ In this 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.

IV. 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 Democrat responses to the negotiation and ratification of human rights treaties in the 1950s and the ratification of North American Free Trade Agreement (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.⁷⁴

states actors, see John McGinnis & Ilya Somin, *Should International Law Be Part of Our Law*, 59 STAN L. REV. 1175 (2007).

⁷³There is a rich debate in the literature about what extent if, any, courts should defer to the President's interpretation of international law. Nonetheless, as 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 (2000); see also Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723 (2007); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007); Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 980 (2004); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

⁷⁴On this note, it is worthwhile noting that a small but growing number of comparative scholars have started to study the role of partisanship in the implementation and enforcement of EU legal commitments by member states. See Treib, *supra* note __; see also Liesbeth Hooghe et al, *Does Left/Right Structure Party Positions on European Integration*, 35 COMPARATIVE POL. STUD. 965 (2002). Unfortunately, however, there is a lack of similar studies for regimes in the rest of the World.

A. Opposing Perceived Partisan Entrenchment: The Post-War Human Rights Treaty Controversies

The controversy surrounding both the Bricker Amendment and the post-war effort to ratify human rights agreements in the United States is familiar to many international law scholars and is recounted in detail elsewhere.⁷⁵ In brief, in the immediate aftermath of WWII, President Truman was facing mounting political pressure to be more proactive on a range of social policy and civil rights issues.⁷⁶ 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.⁷⁷ Moreover, in a growing number of civil rights claims coming before federal and state courts during this period, plaintiffs often invoked the UN Charter, and some courts appeared to be sympathetic to this legal strategy.⁷⁸ President Truman subsequently negotiated two UN human rights treaties: the Genocide Convention and the Convention on the Political Rights of Women. To underscore 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.⁷⁹ 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,” both of these platforms declared, “that no treaty or agreement with other countries deprives our citizens of the rights guaranteed them by the Federal Constitution.”⁸⁰ Leading the Republican charge against the ratification of various human rights treaties was Senator Bricker of Ohio, who sought to introduce a constitutional amendment

⁷⁵ See Duane Tananbaum, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988).

⁷⁶ As one commentator observes:

Frank 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 Pierson & Skocpol, *supra* note __ at 94.

⁷⁷ See Arthur Dean, *The Bricker Amendment and Authority over Foreign Affairs*, 32 *FOREIGN AFFAIRS* 1 (1953).

⁷⁸ See e.g., *Oyama v. California*, 332 U.S. 633, 649-60 (1948) (“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?’”). For a detailed discussion of how courts and litigants have approached UN human rights agreements, please see Bert B. Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 *IOWA L REV* 901 (1983-84).

⁷⁹ In his narrative account of his role in supporting the Bricker Amendment, former American Bar Association President Holman provides some insight as to why the Geneva Convention was not ratified under Truman. See FRANK T. HOLMAN, *STORY OF THE “BRICKER” AMENDMENT* 7 (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* 37-62 (1990) (discussing the intense and politicized ratification debates over the Geneva convention).

⁸⁰ 1952 Republican Party Platform, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2583>.

that would include language stating that “a treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty.”⁸¹

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 the Congress to pass legislation, which in the absence of the treaty, would be reserved to the exclusive power of the states.⁸² 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.⁸³ However, Senator Bricker’s effort to amend the Constitution eventually fizzled after the 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 UN human rights treaties that were at the core of the controversy.⁸⁴ 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.⁸⁵

Much of the scholarship on the Bricker Amendment and the Senate’s post-war opposition to human rights treaties has tended to focus narrowly on special interest politics, especially the role of southern segregationists and allied conservative groups.⁸⁶ 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

⁸¹ FRANK HOLMAN, *THE STORY OF THE BRICKER AMENDMENT* 27.

⁸² 252 U.S. 416 (1920)

⁸³ See Holman, *supra* note __ at 17

⁸⁴ See Holman, *supra* note __ at 36. More specifically, Secretary Dulles stated during congressional hearings: [W]hile we will 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.

Hearings before a Subcommittee of the Committee of the Judiciary, United States Senate, 83rd Congress, 1st Session, on S. J. Res. 1 and S.J. Res. 43, *Treaties and Executive Agreements* at p. 825 (Feb. 18, 19, 25; March 4, 10, 16, 27, 31, April 6-11) cited hereafter as 1953 Hearings.

⁸⁵ 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).

⁸⁶ See Andrew Moravcsik, *The Paradox of US Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 146 (Michael Ignatieff ed., 2005) (describing conservative opposition to human rights treaties in the United States); see also Henkin, *supra* note 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”); 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, 310 (1988); see also Natalie Hevener Kaufman, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* 12-16 (1990). 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 *id.* at 14-16.

any discussion of federal action to dismantle segregation within the states.”⁸⁷ While these interest-group-capture accounts have proven quite useful in explaining particular aspects of post-war 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. On the contrary, there is usually intense lobbying by ideological groups on both sides of the issue, 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 post-war 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 the separation of powers in the human rights treaty context.⁸⁸ As discussed below, the post war dynamic with respect to human rights treaties is better explained by partisan interest group competition, and not capture by any specific set of interest groups.⁸⁹

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 post-war 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 long time foe of Roosevelt’s New Deal initiatives,⁹⁰ but who otherwise exhibited little or no interest in the post-war civil rights movement.⁹¹ 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—about twenty years before the Civil Rights Act of 1964.⁹² More broadly, nineteen out of twenty-four Midwestern Senators supported the proposed Amendment in early 1953.⁹³ From a partisan stance, the 1953 version of the Amendment had sixty-four sponsors

⁸⁷ Kaufman & Whiteman, *supra* note __ at 310.

⁸⁸ For an overview of some of the literature on how progressive politicians were able to overcome the obstacles imposed by federalism, see Keith Whittington, “Interpose your Friendly Hand”: Political Support for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SC. REV 583 (2005).

⁸⁹ See discussion in text at *supra* notes 97-98.

⁹⁰ See RICHARD O. DAVIES, DEFENDER OF THE OLD GUARD: JOHN BRICKER AND AMERICAN POLITICS X-XI; 32-33 (1993).

⁹¹ See *id.* at 193.

⁹² See David Freeman Engstrom, *The Taft Proposal of 1946 & The (Non) Making of American Fair Employment Law*, 9 GREEN BAG 2D 181(2006).

⁹³ See Phillip A. Grant, *The Bricker Amendment Controversy*, 15 PRES. STUD. Q. 572, 577 (1985).

in the Senate, which included forty-five out of forty-eight Republican Senators, but only thirteen of the nineteen Democrat sponsors in the Senate were from the South.⁹⁴ 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,⁹⁵ with an overwhelming majority of Republican Senators from all regions in the country in favor and a significant majority of Democratic Senators against.⁹⁶ 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.⁹⁷

We get more traction if we evaluate the controversy surrounding the post-war 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, while both Democrat and Republican Senators in the post-war era might have been subject to lobbying by a wide array of economic and ideological groups on human rights issues, they were likely to be 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 get elected, but it was the support from the elected official's core constituency (or interest groups) that was often most crucial.⁹⁸ Thus, the orientation of any party towards human rights agreements during the post-war era was likely to reflect the preferences of its key supporters.

Applying this partisan logic to the immediate post war era, the impetus for the Bricker amendment movement and the failure of the post-war UN human rights treaty effort become clearer. In the late 1940s, partisan polarization towards the New Deal programs had become quite intense. Among Truman's supporters, there was a growing concern that Republicans—who had won decisive congressional majorities in the 1946 mid-term elections—would muster enough political support to roll back the core pillars of the New Deal if they also won the White House in

⁹⁴ See Glendon A Schubert, *Politics and the Constitution: The Bricker Amendment During 1953*, 16 J. POL. 257, 266(1954).

⁹⁵ 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 __ at 19-20.

⁹⁶ See Schubert, *supra* note __ at 266. The ideological spectrum of the Amendment's sponsors in the Senate not only encompassed Southern Dixiecrats, but also both isolationist and internationalist Republicans as well.

⁹⁷ For a list of interest groups supporting and opposing the amendment, see *id.* at 271 ns. 53-54.

⁹⁸ As Bueno De Mesquita and others have observed, politicians have an incentive to focus their efforts on the subset of the electorate that make 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, ALASTAIR SMITH, RANDOLPH SIVERSON & JAMES MORROW, *THE LOGIC OF POLITICAL SURVIVAL* (2003); Virag Gabor, *Playing for your Own Audience: Extremism in Two-Party Elections*, 10 J. PUB. ECON THEOR. 891 (2008); Edward Glaeser et al, *Strategic Extremism: Why Republicans and Democrats Divide on Religious Values*, 120 Q.J. ECON. 1283 (2005).

1948.⁹⁹ 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 to almost double the minimum wage (from forty cents to seventy-five cents an hour), and provide more support for education and farmers.¹⁰⁰

In this contentious political climate, certain groups became concerned that Truman might use the various UN human rights conventions to push for positive economic rights and civil rights objectives that his administration could not otherwise accomplish directly through legislation or unilaterally through executive action.¹⁰¹ Bricker crowed, for instance, that the UN Covenant for Human Rights “was an ingenious mechanism designed to stifle all criticism of the so-called Fair Deal.”¹⁰² 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 post-war era often served as shorthand for an idea that also embraced Roosevelt’s vision of Four Freedoms, which included “basic conceptions of economic justice.”¹⁰³ With the support of progressive groups, the Committee for Civil Rights that Truman established had seriously flirted with the idea of using UN human rights treaties as a tool for bypassing domestic obstacles to social and economic reform, (such as federalism and separation of powers).¹⁰⁴ However, this strategy faced one significant obstacle: many of the relevant UN Human Rights Covenants that directly addressed civil rights issues—such as the proposed UN Convention on Human Rights and the Genocide Convention—had not been ratified by the United States Senate. However, the UN Charter had been ratified as a treaty, and at least two of its articles seemed relevant to the civil rights cause.¹⁰⁵ The Truman Committee viewed these Charter provisions as a plausible alternative

⁹⁹ DAVID MCCULLOUGH, TRUMAN 585-86 (1992).

¹⁰⁰ See *id.*

¹⁰¹ See Duane A Tananbaum, *The Bricker Amendment Controversy: Its Origins and Eisenhower’s Role*, 9 Diplomatic History 73, 80 (1985).

¹⁰² Tananbaum, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER’S POLITICAL LEADERSHIP, *supra* note __ at 28.

¹⁰³ 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. See *id.* at 20-21,

¹⁰⁴ See KEN I KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT IF AMERICAN CONSTITUTIONAL LAW 103-104 (2004).

¹⁰⁵ The relevant articles were Articles 55 and 56. Article 55 of the Charter read 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 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.

Article 56 provides:

legal vehicle for advancing progressive civil rights policies, and human rights activists and legal academics provided fodder for the notion that the UN Charter was legally binding in the United States as a matter of domestic law.¹⁰⁶ The favorable political context created by the Truman administration meant that courts could act with considerable latitude, and many cited the UN Charter favorably in the early postwar civil rights cases.¹⁰⁷

Against this background, the ratification of the United Nation 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 these treaties. These treaties did not offer much in way of cross-partisan bundling opportunities because most of the obvious distributive benefits favored groups aligned with the Democratic Party. For instance, the key UN 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.¹⁰⁸ More broadly, the intra-partisan cleavages that sometimes divide right-leaning ideological and business groups were noticeably absent; indeed, opposition to the human rights treaties cut across almost all the key interest groups that were traditionally hostile to the Roosevelt/Truman New Deal programs, including patriot groups like the Daughters of the American Revolution and industry groups like the American Medical Association, American Bar Association, and the United States Chamber of

All members pledge themselves to take joint and desperate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.
Charter of the United Nations, 59 Stat. 1031 (26 June 1945).

¹⁰⁶See Bert B. Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L REV 901 (1983-84) (surveying efforts by interest groups to apply the UN Charter provisions in state and federal courts in the post-war era); Paul Sayre, *Shelley v. Kramer and United National Law*, 34 IOWA L REV 1, 3 (1948) (“[The UN 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 was: We are morally and legally bound to give all full effect all the time”). 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).

¹⁰⁷ See Lockwood, *supra* note __ at 903-48.

¹⁰⁸ See Universal Declaration of Human Rights, G.A. Res. 217A, art.25, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec.12, 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. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (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 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, art. 12, Dec. 19, 1966, 993 U.N.T.S. 3 (signed by the United States on Oct. 5, 1977)

Commerce.¹⁰⁹ If there was a single ideological or philosophical agenda that united all these various right-leaning coalitions 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 UN treaties could be used as vehicles to promote socialist ideals and Soviet propaganda.¹¹⁰ For the most part, however, the industry and professional groups who supported the Amendment were concerned that UN human rights treaties would be used to entrench more expansive labor regulations and implement socialized health care.¹¹¹

Second, and more importantly, the post-war UN 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 mid-term elections, however, the Democratic Party's hold on the African American vote was becoming increasingly tenuous as Republicans made significant inroads among African American strongholds in the Northeast.¹¹² 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 vote," the Rowe Report concluded, "holds the balance of power in Presidential elections for the simple arithmetic reason that the Negroes not only vote in a block but are geographically concentrated in the pivotal, large and

¹⁰⁹ See Schubert, *supra* note __ at 271, n.53.

¹¹⁰ The Republican fears about Soviet influence at the UN proved not to be entirely unjustified—recent evidence suggest that Soviet delegation played a key role in drafting portions of the UN 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* 94-96(1999) (discussing the influence of communist states in drafting the non-discrimination 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. Apparently, 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 amendment 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 communists who riddled this concept with questions and doubts, a goodly portion of the non-Communist world had itself succumbed to these doubts.

quoted in Holman, *supra* note __ at 72.

¹¹¹ See *Editorials and Comments, Dangers of Treaty Law Still Exist*, 152 J. AMER. MED. ASSOC. 823 (1954); see also Duane Tananbaum, *The Bricker Amendment Controversy: Its Origins and Eisenhower's Role*, 9 DIPLOMATIC HISTORY 73, 80 (1985) ("The American Medical Association 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.'" (citations omitted)).

¹¹² See GARY A DONALDSON, *TRUMAN DEFEATS DEWEY* 11 (1998).

closely contested electoral states such as New York, Illinois, Ohio, and Michigan.”¹¹³ Ironically, in what would eventually prove to be a grave political miscalculation, the Rowe Report 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.¹¹⁴

In any event, Southern Democrats feared that Truman would attempt to use UN treaties to shore up his support among both northern liberals and a more politically assertive African-American base. 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.¹¹⁵ For instance, the National Association for Advancement of Colored People (NAACP), had formally petitioned the UN in 1947 to complain about the treatment of African Americans. The organization claimed that having “failed to find relief through constitutional appeal, [we] find ourselves forced to bring this vital issue . . . to the attention of this historic body.”¹¹⁶

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, the 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 with private commercial interests, including anti-discrimination regulation.¹¹⁷ In any event, facing an increasingly split Democratic coalition, Truman eventually chose the option of party unity, forgoing a legislative agenda to push his civil rights agenda and instead concentrating on pushing reform through the courts.¹¹⁸ 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.¹¹⁹

To be sure, one may understand conservative Senators’ hostility to international commitments that might lock in a progressive policy agenda. 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 UN human rights conventions that would stymie the mobilization of oppositional conservative forces? In other words, why did Truman not attempt

¹¹³ Quoted in DAVID MCCULLOUGH, *TRUMAN* 590 (1948).

¹¹⁴ “As always,” the Report concluded, “the South can be considered safely Democratic. And in formulating national policy it can be ignored.” Quoted in *id.* 592.

¹¹⁵ See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 43-46 (2000).

¹¹⁶ Quoted in Dudziak, *supra* note 115 at 44.

¹¹⁷ See DONALDSON, *TRUMAN DEFEATS DEWEY*, *supra* note __ 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 Midwest and New England industrialists who would likely stop contributing to the Republican Party).

¹¹⁸ See Whittington, *Interpose your Friendly Hand*, *supra* note __ at 592-93.

¹¹⁹ See CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955* 215-16 (2003).

to co-opt the political opposition composed of Republicans and Southern Democrats through side-payments within the framework of these draft UN 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 UN Human Rights Commission, proposed two different modifications to the treaty language that would have made the proposed UN Draft Covenant on Human Rights less burdensome to the domestic political opposition.¹²⁰ First, she proposed that the Covenant be non-self-executing and exclude any language on social and economic rights.¹²¹ Second, she attempted to include a "states rights" provision within the Covenant that guaranteed that none of its substantive provisions would apply directly against the states (or federal subdivisions).¹²² 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.¹²³ In sum, the various draft UN covenants 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 in the future 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 post-war 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.¹²⁴ One plausible answer is that the postwar Republican leadership had succumbed to both isolationist and red scare impulses.¹²⁵ But this account suffers from one significant weakness. Although Senator Bricker frequently invoked strident nationalist and anticommunist rhetoric, he was hardly a diehard isolationist. Indeed, Bricker had voted for the United States participation in NATO in

¹²⁰ The Draft UN 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).

¹²¹ See Anderson, *supra* note __ at 200; GLENDON, *A WORLD MADE NEW*, *supra* note __ at 196 (2001).

¹²² See Anderson, *supra* note __ at 4-5; 200.

¹²³ 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, *A WORLD MADE NEW*, *supra* note __ at 202.

¹²⁴ After seeking Eleanor Roosevelt's resignation from the Delegation to the United Nations, Eisenhower appointed as a delegate James Byrne, Truman's former Secretary of State and a committed Southern segregationist, who was a vocal critic of both Truman's civil rights and internationalist policies. See Anderson, *supra* note __ at 215, 241-42. Another controversial Eisenhower appointment to the US Delegation to the UN was that of Mary Pillsbury Lord—a flour mills heiress. See *id.* at 241.

¹²⁵ See, e.g., JUSTUS D. DOENECKE, *NOT TO THE SWIFT: THE OLD ISOLATIONISTS AND THE COLD WAR ERA* 236-37 (1979).

1949 and for the Marshall plan in 1947.¹²⁶ Also, a relatively stable bipartisan consensus had emerged on foreign policy matters from Roosevelt through the Eisenhower administrations, which formed the basis of United States support for post-war multilateral institutions.¹²⁷ 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 significant gap between the views of the Republicans and Democrat elites.¹²⁸

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 UN Charter or other ratified treaties as a source of binding domestic law.¹²⁹ 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 post-war 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 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

¹²⁶ See Tananbaum, *The Bricker Amendment Controversy*, *supra* note __ at 23; Moreover, Wildavsky's famous two presidents' thesis, which argued that presidents are more likely to gain congressional support for their foreign than their domestic policy initiatives, was based largely on political branch interactions in the 1950s. Aaron Wildavsky, *The Two Presidencies*, 4 TRANSACTION 7 (1966). For a critical overview of the notion of whether two-presidencies thesis applies in the modern era. See Richard Fleisher, *The Demise of the Two Presidencies*, 28 AMERICAN POL. Q. 3 (2000).

¹²⁷ James M. McCormick & Eugene R. Wittkopf, *Bipartisanship, Partisanship, and Ideology in Congressional Executive Foreign Policy Relations, 1947-1988*, 52 J POL. 1077 (1990).

¹²⁸ See OLE R. HOLSTI, PUBLIC OPINION AND AMERICAN FOREIGN POLICY 175 (2004).

¹²⁹ 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 the 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 __ at 814

discrimination in the United States, various democratic European allies criticized the civil rights situation in the South.¹³⁰ Moreover, in post-war Europe, elites sympathized with the notion of protecting positive economic rights either through human rights treaties or national constitutions.¹³¹ In sum, the pool of potential stakeholders in the proposed UN human rights agreements was significant and growing, which meant that it might eventually be strong enough in the future to weaken the resolve of conservative forces opposed to progressive social and economic reform.

In the modern era, the issues surrounding Bricker Amendment continue to play out in debates regarding ratification of the UN Convention on the Rights of the Child and the UN Convention on Women's Rights.¹³² For instance, the 2008 Democratic platform endorsed the ratification of both of these covenants as well as the Convention on the Rights of Persons with Disabilities.¹³³ By contrast, the 2008 Republican platform vowed to reject these UN human rights conventions: "Because the UN has no mandate to promote radical social engineering, any effort to address global issues must respect the 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 Covenant on the Rights of the Child."¹³⁴ 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 UN Conventions accentuates the Republican issue ownership over "family values" in a manner that is not only likely to mobilize the party's traditional base,¹³⁵ but that may also appeal to conservative Democrat voters concerned that dominant American cultural values are under attack.¹³⁶

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

¹³⁰ See Anderson, *supra* note __ at 108-11. For a more general view of how Europeans reacted towards American treatment of African-Americans, see DUDZIAK, *COLD WAR CIVIL RIGHTS*, *supra* note __ at 34-36 (2000).

¹³¹ 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 obligations"). 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 Europeans elites and autocratic states. See Jeremy Rabkin, *Is the EU Eroding the Sovereignty of Non-Member States*, 1 CHI. J. INT'L L 273 (2000); John R. Bolton, *Should we Take Global Governance Seriously*, 1 CHI. J. INT'L L 205 (2000); John McGinnis & Ilya Somin, *Should International Law be Part of our Law*, 59 STANFORD L REV. 1175 (2007).

¹³² See Convention on the Rights of the Child, 20 Nov. 1989, UNTS 1577 (entered into force 2 Sept. 1990); Convention on the Elimination of all Forms of Discrimination Against Women, 18 December 1979, 1249, U.N.T.S.13 (entered into force 3 September 1981).

¹³³ Democratic Party Platform of 2008, available at <http://www.presidency.ucsb.edu/platforms.php>

¹³⁴ Republican Party Platform of 2008, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=78545>.

¹³⁵ See William Martin, *The Christian Right and American Foreign Policy*, FOREIGN POL. 66, 66-69 (1999).

¹³⁶ See THE POLITICS OF CULTURAL DIFFERENCES: SOCIAL CHANGE AND VOTER MOBILIZATION STRATEGIES IN THE POST-NEW DEAL PERIOD 158-66 (David C Leege et al, ed. (2002).

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.¹³⁷ Instead, modern debates over human treaties tend to center around constitutional ambiguities, such as whether such treaties can ever be self-executing,¹³⁸ or whether further legislative action is always required.¹³⁹ 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.¹⁴⁰ At bottom, 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 Amendment was a better vehicle for entrenching domestic civil rights policy goals than UN international human rights agreements.¹⁴¹ 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.¹⁴²

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 have an advantage. Then, as now, these debates were often not over competing visions of American foreign policy, but over the role such human rights treaties should play in increasingly polarizing domestic conflicts over cultural and social policy issues.¹⁴²

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

¹³⁷ See John B. Whitton and J Edward Fowler, *Bricker Amendment--Fallacies and Dangers*, 48 AM J. INT'L L 23, 23-24 (1954).

¹³⁸ 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 discussion in text at *supra* note ____.

¹³⁹ See Henkin, *The Ghost of Senator Bricker*, *supra* note ____ at 341-43; 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).

¹⁴⁰ See Henkin, *supra* note ____ 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) (suggesting that reservations should be treated as severable); *but cf* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 PA. L. REV. 399, 402 (2000) (arguing that reservations to human rights treaties "reflect a sensible accommodation of competing domestic and international considerations.").

¹⁴¹ See Whittington, *supra* note ____ at 591-93.

¹⁴² See Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 402-03 (1998-99) (discussing how the proliferation of human rights treaties might affect state control over social issues); Moravcsik, *The Paradox of US Human Rights Policy*, *supra* note ____ at 146-50.

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 UN 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 UN 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 UN 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 morally significant issue of government policy."¹⁴³ Ostensibly, the European Union insists that capital punishment offends "human dignity" and that its abolition will lead to "the progressive development of human rights."¹⁴⁴ 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 would very like undermine the office-holding objectives of that party.¹⁴⁵ The redistributive politics of capital punishment stem not only from the reality that core Republican constituencies tend to favor harsher criminal punishment, but also because independents and swing voters tend to trust Republican candidates to be tougher on crime than their Democrat counterparts.¹⁴⁶ Republicans since the Nixon administration have deliberately cultivated an anti-crime image of which unwavering partisan support for capital punishment has been a key component.¹⁴⁷ 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.¹⁴⁸ Meanwhile, crime has continued to be one of the most electorally salient issues in American politics. As one commentator has observed, "it would not be

¹⁴³ FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 181 (2003).

¹⁴⁴ The European Commission, *Death has no Appeal*, available at http://ec.europa.eu/europeaid/where/worldwide/eidhr/documents/aid_6_0200_leaflet_en.pdf

¹⁴⁵ See David Jacobs & Jason T Carmichael, *Ideology, Social Threat, and the Death Sentence: Capital Sentences Across Time and Space*, 83 *SOCIAL FORCES* 249, 257-58 (2004).

¹⁴⁶ See STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE* 89 (1997) ("People who fear crime gravitate towards 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) (suggesting that 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).

¹⁴⁷ See Jacobs & Carmichael, *Ideology, Social Threat, and the Death Sentence*, *supra* note __ at 257-58.

¹⁴⁸ See David Jacobs and Jason T Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 *AM SOC. REV.* 109, 114-16 (2002)

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.”¹⁴⁹

Given these political dynamics, it is unsurprising that no modern human rights treaty has ever been ratified while Republicans held a majority in the United States Senate; indeed, as Moravcsik has observed, such treaties have only been ratified when the Democrats have held close to a super-majority in the Senate.¹⁵⁰

b. Promoting Intra-Partisan 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.”¹⁵¹ 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.¹⁵² 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 modern era of free trade.¹⁵³ 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.¹⁵⁴

¹⁴⁹ EVAN J. MANDERY, *CAPITAL PUNISHMENT: A BALANCED EXAMINATION* 645 (2005).

¹⁵⁰ See Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, *supra* note __ at 161.

¹⁵¹ I.M. DESTLER, *AMERICAN TRADE POLITICS* (4th ed. 2005); KENNETH W. DAM, *THE RULES OF THE GLOBAL GAME* (2001); Karen E. Schneitz, *The Institutional Foundations of U.S. Trade Policy: Revisiting Explanations for the 1934 Reciprocal Trade Agreements Act*, 12 J POL'S HIST. 417, 418-19 (2000); DAVID A. LAKE, *POWER, PROTECTION, AND FREE TRADE: INTERNATIONAL SOURCES OF U.S. COMMERCIAL STRATEGY, 1887-1939* (1988); Michael A. Bailey et al., *The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade*, 49 WORLD POLITICS 309 (1997); Susanne Lohmann & Sharyn O'Halloran, *Divided Government and U.S. Trade Policy: Theory and Evidence*, 48 INT'L ORG. 595 (1994).

¹⁵² See Destler, *supra* note __ at 14 (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 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) (2000)). The RTAA authorized the president “to 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.” *Id.* at 943.

¹⁵³ See, e.g., Bailey et al., *supra* note __, at 326-28 (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 __, at 429- 32 (same).

¹⁵⁴ See Destler, *supra* note __ at 255 (arguing that NAFTA worked because Congress allowed the President to lead); see also ROSS K BAKER, *HOUSE AND SENATE* 225 (1995) (arguing that Senators were more supportive of NAFTA than members of the House because they had larger constituencies).

But recent scholarship has begun to question this long-standing institutionalist narrative. First, as a growing number of studies have shown, the 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,¹⁵⁵ whereas in the modern era, the parties have largely switched positions, with the Republicans becoming more the party of free trade.¹⁵⁶ Moreover, the broader claim that the President may be more responsive to a much more nationalist constituency (and thus fewer protectionists) than Congress is both under-theorized and lacks empirical support.¹⁵⁷ 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.¹⁵⁸ More broadly, if Congress were seeking to protect itself from the effect 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 in favor 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.¹⁵⁹

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

¹⁵⁵ Michael J. Hiscox, *The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization*, 53 INT'L ORG. 669, 677 (1999) (arguing that the notion that "any president, by dint of having a larger constituency, must be less protectionist than the median member of Congress, is hopelessly ahistorical."). One

¹⁵⁶ 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 COMPARATIVE POL. STUD. 1171 (2002) (arguing that in the post-war era Republican Presidents tend to more protectionist than Republican Congresses while Democratic presidents tend to be less protectionist than Democratic Congresses).

¹⁵⁷ See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (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. ANALYSIS 215 (2009) (finding no support for the constituency size or the assumption that president 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).

¹⁵⁸ See Nzelibe, *The Fable of the Nationalist President*, supra note __ at 1270-71.

¹⁵⁹ In hindsight, a more plausible account of Congress's behavior in the wake of Smooth 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.*

their core electoral coalition, dividing party centrists such as the moderate and business-oriented Democrat Leadership Council (DLC) from the more traditional Democratic labor constituencies.¹⁶⁰ 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 post-war United States trade policy, the fight against NAFTA was the most significant lobbying effort undertaken by organized labor since the 1930s; for the most part, organized labor feared that the agreement would precipitate significant capital flight to Mexico and depress blue collar wages.¹⁶¹ 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. 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.¹⁶² Faced with the possibility of a deeply divided coalition within the Democratic Party, Clinton had an incentive to avoid taking any clear sides during his campaign on an issue that was likely to polarize his base.¹⁶³

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.¹⁶⁴ More importantly, however, the Republicans started to realize that international trade would be a wedge issue for the Democrats that year.¹⁶⁵ After all, the Democratic primaries had revealed very strong cleavages between two different coalitions in the party, one which was personified by the stridently anti-NAFTA position of Senator Larkin of Iowa and the other by the more moderate and business-friendly Clinton.¹⁶⁶ Later that fall, President Bush turned up the heat and accused his opponent Clinton of waffling on international trade;¹⁶⁷ indeed, Clinton's ambivalence over NAFTA became a key talking point for the Republicans as to why the

¹⁶⁰ See L. Ronald Scheman, *A Pact That Divides Democrats*, WASH. POST, Aug. 29, 1992, at A31; SHOCH, TRADING BLOWS, *supra* note __ at 180-81.

¹⁶¹ See SHOCH, TRADING BLOWS, *supra* note __ at 180, 193.

¹⁶² See *id.* at 183; see Sandra Masur, *The North American Free Trade Agreement: Why It's in the Interest of U.S. Business*, 26 COLUM. J WORLD BUSINESS 101 (1991).

¹⁶³ For instance, when Clinton campaigned in the union-stronghold of the Midwest that year, he expressed doubt whether as to whether he would be willing to seek legislative ratification of a NAFTA agreement signed by President Bush. See SHOCH, TRADING BLOWS, *supra* note __ at 158.

¹⁶⁴ See SHOCH, TRADING BLOWS, *supra* note __ at 158-59.

¹⁶⁵ See MAXWELL A CAMERON & BRIAN A TOMLIN, *THE MAKING OF NAFTA: HOW THE DEAL WAS DONE* 179-80 (2000).

¹⁶⁶ See SHOCH, TRADING BLOWS, *supra* note __ at 158.

¹⁶⁷ 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 __ at 180-81.

Democratic candidate could not be trusted as a decisive leader.¹⁶⁸ 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.¹⁶⁹ He eventually relented and said he would accept the signed NAFTA agreement a month before the election, but only if the final agreement included side agreements on labor standards.¹⁷⁰

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 obviously an issue in 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 1992.¹⁷¹ Moreover, it is not clear that the Republicans thought they could even prevail on the NAFTA question had they won the 1992 presidential election since it was unlikely that would pick up enough votes from House Democrats to ensure ratification.¹⁷² More plausibly, the Republicans recognized the political value of using NAFTA to exploit cleavages within the Democratic Party which 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 early 1993, the question of NAFTA ratification had already been foisted squarely unto 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.¹⁷³ 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

¹⁶⁸ 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 and you've got to ~

Transcripts of the October 15, 1992 Presidential Debates, available online at <http://www.pbs.org/newshour/debatingourdestiny/92debates/2prez1.html>

¹⁶⁹ See *id.* at 159.

¹⁷⁰ See *id.*; see also Cameron & Tomlin, *supra* note __ at 180-81.

¹⁷¹ See SHOCH, TRADING BLOWS, *supra* note __ at 159.

¹⁷² Indeed, as USTR Mickey Kantor observed, ratification of NAFTA in 1993 would have been politically difficult under any Republican President. See SHOCH, TRADING BLOWS, *supra* note __ at 185; see also Cameron & Tomlin, *supra* note __ at 181.

¹⁷³ See SHOCH, TRADING BLOWS, *supra* note __ at 177.

investigate and enforce violations of environmental and labor standards.¹⁷⁴ But a sufficient number of pro-NAFTA Republican Senators were intensely opposed to these side agreements and threatened to withhold their support if they were part of the package.¹⁷⁵ Caught between a rock and hard place, the Clinton administration agreed to water down the power of these proposed commissions to only 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.¹⁷⁶ But despite their opposition, Clinton was able to pick up enough wavering Democrats to ensure the bill's passage.¹⁷⁷

Ultimately, however, NAFTA ratification was the product of a largely skewed partisan vote in Congress, with a significant majority of Republicans (75 percent) voting in favor and with 60 percent of Democrats against,¹⁷⁸ 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 internationally oriented business groups seeking market access, while 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.¹⁷⁹

Reeling from their defeat in NAFTA, both the pro-labor 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 79 percent of House Democrats opposing an extension of negotiation authority.¹⁸⁰ 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.¹⁸¹ Again, despite a bill that would ostensibly give the Democrat Clinton more authority in international affairs, opposition by House Democrats was

¹⁷⁴ See *id.* at 175-76.

¹⁷⁵ See SHOCH, *TRADING BLOWS*, *supra* note __ at 176-77.

¹⁷⁶ See *id.* at 176.

¹⁷⁷ See *id.* at 283-85.

¹⁷⁸ The vote breakdown along partisan lines was 132-43 Republicans in favor, while Democrats were against it 102-156. See SHOCH, *TRADING BLOWS*, *supra* note __ at 183-84.

¹⁷⁹ See SHOCH, *TRADING BLOWS*, *supra* note __ at 185.

¹⁸⁰ See James Shoch, *Contesting Globalization: Organized Labor, NAFTA, and the 1997 and 1998 Fast-Track Fights*, 28 Pol. & Soc'y 119, 127, 130 (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 will then submit to Congress for approval and implementation. Under such procedures, the President is then 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)).

¹⁸¹ See Shoch, *Contesting Globalization*, *supra* note __ at 136-37,

both broad and intense with only 15% of Democrats voting in support of the measure.¹⁸² In both of these cases, a significant majority of House Republicans proved to be eager to lend their support to Clinton,¹⁸³ 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 intra-coalitional 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 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.¹⁸⁴ 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 intra-partisan 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 office 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 intra-partisan agreement (or less intense disagreement), such as health care or financial service reform.¹⁸⁵ Perhaps concerns about intra-partisan conflict might explain why criticism of NAFTA was popular among Democratic presidential candidates campaigning in the rustbelt during the 2008 primary election season,¹⁸⁶ 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 where pro-business Democratic leaders could join forces with Republicans to support an agreement that entrenched their preferences at the expense of pro-labor Democrats

¹⁸² See *id.* at 137.

¹⁸³ The Republic vote in favor of extending fast track in 1998 was 151-71. See *id.* at 137.

¹⁸⁴ Take the legislative ratification of NAFTA, for instance. Despite significant lobbying by business groups, more Democratic members of Congress appear to have been responsive to labor concerns than to those of the business wing of the party.

¹⁸⁵ To be sure, agreements like NAFTA can also help Democratic Presidents who have stronger free trade preferences than the median House Democrat avoid unpleasant intra-partisan 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 parties' core labor constituents in the name of enforcing the agreement. In such a case, trade unionists with the party might be less willing to withdraw support from a Democratic President in the face of bad policy outcomes.

¹⁸⁶ See Michael Luo, *Despite Nafta Attacks, Clinton and Obama Haven't Been Free Trade Foes* *The New York Times*, NY 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 lobbying accusations against their opponent on the issue.")

who nonetheless represented a bigger and stronger coalition within the Democratic Party. But is it precisely this cross-coalitional dynamic that makes agreements like NAFTA politically sustainable across multiple electoral periods. The flipside 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 intra-coalitional politics of the Democratic Party. Take, for instance, a scenario where a majority of the pro-business Democrats in Congress lose their seats in a specific election cycle and are replaced by liberal pro-labor Democrats or conservative Republicans.¹⁸⁷ In such a scenario where significant intra-partisan 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.¹⁸⁸

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To summarize, opportunities for cross-partisan bargaining might help explain the different political trajectories in the United States of the post-war human rights treaties and the passage of NAFTA in 1993. Both kinds of international agreements were plagued by distributive partisan conflicts, which 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 post-war human rights treaties, but also provoked a constitutional amendment by conservatives who viewed these post-war treaties as vehicles that would provide one-sided benefits to progressive constituencies. By contrast, in the case of international trade, the presence of a cross-partisan coalition, uniting the pro-business 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.

V. CONCLUSION AND SOME POLICY AND NORMATIVE IMPLICATIONS

A growing number of studies have suggested that domestic factors influence the preferences of states for international cooperation.¹⁸⁹ This Essay 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

¹⁸⁷ For instance, the fact that the House Democratic caucus had become more uniformly pro-labor with the 1996 helped doom Clinton's quest for fast track authority in 1997. As Shoch observes, many of the southern centrist Democrats that helped ratify NAFTA in 1993 had either lost their seats or had retired. See Shoch, *Contesting Globalization*, *supra* note __ at 130.

¹⁸⁸ Indeed, the question of renegotiating the environmental and labor side agreements was a recurring theme during the 2008 presidential elections. See Elisabeth Malkin, *Revisiting NAFTA in Hopes to Cure Manufacturing*, NY TIMES, April 22, 2008, at C7

¹⁸⁹ See discussion in text at *supra* notes 15-45.

sometimes be used as a vehicle for advancing 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 most 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 while this Essay 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 also 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, for instance, to understand whether the United States (or some other country) will comply effectively with a future global climate change regime, we should not simply focus on distributive disputes that occur at the interstate level, but also at the intra-state level among competing political factions from both major political parties. Moreover, in other contexts where electorally based incentives to renege on an international commitment tracks partisan preferences, we should be concerned as to whether reputation or other external enforcement options may be sufficient to induce compliance.

This Essay 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 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 and their representatives to legislate, and, less often, of provoking crude and heavy-handed electoral responses."¹⁹⁰

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

¹⁹⁰ John Ferejohn, *Judicializing Politics, Politicizing law*, 41 LAW & CONTEMP. PROBS. 41, 66-67 (2002).

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 national states. Perhaps a plausible institutional path towards de-politicization 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 era¹⁹¹—already exists in the United States. It is found in the Treaty power requirement that two-thirds of the Senate has to approve an international agreement.¹⁹²

¹⁹¹ See Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1280 (2008).

¹⁹² US Const, art II, § 2, cl 2.