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**Article**

**Our Partisan Foreign Affairs Constitution**

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### INTRODUCTION

The conventional wisdom tends to treat constitutional arrangements, such as the allocation of foreign affairs powers, as socially beneficial constraints that are interpreted behind a veil of ignorance.<sup>1</sup> According to this view, since these arrangements mutually constrain (or empower) political actors across partisan lines, such actors should have no incentive to alter or manipulate these arrangements for partisan gain.<sup>2</sup> Here, one key argument is that by taking the long view, the framers adopted a decision-making structure for foreign affairs that purportedly increased the likelihood that a broader range of interests would be considered.<sup>3</sup> Thus, one might expect judges—or even other constitutional interpreters within the political branches—to eschew purely political considerations in construing or interpreting the allocation of foreign affairs authority between Congress and the President.

This Article suggests the contrary: even if the allocation of foreign affairs powers was originally negotiated behind a veil of ignorance, contemporary politicians can and do pursue narrow

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1. More generally, there is a longstanding debate regarding the benefits of the separation of powers in foreign affairs between pro-Congress scholars who emphasize the benefits of deliberation by multiple actors and pro-President scholars who emphasize the benefits of policy flexibility. But both sides assume that the constitutional structure will likely produce policy effects that are socially beneficial. See Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 996–97 (2006) (describing contours of the debate between pro-Congress and pro-President scholars in foreign affairs); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 697 (1997) (listing those scholars that advocate a pro-presidential view of war powers).

2. Consider, for instance, this observation by Daryl Levinson:

It is a common observation about institutional—and constitutional—design that actors might take a less self-interested, more impartial view of political decisionmaking structures that they expect to be in place for relatively long periods of time simply because they cannot predict how these institutions will affect their own interests.

Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 694 (2011).

3. For a discussion of how veil of ignorance rules apply in the context of constitutional design, please see Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001); see also John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 545 (1999) (applying a veil of ignorance to the selection of justices sitting on cases).

partisan objectives in their efforts to shape both the interpretation and our modern understanding of those powers. In this picture, the ultimate objective of advocating or disavowing constitutional constraints in foreign affairs can be self-serving and strategic; in other words, partisan officials do not expect such constraints to be mutually constraining on policy outcomes in a symmetric fashion, but rather hope that they can serve primarily to constrain policy outcomes favored by their political adversaries.<sup>4</sup> Conversely, officials will seek to relax constitutional constraints on policy issues in which they have an electoral advantage.<sup>5</sup>

At bottom, a partisan approach to constitutional constraints in foreign affairs is likely to exist whenever the threats that may arise from relaxing such constraints are not symmetrical.<sup>6</sup> For instance, a hawkish government may not be worried about establishing new precedent that relaxes constraints on presidential war powers because it will not necessarily be threatened if a future dovish government decides to invoke that precedent for its own political ambitions. By contrast, a dovish government that favors greater constraints over war powers may not really be engaging in an act of mutual constraint, but may simply be seeking to constrain the actions of a future hawkish government. In both kinds of regimes, political actors may have an incentive to develop partisan affinity for particular visions of the Foreign Affairs Constitution,<sup>7</sup> regardless of

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4. Jon Elster has also discussed other circumstances where constitutional arrangements that look like they are self-binding are really intended to bind others. See JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 92–94 (2000) (“Many writers have argued that political constitutions are devices for precommitment or self-binding, created by the body politic in order to protect itself against its own predictable tendency to make unwise decisions.”).

5. For a discussion of how having an electoral advantage helps politicians in changing the constraints on policy issues, see Bruce Bueno de Mesquita et al., *Policy Failure and Political Survival: The Contribution of Political Institutions*, 43 *J. CONFLICT RESOL.* 147 *passim* (1999).

6. See Jide Nzelibe, *Partisan Conflicts over Presidential Authority*, 53 *WM. & MARY L. REV.* 389, 392–93 (2011) (giving an example of how this partisan approach to constitutional constraints might look).

7. For ease of exposition, I will refer often to those provisions of the United States Constitution that govern the allocation of foreign affairs authority between the political branches simply as the “Foreign Affairs Constitution.” More broadly, the Constitution grants Congress the following foreign relations powers in Article I, Section 8: regulation of foreign commerce; regulation of naturalization and immigration; criminalization and punishment of piracy and other felonies on the high seas and offenses against international law; the power to declare war; the power to authorize private citizens to retal-

which party occupies the White House. Nonetheless, societal groups whose ultimate goal may be to advance partisan objectives may obscure their motivations in high-minded language about how their visions of constitutional authority advance the national interest.<sup>8</sup>

Two developments have influenced this distributional dynamic in which the Foreign Affairs Constitution can be pressed into the service of certain partisan groups at the expense of others. First, the established constitutional doctrine governing the allocation of foreign affairs authority is sufficiently sparse and ambiguous that there is often significant leeway for political actors to influence the contours of foreign affairs authority to suit their political objectives. Moreover, the unwillingness of courts to intervene in many foreign affairs controversies gives elected officials opportunities to promote those constitutional constraints that they predict will bring them the greatest distributional benefits.<sup>9</sup>

Second, and more importantly, the Foreign Affairs Constitution is sufficiently unbundled that societal groups can often reasonably estimate whether a particular interpretation of a foreign affairs power is good or bad for them, and these judgments will often depend on factors that divide along partisan lines. Typically, uncertainty over distributional outcomes is likely to be pronounced when a particular constitutional constraint or institutional arrangement bundles together a whole

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iate against citizens or ships of foreign nations; and the power to raise, regulate, and maintain an army and navy. U.S. CONST. art. I, § 8, cl. 3–4, 10–15. In addition, Article II grants the President power to make treaties with the advice and consent of two-thirds of the Senate, and to appoint ambassadors. *Id.* art. II, § 2, cl. 2.

8. To be clear, I am not suggesting that the positions that interest groups stake out on the allocation of foreign affairs authority is motivated entirely (or even mostly) by redistributive partisan objectives. Indeed, domestic groups—including partisan elites—may oppose or support a specific allocation of foreign affairs authority because of principled policy reasons largely detached from partisan considerations. This Article focuses largely on partisan considerations because it has been neglected or sidelined in the literature.

9. There is a long literature that documents the reluctance of courts to intervene in foreign affairs controversies. See PETER W. LOW, JOHN C. JEFFRIES, JR., & CURTIS A. BRADLEY, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 542 (7th ed. 2011) (“Though successful resort to the political question doctrine in purely domestic disputes is unusual, the doctrine may have greater vitality in foreign affairs.”); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 943 (2004) (concluding that “reports of the [political question] doctrine’s demise in foreign affairs are greatly exaggerated”).

range of policies or policy outcomes.<sup>10</sup> In such a picture, bundling helps ensure that no partisan group is likely to view the constraint or institution 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.<sup>11</sup> But the Foreign Affairs Constitution can be unbundled in such a way that the constraints which govern the making of human rights agreements can often be distinguished from those for making war, which can in turn be distinguished from those involved in negotiating international trade agreements. Since the constitutional authority of foreign affairs can almost be effectively unbundled on an issue-by-issue basis, societal groups have an incentive to stake out positions on constitutional constraints in foreign affairs that map onto their partisan preferences regarding the underlying issue area. Thus, a right-leaning or Republican group may favor more constraints (or more veto points) on the constitutional powers that govern the negotiation and ratification of human rights agreements, but less on those that govern the decision to go to war.<sup>12</sup>

For a concrete contemporary illustration of this partisan dynamic, let us consider the ongoing debate regarding the domestic legal effects of treaties ratified by the Senate.<sup>13</sup> At first glance, the controversy as to whether ratified treaties should be

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10. Thus, for instance, Congress's institutional authority is typically viewed as bundling together a variety of policy domains since it employs the same process when it passes legislation on social welfare, health, the economy, or any other matter within its constitutional ambit. For a recent account that endorses a constitutional vision in which power is unbundled along specific policy domains, see Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 302–08 (2010).

11. However, some scholars argue that bundling powers together can be problematic because it puts too much power into one place. *See id.* at 328–38.

12. *See* Nzelibe, *supra* note 6, at 404 (“Thus, a right-leaning party can choose to support presidential flexibility in the use of force, but favor greater constraints on the President's authority when it comes to human rights treaties.”).

13. *See* Martin S. Flaherty, Response, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095, 2128–29 (1999) (contending that the opinion during Convention and ratification debates support the notion that “treaties would be presumptively self-executing”); Carlos Manuel Vázquez, Response, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2169–70 (1999) (defending a reading of Supremacy Clause that results in self-execution of treaties). *But see* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1961, 2024–74 (1999) (contending that evidence supports the view that Founders intended treaties to be non-self-executing).

presumptively treated as self-executing might seem both innocuous and academic.<sup>14</sup> But when one peels beneath the surface, one discovers that much of the debate masks significant differences among the interlocutors about a single issue: the domestic implications of human rights treaties. Put differently, debates in favor of or against the presumption of self-execution in treaties often have little or no implications for decisions of the United States to go to war, enter into international trade agreements, or disperse foreign aid.<sup>15</sup> Thus, invariably, where one stands on the issue of the presumption for or against self-execution is very likely to map into one's preferences or beliefs regarding the merits of domestically binding human rights agreements. In the United States, however, such debates about human rights agreements often expose a particularly deep fault-line that has divided core constituencies aligned with the Republican and Democratic Parties since the end of World War II (WWII).<sup>16</sup>

From a normative perspective, one may argue that one way to resolve this strategic partisan dynamic would be to ensure that judges and informed commentators play a greater role in the interpretation of foreign affairs powers. But rather than depoliticize the allocation of foreign relations authority, such a move may simply re-characterize the underlying problem. To be sure, while judges and academic commentators may have professional and institutional incentives not to act as single-minded maximizers of partisan objectives,<sup>17</sup> they are likely to be susceptible to cognitive biases and the kinds of motivated

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14. For clarification, self-executing treaties are those in which domestic courts can presumably provide a remedy for a treaty violation, while non-self-executing treaties are those in which courts cannot. For a discussion of how treaty self-execution works in American domestic law, see David Sloss, *Self-Executing Treaties and Domestic Judicial Remedies*, 98 AM. SOC'Y INT'L L. PROC. 346 (2004).

15. See *id.*, at 348 (noting that whether or not a treaty is self-executory only affects whether a treaty "creates individual rights under international law").

16. For an incisive overview of the societal battles over human rights agreements in the United States, see Christopher Nigel Roberts, *Exploring Fractures Within Human Rights: An Empirical Study of Resistance* (2010) (unpublished Ph.D. dissertation, University of Michigan), available at [http://deepblue.lib.umich.edu/bitstream/2027.42/78882/1/cnrobert\\_1.pdf](http://deepblue.lib.umich.edu/bitstream/2027.42/78882/1/cnrobert_1.pdf).

17. But that does not preclude the possibility that the Justices might not have strong policy preferences over case outcomes even if such policy preferences are not always partisan. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 22–51 (1998) (arguing that Supreme Court Justices have policy objectives in mind when making all of their decisions).

reasoning that may lead them to make judgments that closely track partisan divisions.<sup>18</sup>

Let us return, for instance, to the question of the domestic legal implications of human rights treaties. A judge trying to resolve the question as to whether human rights agreements can be domestically binding on state officials may resort not just to textual sources, but also to functional judgments as to what the constitutional allocation of powers is trying to achieve, such as the reduction of agency costs (in this example, minimizing capture by interest groups or temporary majorities). But judgments about the source of agency costs are very likely to be plagued by partisan biases even if such biases may be unconscious.<sup>19</sup> For instance, a right-leaning judge may be inclined to conclude that multiple veto points are necessary when ratifying human rights agreements not because she is being strategic, but because she is more likely to believe that human rights agreements are particularly susceptible to capture by left-leaning special interest groups whose preferences may deviate from that of the median voter. On the other hand, a left-leaning judge or commentator may likely think that the agency cost problem in ratifying human rights agreements cuts in the opposite direction; in other words, she may tend to believe that the agency problem is caused by narrow right-leaning groups exploiting the domestic fragmentation of power to thwart human rights agreements purportedly favored by a “majority.” In each case, both left- and right-leaning judges may try to engage

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18. As some commentators have suggested, because of motivated reasoning, it is likely that a judge’s functional judgments will be skewed in favor of his or her personal views. See Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 20 (2011) [hereinafter Kahan, *The Supreme Court, 2010 Term*] (“[A] person who genuinely desires to make a fair or accurate judgment [often] is unwittingly impelled to make a determination that favors some personal interest.”).

19. See Dan M. Kahan, “*Ideology in*” or “*Cultural Cognition of*” *Judging: What Difference Does It Make*, 92 MARQ. L. REV. 413, 413–14 (2009) [hereinafter Kahan, “*Ideology in*” or “*Cultural Cognition of*” *Judging*] (“[The] proponents [of ideological models of judging] have failed, in particular, to distinguish between values as a self-conscious motive for decisionmaking and values as a subconscious influence on cognition.”); see also Kahan, *The Supreme Court, 2010 Term*, *supra* note 18, at 2 (“[C]onstitutional decisionmaking [is often] the focus of status competition among groups whose members are unconsciously motivated to fit perceptions of the Court’s decisions to their values.”); Jonathan J. Koehler, *The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality*, 56 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 28 (1993) (demonstrating the effect of cognitive bias experimentally with a sample of trained statisticians).

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in principled “non-partisan” decision-making, but their empirical assumptions about the source of agency costs and how the Constitution purports to resolve these agency-cost problems may be radically different.

The rest of the Article proceeds as follows. Part I critically reviews other accounts in the literature that seek to explain changes in the Foreign Affairs Constitution. Part II introduces a societal conflict account that explains why interest groups that are aligned with each of the major political parties have often disagreed over the scope of the foreign relations authority.

Part III illustrates how this partisan logic operates to produce partisan conflicts over presidential war powers and the authority to bind the country to international human rights commitments. In the postwar years from 1950–1960, when the expansion of the national security state was complementary to the ambitions of the New Deal, President Truman and progressive Democrats favored greater executive branch flexibility in both war powers and the ratification of human rights treaties. Republicans and conservative Democrats, on the other hand, viewed the expansion of executive branch authority in foreign affairs during that era as a threat to the material and ideological interests of their core constituents. When President Reagan came into power in the 1980s and was able to pursue a cleavage politics of guns or butter, in which the growth of the national security state was decoupled from that of the welfare state, progressive and conservative coalitions cemented a switch of their preferences on war powers which started with the Vietnam War. However, the ratification of human rights treaties continues to exhibit the same postwar trajectory of distributional partisan conflict. This Part concludes with an analysis of contemporary episodes that seem in tension with the partisan framework: President Obama’s 2011 decision to direct airstrikes against Libya, and President Clinton’s military interventions in Haiti and Somalia in the 1990s. In all of these cases, Republican members of Congress appeared either ambivalent about or opposed to an aggressive vision of presidential war powers pushed by a Democratic President.

Part IV explores the question as to whether the partisan incentives can be muted by having courts play a greater role in shaping the contours of the Foreign Affairs Constitution. Part V concludes and examines some implications of the partisan framework for normative constitutional theorizing.

## I. COMPETING ACCOUNTS OF CONSTITUTIONAL CHANGE

This Part critically examines two instrumental accounts that might help explain constitutional change in foreign affairs: institutional and ideational. In doing so, it brackets any discussion of non-instrumental explanations which might include a genuine desire by political actors and courts to conform to their evolving understanding of constitutional constraints,<sup>20</sup> responses to shocks from the international environment,<sup>21</sup> or the recognition that certain institutional forms are better equipped to handle specific foreign policy issues.<sup>22</sup> To be clear, that is not to say these latter factors do not play a role in explaining constitutional change as well, but this Article focuses on instrumental motivations because they have not figured as prominently in debates in the legal literature.

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20. There is a growing and significant amount of literature that explores how historical practice informs the evolution of foreign affairs powers. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. (forthcoming Dec. 2012), available at <http://ssrn.com/abstract=1999516>; see also STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4 (2008) (“[A] foundational principle of law is that to some degree what the law is on the books is determined by what it actually is in practice.”). Moreover, debates about the appropriate understanding of the President’s Article II powers in foreign affairs are hardly static, and new perspectives about how to understand the contours of these powers are relatively common. Compare, e.g., Saikrishna Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256–57 (2001) (arguing that the vesting clause under Article II is an independent source of executive power in foreign affairs), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 *passim* (2004) (disagreeing with the vesting clause argument). Also, some commentators have argued that international law can inform our evolving understanding of the Constitution’s “Commander-in-Chief” clause. See Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 73–74, 82–83 (2007).

21. Sometimes, the source of the shock that produces a change need not be external, as some have argued about the role of the American Civil War. See Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 53–56 (2008).

22. See Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006) (arguing that “the executive is structured for speed and decisiveness in its actions and is better able to maintain secrecy in its information gathering and its deliberations” than Congress, and that it “has access to broader forms of information about foreign affairs”).

## A. INSTITUTIONAL ACCOUNTS

An alternative explanation for politically inspired changes in the Foreign Affairs Constitution focuses on the preferences of institutional actors. The underlying assumption is that conflict between the President and Congress often results in incremental changes to the boundary of the foreign affairs powers. In these power tussles, however, the President presumably prevails for two reasons. The first is that due to the singular nature of the President's office, he has intrinsic institutional reasons to increase his authority since he gets to consume exclusively the benefits of any such usurpation.<sup>23</sup> As Daryl Levinson puts it, "[b]ecause individual presidents can consume a much greater share of the power of their institution than individual members of Congress, we should expect them to be willing to invest more in institutional aggrandizement."<sup>24</sup> By contrast, the prospect of facing frequent elections and collective-action problems often make it unlikely that members of Congress will have an incentive to protect or expand their constitutional prerogatives in foreign affairs.<sup>25</sup> The second is that Pres-

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23. See LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 166 (2000) ("[T]he [P]resident is [the] 'sole organ of the nation in its external relations.'"); Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 399–401 (2009) ("Presidents are well positioned to advance their policy agenda and, in so doing, expand the power of the presidency."); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1291–318 (1988) (explaining why the president usually wins out against other branches of the government on foreign affairs issues); Nzelibe, *supra* note 1, at 1000 (observing that electoral incentives of members of Congress often conflict with institutional concerns).

24. Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 956 (2005). But some commentators have observed that Congress has different tools it can use to push back against excessive executive encroachment, including non-binding resolutions, contempt proceedings, and oversight hearings. See Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 725–53 (2012).

25. See JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 134 (1993) (showing a portion of the War Powers Resolution which mandates that the President provide Congress with information if it requests it regarding its "constitutional responsibilit[y]" of committing the nation to war); Koh, *supra* note 23, at 1297–305 (noting reasons why Congress has failed to check so many of the Presidents' initiatives); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 182 (1996) ("Congressional inaction has led challengers of the [P]resident's use of military force to seek judicial declarations that the President has violated the Constitution.").

idents tend to respond to the preferences of a national constituency, while members of Congress respond to the preferences of narrower constituencies who might be less interested in foreign affairs.<sup>26</sup>

The institutional explanation has yielded significant insights about our understanding of the modern Foreign Affairs Constitution, but is nonetheless incomplete. If, as institutionalists assume, the preferences of the political branches capture the full range of pressures on the Foreign Affairs Constitution, we should invariably expect that under a united government a President's co-partisans in Congress will embrace the executive branch's prerogative in foreign affairs while the opposition will be against it. After all, if Congress's institutional will is weak in foreign affairs, the President's co-partisans in Congress might as well expend their political capital shoring up the institutional goals of their ally in the White House. Indeed, a prevalent view in the political science literature is that divided government will tend to produce both trade policy that is more protectionist and national security policy that is less hawkish.<sup>27</sup> Similar views pervade accounts that attempt to explain the evolution of war powers during united and divided governments. As William Howell and Jon Pevehouse put it in the context of presidential authority during wartime:

Presidential uses of force redound to the electoral benefit of members of the president's own party and, by implication, to the detriment of the opposition party. Members of the president's party, all else equal, ought to actively support the president's plans to exercise force abroad, as members of the opposition party either reserve judgment or voice opposition.<sup>28</sup>

There is also evidence that indicates that under a united government the majority in Congress is largely acquiescent to the President's institutional demands in foreign affairs.<sup>29</sup>

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26. The popular notion of a national-regarding President and a parochial-minded Congress has been the subject of both theoretical and empirical criticism. See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006); see also Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 128–29 (2000) (noting that the President's constituency does not compose the whole nation, but only small sub-sets within it).

27. See Susanne Lohmann & Sharyn O'Halloran, *Divided Government and U.S. Trade Policy: Theory and Evidence*, 48 INT'L ORG. 595, 614–15, 627 (1994) (concluding that divided government produces trade policy that is both more protectionist and restrictive of presidential authority).

28. WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON WAR POWERS* 37 (2007).

29. See *id.* at 36–40.

But there are significant historical examples that cut in the other direction. In the early 1950s, for instance, it was President Eisenhower's co-partisans in the Senate who sought to severely constrain the executive branch's treaty powers, while the progressive northern Democrats largely came to his defense.<sup>30</sup> Similarly, during the Clinton administration, it was Republican Party leaders in the House and Senate—including Senator Dole and House Speaker Gingrich—who sought to introduce a bill that would circumscribe the War Powers Resolution and limit congressional interference with the President's war powers.<sup>31</sup> Also, Republicans in Congress were more solicitous of giving President Clinton fast track authority in international trade; indeed, Clinton's co-partisans in Congress were often actively hostile to his free-trade agenda.<sup>32</sup> More broadly, David Karol has shown that divided government does not have any consistently protectionist impact on international trade policy. Rather, divided government may lead to restrictive trade policies if a protectionist party is the majority in Congress, but facilitates greater liberalization otherwise.<sup>33</sup>

Put simply, it is hard to make any generalizations about preferences by political actors for greater presidential flexibility on policy issues under united or divided government without first understanding the policy preferences of the congressional majority. If a particular expansion of presidential power furthers the long-term objectives of a particular partisan coalition in Congress, it is reasonable to assume that such a coalition may be willing to endorse such an expansion even when the political opposition occupies the White House. Conversely, where a particular expansion of presidential power may hurt a party's long-term office-holding or policy objectives, the partisan leaders in Congress may oppose such an expansion even during periods of united government.

To be clear, that is not to say that partisan considerations play a greater role than institutional ones in explaining the conflicts over political branch authority in foreign affairs. On the contrary, the claim being advanced here is much more modest. The point is that there are sufficient empirical exceptions to the logic of unhindered presidential empire-building in

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30. See *infra* notes 75–77 and accompanying text.

31. See discussion *infra* notes 202–31 and accompanying text.

32. See David Karol, *Divided Government and U.S. Trade Policy: Much Ado About Nothing?*, 54 INT'L ORG. 825, 841–42 (2000).

33. *Id.*

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foreign affairs to suggest that other factors might be at play. At bottom, the dynamic underlying the expansion of presidential authority in foreign affairs implies that there may be tradeoffs between institutional and partisan objectives. On the one hand, while a President and his partisan supporters in Congress may be pulled by shared desire to increase institutional flexibility to achieve common policy objectives, they may also be pushed sometimes to prefer constraints on presidential authority where they suspect it will limit the policy space on issues owned by the political opposition.

#### B. IDEATIONAL ACCOUNTS

One could also assume that the divergent views by political parties on the allocation of foreign affairs authority are motivated primarily by ideational conflicts about which institutional arrangements can best achieve national greatness abroad, rather than by narrow societal interests. In the ideational account, the political left is presumed to be linked philosophically to a world-view that espouses anti-militarism, egalitarianism, and cosmopolitanism, and thus is naturally inclined to embrace multilateral institutions in global affairs as well as institutions that protect individual rights and restrain government authority at home.<sup>34</sup> By contrast, the right is assumed to define the national interest narrowly in terms of American sovereignty, is more enamored of realism as a framework for understanding the international environment, and thus will be more skeptical

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34. David Luban, Essay, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 210 n.1 (2003) (defining progressives as those who are “socially and economically egalitarian in domestic affairs, and cosmopolitan in international affairs”); see also Ole R. Holsti & James N. Rosenau, *The Domestic and Foreign Policy Beliefs of American Leaders*, 32 J. CONFLICT RESOL. 248 *passim* (1988) (explaining how partisan orientation affects elite beliefs in foreign policy). Within 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, but it still loosely corresponds to a right left division. See, e.g., José E. Alvarez, *Contemporary International Law: An ‘Empire of Law’ or the ‘Law of Empire’?*, 24 AM. U. INT’L L. REV. 811, 812 (2009) (“Today’s legal academy, 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.”).

of the role of multilateralism and will prefer fewer restrictions on presidential authority in foreign affairs.<sup>35</sup>

But like institutional explanations, ideational accounts depict an analytical lens that is too narrow. A cursory examination of the history of political conflict over foreign relations authority or international law suggests significant departures from the left-cosmopolitan and right-realist framework. Take, for instance, the notion that because of its realist disposition the Republican right will tend to prefer fewer institutional constraints in foreign affairs. As observed earlier, however, it was Senate Republicans under the Eisenhower administration who precipitated one of the most significant challenges to the President's authority in foreign affairs by pushing for a constitutional amendment that would have severely constrained the President's ability to enter into international treaties.<sup>36</sup> More generally, in the postwar era, Republican legislators have been more willing than their Democratic counterparts to embrace multilateral institutions that constrain domestic sovereignty with respect to agreements that liberalize international trade. On the other hand, Democratic legislators have recently been more skeptical about giving the President more flexible authority in international trade and war, but seem to be more willing to indulge a greater degree of executive branch flexibility in human rights.<sup>37</sup> At bottom, one searches in vain to find a coherent ideological or philosophical framework that unites all these disparate positions taken by the two major political parties on the Foreign Affairs Constitution.

Again, that is not to say such ideational accounts are unimportant, but there is a risk that their influence can be exaggerated. Even in those policy spheres where we expect ideas to have significant traction, such as multilateralism and human

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35. DAVID HALLORAN LUMSDAINE, *MORAL VISION IN INTERNATIONAL POLITICS: THE FOREIGN AID REGIME, 1949–1989*, at 156–57 (1993) (describing preference of 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, 297–303 (2000). Although ideational factors have been used most often to explain divergent societal preferences in international cooperation, they can presumably be extended to analysis of preferences for constitutional constraints in foreign affairs. See generally BRIAN C. RATHBUN, *PARTISAN INTERVENTIONS: EUROPEAN PARTY POLITICS AND PEACE ENFORCEMENT IN THE BALKANS* 18 (2004) (discussing the left-right split between European political parties on the question of humanitarian intervention).

36. See *supra* Part I.A.

37. See *supra* Part I.A.

rights, the effects do not seem to be that strong. For instance, one might expect progressives to side consistently with the aggressive promotion of international law and human rights ideals at the expense of realist considerations, while conservatives would be aligned with the opposite position. But as some commentators have observed, it was southern politicians in the early part of the twentieth century who were most supportive of international law and the use of multilateral institutions to resolve collective security issues, and the South was then (as now) hardly considered a bastion of progressive idealism.<sup>38</sup>

To be sure, ideational attachments seem to have had some impact on contemporary foreign policy debates, as illustrated by the more idealist stance taken by President Carter earlier in his administration in an effort to distance his legacy from the realism of the Nixon era. Upon closer inspection, it is unlikely that such ideational factors were determinative. When Carter received pushback on his idealist stance from both the State Department and his own National Security Adviser, Zbigniew Brzezinski,<sup>39</sup> he retreated and often adopted policy stances that would be considered largely consistent with hard-nosed realism.<sup>40</sup> Similarly, although President Reagan initially opposed the human rights stance of Carter and sought to appoint a human rights skeptic, Ernest Lefever, as the Assistant Secretary for Human Rights and Humanitarian Affairs, he quickly capitulated once he faced congressional opposition from Democrats.<sup>41</sup> Rather than persist in his realist stance, Reagan decided to appropriate the rhetoric of human rights idealism in his attacks on communist regimes.<sup>42</sup> Furthermore, the Republican platforms in 1980 and 1984 accused the Democrats of not being sufficiently solicitous of the human rights of citizens in Soviet Bloc states,<sup>43</sup> and the 1996 Republican platform also accused the

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38. See PETER TRUBOWITZ, *DEFINING THE NATIONAL INTEREST: CONFLICT AND CHANGE IN AMERICAN FOREIGN POLICY* 134–35 (1998).

39. See MARY E. STUCKEY, *JIMMY CARTER, HUMAN RIGHTS, AND THE NATIONAL AGENDA* 115 (2008).

40. See Hauke Hartmann, *U.S. Human Rights Policy Under Carter and Reagan, 1977–1981*, 23 *HUM. RTS. Q.* 402, 413–20 (2001).

41. See *id.* at 424–25; Tamar Jacoby, *The Reagan Turnaround on Human Rights*, 64 *FOREIGN AFF.* 1066, 1069–71 (1985–1986).

42. Aryeh Neier, *Human Rights in the Reagan Era: Acceptance in Principle*, 506 *ANNALS AM. ACAD. POL. & SOC. SCI.* 30, 37–38 (1989).

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

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Clinton administration of not doing enough to protect the rights of Christians suffering from atrocities in the Sudanese civil war.<sup>44</sup>

In sum, the ideational account does not adequately explain the observed patterns of partisan conflict over the scope of foreign relations authority. In the next Part, I suggest that such partisan differences are better explained by significant differences between advocacy and interest groups aligned with the Republican and Democratic parties regarding how specific interpretations of the foreign affairs powers would affect their material interests and values in the context of domestic political conflict. But while partisan elites might invoke the rhetoric of normative constitutional discourse in justifying their policy positions, such rhetoric often masks more mundane political considerations rooted in the redistributive strategies of the different political parties. To be sure, staking out high-minded views about constitutional constraints may frequently overlap with the more parochial objectives of a party's core constituents, but sometimes it will not. And when such divergences do occur, it is not far-fetched to assume that office-seeking politicians will be willing to sacrifice ideals about optimal constitutional design for electoral self-interest. To be clear, the claim is not that ideational explanations cannot influence the preferences of politicians for the separation of powers in foreign affairs, but that to be politically sustainable these ideas will usually have to resonate with the material or ideological interests of core constituencies aligned with either of the political parties.

## II. THE PARTISAN LOGIC OF INTERPRETIVE CHOICE IN FOREIGN RELATIONS

This Part explains why partisan groups will often seek to shape the scope of the Foreign Affairs Constitution to achieve electoral or policy goals, often at the expense of the political opposition. Section A outlines the basic theoretical framework. Section B speculates about some of the conditions that are likely to make any new rule reallocating foreign relations authority moderately stable across multiple electoral periods.

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

## A. THE THEORETICAL FRAMEWORK

Constitutional constraints on foreign affairs, or the distribution of policy veto points, may often shape and influence policy outcomes in a distributional manner. Thus, it is reasonable to assume that political parties have an incentive to evaluate the merits of any constitutional constraint based on how it shapes policies that affect their core supporters. As significant social science research demonstrates, elected officials are often held accountable by a subset of the voting population, which has been defined variously as a “selectorate,” or a minimum winning coalition.<sup>45</sup> This winning coalition need not represent a majority of the population, but will often represent some portion of the population that seeks to advance its preferred interest at the expense of others.<sup>46</sup> Thus, in this picture, any resultant change in the Foreign Affairs Constitution may not necessarily reflect a structure of cooperation that benefits a majority of voters or that advances the national interest however defined. On the contrary, any partisan coalition who successfully manages to alter the rules of the game on how foreign policy is made may be able to do so in a way that benefits its side, and that makes the political opposition (and perhaps the majority) worse off.<sup>47</sup>

The theoretical framework espoused here assumes that it is feasible to manipulate the contours of the Foreign Affairs Constitution in a distributional manner. But it is not obvious why this would be the case. After all, one of the prevailing theoretical justifications for the stability of constitutional rules is that such rules are both negotiated and interpreted behind a veil of ignorance. In this picture, the constitutional allocation of foreign affairs authority is an efficiency-enhancing rule because by lowering agency costs it produces benefits that are dispersed equally to every segment of society. For instance, it should seem uncertain to societal groups as to whether a gradual expansion of presidential authority in war powers over time would accrue disproportionately to the benefit of right- or left-leaning constituencies; on the contrary, the prevailing view is

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45. See Bueno de Mesquita et al., *supra* note 5, at 149.

46. See *id.* at 149–51.

47. Using institutional arrangements to advance material interests is a common theme in the literature on international institutional design. See, e.g., GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003) (exploring how interest groups might exploit litigation and court room adjudication to advance their material interests).

that both sides will gain equally (or lose equally) from institutions that disperse war authority. Moreover, partisan actors may lack the requisite information about key aspects of the strategic environment associated with changing constitutional rules, such as whether they are likely to hold power in the near future, what their likely payoffs will be from altering the balance of foreign affairs powers, and whether the preferences of their core supporters will remain stable. For all these reasons, it is reasonable to conjecture that partisan groups will be ambivalent about staking out clear or distinct positions on the constitutional allocation of foreign affairs authority.

But there are reasons to doubt that policy outcomes associated with various allocations of foreign affairs authority will be opaque. More importantly, specific delineations of foreign affairs authority may sometimes have asymmetric consequences for the policy objectives favored by each party. Thus, rather than treat constitutional rules purely as exogenous constraints on policy outcomes, political actors may try to modify these rules to suit their particular policy objectives. In other words, the relationship between the allocation of constitutional authority and foreign policy objectives is partly endogenous; while the constitutional rules structure political conflict, the scope of these rules are often the product of ongoing political conflict.

To substantiate this argument, I will briefly sketch out a partisan framework that relies on the following set of assumptions. First, as many commentators have observed, political parties typically wage electoral competition by attempting to raise the salience of the issues they own at the expense of those issues owned by the political opposition.<sup>48</sup> Thus, rather than seek votes according to a spatial model of electoral competition where each party stakes out different positions on the same issue, parties tend to appropriate issues and then often try to compete by convincing voters that their issues are the most important. In the United States, Democrats and Republicans have developed distinct reputations among the electorate for handling a range of foreign and domestic policy issues, which are very likely to have a direct effect on the preferences of both parties for placing certain issues on the policy agenda. Generally, Republicans have cultivated a better reputation for handling

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48. See Éric Bélanger & Bonnie M. Meguid, *Issue Salience, Issue Ownership, and Issue-Based Vote Choice*, 27 *ELECTORAL STUD.* 477, 478 (2008); John R. Petrocik et al., *Issue Ownership and Presidential Campaigning, 1952–2000*, 118 *POL. SCI. Q.* 599, 601–02 (2003–2004).

matters of national security, illicit drugs, crime, and so-called family-values issues.<sup>49</sup> Democrats, on the other hand, have an electoral advantage in economic redistribution, social welfare, and other socially progressive issues implicating inter-group relations.<sup>50</sup>

Second, political actors will often be able to link specific delineations of the foreign affairs authority to issues they own.<sup>51</sup> One key feature of the allocation of foreign affairs authority under the United States Constitution is that different policy issues may have distinct pathways. Unbundling the foreign affairs powers allows political actors to link specific institutional pathways to issues they own. They can then rank their preference for greater constraints over a particular pathway based upon expectations about how it will make it more or less likely to advance those issues in which they are considered to have an advantage.<sup>52</sup> Thus, Republicans may favor greater constraints (or more veto points)<sup>53</sup> on the constitutional powers that govern the negotiation and ratification of human rights agreements, but less on those that govern the decision to go to war. Democrats, on the other hand, may have an opposite set of preferences over the institutional pathways that lead to war and human rights treaties.

Third, the constitutional specification of the number and scope of veto points is not necessarily fixed in stone, but is often subject to constant contention. This observation does not imply that the constitutional separation of powers is completely malleable or that it is constantly under threat from partisan forces. Rather, the point is that at the margins the contours of such powers are sufficiently ambiguous that partisan actors can try to make incremental changes that shift the balance of power in their favor.<sup>54</sup> In the United States, for instance, there is sufficient lack of doctrinal clarity whether international agreements

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49. See Petrocik et al., *supra* note 48, at 608–09; see also Danny Hayes, *Candidate Qualities Through a Partisan Lens: A Theory of Trait Ownership*, 49 AM. J. POL. SCI. 908 *passim* (2005) (claiming that the American public views Republicans as stronger leaders and more moral, while Democrats hold advantages on compassion and empathy).

50. See Petrocik et al., *supra* note 48, at 608–09.

51. See generally Hayes, *supra* note 49, at 909–13 (developing a “trait ownership” theory for how political parties affect voters).

52. *Id.* at 909.

53. Nzelibe, *supra* note 6, at 399–401.

54. Hayes, *supra* note 49, at 915–20 (espousing a theory of “expectations gap”).

ratified under the treaty clause are interchangeable with those implemented through a congressional-executive agreement, which only requires a simple majority of both houses of Congress.<sup>55</sup> Although one cannot measure directly whether the veto points on one pathway are more restrictive than the other, it is plausible that political actors can test the waters to see which one poses a greater obstacle to ratification and choose accordingly.

At bottom, partisan pressures to change constitutional constraints in foreign affairs are likely whenever the threats of relaxing such constraints are not symmetric across the political parties. Ideally, constraints on political authority are likely to be durable whenever the current regime is aware that it is likely to be out of power one day and hopes to benefit from the protections afforded by those constraints.<sup>56</sup> However, if an incumbent regime does not think that it will be harmed by relaxing those constraints even when it is out of power, then it has no incentive to seek to preserve them.

#### B. THE PUZZLE OF MODERATE CONSTITUTIONAL STABILITY IN FOREIGN AFFAIRS

Although the foregoing account suggests why politicians may have strong incentive to change the boundaries of the foreign affairs authority for electoral purposes, it still begs the question of why these politicians will be willing to invest significant political capital in doing so if the new rules will be susceptible to revision once the opposition comes into power. After all, if part of the benefit of stacking the rules in your favor is to constrain the policy space of future hostile governments, then the proposed benefit is doubtful if these new rules immediately become unstable.

There are certain circumstances when we would expect a new institutional regime to be plagued by instability. If the new

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55. 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).

56. See Levinson, *supra* note 2, at 712 (“Constitutional restraints may serve to fend off revolutions or to provide ‘insurance’ to current holders of power by offering them reciprocal protection if they find themselves on the receiving end of domination.”).

institutional regime devised by an incumbent regime to lock in its interests has radically asymmetric effects on the policy issues owned by the various parties, then it is unlikely that such a regime will be durable. For instance, if a particular configuration of war powers pushed by an incumbent Republican administration always favored its constituents and hurt those aligned with the Democratic Party, then that particular configuration will likely be sabotaged once a Democratic administration comes into power. So, a key objective of a winning coalition seeking to entrench a *biased* institutional regime is to make sure its policy effects are sufficiently diffuse such that the political opposition (the losers) will either be unwilling or find it too costly to thwart the new regime once they come into power. A plausible device for achieving this objective is to ensure the new constitutional regime provides side-payments to certain salient constituencies within the political opposition, even if the political opposition would be unwilling to push for the regime on its own.<sup>57</sup> The new rule's stability is an artifact of the opposition's reluctance to seek revision once the rule is in place if doing so is likely to cause infighting among its core constituencies. For instance, in the postwar era, this divide-and-rule strategy of partisan side-payments has been used to garner institutional stability for international trade commitments, such as the North American Free Trade Agreement (NAFTA).<sup>58</sup> The resulting structure of side-payments within NAFTA was such that it mitigated the losing coalition's willingness to thwart the new regime, while simultaneously providing the winners with net benefits.

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57. There is a literature in political science that discusses the role of the strategic side-payments to domestic groups in the context of negotiating international agreements, but that literature tends to focus on domestic factional conflict defined broadly rather than the specific context of partisan conflict between an incumbent regime and the political opposition. See, e.g., Christina L. Davis, *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 AM. POL. SCI. REV. 153, 153 (2004) (arguing that issue linkages in international trade agreements can “counteract[] domestic obstacles to liberalization by broadening the negotiation stakes”); Frederick W. Mayer, *Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side-Payments*, 46 INT'L ORG. 793, 795 (1992) (analyzing the capacity of domestic factions to make side-payments to one another in the context of an international negotiation and demonstrating that there is a strategic dimension to these side-payments).

58. For a broader discussion of this point, see Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 NW. U. L. REV. 635, 658–82 (2011).

Of course, for the incumbents, the new institutional regime may not be ideal, since the political opposition may sometimes gain under the new regime at the expense of the enacting coalition. But the incumbents may be willing to sacrifice such costs for the benefit of having a distributional regime that is sustainable across multiple electoral periods. Take, as an illustration, a constitutional regime that requires a legislative supermajority (as opposed to a simple majority) for any legislation affecting state revenues. Such a rule will likely benefit business constituencies that favor lower taxes at the expense of groups that are net-beneficiaries of the status quo tax regime. The policy consequences of the new regime will not be completely asymmetric; although the regime will make it more difficult to raise taxes than under a simple majority rule, it will also make it more difficult to repeal or lower taxes. However, provided that the enacting coalition correctly calculates that a legislature will be more likely to face societal pressures to raise rather than lower (or repeal) taxes, then the new rule will likely yield net-benefits for that coalition. In other words, although the new rule will sometimes constrain the policy choices of both sides, it may—on average—tend to constrain more the policy choices of the groups that are more likely to benefit from higher taxes.

Assuming the lack of radical asymmetry in policy outcomes from a new rule, there are perhaps three other reasons why we may expect incremental changes to the separation of powers to exhibit moderate stability across multiple electoral periods. First, other institutional actors or societal groups may have preferences for maintaining the new status quo if it provides other benefits which are divorced from partisan objectives. Thus, for instance, presidents may embrace new arrangements that facilitate legacy building objectives even when such arrangements are disfavored by their co-partisans.<sup>59</sup> As Stephen Skowronek has observed, such conflicts may be unavoidable: “Presidents act on American politics through personal struggles to impose an authoritative definition on their respective historical situations. In so doing, they are continually undermining the status quo ante.”<sup>60</sup>

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59. See JAMES CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 36–38 (1979) (discussing Woodrow Wilson’s view of the tension between partisanship and presidential leadership).

60. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 50 (1993).

Second, and more importantly, the preferences of relevant actors might change such as when partisan groups discover that a formerly disfavored constitutional innovation can now work to their advantage. For instance, Republican leaning constituencies consistently favored high tariffs in international trade from the Civil War until the end of WWII.<sup>61</sup> When Congress passed the Reciprocal Trade Agreement Act of 1934 (RTAA), which allowed the President to drastically slash tariffs without congressional authorization, Republican leaders denounced it as an unconstitutional delegation of legislative authority.<sup>62</sup> The Republican Party platform of 1936 not only vowed to repeal the RTAA,<sup>63</sup> it also “condemn[ed] the secret negotiations of reciprocal trade treaties without public hearing or legislative approval.”<sup>64</sup> For decades prior to the 1940 election, the Republican leaders in the Congress and Senate overwhelmingly voted for repeal of the RTAA every time it came up for renewal.<sup>65</sup> By the late 1940s, however, when some of the Republican business constituencies that initially supported repeal eventually became net exporters, a split emerged within Republican legislators and many decamped from their long-held protectionist positions to embrace free trade.<sup>66</sup> But this intra-coalitional split within the Republican Party made it more likely that the constitutional innovations that made the RTAA possible would remain durable.

Third, courts might provide cover when they endorse one of the competing partisan visions of the allocation of foreign affairs powers.<sup>67</sup> For instance, if the Supreme Court spells out a

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61. See Douglas A. Irwin & Randall S. Kroszner, *Interests, Institutions, and Ideology in Securing Policy Change: The Republican Conversion to Trade Liberalization After Smoot Hawley*, 42 J.L. & ECON. 643, 644–46 (1999).

62. *Id.* at 650.

63. See *Republican Party Platform of 1936*, AM. PRESIDENCY PROJECT (June 9, 1936), <http://www.presidency.ucsb.edu/ws/index.php?pid=29639#ixzz1RR7G6ga4> (“We will repeal the present Reciprocal Trade Agreement Law. It is futile and dangerous. Its effect on agriculture and industry has been destructive. Its continuation would work to the detriment of the wage earner and the farmer.”).

64. See *id.*

65. See Irwin & Kroszner, *supra* note 61, at 644–45.

66. See *id.* at 647 (“Senate Republicans voting in 1934 were responsive only to import-competing interests, whereas those voting in 1945 were responsive to both import-competing and export-oriented interests.”).

67. The role of courts as tools for entrenching the preferences of societal groups across multiple electoral periods has been a common theme in both the law and economics and political science literatures. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspec-*

bright-line rule that eliminates any alternative interpretation, such a doctrinal rule may become stable provided it is not radically at odds with the policy objectives of any of the major political parties.<sup>68</sup>

### III. ILLUSTRATIONS OF PARTISAN CONSTITUTIONAL CONFLICT

This Part applies the distributional partisan framework to two contexts in which there has been significant contention over the scope of the Foreign Affairs Constitution: the pathway for adopting human right commitments and war powers.

#### A. THE POLITICIZED PATHWAY TO INTERNATIONAL HUMAN RIGHTS COMMITMENTS

Although debates regarding the pathways for adopting international human rights treaties and norms are often couched in lofty normative terms, they often implicate more mundane political considerations. With respect to the postwar controversies over human rights treaties and customary international law, American partisan elites often served as agents of conflicting societal factions who sought to shift political decision-making to institutional spaces where they were likely to prevail over their domestic political adversaries. Then, as now, these conflicts were often not rooted in competing visions of American foreign policy, but on the role such human rights treaties should play in divisive conflicts over cultural issues and economic redistribution.

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*tive*, 18 J.L. & ECON. 875 (1975) (discussing the entrenchment of interest group preferences); see RAN HIRSCHL, TOWARDS JURISTOCRACY 50–99 (2004) (discussing the entrenchment of threatened preferences of societal elites); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–67 (2001) (discussing the entrenchment of partisan objectives); 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 (2002) (same). More recently, scholars have also explored how interpretive methodologies—which govern how courts decide cases—can also be imbued with partisan objectives. See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 690–96 (2009); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 559 (2006).

68. Of course, delegation to courts does not exhaust the options for societal actors seeking to entrench a policy preference. They may also delegate to sympathetic administrative agencies. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

Two kinds of conflicting parochial interests are likely to be affected by human rights treaties when and if such treaties become enforceable by private parties in domestic courts. First, and most significantly, human rights treaties might implicate material interests because they often have the potential of redistributing economic goods among conflicting domestic groups. For instance, United Nations human rights agreements, such as the International Covenant on Economic, Social and Cultural Rights, espouse positive rights to a living wage, healthcare, housing, and education,<sup>69</sup> which ostensibly increase the material welfare of labor groups and other left-leaning coalitions at the expense of landlords, industrial groups, and other capital-owning interests.

Second, human rights treaties also touch on what has sometimes been termed the “redistributive” politics of morality where “one segment of society attempts by government fiat to impose their values on the rest of society.”<sup>70</sup> In the United States, for instance, the cluster of political issues that are addressed by many human rights treaties often mirror those affected by the so-called domestic culture wars, such as the appropriate definition of the family unit, capital punishment, abortion, the role of women in society, family planning, and antidiscrimination.<sup>71</sup> Yet much of the literature often misses this key element of the global debate over the politics of human rights, often preferring to restrict the analysis of redistributive conflicts to treaties on economic matters while treating the dif-

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69. The International Covenant on Economic, Social and Cultural Rights, which was submitted for signature years later, protected a range of positive rights. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 50–51 (Dec. 16, 1966); 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-1; *see also* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 25 (Dec. 10, 1948) (declaring the right to a sufficient standard of living, including the right to health care).

70. KENNETH J. MEIER, *THE POLITICS OF SIN* 4 (1994) (examining the morality politics of drug policy).

71. *See, e.g.*, G.A. Res. 2200A, *supra* note 69; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, at 166 (Nov. 20, 1989); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Dec. 18, 1979).

fusion of human rights as the product of the behavior of progressive norm entrepreneurs.<sup>72</sup>

Thus, in contrast to the rosier vision of global society where like-minded transnational groups exchange information and resources to promote global objectives on which there is wide consensus,<sup>73</sup> this partisan framework assumes a political environment that is frequently characterized by contention between societal groups on both sides of an issue trying to employ domestic and international institutions to tilt the political landscape in their favor. However, these value-laden conflicts are not necessarily rooted in ideological disagreements about globalization per se, but in how human rights treaties help or hinder the ability of groups to promote other domestic political objectives.

Take, for instance, the post-WWII conflict between conservative and progressive leaning constituencies over the scope of the treaty power. Fearing that the new U.N. treaties would be used to push for New Deal economic as well as civil rights policies, Republican Senators—led by Senator John Bricker of Ohio—aligned with southern Democrats sought to introduce a constitutional amendment that would make it more difficult to ratify treaties that would be enforced by private parties.<sup>74</sup> The

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72. Admittedly, this skewed treatment of the politics of morality also extends the domestic politics literature. See MEIER, *supra* note 70, at 4 (citations omitted) (“As such [morality politics] are a form of redistributive policy that is rarely viewed as redistributive because the policies redistribute values rather than income.”).

73. The literature on norm entrepreneurs in international human rights is vast. See, e.g., See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 639–50 (2004); see also Roger P. Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs*, 49 VA. J. INT’L L. 61 (2008) (exploring how Nobel Laureates have played an especially important role as preference-creators in the development of international legal norms). For a good discussion of norm diffusion in an international legal context, see Katerina Linos, *How Can International Organizations Shape National Welfare States?*, 40 COMP. POL. STUD. 547, 564 (2007) (concluding that international organizations are “powerful motors” to “reorient debate axes” in national human rights policies). But see Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT’L L. 1, 1–2 (2007) (expressing skepticism about norm diffusion through international law).

74. The partisan dynamic underpinning the Bricker Amendment movement has been analyzed in detail elsewhere. See Nzelibe, *supra* note 58, at 658–74; see also Nzelibe, *supra* note 6, at 426–29. However, this section extends that previous analysis by examining the lack of mutual constraint that underpinned the partisan conflict over the Bricker Amendment.

ultimate objective of the Bricker Amendment was to overrule the Supreme Court's holding in *Missouri v. Holland*, which seemed to suggest that the scope of the treaty power could be broader than Congress's power to pass regular legislation.<sup>75</sup> The 1953 version of the amendment included language that, "[n]o treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States . . . or any matter within the domestic jurisdiction of the United States."<sup>76</sup> Ultimately, the Bricker Amendment was narrowly defeated in the wake of intense lobbying against it by progressive groups and staunch opposition by President Eisenhower, who although he sympathized with Bricker's policy concerns, was concerned that the reform would intervene too much in executive branch authority in foreign affairs.<sup>77</sup>

For business interests and professional groups aligned with the Republican Party, the postwar U.N. human rights agreements were viewed as facilitating the ascendance of a global order that threatened to redefine the relationship between labor and owners of capital.<sup>78</sup> Believing that such agreements could be used to as ploys for entrenching New Deal related objectives ranging from universal health care to an international minimum wage, economic constituencies were able to mobilize and find common ground in challenging what they believed was an internationalist threat to their material interests.<sup>79</sup> Business constituents supporting the amendment included the American Medical Association (opponents of uni-

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75. 252 U.S. 416, 434–35 (1920); see Nzelibe, *supra* note 58, at 660.

76. S.J. Res. 1, 83d Cong. (1953); S.J. Res. 130, 82d Cong. (1952).

77. See DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* 71 *passim* (1988).

78. See *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before the S. Comm. on the Judiciary*, 83d Cong. 175 (1953) [hereinafter *Hearings*] (statement of Enid Griswold, V.P. of the Nat'l Econ. Council of N.Y.) (decrying the domestic impact of "fantastic" proposals for social security, socialized medicine, and an international minimum wage by the International Labor Organization (ILO)); see also *id.* at 147 (statement of Frank Holman, former President, Am. Bar Ass'n.) ("But this is exactly what is now being attempted by the modern 'internationalists' in the United Nations—to use treaties to make domestic law—and they propose through the doctrine of Missouri against Holland 'to make laws for the people of the United States in their internal concerns,' for as the State Department has officially said: 'There is no longer any real difference between domestic and foreign affairs.'" (citation omitted)).

79. *Id.* at 175.

versal health care),<sup>80</sup> the United States Chamber of Commerce (opponents of the ILO conventions on labor),<sup>81</sup> the National Economic Council (same), and the Executive Committee of the American Bar Association.<sup>82</sup> Moreover, groups ideologically oriented with the right, such as the Daughters of the American Revolution, Wheels of Progress, and the American Legion, also supported the Bricker Amendment because they viewed the U.N. human rights agreements as a threat to a particular vision of American moral values and social order, including the contentious question of civil rights.<sup>83</sup>

At first glance, the Bricker Amendment movement appeared to be an exercise in mutual constraint, for if the proponents had succeeded the effects of the new constitutional constraints would presumably be symmetrical. But upon further examination, the Bricker Amendment was more likely intended as a one-sided constraint. In other words, restricting the treaty power was more likely an effort to bind progressive constituencies, while simultaneously preserving policy flexibility in institutional venues where conservative forces were more likely to prevail against their political adversaries. Conservative groups likely calculated that if political conflict on social issues and economic redistribution took place primarily at the state level in a federal structure, they had a better chance of pushing their policy objectives and blocking some of the centralizing policy goals of the New Deal coalition.<sup>84</sup>

The upshot of this strategy is that on those foreign policy issues favored by the right, constraining the treaty power under the Bricker Amendment would not have made much of a

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80. *Id.* at 16 (statement of George F. Lull, Sec'y and Gen. Manager, Am. Med. Ass'n).

81. Some of the rhetoric against the ILO conventions was quite alarmist and possibly overblown. Take, for instance, the testimony of W.L. McGrath, a Cincinnati businessman, on behalf of the U.S. Chamber of Commerce: "The ILO is today, in my opinion, almost completely in the hands of a socialistic government-labor coalition, which apparently has as its objective the enactment of socialistic legislation, standardized along ILO lines, in the largest possible number of countries in the world." *Id.* at 536.

82. *Id.* at 129, 174; see Glendon Austin Schubert, Jr., *Politics and the Constitution: The Bricker Amendment During 1953*, 16 J. POL. 257, 271 n.52 (1954).

83. See *Hearings*, *supra* note 78, at 171 (statement of Mrs. James C. Lucas, Exec. Sec'y, Daughters of the Am. Revolution); *id.* at 19 (statement of Mrs. Ernest W. Howard, Leg. Chairman, The Wheels of Progress); *id.* at 286-87 (statement of Ray Murphy, Chairman, Am. Legion Special Comm. on Covenant of Human Rights and U.N.).

84. See Nzelibe, *supra* note 58, at 658-74.

difference. For instance, on an issue such as international trade which was favored by southern constituencies as well as a growing number of northeast Republican business interests, or on global cooperation on transnational crime, there was already other independent constitutional authority for Congress to act.<sup>85</sup> Thus, the executive branch authority to act in these issue areas in foreign affairs would presumably not have been affected by the proposed amendment.<sup>86</sup> In other areas, such as arms reduction treaties or agreements governing military alliances, the question of whether the treaty should be enforceable in domestic courts was hardly an issue.<sup>87</sup> And in other policy issues where direct legal application was desired, Congress was already likely to pass implementing legislation.

But a puzzling aspect of this strategy is that conservative forces in the early 1950s under the Eisenhower administration were hardly a besieged minority that needed constitutional reform to protect their interests. On the contrary, they now had an ally in the White House who opposed human rights treaties.<sup>88</sup>

If conservative groups in the early 1950s had more than enough clout at the national level to block the ratification of

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85. These subjects would fall presumably within Congress's other independent constitutional powers to regulate foreign commerce and punish offenses against the law of nations. *See* U.S. CONST. art. I, § 8. Other than making the scope of the treaty power largely the same as Congress's domestic legislative powers, and requiring implementing legislation before treaties could be self-executing, the Bricker Amendment would presumably not affect the rest of the foreign affairs powers listed above. *See also* Nzelibe, *supra* note 58, at 662–63 (describing the coalition of constituencies on international trade).

86. For instance, a member of the ABA Standing Committee of Peace and Law, testifying in favor of the Bricker Amendment, argued that it would not affect the United States ability to enter into and give effect to treaties, such as the Narcotics Convention. *See Hearings, supra* note 78, at 127–129 (statement of Eberhard Deutsch, Am. Bar Ass'n); *see also id.* at 149 (statement of Frank Holman, former President of the Am. Bar Ass'n) ("Some critics say . . . that such an amendment would abridge the power of the United States to make treaties of commerce, of navigation and of friendship and the power to make other traditional types of treaties. This argument is fully disposed of in the February 1952 report of the committee of law and peace . . ." (referencing *Report of the Standing Committee on Peace and Law Through United Nations*, 77 ANN. REP. A.B.A. 244 (1952))).

87. *See generally id.* at 120 (statement of Eberhard Deutsch, Am. Bar Ass'n).

88. *See, e.g.,* TANANBAUM, *supra* note 77, at 65 (noting that Eisenhower was elected on a platform which "promised that international agreements would not be allowed to jeopardize the rights of the American people").

any human rights treaty, why one might ask, did they also need to seek a constitutional amendment? One likely answer is that they anticipated that future Democratic administrations might seek to use treaties instrumentally for redistributive policy objectives, and they sought to restrict the freedom of action of their successors. There is evidence in the congressional testimony by groups in support of the Bricker Amendment to suggest such considerations were at play.<sup>89</sup>

Additionally, they may have been concerned that entrepreneurial judges might exploit favorable treaty language—even in legally non-binding treaties—to advance a progressive agenda. These concerns were not entirely unfounded. Progressive interest groups, such as the American Civil Liberties Union, the National Lawyers Guild, the NAACP, and others were all key participants in the first wave of human rights litigation in the United States in the early postwar era, and they cited to the U.N. Charter in briefs challenging restrictive covenants, discrimination in education, transportation, and employment.<sup>90</sup> And in a legal and political climate where the precise legal status of treaties like the U.N. Charter was often the subject of contentious legal debate, there was often room for creative interpretation by a friendly court. Some state court decisions, like the California Supreme Court in the *Sei Fujii* case, favorably alluded to the U.N. Charter in domestic civil rights disputes, even though the Charter was not intended to be a legally binding document.<sup>91</sup>

Ultimately, although postwar conservatives failed in their quest to amend the Constitution, their efforts set in motion a quasi-constitutional commitment that treaties should not be used to address social issues that are primarily of local concern. For instance, beyond enshrining this principle of treaty re-

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89. See *Hearings, supra* note 78, at 641 (comment by Sen. Everett Dirksen, Republican from Ill.) (“Speaking for myself, we think we would like to lock the door before the horse gets out.”).

90. For an example of the litigations role of these interest groups, see Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946–1955*, 69 IOWA L. REV. 901, app. at 950–56 (1984).

91. *Sei Fujii v. State*, 242 P.2d 617, 619–22 (Cal. 1952). (“The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities.”). For a full discussion of these federal and state cases, see Lockwood, *supra* note 90 *passim*.

straint in State Department policy guidelines,<sup>92</sup> the anti-treaty movement also instigated the contemporary practice in the United States of attaching reservations or declarations to human rights treaties to ensure that such treaties cannot be invoked by private parties in domestic litigation.<sup>93</sup> Moreover, in the mid-1950s, courts appeared to respond to the treaty backlash by retreating from the early postwar habit of citing favorably to the U.N. Charter and other treaties in domestic constitutional controversies.<sup>94</sup> In the 1956 case of *Reid v. Covert*, for instance, the Supreme Court signaled a decisive end to this postwar judicial practice when it declared in a plurality opinion by Justice Hugo Black, “no agreement with a foreign nation can confer power on the Congress, . . . which is free from the restraints of the Constitution.”<sup>95</sup> Although Senator Bricker recognized that the Court’s decision in *Reid* would take away much of the political wind out of his campaign,<sup>96</sup> he nonetheless vowed to continue in his efforts to seek a constitutional amendment. But his defeat for reelection in 1958 formally ended his quest.<sup>97</sup>

In any event, the postwar conservatives’ anti-treaty discourse became politically durable for two distinct but interrelated reasons. First, and most obviously, determined opposition by Republican constituencies and southern Democrats suggested that any constitutional innovation based upon using the treaty power to sidestep federalist obstacles would have had a short political shelf life. Second, and just as importantly, certain progressives came to view the strategy of domestic entrenchment through the treaty pathway as a political liability. For these progressives, this institutional innovation of treaty

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92. See Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1304 (2008) (quotations omitted) (“[A] set of guiding principles for international lawmaking first written in the heat of the controversy in 1953 and still in effect in amended form today in the form of Circular 175 and the attendant regulations, echoes this commitment: treaties are not to ‘be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.’”).

93. See Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L. L. 341, 342–48 (1995).

94. See KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 110–11 (2004).

95. 354 U.S. 1, 16 (1957).

96. See TANANBAUM, *supra* note 77, at 213.

97. See *id.* at 215.

entrenchment not only was a distraction, but it also ultimately proved to be unnecessary because many of the same domestic policy goals could be accomplished from an expansive reading of the Fourteenth Amendment.<sup>98</sup> Thus, it is not implausible to think that these progressives might have embraced the Court's decision in *Reid* for neutralizing a policy issue that had long been a political boon for the political opposition. This latter consideration suggests that political parties might come to endorse constitutional innovations that not only entrench those issues they own that prove to be electoral assets, but that also remove from the electoral agenda those owned issues that are considered electoral liabilities.

Of course, the post-WWII conflict between conservatives and progressives over human rights treaties has hardly ebbed, as exemplified by recent strong partisan rancor over the wisdom of ratifying other modern human rights treaties.<sup>99</sup> While much of the academic commentary has focused on whether ratification might be desirable from a foreign policy objective,<sup>100</sup> it has not sufficiently explored whether ratification is likely to have distributional consequences for constituencies affiliated with the Republican and Democratic parties.

However, there are three key reasons why one might continue to expect a left-right split on the question of domestic enforcement of international human rights treaties and norms. First, Democrats are more likely to have their winning coalition comprised of voters and interest groups who are sympathetic to promoting social and economic rights across national bounda-

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98. See KERSCH, *supra* note 94, at 111.

99. For instance, the 2008 Democratic platform endorsed the ratification of the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as well as the Convention on the Rights of Persons with Disabilities. See *2008 Democratic Party Platform*, AM. PRESIDENCY PROJECT (Aug. 25, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=78283>. By contrast, the 2008 Republican platform vowed to reject the ratification of both CEDAW and the Convention on the Rights of the Child. See *2008 Republican Party Platform*, AM. PRESIDENCY PROJECT (Sept. 1, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=78545>.

100. See, e.g., JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* 16–17 (2005) (arguing against reliance on global governance norms which find favor in Europe); see also John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 206 (2000) (same). But see Moravcsik, *Conservative Idealism*, *supra* note 35, at 297–308 (discussing and criticizing conservative views on multilateralism).

ries.<sup>101</sup> Second, given the closer alignment between the views of left leaning groups in the United States and European elites, Democratic constituencies are likely to find more willing and sympathetic transnational allies than their conservative adversaries.<sup>102</sup> Third, the adoption and domestic enforcement of human rights treaties is more likely to elevate issues in which Democrats have an electoral advantage over Republicans. Democrats have an electoral advantage in economic redistribution, social welfare, and other socially progressive issues implicating inter-group relations.<sup>103</sup> Republicans, on the other hand, have cultivated a better reputation for handling matters of national security, illicit drugs, crime, and so-called family-values issues.<sup>104</sup> Thus, all else equal, we may expect that Democratic or left-leaning constituencies to be more sympathetic to reducing veto points or institutional barriers to ratifying and implementing human rights agreements, and right-leaning groups to favor more constraints.

#### B. THE AMBIGUOUS AND CONTINGENT PARTISAN EFFECTS OF AN EXPANSIVE WAR POWERS REGIME

Unlike the pathways for ratifying human rights agreements, the allocation of war powers authority seems to present a much more ambiguous and complicated institutional landscape for partisan actors seeking to entrench their policy goals. On the one hand, we may anticipate left-leaning parties to favor greater constraints on the executive branch in national security because they will have an incentive to shift resources from the military towards those domestic issues in which they have an advantage, such as social security, education, access to health care, and welfare.<sup>105</sup> Thus, we may expect left-leaning groups to embrace institutional constraints that forestall the kind of hawkish policy agenda that forces a tradeoff between

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101. See generally Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 147 (Michael Ignatieff ed., 2005) (describing conservative opposition to human rights treaties in the United States).

102. See *id.*

103. See *supra* text accompanying notes 49–50.

104. See *supra* text accompanying notes 49–50.

105. Michael T. Koch & Skyler Cranmer, *Testing the “Dick Cheney” Hypothesis: Do Governments of the Left Attract More Terrorism than Governments of the Right?*, 24 CONFLICT MGMT. & PEACE SCI. 311, 314 (2007); see Glenn Palmer et al., *What’s Stopping You?: The Sources of Political Constraints on International Conflict Behavior in Parliamentary Democracies*, 30 INT’L INTERACTIONS 1, 7–8 (2004).

butter and guns. On the other hand, executive branch flexibility may also lead to greater military expenditures and the growth of a garrison state, which may tend to spur a redistributive politics where the rich or business interests bear a greater share of the increasing tax burden from rearmament than labor-leaning interests.<sup>106</sup> Thus, we may anticipate right-leaning parties, who are more aligned with business interests and other groups opposed to progressive taxation, to disfavor greater executive branch flexibility in war powers.

The next three sections examine the conflicting partisan preferences for executive branch flexibility for human rights and war powers in the postwar era. Conservative resistance to greater executive branch flexibility for ratifying human rights agreements was consistent from the postwar era until the modern era.<sup>107</sup> However, partisan preferences for greater flexibility on war powers were much more contingent on background political factors, such as whether the rise in the national security state was viewed as complementary or hostile to business or labor interests. I focus on two distinct time periods. First, I analyze the era immediately after WWII when President Truman's complementary politics of guns and butter triggered conservative opposition to executive branch primacy in war powers. I then examine the post-Vietnam War era, when conservatives and progressives started to switch their long-term positions on the growth of the national security state. When President Reagan came into power in 1980, he pursued a cleavage politics of guns or butter that alienated progressives, but consolidated conservative groups in favor of greater flexibility in war powers. Finally, the last section explores what seem to be exceptions to what a partisan model would predict: contemporary Republican resistance to expansive war powers by Democratic presidents.

### 1. How the Complementary Politics of Guns and Butter Influenced War Powers in the Early Post-WWII Era

The Truman administration contributed to another constitutional innovation in foreign affairs which ultimately proved to be the source of significant partisan contention. In 1950, pursuant to a U.N. Security Council Resolution but without

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106. See Kevin Narizny, *Both Guns and Butter, or Neither: Class Interests in the Political Economy of Rearmament*, 97 AM. POL. SCI. REV. 203, 203–05 (2003).

107. See *supra* text accompanying note 16.

congressional authorization, President Truman ordered the deployment of American troops to intervene in hostilities in Korea. Although the Korean deployment ultimately proved to be a political liability for Truman,<sup>108</sup> commentators generally regard it as a key turning point in the modern understanding of presidential war powers. As Louis Fisher put it, "President Harry Truman's commitment of U.S. troops to Korea in June 1950 still stands as the single most important precedent for the executive use of military force without congressional authority."<sup>109</sup>

Truman invoked both his commander-in-chief power as well as United States treaty commitments to the United Nations as legal authority for the proposition that the President could unilaterally commit troops to police actions approved by the U.N. Security Council.<sup>110</sup> Whether treaty commitments made under the U.N. Charter could ever serve as a substitute for congressional authorization has been debated extensively in the literature,<sup>111</sup> but the Korean intervention has nonetheless influenced much of the contemporary executive branch understanding of war powers.<sup>112</sup> Truman's actions have since been in-

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108. LOUIS FISHER, *PRESIDENTIAL WAR POWER* 88–89 (1995) ("Just as the Vietnam War spelled defeat for the Democrats in 1968, so did the Korean War help put an end to twenty years of Democratic control of the White House.").

109. Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 21 (1995).

110. According to Truman:

Under the President's constitutional powers as Commander in Chief of the Armed Forces he has the authority to send troops anywhere in the world . . . This Government will continue to live up to its obligations under the United Nations, and its other treaty obligations, and we will continue to send troops whenever it is necessary to uphold those obligations.

Ted G. Carpenter, *United States' NATO Policy at the Crossroads: The 'Great Debate' of 1950–1951*, 8 INT'L HIST. REV. 389, 406 (1986) (quoting The President's News Conference of January 11, 1951, 7 PUB. PAPERS 19 (Jan. 11, 1951)) (quotation marks omitted).

111. See, e.g., ELY, *supra* note 25, at 11 (suggesting the Korean deployment was unconstitutional); Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 21–22 (1995) (same). But see David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 U. COLO. L. REV. 1491, 1492, 1498–521 (1999) ("[A]doption of the [U.N.] Charter . . . transformed the constitutional understanding of the war powers" in an internationalist sense that confirms "the President's unilateral power to use armed force in United Nations collective security actions . . .").

112. As David Barron and Martin Lederman recently put it, "Truman took a dramatic step forward in a history of unilateral presidential use of military power, a development that had been building for over one hundred years, since at least the Mexican War, in various contexts short of full-scale hostilities

voked as legal precedent for unilateral presidential uses of force in United Nations or NATO police actions by various administrations ranging from President Bush during the 1990 Iraq deployment, to President Clinton in Bosnia and Haiti, to President Obama for the U.N. Security Council-authorized air strikes in Libya.<sup>113</sup>

How would the conventional accounts of constitutional preferences explain the societal conflict over war powers in the Korean crisis? Take, for instance, the institutional empire-building approach. In this picture, President Truman presumably did what we would expect of any modern president: he sought to expand his policy flexibility during wartime and the political opposition in Congress sought to constrain it. Once the Republican opposition wins the White House, however, we would expect the positions of the parties to be reversed.

Alternatively, one might evaluate Truman's actions under an ideational partisan approach. Republican constituencies, presumably more hawkish than their Democratic counterparts, would have eagerly embraced Truman's quest for greater presidential flexibility to combat the growing communist threat. Conversely, one would expect that progressive Democrats, normally associated with dovish positions, would have been more ambivalent about their co-partisan's move to embrace an expansive vision of war powers.

Both of these approaches seem appealingly simple and parsimonious, but they are also largely inadequate. The ideational account of the postwar era does not work because conservative Republicans in Congress were overwhelmingly hostile to Truman's broad conception of war powers, while progressive Democrats embraced it. The institutional empire building account does not shed much light earlier. While congressional Republicans opposed flexible war powers and greater defense spending under Truman, they also opposed it under Eisenhow-

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against another nation's armed forces." David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1056 (2008).

113. Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to Eric Holder, Attorney Gen., U.S. Dep't of Justice 5–7 (Apr. 1, 2011) [hereinafter Memorandum from Caroline D. Krass], available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (arguing that the U.N. Security Council resolution expands the President's war powers because the President has a responsibility to preserve the Council's credibility and to ensure that its edicts do not turn out to be "empty words").

er.<sup>114</sup> In sum, as the war party during the 1950s, the Democrats appeared to favor the expansion of presidential war powers regardless of the administration in the White House, while Republicans opposed it.<sup>115</sup>

To a certain degree, however, the immediate legislative reaction to the Korean deployment did not suggest any obviously deep partisan cleavages.<sup>116</sup> But bipartisan support on both the merits and constitutionality of the Korean deployment was short-lived. Within a year after the war started, leading Republican Senators were roundly denouncing the intervention as both unconstitutional and a partisan measure by warmongering Democrats.<sup>117</sup> “[T]he Democratic Party,” Senator Mundt crowed in the 1951 Senate hearings, “since 1900 has never failed to get us into every war that was around . . . .”<sup>118</sup> And the partisan backlash by these Republican Senators was hardly an isolated case of political grandstanding. On the contrary, as observed by various commentators, conservative opposition to Truman’s rearmament policies and increases in defense spending was both intense and sustained.<sup>119</sup> And one key feature of the national security state feared by conservatives was how the expansion of presidential war authority could lead to the kinds of unnecessary military engagements that drained the nation’s treasury. In his 1951 testimony, for instance, Senator Mundt criticized the purported “legal basis upon which the President of the United States, acting on his own authority and without a declaration of war by Congress, could plunge us into what has already become the fourth most costly war in our Nation’s history.”<sup>120</sup> Finally, conservatives also emphasized Congress’s superior democratic pedigree over the executive as a factor that would make it less likely to endorse provocative or unnecessary wars.<sup>121</sup>

Conservative Republicans also feared that expansive war powers could also lead to greater assertions of presidential au-

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114. See SAMUEL HUNTINGTON, *THE COMMON DEFENSE: STRATEGIC PROGRAMS IN NATIONAL POLITICS* 253–56 (1961).

115. *Id.*

116. DAVID McCULLOUGH, *TRUMAN* 780–81 (1992).

117. 97 CONG. REC. 5078–5103 (1951).

118. *Id.* 5089 (statement of Sen. Karl Mundt).

119. See MICHAEL J. HOGAN, *A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945–1954*, at 5–6 (1998); HUNTINGTON, *supra* note 114, at 253–56.

120. 97 CONG. REC. 5078 (1951).

121. See Carpenter, *supra* note 110, at 407.

thority in domestic policy issues. During the Great Debates over American foreign policy that spanned from 1950 through 1951, for instance, Senator Taft warned: "If in the great field of foreign policy the President has arbitrary and unlimited power, as he now claims, then there is an end to freedom in the United States in a great realm of domestic activity which affects, in the long run, every person in the United States."<sup>122</sup>

These partisan divisions on both the President's war powers and the growth of the national security state went beyond mere support or antipathy to any particular occupant of the White House. As Samuel Huntington observed regarding the early Cold-War era, "party attitudes did not change with changes in Administration. Throughout the fifteen years [1945–60], the Democrats favored a higher level of military effort than did the Republicans."<sup>123</sup> Republican members of Congress, on the other hand, consistently favored lower levels of military spending throughout the 1950s regardless of which party occupied the White House.<sup>124</sup> By contrast, during Eisenhower's administration, congressional Democrats often attempted to increase the defense budget in explicit opposition to the administration's position.<sup>125</sup> Facing pressures from his conservative flank to reduce taxes and defense spending, Eisenhower instituted budget cuts, but was swiftly condemned by Democrats in Congress for endangering national security.<sup>126</sup>

Eisenhower not only rejected Truman's rearmament agenda, he also decisively repudiated Truman's view of unilateral presidential war powers.<sup>127</sup> Beyond the constitutional concerns, which he shared with his co-partisans in Congress, Eisenhower argued that refusing to seek authorization from Congress on decisions to use force was politically imprudent.<sup>128</sup> He suggested

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122. Geoffrey Matthews, *Robert A. Taft, The Constitution and American Foreign Policy, 1939–53*, 17 J. CONTEMP. HIST. 507, 518 (1982) (quoting 97 CONG. REC. 2988 (1951)) (internal quotations omitted).

123. HUNTINGTON, *supra* note 114, at 253.

124. *See id.* at 253–62.

125. *See id.*

126. *See id.* at 260–61.

127. *See* DWIGHT D. EISENHOWER, MANDATE FOR CHANGE: 1953–1956, at 82 (1963); *see also* FISHER, *supra* note 108, at 103 ("Eisenhower . . . came to realize that it was a serious mistake, politically and constitutionally, to commit the nation to war in Korea without congressional approval."). Eisenhower stressed that "[o]nly with [congressional] cooperation can we give the reassurance needed to deter aggression." *Id.* (quoting Special Message to the Congress on the Situation in the Middle East, 6 PUB. PAPERS 11 (Jan. 5, 1957)).

128. *See* FISHER, *supra* note 108, at 103–04.

that authorization not only reduced the domestic political risks of military conflicts, it also signaled to foreign adversaries and allies the collective resolve of the United States.<sup>129</sup> In 1954, when the question arose as to whether the United States would intervene on France's behalf in Indochina, Eisenhower reassured reporters that "there is going to be no involvement of America in war unless it is a result of the constitutional process that is placed upon Congress to declare it."<sup>130</sup>

But why would Eisenhower and postwar Republicans consider expansive presidential war powers to be inconsistent with their ideological and material interests? One answer is that the plausible threat posed by the specific constitutional vision favored by Truman and the Democrats was not likely to be reciprocal across party lines. Truman's constitutional argument was that the U.N. Security Council Resolution authorizing military action in Korea was sufficient legal authority for his decision. By ratifying the U.N. Charter and passing the U.N. Participation Act, Congress had presumably sanctioned the Korean deployment.

But a reciprocal threat by Republicans to engage in similar expansive interpretations of the Constitution and the U.N. Charter if they came into power would very likely not have been a source of concern for progressive Democrats. Imagine, for instance, how progressive Democrats would have reacted if a conservative opponent of Truman's Korean policies, such as Senator Robert Taft (R-Ohio), made the following argument: "You Democrats might think you have gotten your way today, but consider how you would feel if a Republican President were to come into power in 1953 and decide to embark on his preferred U.N. sanctioned wars without first seeking congressional authorization?" The problem with such a threat would be three-fold. First, it would not be particularly credible, since the Taft wing of the Republican Party really did not care that much for the United Nations.<sup>131</sup> Second, the Democrats might actually benefit from having the Republicans follow through on such a threat since they probably wanted the Taft Republicans to buy into the legitimacy of the United Nations. Third, for reasons

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129. *Id.*

130. The President's News Conference of March 10, 1954, 50 PUB. PAPERS 306 (Mar. 10, 1954).

131. See CLARENCE E. WUNDERLIN, ROBERT A. TAFT: IDEAS, TRADITION, AND PARTY IN U.S. FOREIGN POLICY 213-14 (2005) (explaining that close to the end of his career Taft was in favor of abandoning the United Nations in favor of a league of non-communist states).

discussed in more detail below, as the “war party” of the 1950s, the Democrats did not stand to lose much politically from a more militaristic foreign policy, regardless of which party occupied the White House.

Republicans were also concerned that Truman’s vision of war powers would lead to more expensive wars with redistributive tax consequences. As Kevin Narizny has pointed out, conservative business constituents during the early 1950s feared that they would bear a disproportionate burden of any tax increases associated with increased rearmament.<sup>132</sup> Thus, given the likely tax impacts, the postwar Republican Party was especially in favor of scaling back defense spending. The 1952 Republican Party Platform reflected this sentiment:

We shall always measure our foreign commitments so that they can be borne without endangering the economic health or sound finances of the United States. Stalin said that “the moment for the decisive blow” would be when the free nations were isolated and were in a state of “practical bankruptcy.” We shall not allow ourselves to be isolated and economically strangled, and we shall not let ourselves go bankrupt.<sup>133</sup>

Second, business interests were also worried that massive wartime borrowing could lead to inflation, which would in turn instigate political pressures for the government to impose the kind of price controls which were considered a threat to free enterprise.<sup>134</sup>

Third, and more importantly, conservatives feared that the transformations wrought by Truman’s national security agenda would lead to greater expansions of the federal government into private and commercial spheres, justifying economic controls and entrenching the regulatory objectives of the New Deal.<sup>135</sup> They worried that the centralizing tendencies of the national security state would further erode the *laissez faire* system, which favored reliance on market forces and private ordering.<sup>136</sup> On the international front, Republicans were also critical as to whether Europeans were bearing their share of the weight in

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132. See Narizny, *supra* note 106, at 215.

133. *Republican Party Platform of 1952*, AM. PRESIDENCY PROJECT (July 7, 1952), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25837>.

134. See HOGAN, *supra* note 119, at 289.

135. *Id.* at 290–91.

136. See *id.* at 8; see also *id.* at 115 (“No one worried more than Taft about the dangers of the garrison state, which he saw as a large, national security bureaucracy grafted on to the New Deal state and consuming resources that properly belonged in the private sector.”).

terms of resources and manpower in the Korean intervention.<sup>137</sup> While still associated with the Truman administration, as Supreme NATO Commander, Eisenhower embraced the Republican criticism that the growth of a national security state could threaten domestic institutions.<sup>138</sup> In early 1952, for instance, he warned of “the danger of internal deterioration through the annual expenditure of unconscionable sums on a program of indefinite duration, extending far into the future.”<sup>139</sup>

Thus, postwar Republican business interests wedded to a vision of a limited government might have reasonably conjectured that the Truman administration would have taken advantage of the Korea crisis and rearmament to strengthen the Democratic Party’s policy agenda and further weaken Republican efforts to roll back the New Deal.<sup>140</sup> And there was already some precedent in the 1950s that the presence of an external threat could be used to transform or consolidate progressive social welfare reforms.<sup>141</sup> As Michael Desch observes, “[w]ith the exception of the Social Security Act of 1935, the most durable increases in U.S. social welfare spending occurred not as a result of the continuation of New Deal social programs but as an extension of wartime social welfare programs initiated during World War II.”<sup>142</sup>

Eisenhower immediately shifted gears on national security once he entered the White House, favoring nuclear deterrence as the preferred strategy for dealing with the Soviet threat.<sup>143</sup> He then cut the defense budget, abolished universal training, and scaled back on aspects of national security that would re-

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137. See Carpenter, *supra* note 110, at 401.

138. MEENEKSHI BOSE, SHAPING AND SIGNALING PRESIDENTIAL POLICY: THE NATIONAL SECURITY DECISION MAKING OF EISENHOWER AND KENNEDY 20 (1998).

139. *Id.* (quoting a January 22, 1952 diary entry by Eisenhower).

140. See HOGAN, *supra* note 119, at 291 (“In conservative thinking, the big budgets and big government of the Cold War were linked not only to national security imperatives but also to the New Deal of the 1930s.”).

141. The notion that responses to national security crisis may prompt long-term institutional changes is central to the bellicist theory of state formation, which not only argues that external threats stimulated the origins of the modern state, but that such threats increased the ability of the state to extract taxes and project its authority. See CHARLES TILLY, *Reflection on the History of European State-Making*, in THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 32 (Charles Tilly ed. 1975).

142. Michael C. Desch, *War and Strong States, Peace and Weak States?*, 50 INT’L ORG. 237, 252 (1996).

143. AARON L. FRIEDBERG, IN THE SHADOW OF THE GARRISON STATE: AMERICA’S ANTI-STATISM AND ITS COLD WAR GRAND STRATEGY 71 (2000).

quire significant resources, such as building up conventional troop levels.<sup>144</sup> Despite his celebrated military career, Eisenhower constantly deemphasized the purely military aspect of the Cold War, and seemed to embrace the notion that a healthy and robust American economy would be one of the best foils for the expansion of Soviet communism.<sup>145</sup> The reduction of defense expenditures was necessary, Eisenhower argued,

not because of any belief that we can afford relaxation of the combined effort to combat Soviet communism. On the contrary, it grows out of a belief that our organized, effective resistance must be maintained over a long period of years and that this is possible only with a healthy American economy.<sup>146</sup>

The preferences of the postwar Republican Party on war powers and national security were largely shaped by many of the domestically oriented business interests that constituted its core constituency. As the diplomatic historian Michael Hogan contends, the postwar Republican coalition largely consisted of “small producers and labor-intensive firms, that found it difficult to shoulder the tax burden required to sustain New Deal social programs, a large military establishment, or expensive foreign aid programs.”<sup>147</sup> Antipathy by these business groups towards both the role of government in economic affairs and increased tax burdens had been evolving steadily since the mid-19th century.<sup>148</sup> In his extensive review of American business attitudes towards government, David Vogel writes: “Studies of executive opinions from the Great Depression through the mid-sixties present a portrait both of business resentment toward the New Deal and the unwillingness of executives in the postwar period to abandon the ideal of a self-regulating market.”<sup>149</sup> And an analysis of speeches by business leaders from 1948–51 suggests that they were most concerned that the expenditures

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144. *Id.*

145. SAKI DOCKRILL, EISENHOWER’S NEW-LOOK NATIONAL SECURITY POLICY, 1953–61, at 30 (1996) (quoting Eisenhower’s Letter to Gruenther of May 4, 1953).

146. *Id.* (quoting Eisenhower to Gruenther, in *The Diaries of Dwight D. Eisenhower, 1953–1961*).

147. HOGAN, *supra* note 119, at 6.

148. David Vogel, *Why Business Distrust Their State: The Political Consciousness of American Corporate Executives*, 8 BRIT. J. POL. SCI. 45, 46 (1978).

149. *Id.*

associated with the Korean War would lead to greater taxes and inflation.<sup>150</sup>

Both Truman's national security agenda and his assertion of expansive wartime powers during the Korean War were largely welcomed by progressives.<sup>151</sup> Democrats had come to be known as the "war party" and they were willing to embrace an understanding of executive powers that would counter the growing anti-statist movement within the Republican Party.<sup>152</sup> In his memoirs, Secretary of State Acheson not only defended Truman's actions in Korea as constitutional, he also argued that it was politically prudent for Truman to have avoided a congressional resolution because the arduous process of doing so could have "shaken [the] morale of the troops."<sup>153</sup> Moreover, he rebuffed the view that a congressional resolution would have softened political criticism if the war became unpopular; after all, he insisted, "[c]ongressional approval did not soften or divert the antiwar critics of Presidents Lincoln, Wilson, and Roosevelt."<sup>154</sup> During the early stages of the Korean War, Democratic Senator Douglas of Illinois also mounted an elaborate defense of the legality of the intervention on the floor of the Senate.<sup>155</sup>

Academic commentators also joined the fray. Writing in the *New York Times*, Henry Steele Commager, a well-known progressive historian, took Senator Taft to task for suggesting that Truman's actions were unprecedented and a threat to democracy: "[T]here is, in fact, no basis in our own history for the distrust of the Executive authority."<sup>156</sup> Also in the *New York Times*, prominent legal scholar Arthur Schlesinger, declared: "Presidents have repeatedly committed American armed forces abroad without prior Congressional consultation or approv-

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150. See Clarence Lo, *Theories of the State and Business Opposition to Increased Military Spending*, 29 SOC. PROB. 424 (1982) (examining business opposition to U.S. national security expenditures between 1948 and 1953).

151. See DEAN ACHESON, *PRESENT AT THE CREATION* 414-15 (1969) (chronicling the Korean War and shifting attitudes).

152. *Id.*

153. *Id.* at 415.

154. *Id.*

155. See RONALD J. CARIDI, *THE KOREAN WAR AND AMERICAN POLITICS: THE REPUBLICAN PARTY AS A CASE STUDY* 46 (1968) (describing Senator Douglas's defense).

156. Henry Steele Commager, *Does the President Have Too Much Power?* N.Y. TIMES, Apr. 1, 1951, at 172; see also Henry Steele Commager, *Presidential Power: The Issue Analyzed*, N.Y. TIMES, Jan. 14, 1951, § 6, at 11.

al.”<sup>157</sup> He then went on to accuse conservatives like Taft of distorting history and warned that past presidential actions would stand as “obstacles to their efforts to foist off their current political prejudices as eternal American verities.”<sup>158</sup>

The New Deal progressive coalition was composed of internationally minded businesses, trade union members, minorities, and reformers who were much more comfortable with an active state role in the economy as well as strong international institutions that would facilitate world peace.<sup>159</sup> Of course, a significant portion of this coalition also involved business interests, but they were more likely to be export oriented groups that stood to benefit from closer security alliances with Europe and the reconstruction efforts of the Marshall Plan.<sup>160</sup> Together, this coalition stood to gain from a more statist agenda that not only embraced ambitious military overtures towards Europe (which favored internationally oriented businesses), but also from efforts to grow or consolidate New Deal social programs (which benefited trade unions).<sup>161</sup> To prosecute the Korean War effectively, a coalition of trade unions and consumer groups endorsed the mobilization of United States military and economic resources through more aggressive regulation and economic intervention, including wage controls, credit controls, price ceilings on agricultural products, rent controls, and regulation of bank loans.<sup>162</sup> Moreover, Truman also believed that expansion of America’s national security capacity would complement the goals of the welfare state.<sup>163</sup> “To Truman’s way of thinking,” Hogan observed, “national welfare and national security, domestic and international programs, were inextricably linked.”<sup>164</sup>

The economic interventions occasioned by the Korean War

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157. Arthur Schlesinger, Jr., *Presidential Powers: Taft Statement on Troops Opposed, Actions of Past Presidents Cited*, N.Y. TIMES, Jan. 9, 1951, at 28.

158. *Id.*

159. See HOGAN, *supra* note 119, at 5.

160. See Benjamin O. Fordham, *Economic Interests, Party, and Ideology in Early Cold War Era U.S. Foreign Policy*, 52 INT’L ORG. 359, 363–64 (1998); see also Thomas Ferguson, *From Normalcy to New Deal: Industrial Structure, Party Competition, and American Public Policy During the Great Depression*, 38 INT’L ORG. 41, 46 (1984) (stating that the center of the coalition consists of capital-intensive industries, investment banks, and internationally oriented commercial banks).

161. See, e.g., HOGAN, *supra* note 119, at 5–7 (discussing the make-up of the coalition).

162. See *id.* at 350–51.

163. See *id.*

164. *Id.* at 173.

would eventually trigger yet another constitutional controversy with significant partisan overtones. After talks between the union of steel workers and steel mill owners collapsed over a wage dispute in 1952, President Truman decided to take over the mills under his Article II vested executive powers.<sup>165</sup> In doing so, Truman eschewed relying on his statutory authority to seek to enjoin the unions from striking under the Taft Harley Act.<sup>166</sup> As Maeva Marcus's thorough review of the *Steel Seizure* case suggests, partisan politics was never far from the surface in Truman's decision.<sup>167</sup> Truman had strong ties to the unions, especially after their support for his 1948 election and his own earlier political attack on the Taft Harley Act, and he felt disinclined to invoke what he considered a labor unfriendly statute.<sup>168</sup> The labor unions were elated with Truman's decision. "To rank and file union members," Marcus observes, "Harry Truman became a hero."<sup>169</sup> On the other hand, Republican Party leaders and business interests were apoplectic over the seizure.<sup>170</sup> "To permit this [act] to go unchallenged," Senator William Knowland thundered before a huge GOP rally, "is to open the door to the socialization of all of our principal industries."<sup>171</sup> A meeting of business executives called by the United States Chamber of Commerce and the American Association of Manufacturers decried Truman's action as a violation of the Bill of Rights that would lead to "nationalization of all business."<sup>172</sup> The steel mill owners sued the government and the Supreme Court eventually struck the seizure down as a violation of the separation of powers.<sup>173</sup>

Unlike Truman's decision to embark on the Korean War, however, strong opposition to the steel seizure came also from

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165. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

166. *Id.*

167. See MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 18–21, 76 (1977). For a concise and up-to-date review of the Steel Seizure Case, see Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *PRESIDENTIAL POWER STORIES* 233 (Christopher H. Schroeder & Curtis Bradley eds., 2009).

168. See MARCUS, *supra* note 167, at 18.

169. *Id.* at 87.

170. Chester G. Hanson, *Knowland Denounces Steel Seizure at Record Rally*, L.A. TIMES, Apr. 17, 1952, at A1.

171. *Id.*

172. See *Steel Seizure is Denounced: Business Executives Claim Bill of Rights Violated*, BALTIMORE SUN, Apr. 16, 1952.

173. *Steel Seizure*, 343 U.S. 579, 587–89 (1952).

the progressive press. As Marcus observes, “even previous defenders of the President censured him for abusing the powers of his office.”<sup>174</sup> *The Nation* magazine, for instance, denounced Truman for “exaggerate[ing] the . . . ‘inherent powers’ with which the Constitution has invested him.”<sup>175</sup> One plausible explanation for the divergent reactions by the progressive press to the two cases is that they might have perceived Truman’s unilateral action in the seizure of the mills as relaxing an important constitutional constraint that could also protect Democratic constituencies under a future Republican administration. Among the majority, Justice Douglas’s concurring opinion came closest to recognizing Truman’s actions as having obvious reciprocal partisan implications:

Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade-unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.<sup>176</sup>

## 2. Vietnam and the Partisan Switch on Presidential War Powers

In the decades prior to the late 1960s, progressive Democrats continued to be supporters of greater militarization and increases in defense budgets while conservative Republicans were against these measures.<sup>177</sup> In the wake of the Vietnam War, however, both progressive Democrats and Republicans started to revise their longstanding views on the merits of the national security state.<sup>178</sup> Indeed, there is now a growing literature that explores how the Vietnam experience redefined societal conflicts over the Cold War.<sup>179</sup>

But did the shift in partisan preferences on national security extend beyond the specific military engagements to which they were directly relevant, changing preferences for presidential war powers as well? While there has been some research

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174. MARCUS, *supra* note 167, at 89.

175. *Id.* (quoting THE NATION, Apr. 1952, at 393).

176. *Steel Seizure*, 343 U.S. at 633–34.

177. See generally Benjamin Fordham, *The Evolution of Republican and Democratic Positions on Cold War Military Spending*, 31 SOC. SC. HIST. 603 (2007) (describing evolving attitudes toward the Cold War).

178. *Id.*

179. See IRVING BERNSTEIN, GUNS OR BUTTER: THE PRESIDENCY OF LYNDON JOHNSON 535–37 (1996) (describing attitudes regarding the Vietnam experience). See generally Fordham, *supra* note 177, at 603.

done on the evolution of partisan preferences for military spending since the late 1960s,<sup>180</sup> there has been little or no research done on how the shifts in constituent interests influenced partisan preferences for constraints on presidential authority. Instead, much of the literature assumes divergent preferences about presidential war powers are mostly motivated by ideas and beliefs about how particular institutions best promote American national security objectives. I suggest that both the Vietnam War and Reagan's military policies in the 1980s prompted certain changes that altered the relative strength and material interests of constituents affiliated with the Republican and Democratic Parties, which in turn affected how these groups viewed the appropriate balance of war powers between the President and Congress.<sup>181</sup>

So why did progressive Democratic constituencies abandon their postwar stance on the merits of Cold War military spending and the growth of the national security state? Furthermore, why did postwar Republican constituencies, who bemoaned the statist implications of militarization in the 1950s, start to switch their views in the 1960s? One plausible account has emphasized the spread of post-materialist cultural beliefs among progressive groups during that period.<sup>182</sup> Other accounts emphasize how the distributional implications of the national security state started to change as the war evolved.<sup>183</sup> In the face of the economic downturn in the late 1960s, for instance, key progressive Democrats seemed to perceive a growing defense budget as actually exerting a crowd out effect on other domestic priorities that were key planks of Johnson's "Great Society" agenda.

This evolution of progressive views of a tradeoff between

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180. See Fordham, *supra* note 177, at 604–07.

181. To be clear, however, the political and institutional repercussions of the Vietnam War often transcended partisan lines. The United State's humbling experience during that war contributed to growing public weariness of cold-war military adventurism as well as a desire to constrain presidential war authority. When the War Powers Resolution passed in 1973 over President Nixon's veto, for instance, it commanded the support of bipartisan majorities in both houses of Congress. But one factor that is not sufficiently acknowledged in the literature is how the escalation of cold war military engagements during this period transformed the relative strength and makeup of the constituencies of both political parties.

182. See RONALD INGLEHART, *CULTURE SHIFT IN ADVANCED INDUSTRIAL SOCIETY* 298 (1990) ("Opposition to the War became a major Postmaterialist cause, linked with humanitarian (rather than economic) concerns. . . .").

183. See Fordham, *supra* note 177, at 622–27.

butter and gun was gradual but nonetheless significant. Early in the American involvement in the Vietnam War, for instance, President Johnson was still willing to echo the conventional view of a complementary relationship: "I believe we can do both. We are a country that was built by pioneers that had a rifle in one hand and an axe in the other. We are a nation with the highest GNP, the highest wages, and most people at work. We can do both."<sup>184</sup> The platform of the Democratic Party in 1972, by contrast, reflected the emerging progressive consensus that there was a tradeoff:

[M]ilitary defense cannot be treated in isolation from other vital national concerns. Spending for military purposes is greater by far than federal spending for education, housing, environmental protection, unemployment insurance, or welfare. Unneeded dollars for the military at once add to the tax burden and pre-empt funds from programs of direct and immediate benefit to our people.<sup>185</sup>

In hindsight, the ensuing political and economic fallout of the Vietnam War seemed to confirm the worst fears of progressive skeptics. As one commentator wryly observed, "[o]ne may speculate over what might have been if the country had remained at peace . . . . This might have launched a long period of Democratic control of the White House and the Congress. The Great Society would have survived and might have been expanded."<sup>186</sup> For Republicans, on the other hand, the effects of the military buildup during the Vietnam War did not result in the same kind of economic interventionist policies that accompanied Truman's efforts in Korea.<sup>187</sup> Indeed, hawkish Republicans, such as Senator Goldwater of Arizona, often boasted of their support for Johnson's war effort, even as support by Johnson's fellow Democrats in Congress started to wane.<sup>188</sup> Ulti-

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184. See BERNSTEIN, *supra* note 179, at 526.

185. *Democratic Party Platform of 1972*, AM. PRESIDENCY PROJECT (July 10, 1972), <http://www.presidency.ucsb.edu/ws/?pid=29605>.

186. See BERNSTEIN, *supra* note 179, at 537.

187. See Fordham, *supra* note 177, at 624 (showing that military spending in the Vietnam War posed a smaller inflation risk than in the Korean War, and therefore required less regulation and lower tax rates); cf. David E. Kaun, *War and Wall Street: The Impact of Military Conflict on Investor Attitudes*, 14 *CAMB. J. ECON.* 439, 451 (1990) (contrasting the reactions of investors during the Korean War to those during the Vietnam War).

188. In a letter to a newspaper, Goldwater boasted, "I have probably been more active in the support of Johnson's policies in Vietnam as he is now conducting them than have most Democrats." Andrew L. Johns, *Doves among Hawks: Republican Opposition to the Vietnam War, 1964-68*, 31 *PEACE & CHANGE* 585, 595 (2006) (quoting a March 31, 1967 Letter to the Editor by Senator Barry Goldwater published in the Louisville Courier Journal).

mately, Republicans were able to view the prosecution of that conflict as consistent with their staunch anticommunist proclivities without having to worry about any negative economic effects it might have on their key business constituencies.<sup>189</sup>

Reagan's victory in 1980 cemented the switch in Republican and Democratic preferences on militarization. Prior to his election, the question of a tradeoff between guns and butter had been largely a matter of conjecture.<sup>190</sup> When Reagan came into power, however, he embraced an agenda that would make such a tradeoff explicit. Advocating a supply side theory that lower taxes could spur higher revenues, Reagan pushed for the most significant defense budget increases since the Korean War, while simultaneously embarking on a fiscal agenda of lower taxes and cuts in civilian spending on domestic programs.<sup>191</sup> Since the revenue boost expected by lowering taxes did not quite transpire, Reagan's initiative essentially evolved into a gambit to scale back the New Deal welfare state by starving it.<sup>192</sup> Subsequent empirical studies have shown that the Reagan administration departed significantly from the budget priorities of his predecessors, and used defense spending to crowd out the kind of domestic social spending favored by Democratic constituencies.<sup>193</sup> As the presidential scholar Wildavsky acutely observed, "[d]efense policy became domestic policy in that more

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189. To be sure, the Republicans were not overwhelmingly in support of Johnson's war, especially as the toll of the conflict mounted over the late 1960s and American public started to show signs of weariness with the conflict. See Johns, *supra* note 188, at 595 (exploring the blurring of partisan lines during the growth of congressional sentiment against the Vietnam War).

190. See Bruce Russett, *Defense Spending and National Well-Being*, 76 AM. POL. SCI. REV. 767, 776 (1982) (noting that expenditures for education and health largely rose through both the Korean and Vietnam wars).

191. See *id.*

192. Some commentators have suggested that this approach was part of an overall fiscal strategy by the Reagan administration. See Jack A. Meyer, *Social Programs and Social Policy*, in PERSPECTIVES ON THE REAGAN YEARS 65, 70–72 (John L. Palmer ed., 1986). But see Mark S. Kamlet et al., *Upsetting National Priorities? The Reagan Administration's Budgetary Strategy*, 82 AM. POL. SCI. REV. 1293, 1304 (1988) (“[A]lthough the Reagan administration has had a major impact on the composition of the budget, the strategy of ‘starving the budget’ through tax cuts has been a mixed success at best.”).

193. See Russett, *supra* note 190, at 776 (citation omitted) (“The current Republican president, sensing widespread public support for military expenditures, has imposed trade-offs between military and federal civil spending.”); see also Alex Mintz, *Guns Versus Butter: A Disaggregated Analysis*, 83 AM. POL. SCI. REV. 1285, 1292 (1989) (showing the existence of trade-offs between investments in the development and production of weapons systems and spending on education).

for defense became less for domestic, mostly welfare programs.”<sup>194</sup>

But the existence of a perceived tradeoff between guns and butter was not the only factor that shaped the shift in partisan preferences for national security. Changes in the composition of constituent interests of the parties likely played a role as well. Internationally oriented business interests, which had once been a core part of the New Deal coalition that supported greater defense spending in the postwar era, had been drifting slowly to the Republican Party since the 1960s as the GOP solidified its new identity as the party of “free trade.”<sup>195</sup> By the early 1970s, McGovern’s rhetoric had largely scared even “progressive” multinationals away from the Democratic Party, making Democrats in the 1980 election even more reliant on contributions from trade union constituencies who favored a retreat from postwar internationalism.<sup>196</sup> Another crucial development was the shift of the Republican Party’s regional base of support to the South and West, which had historically been a stronghold of Cold War internationalism.<sup>197</sup> More importantly, however, this region also stood to gain the most materially from Reagan’s new budget priorities. As Peter Trubowitz has observed, “[t]he main beneficiaries . . . measured in terms of gains in industrial employment from the Reagan [military] buildup, were concentrated in the sunbelt, particularly in the South and West.”<sup>198</sup> The support base of the Democratic Party, on the other hand, was shifting towards the Northeast, which bore the

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194. AARON WILDAVSKY, *THE NEW POLITICS OF THE BUDGETARY PROCESS* 380 (1988).

195. See William R. Keech & Kyoungsan Pak, *Partisanship, Institutions, and Change in American Trade Politics*, 57 *J. POL.* 1130, 1131–33 (1995) (discussing the evolution of the Republican Party’s platform from protectionism to free trade).

196. What little financial support Democrats could expect from internationally oriented multinationals dwindled significantly during the late 1970s, as these business groups threw their support behind Reagan’s candidacy in 1980. See THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* 76 (1986) (discussing how McGovern’s “openness to progressive redistribution” lost him the support of most American businesses); cf. Michael Hout et al., *Classes, Unions and the Realignment of U.S. Presidential Voting, 1952–1992*, in *THE END OF CLASS POLITICS? CLASS VOTING IN COMPARATIVE PERSPECTIVE* 83 (Geoffrey Evans ed., 1999) (examining the Republican Party’s successful tactic of focusing on the individual self-interest of voters).

197. TRUBOWITZ, *supra* note 38, at 225 (discussing “the Nixon administration’s desire to create political patronage in the South and West”).

198. *Id.* at 225–26.

fiscal brunt of Reagan's military buildup.<sup>199</sup>

As the parties' views of the relative benefits of militarization for their constituents started to change, so did their views of presidential war powers. To be clear, however, the initial institutional repercussions of the Vietnam War seemed to transcend partisan lines. In addition to the military debacle in Indochina, Nixon's Watergate scandal had soured the public mood in the early 1970s on both Cold War military adventurism and expansive presidential authority. When the War Powers Resolution (WPR) passed in 1973 over President Nixon's veto, for instance, it commanded the support of bipartisan majorities in both houses of Congress.<sup>200</sup> Ostensibly, the WPR was designed to provide a framework for collective judgment by both branches before United States troops are deployed into combat, especially for lengthy military engagements.<sup>201</sup> Since its passage, however, the WPR has been criticized intensely for both its awkward language and purported loopholes that make it easy for presidents to evade its reporting and consultation requirements.<sup>202</sup> But one factor that is not sufficiently acknowledged in the literature is how the parties have adopted distinct and conflicting positions about how best to reform or revise the WPR.

For the most part, Republican legislative efforts to amend the WPR have focused on either weakening or repealing it altogether, whereas Democrats have sought to strengthen it. More importantly, however, Republican members of Congress have often invoked as a rationale for reforming the WPR that it has encouraged legislative interference with the President's war powers. Take, for instance, the contentious debates surrounding Republican Congressman Henry Hyde's efforts to introduce a measure to repeal the WPR in 1995. This measure was championed by conservative Republicans when President Bill

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199. See *id.* at 228 ("When lawmakers from the Northeast argued that the rearmament program was excessive and wasteful and proposed defense cutbacks, they were appealing to constituents in an era of sluggish growth in the region's big urban states.").

200. FISHER, *supra* note 108, at 130.

201. See *id.* at 128–33 (discussing the goals of the WPR).

202. See ELY, *supra* note 25, at 115–31 (suggesting that the War Powers Resolution was poorly drafted and suggesting changes in language that would force the President to seek congressional authorization before going to war); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 189–93 (1996) (suggesting that a stronger framework statute that encourages Congress to be more active in war powers would serve as a check on tyranny and discourage overreaching by the executive branch).

Clinton, a Democrat, occupied the White House. In introducing his amendment, Hyde was explicit that he viewed the WPR as an unconstitutional infringement on the President's war authority, but he also condemned the 1973 legislation for "embolden[ing] our adversaries while hamstringing the President when he most urgently needs the authority . . . to act."<sup>203</sup>

Milking the apparent irony of this Republican measure for all its worth, House Speaker Newt Gingrich threw his weight behind it and cajoled his colleagues, "I rise for what some Members might find an unusual moment, an appeal to the House *to, at least on paper, increase the power of President Clinton . . . .* [T]he American nation needs to understand that as Speaker of the House and as the chief spokesman in the House for the Republican party, I want to strengthen the current Democratic president because he is the President of the United States."<sup>204</sup> Among House Democrats, however, the amendment was denounced as a dangerous measure that would spur riskier presidential war initiatives that lacked public support.<sup>205</sup> House Republicans voted—by a lop-sided margin of 178 to 44—to support the amendment.<sup>206</sup> That was not enough to win a majority, however, as an overwhelming number of House Democrats combined with some wavering Republicans to vote against it.<sup>207</sup> In hindsight, Gingrich acknowledged that some of his Republican colleagues who might have supported the repeal of the WPR in principle eventually decided to vote against it because they did not want to appear to be supporting Clinton.<sup>208</sup> But the House Speaker admitted to being particularly surprised and disappointed that President Clinton himself did not

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203. 141 CONG. REC. H5656 (1995) (daily ed. June 7, 1995).

204. 141 CONG. REC. H5672–73 (daily ed. June 7, 1995) (emphasis added).

205. For instance, Congresswoman Pat Schroeder (D-Colo.), testifying in opposition to the amendment, warned:

I think the War Powers Act has had an effect, and I think with the demise of the cold war I do not see any reason that we cannot work out a better way to maybe make this better, to maybe make it more efficient, but I am not sure that we need to do it in a haste right now where we just withdraw as members of Congress . . . .

141 CONG. REC. H5657 (1995) (daily ed. June 7, 1995).

206. See 141 CONG. REC. 15, 209–10 (1995).

207. Overall, the House voted 217 to 201 not to repeal the WPR, with House Democrats voting 172 to 23 against. *Id.*

208. See Katharine Q. Seelye, *House Defeats Bid to Repeal 'War Powers,'* N.Y. TIMES, June 8, 1995, <http://www.nytimes.com/1995/06/08/world/house-defeats-bid-to-repeal-war-powers.html> (detailing Mr. Gingrich's and Mr. Hyde's attempts to gather Republican support for the repeal).

seem to evince any obvious enthusiasm for Hyde's amendment.<sup>209</sup>

During Clinton's presidency, such unsolicited Republican efforts to repeal the WPR and expand presidential war powers were hardly isolated. In the Senate, Robert Dole, the 1996 Republican presidential candidate, also proposed repealing the WPR in 1995 and replacing it with another framework statute which in his words would "untie the president's hands in using American forces to defend American interests."<sup>210</sup> Republican legislative leaders, including Senator Dole and House Speaker Gingrich, also threw their support behind Clinton's 1995 decision to intervene in Bosnia,<sup>211</sup> and often prodded the administration to take a much more aggressive stance against the Serbs.<sup>212</sup> Bucking criticism from some Republican rank and file members, Senator Dole went so far to propose drafting a resolution that would have provided bipartisan support for the Bosnia mission in 1995 in the wake of a proposed peace agreement later that year.<sup>213</sup>

When viewed through a partisan prism, the decision by Republican leaders to boost presidential war powers during Clinton's presidency is not that surprising. Despite House Speaker Gingrich's high-minded rhetoric during the debates on the Hyde Amendment, Republican legislators were not necessarily being altruistic. Implicitly, the congressional Republicans were likely building the institutional foundation for a future when they expected their co-partisan to win back the presidency. And the Republican chance of legislative success in pushing this innovation was probably more likely when a Democrat was in the White House since they would at least be able to pick up the support of some congressional Democrats who would have been less keen to repeal the WPR during a Republican presidency. Also, from the perspective of voters, Hyde's proposed amendment seemed less electorally self-serving than it would have been if his co-partisan occupied the White House. In this vein, the Republicans were likely exploiting the political opportunity that might arise from a "Nixon Goes to China" logic. As Robert

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209. *See id.*

210. Robert Dole, *We Will Continue in Our Drive to Return Power to Our States and Our People*, WASH. POST, Jan. 5, 1995, at A10.

211. *See* Elaine Sciolino, *Dole Backs Plan to Send U.S. Forces on Bosnia Mission*, N.Y. TIMES, Dec. 1, 1995, at A1.

212. *See* Steven Greenhouse, *Gingrich is Urging a Tougher Policy on Bosnia's Serbs*, N.Y. TIMES, Dec. 5, 1994, at A1.

213. *See* Sciolino, *supra* note 211, at A1.

Goodin has suggested in explaining this logic, “[i]f an action is somehow out of character for a particular politician, then, for that very reason there are fewer external obstacles to that politician’s performing it.”<sup>214</sup>

In any event, in the wake of Vietnam, Democrats started advocating greater constraints on the President’s war powers. In the 1972 platform, the Democratic Party asserted the need to “[r]eturn to Congress, and to the people, a meaningful role in decisions on peace and war,”<sup>215</sup> and four years later, after the Watergate incident, it again pledged that “Congress will be involved in the major international decisions of our government, and our foreign policies will be openly and consistently presented to the American people.”<sup>216</sup> The Democrats did not necessarily launch a frontal attack on all presidential war decisions during this period but were much more sanguine than the Republicans that the WPR could constrain the executive branch’s decisions to use force. In their 1984 platform, for instance, the Democrats declared: “In the face of the Reagan Administration’s cavalier approach to the use of military force around the world, the Democratic Party affirms its commitment to the selective, judicious use of American military power in consonance with Constitutional principles and reinforced by the War Powers Act.”<sup>217</sup> Subsequent platforms in 1988 and 2008 called for either a greater role for Congress or more respect for constitutional constraints on presidential decisions during wartime.<sup>218</sup> And during the Clinton administration, congressional Democrats shied away from supporting Republican proposals to weaken the WPR. On the contrary, leading Senate Democrats

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214. Robert E. Goodin, *Voting Through the Looking Glass*, 77 AMER. POL. SCI. REV. 420, 421 (1983).

215. *Democratic Party Platform of 1972*, AM. PRESIDENCY PROJECT (July 10, 1972), <http://www.presidency.ucsb.edu/ws/?pid=29605>.

216. *Democratic Party Platform of 1976*, AM. PRESIDENCY PROJECT (July 12, 1976), <http://www.presidency.ucsb.edu/ws/?pid=29606>.

217. *See Democratic Party Platform of 1984*, AM. PRESIDENCY PROJECT (July 16, 1984), <http://www.presidency.ucsb.edu/ws/?pid=29608>.

218. *See Democratic Party Platform of 1998*, AM. PRESIDENCY PROJECT (July 18, 1998), <http://www.presidency.ucsb.edu/ws/?pid=29609> (“WE BELIEVE in a clear-headed, tough-minded, decisive American foreign policy that . . . reflects our values and the support of our people, a foreign policy that will respect our Constitution, our Congress and our traditional democratic principles and will in turn be respected for its quiet strength.”); *see Democratic Party Platform of 2008*, AM. PRESIDENCY PROJECT (Aug. 25, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=78283> (“We reject sweeping claims of ‘inherent’ presidential power . . . We believe that our Constitution, our courts, our institutions, and our traditions work.”).

actually entertained a proposal in 1993 that would have amended the WPR in a manner that would further circumscribe President Clinton's war authority, even though the Clinton administration was embroiled at the time in troop deployments in both Haiti and Somalia.<sup>219</sup>

The policy consequences of greater constraints on the executive branch's war powers were largely consistent with the views of post-Vietnam progressive regime. By 1973, the progressive historian Arthur Schlesinger, having previously denounced Senator Taft for distorting the history of presidential war powers in 1951, issued a mea culpa. He admitted that in labeling Senator Taft's position on Korea "demonstrably irresponsible,"<sup>220</sup> he had engaged in "a flourish of historical documentation and, alas, hyperbole . . ."<sup>221</sup> Schlesinger was keenly aware that the Vietnam War had seriously compromised the political landscape for many of the key programmatic goals of the postwar Democratic Party. "[T]he Great Society," he declared in 1966, "is now, except for token gestures, dead."<sup>222</sup> In congressional testimony in 1971, Commager also retracted his earlier support for robust presidential war powers and appealed for a greater legislative role in decisions to use force.<sup>223</sup>

But expanded presidential war powers not only seemed discordant with the policy and constitutional views of progressive elites, it also threatened to strengthen the electoral objectives of Republicans at the expense of Democrats. In the modern era, for instance, the constituencies of both parties tend to reward and punish presidential decisions to use force differently. Democratic voters and constituencies appear more willing to sanction their co-partisan in the White House for military failure or stalemate.<sup>224</sup> By contrast, right leaning constituencies

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219. Adam Clymer, *Democrats Study Amending War Powers Act*, N.Y. TIMES, Oct. 24, 1993, at 5N.

220. Schlesinger, *supra* note 157, at 28.

221. ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY 139 (1973).

222. ARTHUR M. SCHLESINGER, THE POLITICS OF HOPE AND THE BITTER HERITAGE: AMERICAN LIBERALISM IN THE 1960S at 432 (2008).

223. *War Powers Legislation: Hearings Before the Senate Committee on Foreign Relations*, 92d Cong., 1st Sess. 7-74 (1971). And the celebrated constitutional law professor John Hart Ely also argued that a significant portion of the war in Indochina, most especially Nixon's secret bombing of Cambodia, was in fact unconstitutional. See John H. Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990).

224. See Dennis M. Foster & Glenn Palmer, *Presidents, Public Opinion, and Diversionary Behavior: The Role of Partisan Support Reconsidered*, 2

appear more willing to forgive bad military outcomes and reward successful ones during Republican presidencies.<sup>225</sup>

Given the acute political sensitivity of presidential military decisions, courts have been understandably reluctant to get involved in war powers controversies.<sup>226</sup> Nonetheless, prominent progressive commentators, interest groups, and judges have tended to be sympathetic to a more active judicial role. The constitutional scholar John Hart Ely has suggested that courts might be one of the only institutions politically capable of checking presidential usurpation of Congress's war authority.<sup>227</sup> He urged judges to abandon the "justiciability" doctrines sometimes interposed in these situations" given that "Congress will seldom have either the incentive or the moral standing to do anything about an unconstitutional war."<sup>228</sup> In the wake of Reagan's Iran-Contra scandal, Harold Koh, another leading liberal scholar, warned: "[J]udges retain a duty in the post-Iran-contra era to ensure that in the field of foreign affairs, legal authority does not become permanently uncoupled from legal constraint."<sup>229</sup>

When plaintiffs challenged the constitutionality of both the Vietnam War and other post-Vietnam uses of force, liberal leaning judges sometimes suggested that they would be willing to consider such challenges on the merits under the right circumstances.<sup>230</sup> More broadly, liberal interest groups such as the

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FOREIGN POL'Y ANALYSIS 269, 275 (2006) (noting that Republican presidents see a larger surge in popularity following the use of force than Democratic presidents); see also Benjamin Fordham, *Partisanship, Macroeconomic Policy and the U.S. Uses of Force, 1949–1994*, 42 J. CONFLICT RESOL. 418, 422 (1998) (exploring the attractiveness of "diversionary" uses of force by a president to combat poor economic performance).

225. See Foster & Palmer, *supra* note 224, at 275 (2006); see also Michael T. Koch & Patrick Sullivan, *Should I Stay or Should I Go Now? Partisanship, Approval, and the Duration of Major Power Democratic Military Interventions*, 72 J. POL. 616, 617 (2010) ("[R]ight party executives become less likely to terminate military interventions as their popularity declines.").

226. See *Steel Seizure*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety . . . . And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.").

227. See Ely, *supra* note 223, at 1135.

228. See *id.*; but see FISHER, *supra* note 108, at 199 ("Each branch must protect its own territory. Congress cannot go to the courts, hat in hand, asking judges to do what legislators are fully capable of doing: Check the President.").

229. KOH, *supra* note 202, at 184.

230. In *Mitchell v. Laird*, for instance, Judges Bazelon and Wyzanski ob-

Center for Constitutional Rights (CCR) and the New York Civil Liberties Union have been quite active in bringing cases challenging presidential war powers since the early 1970s,<sup>231</sup> and the National Lawyers Guild—another prominent liberal advocacy group—even opened an office in the Philippines to represent American soldiers who were charged with being AWOL (absent without leave) during the Vietnam War.<sup>232</sup>

Consistent with a partisan logic of issue ownership, there is some anecdotal evidence that liberal judges may be less willing to defer to the executive branch's exercise of war powers even when a Democrat occupies the White House.<sup>233</sup> By contrast, conservative judges seem to be more open to deferring to presidential judgment during wartime regardless of the party affiliation of the President. For instance, in the 1995 case of *Campbell v. Clinton*, D.C. Circuit Judge David Tatel, a Clinton appointee, distanced himself from Judge Laurence Silberman's concurring opinion that President Clinton's authorization of air strikes in Kosovo without congressional authorization was a non-justiciable political question.<sup>234</sup> While agreeing with Judge Silberman, a conservative Reagan appointee, that the congressional plaintiffs lacked standing, he opined that if the right

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served that the Vietnam War could be unconstitutional, despite Congress's continued funding of the war, although they found the limits of the President's duty to be only bad faith and held that there was no evidence available by which a court could assess that issue. 488 F.2d 611, 614–15 (D.C. Cir. 1973). David Bazelon was a Truman appointee to the D.C. Circuit and Charles Wyzanski, a Roosevelt appointee, was a Senior Judge from the District of Massachusetts who was sitting by designation on the D.C. Circuit. See GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 39 (John R. Vile ed., 2003); BIOGRAPHICAL DIRECTORY OF FED. JUDGES, <http://www.fcj.gov/servlet/nGetInfo?jid=2669&cid=999&ctype=na&instate=na> (last visited Oct. 12, 2012). Judge George MacKinnon, a Nixon Appointee to the D.C. Circuit, wrote a separate opinion to disagree with the view by Wyzanski and Bazelon that Congress's appropriations and other legislation was not sufficient to constitute consent to the war in Indochina. *Mitchell*, 488 F.2d at 617–18 (MacKinnon, J., concurring). Also, in *Crockett v. Reagan*, Judge Joyce Green, a liberal Carter appointee, ruled that if the United States is involved in a major military conflict, a court could enforce the War Powers Resolution, at least to the extent of ordering the President to report to Congress. 558 F. Supp. 893, 902 (D.D.C. 1982).

231. See Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1393–411 (1995) (describing the CCR's role in challenging war decisions during the Reagan administration).

232. See Patricia G. Barnes, *A Lawyer Group with a Mission: Guild Tries to Buck Communist Label, Conservative Tide*, 81 A.B.A. J. at 23 (July 1995).

233. See, e.g., *Steel Seizure*, 343 U.S. 579, 587 (1952).

234. 203 F.3d 19, 37–39 (D.C. Cir. 2000) (Tatel, J., concurring) (discussing the competency and constitutionality of courts determining the existence of a war).

plaintiffs came along there should be no barrier to judicial review.<sup>235</sup>

More recently, Judge Janice Rogers Brown, a conservative Bush appointee to the D.C. Circuit, expressed strong reservations as to whether the international laws of war could constrain President Obama's war powers.<sup>236</sup> "[W]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the [Authorization to Use Military Force] speaks," she observed, "their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers."<sup>237</sup> Ironically, the Obama administration went out of its way to object to Judge Brown's opinion, arguing that the administration could prevail under a narrower legal standard.<sup>238</sup>

Of course, these judicial decisions are merely anecdotal and may not be sufficient to warrant making generalizations about partisan judicial behavior during wartime. Nonetheless, the goal here is not to suggest such judicial decisions are pervasive, but that they occur with enough frequency to be of theoretical interest.

Despite partisan differences over constraints on the President's use of force decisions, the trajectory of presidential war powers has remained relatively stable in the postwar era.<sup>239</sup> This stability is partially an artifact of the fact that the President, the institutional actor who has both the power and ability to reverse this trajectory, is the one who benefits from it the most.<sup>240</sup> But presidential empire building cannot be a sufficient

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235. *Id.* at 37.

236. *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010). Subsequently, a majority of active judges on the D.C. Circuit declared that the rejection of international law was dictum. *See Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010).

237. *Al-Bihani*, 590 F.3d at 871.

238. *See Al-Bihani v. Obama*, 619 F.3d at 3 (Brown, J., concurring) (noting "the government's eager concession that international law does in fact limit the [Authorization for Use of Military Force] . . .").

239. *See FISHER*, *supra* note 108, at 185 (arguing that the trajectory of war powers in the postwar era has been unmistakably from Congress towards the President).

240. *See MARIE T. HENEHAN*, *FOREIGN POLICY AND CONGRESS: AN INTERNATIONAL RELATIONS PERSPECTIVE* 8–11 (2000) (citing several studies showing that the President is stronger in foreign affairs because he initiates policy and has an executive advantage in informational resources and technical expertise).

explanation for the durability of the postwar regime of war powers. The partisan composition of Congress likely plays a role as well. When the political costs of a particular military stalemate are high enough, and Democrats (or the dovish party) have decisive majorities in both houses, we may expect Congress to marshal the political will to turn the tide.<sup>241</sup> But as long as members of Congress from the hawkish party sense that flexible presidential war powers may deliver greater benefits to their core constituencies at the expense of the political opposition, it will prove difficult to garner the requisite bicameral congressional majorities necessary to implement meaningful and enduring constraints on presidential war powers.

### 3. A Caveat: Republican Opposition to Wars by Democratic Presidents

One important caveat to this analysis is that the partisan response to military initiatives by Democratic presidents has hardly been one-sided with Republican legislators largely in support and Democrats against. Furthermore, Republican members of Congress have not always been solicitous of expansive presidential authority by Democratic presidents during wartime.

On the contrary, Republican members of Congress in the 1990s were often vocally critical of Clinton's deployments in Haiti and Somalia.<sup>242</sup> Senator Dole, who supported Clinton's engagements in the Balkan region, threatened to introduce legislation that would have forced the President to seek authoriza-

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241. There is some commentary that suggests that this dynamic occurs. See *id.* at 7 (arguing that Congress's role in foreign affairs is cyclical; it acquiesces to presidential encroachment initially, and then asserts itself again whenever executive usurpations seem to get out of hand).

242. See Michael R. Gordon, *Top U.S. Officials Outline Strategy for Haiti Invasion*, N.Y. TIMES, Sept. 14, 1994, at A1 ("Administration officials face strong opposition to an invasion from Republicans in Congress . . ."). For a discussion of the partisan nature of the congressional reaction to Clinton's Somalia deployment, see Christopher A. Ford, *War Powers as We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609, 683-88 (1995). There was also some Republican resistance to Clinton's Kosovo intervention, but the positions of the party leaders were more mixed and ambivalent. For instance, Dole was a keen supporter of Clinton's decision. See HOWELL & PEVEHOUSE, *supra* note 28, at 37. But see Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 641-42 n.53 (2010) (discussing Republican opposition to Clinton's unilateral use of force in Kosovo).

tion for the Haiti deployment in 1994.<sup>243</sup> And in the spring of 1993, Republican members of Congress voted overwhelmingly against a resolution authorizing the deployment of U.S. forces in Somalia.<sup>244</sup>

Or consider the response of Republican legislators to President Obama's 2011 decision to direct air strikes in Libya. The objective of the Libyan air strikes was to protect citizens during a popular uprising against the rule of Muammar Qadhafi.<sup>245</sup> But Congress never formally authorized the Libyan intervention, prompting criticism that President Obama had violated Congress's constitutional prerogative to "Declare War."<sup>246</sup> The Office of Legal Counsel subsequently issued a memorandum defending the legality of the President's action by invoking past historical practice of unilateral presidential uses of force.<sup>247</sup> And a separate opinion by the Legal Advisor in the State Department also argued that the U.S. role in Libya did not amount to "hostilities" for purposes of triggering the sixty-day requirement for congressional authorization under the "WPR."<sup>248</sup>

By the summer of 2011, a group of Republican legislators, including House Speaker John Boehner, criticized the legal opinion by the State Department as "not credible" and argued that the President might be violating the WPR.<sup>249</sup>

At first blush, the Republican response seems to undermine the partisan model's prediction that the party of the right will prefer presidential flexibility during wartime while the left will be against. However, the facts of the matter are not so clear cut. During Clinton's intervention in Kosovo, for instance, then Representative Boehner argued that invoking the WPR

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243. See, e.g., Neil A. Lewis, *Clinton Has Authority He Needs to Invade Haiti*, *Top Aides Say*, N.Y. TIMES, Sept. 12, 1994, at A1.

244. See Ford, *supra* note 242, at 684.

245. See Elisabeth Bumiller & David D. Kirkpatrick, *Airstrikes Pound Libyan Forces*, N.Y. TIMES, Mar. 24, 2011, at A15.

246. See Michael Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SEC. J.F., 2011, at 1, 18–19; Bruce Ackerman, *Obama's Unconstitutional War*, FOREIGN POL'Y, Mar. 24, 2011, available at [http://www.foreignpolicy.com/articles/2011/03/24/obama\\_s\\_unconstitutional\\_war](http://www.foreignpolicy.com/articles/2011/03/24/obama_s_unconstitutional_war).

247. See Memorandum from Caroline D. Krass, *supra* note 113, at 6.

248. *Questions for the Record Submitted to Legal Adviser Harold Hongju Koh by Sen. Richard G. Lugar Before the S. Comm. on Foreign Relations*, 112th Cong. (2011), available at <http://lugar.senate.gov/issues/foreign/libya/LugarKoh062811.pdf>.

249. See Charlie Savage & David E. Sanger, *Vote in Congress Reveals Discontent on Role in Libya*, N.Y. TIMES, June 28, 2011, at A10.

would be “likely to tie the hands of future presidents who will need the authority to lead in crises with less ambiguous implications for our national security.”<sup>250</sup> And in a March 23, 2011 letter to President Obama, Speaker Boehner raised some policy questions about the wisdom of the Libya intervention, but nonetheless did not raise any concerns about its constitutionality.<sup>251</sup>

To be sure, one may take these apparent inconsistencies as evidence of the sometimes calculating and myopic nature of modern partisan politics. However, there is a more charitable reading of this dynamic that admits of more in-depth analysis. In his March 2011 letter, Speaker Boehner seemed to be willing to acknowledge that President Obama had the authority to deploy troops without first seeking congressional authorization, which would be consistent with what a partisan model would predict.<sup>252</sup> Nonetheless, Boehner also sought to preserve Congress’s prerogative to invoke the statutory requirements of the WPR once the sixty-day clock had run and the deployment had started to become less popular. And while Boehner had previously expressed concerns about the wisdom of the WPR under the Clinton administration,<sup>253</sup> it would not be out of character for him as the Speaker of the House to invoke the WPR’s legal requirements provided that the statute had not already been struck down by a court. Finally, the congressional backlash against the President’s legal opinion on the Libyan intervention was hardly a one-sided partisan affair. For instance, the congressional contingent that filed suit challenging the legality of the Libya intervention was led by Dennis Kucinich, a liberal Democrat from Ohio.<sup>254</sup>

Setting aside questions of legality, however, Republican members of Congress largely opposed or seemed ambivalent about Obama’s Libyan air strikes,<sup>255</sup> as they were about Clin-

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250. See Sarah Parnass, *In War Powers Act Debate, Obama and Boehner Throw Past Quotes at One Another Revealing Inconsistencies*, ABC NEWS (June 16, 2011), <http://abcnews.go.com/blogs/politics/2011/06/in-war-powers-act-debate-obama-and-boehner-throw-past-quotes-at-one-another-revealing-inconsistencies/>.

251. See Letter from John A. Boehner, Speaker of the U.S. House of Representatives, to Barack Obama, President of the U.S. (Mar. 23, 2011), available at <http://journaloflaw.us/1%20Pub.%20L.%20Misc./1-2/JoL1-2,%20PLM1-2.pdf>.

252. See *id.*

253. See Parnass, *supra* note 250.

254. See *Kucinich v. Obama*, 821 F. Supp. 2d 110, 116 (D.D.C. 2011) (ruling that congressional plaintiffs lacked standing).

255. See David Eldridge, *Republicans Criticize Obama on Libya, Iraq*,

ton's interventions in Haiti and Somalia. This dynamic is consistent with the notion that left-leaning parties will tend to exhibit greater solicitude for humanitarian interventions than their right-leaning counterparts.<sup>256</sup> Nonetheless, the observation that Democrats (or left-leaning parties) might evince stronger preferences for a certain category of military conflicts does not imply that parties of the right do not benefit more than left-leaning parties from presidential flexibility in war powers. As discussed earlier, the durability of a partisan institutional arrangement actually depends on whether its policy effects are perceived as not being overwhelmingly skewed in favor of any specific political faction or party.<sup>257</sup> Thus, if all categories of military conflicts tended to benefit the interests of Republican or right-leaning constituencies, then any configuration of war powers is likely to be highly unstable across electoral periods.

In sum, while Republicans today may as a general matter prefer more presidential flexibility in war powers than Democrats, it is not necessarily the case that Republicans will consistently tend to side with the President during wartime, especially if different kinds of wars may also have distinct distributional effects.

#### IV. WOULD INCREASING JUDICIAL OVERSIGHT IN FOREIGN AFFAIRS HELP?

One might argue that one way to mitigate the perceived partisanship in areas like human rights and war powers is to increase judicial oversight in foreign relations. But there are many obstacles to impartial judicial decision making in this arena. Even though judges and academic commentators may not necessarily be susceptible to the same instrumental motivations as elected officials, they may very well be plagued by both

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WASH. TIMES, Oct. 23, 2011, <http://www.washingtontimes.com/news/2011/oct/23/republicans-criticize-obama-libya-iraq/?page=all>.

256. See RATHBUN, *supra* note 35, at 2–3 (arguing that left-leaning parties in Europe tend to favor humanitarian intervention, although for ideational reasons). Also, with respect to the Haiti intervention, some commentators remarked on the reversal of roles between the traditionally Hawkish Republicans and Dovish Democrats. See G. Thomas Goodnight & Kathryn M. Olson, *Shared Power, Foreign Policy, and Haiti, 1994: Public Memories of War and Race*, 9 RHETORIC & PUB. AFF. 601, 608 (2006) (“The Haiti intervention unsettled the grounds upon which the exposition of political positions could be developed and extended to the particular case . . . . Conservatives . . . are the new doves on Haiti.” (internal quotation marks omitted)).

257. See *supra* Part II.B.

the kinds of cognitive biases and motivated reasoning that largely track partisan judgments in the electoral arena.<sup>258</sup> Put simply, when certain constitutional constraints yield distributional policy consequences across political coalitions, it is reasonable to also expect judicial disagreement over the scope of such constraints.<sup>259</sup> In the war powers context, for example, the risks of agency slack and negative policy outcomes that could be generated by greater presidential flexibility might be more obvious to left-leaning than right-leaning judges.<sup>260</sup> More broadly, a judge's perception of the dangers of special interest capture under any particular allocation of constitutional authority is likely to be different depending on how close the preferences of the relevant interest group to those of the particular judge.

Take, for instance, the positions often adopted by leading commentators and some judges over the plausible source of agency costs in the context of adopting and ratifying human

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258. Dan Kahan emphasizes that a cultural cognition approach of judging may be consistent with the evidence embraced by the social science view of judges as deliberately pushing purely partisan or ideological objectives. See Kahan, "Ideology in" or "Cultural Cognition of" Judging, *supra* note 19, at 413–16. As Kahan explains:

The phenomenon of cultural cognition refers to the tendency of individuals to conform their views about risks and benefits of putatively dangerous activities to their cultural evaluations of those activities. Psychologically speaking, it's much easier to believe that behavior one finds noble is also socially beneficial and behavior one finds base is dangerous rather than vice versa.

*Id.* at 417–18. But of course, there is a rich literature in judicial politics that explores the role of ideology in judicial decision making. See, e.g., EPSTEIN & KNIGHT, *supra* note 17, at 95–111. But the claim here is that even if judges may sometimes act as policy motivated actors, we can still assume that they may not have the same incentives to advance the electoral fortunes of a political party as elected officials in the political branches. Indeed, some of the literature has pointed to distinctly legal factors that sometimes drive judicial outcomes. See generally Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 208 (2009) ("Empirical judicial scholars have not yet proven whether the overwhelming bulk of decisionmaking for courts can be collapsed down to one dimension of liberalism versus conservatism without losing much explanatory power—as it can be for Congress."); Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996) (modeling decision making as a product of a substantive legal issue and federalism, and providing initial empirical evidence of some cases dividing Justices by these two dimensions).

259. See Kahan, "Ideology in" or "Cultural Cognition of" Judging, *supra* note 19, at 418 ("Research . . . shows that cultural cognition also creates conflict over legally consequential facts.").

260. See *supra* notes 228–48, 234–56, 258 and accompanying text.

rights treaties or applying customary international law norms. Generally, right-leaning commentators and judges tend to trace the source of agency costs to left-leaning groups and legal academics who seek to exploit their elite status and influence over federal judges to push for progressive ideological objectives disfavored by a majority.<sup>261</sup> In other words, having failed to convince elected officials about the merits of their position, the assumption is that the progressive groups and their elite cohorts in the legal academy have turned to courts to overcome the obstacles imposed by federalism and the separation of powers.

But consider a radically different perspective, fashionable among progressive legal academics and historians, which argues that the postwar movement against human rights treaties was primarily a creation of southern segregationists who were concerned that such treaties would be used to dismantle racial discrimination.<sup>262</sup> Or consider the view by some social-science commentators, such as Andrew Moravcsik, that the ratification of human right treaties in the United States has been largely defeated by conservative minorities who have wielded the fragmentation of domestic authority to their advantage.<sup>263</sup>

Central to both sets of claims is the normative assumption

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261. See Bolton, *supra* note 100, at 205–06 (describing a division between an elite class of academics and media professionals who favor international law and global governance and a majority of Americans who are against). Indeed, Justice Scalia probably echoed the view of many conservative commentators when he recently declared in *Sosa v. Alvarez-Machain*:

The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates . . . The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty . . . could be judicially nullified because of the disapproving views of foreigners.

542 U.S. 692, 749–50 (2004) (Scalia J. concurring) (emphasis in original). Commentators have also observed the risk that courts will cherry pick among norms of international law that tend to confirm the outcome they would like to reach for other reasons. See Eugene Kontorovich, *Disrespecting the "Opinions of Mankind,"* 8 GREEN BAG 2d 261, 261–62 (2005).

262. See Henkin, *supra* note 93, 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) (emphasizing conservative opposition to racial integration).

263. See Moravcsik, *supra* note 101, at 150 (describing conservative opposition to human rights treaties in the United States).

that our constitutional structure ought to reduce the capture of the political process by narrow interest groups or temporary majorities.<sup>264</sup> Ironically, to a certain degree, the theoretical premises relied on by both camps to illustrate the agency cost problem are both defensible. According to one set of assumptions, favored by conservatives, the fragmentation of authority or the existence of multiple veto points in the human rights treaty and customary international law context may decrease the likelihood that the policy-making process will be hijacked by any one interest group or a temporary majority.<sup>265</sup> However, under another set of assumptions, favored by progressives, the proliferation of veto points increases the leverage of electoral minorities and of sub-national political actors whose preferences may be out of tune with national majorities.<sup>266</sup>

However, adherents of either side may sometimes make overbroad empirical claims about the likely preferences of the median voter, the purported influence of narrow interest groups, and whether any specific decision to ratify (or not ratify) a human rights treaty represents a mutually beneficial social outcome. Take, for instance, the claim made by Frank Holman, the former American Bar Association (ABA) president and intellectual architect of the Bricker Amendment move-

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264. See, e.g., Bolton, *supra* note 100, at 205–06 (stating that an alliance of internationalist law professors, media professionals, and members of human rights and environmental groups, have promoted global governance at the expense of the American people); Moravcsik, *supra* note 263, at 146, 149–50 (arguing that American politicians and citizens recognize the importance of spreading civil liberties abroad, yet our constitutional structure allows a small but powerful minority to prevent enforcement of international human rights norms at home).

265. See JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 10–21 (1998) (emphasizing the need for stronger constitutional safeguards in the creation of international commitments); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1233–46 (2007) (discussing the democratic deficit of certain kinds of international law, including customary international law). Of course, there are scholars who think that judicial reliance on human rights treaties despite the absence of implementing legislation giving domestic legal effect to the treaties can be benign. See, e.g., Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 648 (2007) (discussing the benefit to individual rights resulting from the trend of national courts to recognize international human rights laws).

266. See Rui J.P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321, 322 (2002) (“Because of the multiplicity of veto points in the legislative process under a separation of powers system, new laws are extremely difficult to pass, for a minority can block new legislation.”).

ment, that most Americans supported the Amendment and that those who opposed the Amendment were only narrow ideological groups sympathetic to socialist ideals as well as proponents of the so-called “World Government” movement.<sup>267</sup> But there is little or no survey evidence that would support Holman’s views about what a majority of Americans thought about human rights treaties.<sup>268</sup> And there is some basis to think that postwar federal judges were not immune to such partisan rationalizations; indeed, at least one federal judge of that era—Judge Florence Allen of the Sixth Circuit—wrote an entire book that seemed to be sympathetic to Holman’s interest group capture account.<sup>269</sup>

By contrast, it is now close to received wisdom among progressive scholars that the Bricker Amendment movement was primarily driven by segregationist conservatives.<sup>270</sup> However, this progressive characterization is belied by the reality that sixty-four Senators (out of a total of ninety-six) acted as co-sponsors of the 1953 version of the Amendment (exactly the two-thirds majority required for ratification), and of that number only thirteen were southern Democrats.<sup>271</sup> On the other hand, an overwhelming majority of Republican Senators (forty-five out of forty-eight) were co-sponsors of the 1953 version of

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267. See FRANK E. HOLMAN, *THE INCREASING NEED FOR A CONSTITUTIONAL AMENDMENT ON TREATIES AND EXECUTIVE AGREEMENTS* 17–19 (1955).

268. Indeed, on October 6, 1953, Gallup poll that was introduced into the Senate record showed that 81% of Americans polled had never heard of the amendment; of those who had, 9% were in favor, 7% opposed, and 3% had no opinion. See *Gallup Poll Finds Few Voters Show Interest in Bricker Amendment*, SPARTANBURG HERALD, Oct. 13, 1953, at 10.

269. To be sure, Judge Allen’s account adopted a much more judicious and less partisan tone than Holman’s writings, but her ultimate concern that treaties could be used by narrow interest groups to bypass domestic constitutional constraints echoed themes similar to that of Holman. See FLORENCE ELLINWOOD ALLEN, *THE TREATY AS AN INSTRUMENT OF LEGISLATION* (1952).

270. See Henkin, *supra* note 93, at 348.

271. See Schubert, *supra* note 82, at 266. 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, but who otherwise exhibited little or no interest in the postwar civil rights movement. See RICHARD O. DAVIES, *DEFENDER OF THE OLD GUARD: JOHN BRICKER AND AMERICAN POLITICS*, at X–XI, 32–33 (1993). 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 who in 1946 had sought to propose legislation that would effectively abolish racial discrimination in the workplace—about twenty years before the Civil Rights Act of 1964. See David Freeman Engstrom, *The Taft Proposal of 1946 & the (Non-) Making of American Fair Employment Law*, 9 GREEN BAG 2d 181, 182 (2006).

the Amendment and most of these Republican Senators were non-Southerners.<sup>272</sup> In addition, the interest groups that testified in support of the Amendment ranged from the United States Chamber of Commerce, the American Medical Association, the leadership of the American Bar Association, and the National Economic Council as well as ideological/patriotic groups like the Daughters of the American Revolution.<sup>273</sup> The distribution of support and opposition to the various versions of the Amendment transcended traditional geographical or ideological lines on issues like segregation,<sup>274</sup> with most Republican Senators from all regions in the country in favor and a significant majority of Democratic Senators against.

In sum, the strong emphasis on either socialist sympathizers or southern segregationist influences in the interest group account of the Bricker Amendment is somewhat misleading. At bottom, the notion that conflicts over human rights treaties in the United States can be best explained by public choice accounts of interest group capture rests on suspect premises. The politics underlying international human rights treaty ratification is not necessarily characterized by diffuse costs borne by a majority with concentrated benefits accruing largely to either conservative or liberal special interest groups. On the contrary, there is usually intense lobbying by ideological groups aligned with the major parties on both sides of the issue, making dependence on *interest group capture* theories particularly problematic.

Thus, one needs to be careful in suggesting that judicial intervention may be the solution to the risk of interest group capture of the institutional framework for foreign affairs. Partisan groups—core constituents affiliated with either of the major political parties—may play a bigger role than undifferentiated and narrow interest groups in structuring political conflict in this arena. But there is no reason to think that judges will be less susceptible to the kinds of cognitive and political biases

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272. See Schubert, *supra* note 82, at 266.

273. See *supra* notes 78–101 and accompanying text.

274. 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 partisan Republican proposal as motivated primarily by segregationist impulses. See generally EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* (1989) (theorizing about causes and consequences of postwar partisan realignment on race issues).

that influence such groups, especially when either an expansive or narrow interpretation of the foreign affairs powers is likely to generate policy outcomes that fall along a left-right spectrum.

### CONCLUSION

The benign account of the allocation of constitutional authority between the President and Congress is captured by this passage from Cass Sunstein's study of post New Deal constitutionalism:

The distribution of national powers was designed to check unenlightened or self-interested representatives. Above all, it diffused governmental power, reducing the likelihood that any branch would be able to use its power against all or parts of the citizenry. The system of checks and balances allowed each branch—armed with its own ambitions—to attempt to counter the other.<sup>275</sup>

These kinds of explanations assume that structural constitutional arrangements, such as the allocation of foreign affairs powers between the political branches, will serve to enhance the national welfare. Furthermore, such explanations tend to privilege the notion that such arrangements will be stable and enduring because they were originally negotiated by a founding generation with the goal of obviating the self-serving or narrow interests of political factions. If any constitutional change occurs incrementally without formal amendment, such as some have argued occurred after WWII, it is assumed to be due to the institutional empire building ambitions of the political branches or pressures by populist movements.<sup>276</sup>

By contrast, this Article has argued that the scope of the Foreign Affairs Constitution has often been the source of significant contention by partisan groups with narrow and conflicting political objectives. In this picture, a hawkish group may seek to advance an expansive vision of the Foreign Affairs Constitution largely because it results in policy outcomes that empower its supporters at the expense of the political opposition, even if such a vision may ultimately harm the national interest. On the other hand, a dovish coalition that is under threat of being marginalized will then resist the hawks' constitutional vision, even if such a vision may benefit the national interest by

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275. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 433 (1987).

276. See Ackerman & Golove, *supra* note 55, at 802–03 (referring to populist postwar constitutional movement that changed the understanding of the treaty clause).

providing the policy flexibility to meet unpredictable security threats. At bottom, such partisan divisions undermine the conventional assumption that one can discern an unbiased vision of the national interest in foreign affairs. For while actors across the political spectrum may agree in principle that promoting international peace or resisting foreign aggression are desirable objectives, they are likely to disagree as to the institutional means for achieving these objectives, especially when alternative means have significant distributional implications for partisan constituencies.