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## Partisan Conflicts Over Presidential Authority

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## PARTISAN CONFLICTS OVER PRESIDENTIAL AUTHORITY

JIDE NZELIBE\*

### ABSTRACT

“In politics, people never try to bind themselves, only to bind others.”<sup>1</sup>

*A prevailing view in the legal and political science literature assumes that power holders seek to expand or contract their constitutional authority based on incentives that are intrinsic to the logic of the institutional offices they occupy. For instance, it is generally assumed that Presidents are empire builders who will almost always prefer maximum flexibility in shaping their policy objectives, whereas members of Congress may sometimes shirk their institutional prerogatives because of electoral incentives or collective action problems. A similar institutional logic underpins the view that federal courts will often seek to expand their interpretive authority in constitutional controversies at the expense of the political branches. In this Essay, I sketch out the possibility that power holders may often seek to expand or contract the scope of presidential authority based on whether it advances partisan rather than institutional objectives. More specifically, when the constitutional allocation of presidential authority is unbundled along discrete issue dimensions, partisan power holders may have an incentive to stake out a vision of presidential authority that increases the chance of carrying out their favored issues and that makes it more difficult to carry out issues that favor the political opposition. And as the parties' electoral bases and elites become more polarized in terms of ideology and presiden-*

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\* Professor of Law, Northwestern University Law School. I am grateful to Tonja Jacobi, Andrew Koppelman, John McGinnis, Ronald Allen, Nancy Staudt, Jay Koehler, and Lee Epstein for comments on an earlier version of this paper. I also benefited from comments by Neal Devins, John Yoo, Gillian Metzger, and other participants at the 2011 William & Mary School of Law's Symposium, *Constitutional Transformations: The State, the Citizen, and the Changing Role of Government*.

1. JON ELSTER, ULYSSES UNBOUND, at xx (2000).

*tial voting patterns, such partisan divisions regarding the allocation of presidential authority are likely to become more pronounced. This Essay illustrates this dynamic by examining the conflicting positions on presidential power adopted by the administrations of President Barack Obama and his predecessors on issues like human rights, war powers, and executive branch oversight of the administrative state.*

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## INTRODUCTION

This Essay argues that politicians may sometimes strategically manipulate the contours of the President's constitutional authority in order to achieve partisan objectives. At first glance, the notion that societal groups may ever stake out conflicting visions of presidential authority seems puzzling. After all, it is difficult to envision how any view of presidential authority can systematically confer one-sided benefits on any partisan or interest group, because presumably each group will sometimes lose and gain from any particular constraint on presidential authority. Thus, given the implicit veil of ignorance that underpins the separation of powers, one may think that the incentives of judges and elected officials to embrace visions of presidential authority that advance the specific objectives of any political party will be blunted. Unsurprisingly, much of the contemporary scholarship on presidential power has ignored partisan factors and has instead focused on how incentives inherent in the institutional nature of the various branches of government shape preferences for expansive presidential authority.<sup>2</sup>

This Essay suggests a contrary view: if certain conditions hold, partisan power holders can often calculate how an expansive or narrow view of presidential authority over discrete issues is likely to affect their electoral and ideological objectives. More specifically, staking out partisan positions on the allocation of presidential authority is likely to be rational when such authority can be unbundled on an issue-by-issue basis.<sup>3</sup> Under these conditions, parties are likely to favor a vision of presidential authority that will enable them to carry out those issues in which they have an electoral advantage over the opposition, but that make it more difficult for the opposition to carry out its favored issues. For instance, when the presidential authority to negotiate human rights treaties can be effectively unbundled from the war-making power, Republicans may prefer more constraints on the President's treaty-making authority in human rights, but less on his war-making

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2. See *infra* notes 12-22 and accompanying text.

3. See *infra* text accompanying notes 48-54.

authority.<sup>4</sup> By contrast, Democrats or left-leaning constituencies will likely adopt the opposite set of preferences regarding presidential authority on war and human rights. Similarly, Democratic administrations may be more willing to indulge a greater role for courts in adjudicating human rights controversies even at the expense of the President's interpretive discretion over international law, whereas Republican administrations are more likely to view such adjudications as interfering with the President's flexibility to conduct foreign affairs.<sup>5</sup>

Finally, contrary to the conventional wisdom, this account assumes that these partisan differences over the scope of presidential authority may often persist regardless of which party occupies the White House. For the most part, rational choice accounts that emphasize the primacy of institutional preferences assume that members of Congress will tend to support expansive authority of a copartisan President; otherwise, they will tend to act as a force of opposition.<sup>6</sup> Thus, as long as the President's party enjoys a majority in both houses of Congress, the received wisdom assumes that he will enjoy greater flexibility to pursue his policy agenda. But in the postwar era, illustrations abound when partisan goals embraced by members of Congress conflict with the institutional prerogatives of a copartisan in the White House.<sup>7</sup> It was Eisenhower's fellow Republicans in the Senate, for instance, who proved to be the biggest thorn in his side regarding the postwar controversies over the scope of the President's authority to negotiate international

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4. See *infra* notes 50-54 and accompanying text.

5. Take, for instance, disputes under the Alien Tort Statute (ATS), "a long dormant founding era statute that was judicially revived in the late 1970s to permit foreign plaintiffs to bring claims for egregious human rights abuses committed by foreign governments." See Jide Nzelibe, *Desperately Seeking Political Cover: The Partisan Logic of Alien Tort Statute Litigation* 1 (Northwestern Law Searle Ctr. on Law, Regulation, and Econ. Growth, Working Paper No. 009, 2010), available at [http://www.law.northwestern.edu/searlecenter/papers/Nzelibe\\_Alien\\_Tort\\_Statute.pdf](http://www.law.northwestern.edu/searlecenter/papers/Nzelibe_Alien_Tort_Statute.pdf). Democratic administrations from Carter to Obama have endorsed judicial efforts to broadly adjudicate ATS claims consistent with American foreign policy objectives, whereas Republican administrations have argued that ATS adjudication interferes with the President's prerogative in foreign affairs. *Id.* at 1-2; see also Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 *BROOK. J. INT'L L.* 773, 801-08 (2008) (criticizing the Bush administration for its opposition to the adjudication of ATS claims).

6. See *infra* notes 17-19 and accompanying text.

7. See *infra* notes 73-76 and accompanying text.

treaties.<sup>8</sup> Similar logic also explains why Clinton, a Democrat, found a much more hospitable reception from the Republican opposition in Congress with respect to his international trade authority, but often faced resistance—if not outright hostility—from congressional members of his own party.<sup>9</sup> Finally, it was Newt Gingrich, the Republican Speaker of the House, who attempted to summon his fellow Republican colleagues to give the Democrat Clinton more war-making powers.<sup>10</sup> In all these examples, the conventional wisdom that copartisans in Congress are more likely to show solidarity for their President's expansive use of authority than the political opposition is contradicted, yet the literature does very little to help us understand these anomalies.

To be clear, this Essay is neither claiming that partisan preferences over presidential authority will usually trump empire-building considerations nor is it suggesting that such strategic partisan factors pervade our constitutional politics. Rather, the Essay's objective is much more modest. It simply suggests that such partisan considerations often prove to be frequent enough to be of theoretical interest. And more importantly, if the polarization of the parties' respective electoral bases continues along the same upward trajectory that it has since the Nixon administration,<sup>11</sup> it is very likely that the partisan divisions over the allocation of presidential authority will become exacerbated. This Essay begins with a preliminary examination of the institutional literature that attempts to explain interbranch conflicts over constitutional authority. It then explores the conditions under which political parties are likely to develop conflicting preferences over presidential authority. It concludes with some examples that illustrate this partisan dynamic from the postwar era.

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8. See *infra* text accompanying note 75.

9. See Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 NW. U. L. REV. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1690735](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690735).

10. See *infra* notes 91-95 and accompanying text.

11. See *infra* note 65 and accompanying text.

## I. INSTITUTIONAL EXPLANATIONS FOR EXPANSION OF PRESIDENTIAL AUTHORITY

There is an established rational choice literature that attempts to explain changes in the allocation of constitutional authority over time among the branches of government. But hardly any of this literature assumes that political parties play a key role in these developments. Presumably, such theories assume that uncertainty about how the separation of powers affects discrete policy outcomes makes it unlikely that parties can have coherent preferences over the scope of presidential power. Rather, much of the literature assumes that Presidents often have intrinsic institutional reasons for expanding their authority, but that the combination of frequent elections, narrow constituencies, and collective action problems often make it unlikely that members of Congress will have an incentive to protect or expand their constitutional prerogatives.<sup>12</sup>

For instance, Harold Koh has suggested that in the contemporary era the President always wins interbranch conflicts over foreign affairs because he seizes the initiative and that Congress is unable to stop him because of poor and inadequate legislative tools.<sup>13</sup> Similarly, Aaron Wildavsky observed thirty-five years ago that the President tends to dominate foreign policy not only because of the unique nature of his office but also because “[his] potential opponents are weak, divided, or believe that they should not control foreign policy.”<sup>14</sup> More recently, Daryl Levinson has opined:

Because 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. Presidents are also less constrained than members of Congress by the need to stand

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12. For a good overview of the notion that competition between the political branches may lead to a desirable balance of powers, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950-51 (2005).

13. See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1291-305 (1988).

14. Aaron Wildavsky, *The Two Presidencies*, in PERSPECTIVES ON THE PRESIDENCY 448, 452 (Aaron Wildavsky ed., 1975).

repeatedly for reelection, leaving them considerable freedom to pursue their own agendas.<sup>15</sup>

At least one commentator has connected the growth of presidential unilateralism to the increasing partisan polarization of Congress since the Watergate era.<sup>16</sup> Finally, Professors Howell and Moe have concluded: “[P]residents have strong incentives to push this [constitutional] ambiguity relentlessly ... to expand their own powers, and ... for reasons rooted in the nature of their institutions, neither Congress nor the courts are likely to stop them.”<sup>17</sup>

To be clear, partisanship is not wholly irrelevant to such institutional accounts, but it often plays a more subtle and indirect role. For instance, these theories often assume that copartisan members of Congress will prefer to expand the policy discretion of their President during united government, but will prefer to constrain such discretion during periods of divided government.<sup>18</sup> Here, because the President and his copartisans in Congress share common ideological beliefs and often have their electoral fortunes linked, it is assumed that the President’s copartisans in Congress stand to benefit from greater presidential discretion, whereas the opposition has every incentive to oppose expansive presidential authority.<sup>19</sup> The implication of this line of reasoning for normative institutional design is fairly significant. For instance, Daryl Levinson and Richard Pildes have recently suggested that partisan competition stemming from divided government ought to be treated as a substitute for Madison’s vision of interbranch competition,<sup>20</sup> especially because Congress often lacks much of an institutional incentive to act as a bulwark against growing presidential authority.

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15. Levinson, *supra* note 12, at 956 (citation omitted); *see also* Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1000 (2006) (observing that electoral incentives of members of Congress often conflict with institutional concerns).

16. *See* 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, 407-10 (2009).

17. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 134-35 (1999).

18. *See, e.g.*, WILLIAM G. HOWELL & JON PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* 37 (2007).

19. *See id.* at 37-38.

20. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2339, 2380 (2006).

The problem, I suggest below, is that these institutional accounts do not capture the full range of pressures that influence the preferences of elected officials for expanding or contracting presidential authority. Although Presidents and their copartisans in Congress may be pushed towards an expansive vision of presidential authority by a shared desire to maintain maximum policy flexibility, they are often pulled by their partisan commitments to try to embrace constraints that limit the President's policy flexibility on those issues that may be owned by the political opposition.<sup>21</sup> Indeed, both electoral and ideological incentives may explain why politicians are sometimes willing to commit to institutional arrangements they hope will constrain their successors even if it comes at the expense of maintaining policy flexibility. To be clear, some constitutional scholars have recognized that societal actors may try to usher in new constitutional orders for partisan objectives, but these scholars have focused largely on tactics like stacking the judiciary, exerting greater influence over administrative agencies, or establishing policy agendas in a way that demobilizes political opponents.<sup>22</sup> However, these scholars have neither focused specifically on the separation of powers nor examined the interaction between partisan issue ownership and constitutional structure, which is a crucial aspect of the approach this Essay advances.

## II. THE LOGIC OF PARTISAN PREFERENCES FOR PRESIDENTIAL AUTHORITY

The framework developed here suggests that different visions of presidential authority can shape policy outcomes in a distributive manner, and thus political parties have an incentive to rank alternative visions of presidential authority depending on how they advance future ideological and electoral objectives. This analysis builds upon well-established insights in the rational choice literature that recognize that political institutions often influence policy

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21. See *infra* notes 48-50 and accompanying text.

22. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067-69, 1076 (2001) (focusing on partisan entrenchment through the courts); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 530 (2004) (describing constitutional hardball as involving administrative entrenchment and policy agenda setting in addition to stacking the courts).

outcomes in a way that favors certain societal groups over others.<sup>23</sup> Thus, there will often be disagreements among societal groups about institutional choices when there are also disagreements about what policy outcomes such institutions are likely to produce. To be clear, the relationship between political institutions and policy outcomes is quite complex and the direction of cause and effect is unlikely to be straightforward. On the one hand, political institutions are often designed with a view of either channeling or diffusing distributive conflict.<sup>24</sup> On the other hand, those institutions might themselves be the product of distributive political conflict among various societal groups.<sup>25</sup> As William Riker pointed out three decades ago, “institutions are no more than rules and rules are themselves the product of social decisions.”<sup>26</sup> Thus, to the extent that the allocation of presidential authority may influence policy outcomes in a distributive manner, we would expect that different social groups may also stake out conflicting visions of presidential authority.

But the observation that power politics pervades institutional design does not necessarily tell us whether formal institutions, such as the allocation of presidential authority, can ever be harnessed to serve purely partisan or distributive political objectives. Political scientists and lawyers have tended to treat structural constitutional arrangements as stable governance platforms which broadly command the commitment of all contending political factions.<sup>27</sup> In this picture, all political conflict is assumed to take place within the framework of these widely accepted ground rules.<sup>28</sup> Thus, it is

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23. JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 19 (1992) (arguing that most social institutions are not “best explained as a Pareto-superior response to collective goals or benefits but, rather, as a by-product of conflicts over distributional gains”).

24. *Id.* at 123.

25. *Id.* at 131-32 (noting that institutional rules arise from bargaining between individuals with asymmetric resources).

26. William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 444-45 (1980).

27. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 682 (2011) (“All of these accounts are premised on the assumption that structures and processes of political decisionmaking—democratic voting rules, independent courts, federalism, and the like—tend to be relatively resistant to political revision or override by opponents of the policies these structures and processes generate.”).

28. In the normative legal literature, these delineations of authority can be guarded by the courts. See MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 99-101 (1995)

unsurprising that Jack Knight, one of the pioneers of the study of the role of power in institutional structure, focuses much of his attention on the distributive logic of informal political institutions but largely sidesteps the constitutional structures that are the foundation of the democratic state itself.<sup>29</sup> The reluctance of political scientists to address the role of partisanship in foundational political institutions is understandable. After all, arrangements like the separation of powers are supposed to be meta-rules that are both negotiated and interpreted behind a veil of ignorance.<sup>30</sup>

Under certain conditions, however, these institutional arrangements may be more susceptible to manipulation and revision by partisan political actors than has often been assumed. At bottom, institutional arrangements, like the separation of powers, simply spell out the relevant number of veto players, and that number determines the ease to which the political system can effect policy change.<sup>31</sup> Thus, if politicians are able to manipulate the number and configuration of veto players, they may be able to influence policy flexibility. All else equal, it is plausible to assume that politicians will prefer more veto players, and hence less policy flexibility, with respect to the initiation of policy issues that belong to the political opposition but fewer veto players, and hence more policy flexibility, with respect to initiating policy issues they own.<sup>32</sup>

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("[T]he Court's role in separation-of-powers cases is to be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers.")

29. See KNIGHT, *supra* note 23, at 19-20.

30. Louise A. Halper, *Parables of Exchange: Foundations of Public Choice Theory and the Market Formalism of James Buchanan*, 2 CORNELL J.L. & PUB. POL'Y 229, 290 (1993).

31. For a thorough discussion of how the number of veto players influences policy choices, see GEORGE TSEBELIS, VETO PLAYERS 19-20 (2002). Veto players are the actors—individual politicians or political parties—who can effectively block policy proposals that alter the status quo. *Id.* Subsequent work has tried to show how veto players might help governments initiate public-regarding policies. See Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong To Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 56-57 (2001); Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 645-47 (2010); Torsten Persson et al., *Separation of Powers and Political Accountability*, 112 Q.J. ECON. 1163, 1166 (1997); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 300 (1996) (noting that the Constitution makes Congress and the President the only veto players in regard to the use of war powers).

32. One may think it likely that these preferences will be reversed when it comes to the repeal of such policy issues. Thus, we should expect politicians to prefer more veto points, and

To be sure, politicians who try to manipulate the allocation of presidential authority to advance explicitly partisan objectives face significant obstacles. They may lack enough information about the relevant strategic dynamic, such as the future distribution of powers, what their likely future payoffs may be from alternative allocations of presidential authority, and the stability of the preferences of political actors and interest groups. All these factors suggest that instrumental efforts to shape the expansion or contraction of presidential authority for partisan gain should be relatively rare.

But the framework developed here suggests the contrary. Below I sketch some very plausible empirical assumptions that undermine the notion that the veil of ignorance over the allocation of presidential authority will always be thick.

First, political parties tend to compete orthogonally over different issues—each party tries to convince voters that the issues they own are the most salient.<sup>33</sup> Moreover, the respective advantage that each party has over discrete issues tends to be relatively stable across multiple electoral periods.<sup>34</sup> Second, each party has an incentive to adopt institutional arrangements that highlight or emphasize those issues that it owns and deemphasize those owned by the political opposition. Third, the constitutional allocation of presidential authority is sufficiently opaque and incomplete that elected officials have some discretion in influencing or altering the scope of such authority.<sup>35</sup> Fourth, presidential authority can often be unbundled on an issue-by-issue basis such that parties can adopt preferences over the scope of that authority depending on the underlying issue.<sup>36</sup>

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hence more policy stability, once the issues they own have been put in place but then prefer less veto points, and hence more policy flexibility, in repealing policy issues owned by the political opposition. However, undoing extant policy initiatives, or legislation, may in practice prove to be much more difficult than initiating such policies in the first place. See ELSTER, *supra* note 1, at 148 (“The people are penetrated by the benefits they have been promised; they will not let themselves be de-penetrated.”). Political parties may have strong preferences about institutional mechanisms when initiating policies, but then rely more on societal forces to entrench such policies once they have been passed.

33. See John R. Petrocik et al., *Issue Ownership and Presidential Campaigning, 1952-2000*, 118 POL. SCI. Q. 599, 601-02 (2003).

34. *Id.* at 603.

35. Moe & Howell, *supra* note 17, at 135.

36. See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386-87 (2008) (noting the possibility of vesting power over different issues in separate executives).

Fifth, although partisans will strategically promote changes in the scope of presidential authority for electoral or ideological gain, such changes themselves can eventually devolve into stable institutional arrangements that persist over multiple electoral periods.

The first two assumptions underpin the “issue ownership” theory of partisan competition in which parties try to shape the relevant agenda of a political contest in a way that favors those issues in which they have an electoral advantage.<sup>37</sup> As one prominent political scientist observed, “[P]arties do not debate positions on a single issue, but try instead to make end runs around each other on different issues.”<sup>38</sup> According to this framework, parties cultivate issue-specific reputations and are thus perceived by voters as being more competent at reaching certain policy problems. In the United States, for instance, Democrats have cultivated a better reputation for handling social welfare and health issues, whereas Republicans seem to have an electoral advantage in national security, drugs, and crime.<sup>39</sup> As such, each party has an incentive to focus their campaigns on those issues in which they are perceived to have a leg up over the opposition.

Furthermore, issue ownership tendencies may be exacerbated by the reality that Democrats and Republicans are likely to have separate winning coalitions that have conflicting priorities over which issues should be on the electoral agenda.<sup>40</sup> Although they may seek as much as possible to address the issues favored by a broad coalition of voters, politicians will be particularly mindful of the preferences of those core supporters who constitute the largest portion of their winning coalition.<sup>41</sup> In this picture, the base of the Republican party is more likely to be composed of interest groups who favor free trade, law and order, and possess hawkish national

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37. See Éric Bélanger & Bonnie M. Meguid, *Issue Salience, Issue Ownership, and Issue-Based Vote Choice*, 27 ELECTORAL STUD. 477, 478 (2008); Petrocik et al., *supra* note 33, at 601-02.

38. William H. Riker, *Introduction* to AGENDA FORMATION 1, 4 (William H. Riker ed., 1993).

39. See Petrocik et al., *supra* note 33, at 608-09.

40. William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 308-12 (2008).

41. See Bruce Bueno de Mesquita et al., *Political Institutions, Policy Choice and the Survival of Leaders*, 32 BRIT. J. POL. SCI. 559, 561-62 (2002) (spelling out a selectorate theory of winning coalitions).

security preferences.<sup>42</sup> By contrast, Democrats are more likely to have a winning coalition composed of interest groups that are more concerned with social welfare issues, access to health care, economic justice, and a preference for multilateral solutions to global policy problems.<sup>43</sup> As a result, Democratic governments probably will be more reluctant to adopt the kinds of policies disfavored by their core supporters, such as aggressive executive unilateralism in national security, whereas Republicans will be wary of pushing left-leaning issues such as health care reform.

This “issue ownership” approach contrasts with a Downsian model of partisan competition, which assumes that parties tend to stake out left-right positions on the same issue.<sup>44</sup> Building on the notion that “parties formulate policies to win elections,” Downs predicted that party platforms are likely to converge towards the policy preferences of the median voter.<sup>45</sup> Although insightful as a matter of theory, the Downsian model does not sufficiently account for the empirical reality that parties consistently tend to emphasize distinct issues as well as stake out polarized positions on the same issue in their platforms.<sup>46</sup> Moreover, the issues owned by each party tend to be relatively durable and trespassing on another party’s issue might be politically risky.<sup>47</sup>

In such a framework of political competition, partisan groups may be able to stake out preferences for presidential authority that increase the opportunities to carry out their issues and minimize opportunities to carry out those issues owned by the opposition.

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42. Petrocik et al., *supra* note 33, at 603.

43. *See id.* at 608-09; *see also* Danny Hayes, *Candidate Qualities Through a Partisan Lens: A Theory of Trait Ownership*, 49 AM. J. POL. SCI. 908, 908 (2005) (“The American public views Republicans as stronger leaders and more moral, while Democrats hold advantages on compassion and empathy.”).

44. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 116-19 (1957) (discussing a partisan competition model).

45. *See id.* at 28, 114-17.

46. *See* Petrocik et al., *supra* note 33, at 608-09.

47. *See id.* at 603 (“Constituency pressures within and between the parties, constant party rhetoric, and recurring policy initiatives reinforce issue reputations and keep them intact over long periods of time.”); Helmut Norpoth & Bruce Buchanan, *Wanted: The Education President: Issue Trespassing by Political Candidates*, 56 PUB. OPINION Q. 87, 98 (1992) (“[An issue trespassing] strategy runs the risk of raising issues where familiar party images strongly favor the opposing party. At best, voters may simply ignore the issue; at worst, they may vote for the opponent.”).

However, certain conditions make it more likely that political parties will be able to successfully link visions of presidential authority with distributive partisan objectives. Specifically, if presidential authority can be unbundled across distinct issues in which parties have conflicting preferences, politicians may be able to predict how specific constraints on presidential authority may affect their favored issues.<sup>48</sup> Hypothetically, if the presidential authority to enforce social welfare policies can be unbundled from the criminal enforcement authority, then parties can stake out preferences for enlarging or contracting presidential authority depending on whether they own the underlying issue being unbundled. Thus, in this example, Democrats might seek to expand the President's social welfare enforcement authority while weakening the criminal enforcement authority, whereas Republicans might have the opposite set of institutional preferences.<sup>49</sup> All else equal, we should expect partisans who stand to lose if a specific issue dominates the electoral agenda to have an incentive to push for multiple veto points or more constraints on presidential authority over that issue, whereas proponents will push for more presidential discretion.

One obvious caveat is that in many circumstances there will be little or no opportunity for politicians to link any specific vision of presidential authority to an unbundled issue. There is a sufficient range of policy domains, however, in which such linking may be possible, either because the Constitution explicitly carves out different institutional pathways to achieving policy objectives or because there is sufficient ambiguity in the constitutional text such that politicians have some leeway to shape constitutional doctrine to suit their policy goals.<sup>50</sup> Consider the constitutional allocation of

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48. Indeed, the notion that institutions might constitute a bundle of multiple policy choices is given as one of the reasons why such institutions might become entrenched. See Levinson, *supra* note 27, at 694-95 ("Decisionmaking institutions effectively 'bundle' policies in the sense that a given institution will generate—or, in conjunction with a number of other such institutions, causally contribute to generating—many different policy outcomes. These outcomes will usually be at least somewhat uncertain, or probabilistic, from the ex ante perspective of the political actors who are assessing proposed and ongoing institutional arrangements.")

49. This hypothetical assumes that Republicans own the issue of strong criminal enforcement, but some commentators have suggested that Democratic leaders may sometimes trespass successfully on this issue. See David B. Holian, *He's Stealing My Issues! Clinton's Crime Rhetoric and the Dynamics of Issue Ownership*, 26 POL. BEHAV. 95, 101-02, 106 (2004).

50. Interestingly, Christopher Berry and Jacob Gersen have recently suggested that one

foreign affairs authority. Because such authority 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. As an illustration, the pathway for ratifying international human rights obligations is primarily through the treaty power,<sup>51</sup> whereas the conventional pathway for military engagements rarely implicates the treaty power at all.<sup>52</sup> 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. Finally, even if the Senate ratifies a human rights treaty negotiated by the President, there is debate as to whether it can be binding without further legislation,<sup>53</sup> or whether there are federalist restrictions on the scope of the treaty power.<sup>54</sup>

Nonetheless, politicians seeking to entrench their policy preferences by revising presidential authority face a quandary. Even if the scope of presidential power can be influenced by partisan pressure, one may still wonder if such changes will ever devolve into institutional arrangements that are themselves resistant to change. Otherwise, if interpretations and understandings of presidential

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institutional innovation that might increase accountability and flexibility in the executive branch would be to unbundle it along discrete issue dimensions. *See* Berry & Gersen, *supra* note 36, at 1386 (“The unbundled executive is a plural executive regime .... Imagine a directly elected war executive, education executive, or agriculture executive. We show that a partially unbundled executive is likely to perform better than the completely bundled executive structure attendant in the single executive regime.”). Although Berry and Gersen may be correct about the institutional ramifications of their proposal, one plausible consequence of their suggested innovation is that politicians may be able to stake out much more forceful views about their preference for expansive or contracted presidential power based on the regime in which they find themselves. Thus, given a labor relations executive and an international trade executive, a right-leaning party might prefer greater flexibility in the latter regime and less in the former.

51. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 397 (1998) (discussing the proliferation of human rights treaties).

52. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2091-92 (2005) (discussing the scope of a President's authority to wage war based on congressional authorization).

53. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 371-72, 380 (2d ed. 2006) (discussing the debates regarding treaty self-execution); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 601-02 (2008) (arguing for a presumption in favor of self-execution).

54. *See* Bradley, *supra* note 51, at 402-03.

authority are inherently manipulable across electoral periods, then no stable equilibrium over the scope of such authority may be feasible.

Ultimately, we should expect any specific interpretation of presidential authority to become stable when no party has either the opportunity or the incentive to continue shaping the interpretation of such powers for partisan gain. Although the following conjecture is admittedly speculative, three conditions may seem to make stable interpretations of presidential authority more likely.

First, institutional rules like the separation of powers may be relatively sticky because the transaction costs associated with changing such rules may often outweigh any short-term benefits. Indeed, Kenneth Shepsle suggests this dynamic may even hold for some suboptimal institutions: “[I]nstitutions may be robust, not because they are optimally suited to the tastes of participants and the present environment, but rather because transaction costs price alternative arrangements too high.”<sup>55</sup>

Second, courts may break the deadlock and formally adopt one of the competing partisan visions of presidential authority.<sup>56</sup> For instance, if the Supreme Court intervenes and embraces a doctrinal test for presidential authority that provides little leeway for creative interpretation by subsequent powerholders, then all parties may eventually become bound by that interpretation, provided it does not produce policy outcomes that diverge significantly from the preferences of either party. In this sense, the judiciary might serve as a commitment mechanism in which societal groups can entrench

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55. Kenneth A. Shepsle, *Studying Institutions: Some Lessons from the Rational Choice Approach*, 1 J. THEORETICAL POL. 131, 144 (1989).

56. The role of courts as tools for entrenching the preferences of societal groups across multiple electoral periods has been a common theme in both law and economics and political science literatures. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 876-77 (1975) (entrenching interest group preferences); see also RAN HIRSCHL, TOWARDS JURISTOCRACY 11-12 (2004) (entrenching threatened preferences of societal elites); Balkin & Levinson, *supra* note 22, at 1066-67 (entrenching 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, 512 (2002) (entrenching partisan objectives). More recently, scholars have also explored how interpretive methodologies, which govern how courts decide cases, can also be imbued with partisan objectives. See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 658-60 (2009); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006).

their objectives by delegating authority to a politically insulated actor.<sup>57</sup> Of course, a court-generated stable equilibrium is subject to the criticism that the judges who make these decisions are themselves political actors who may have conflicting and unstable preferences about the optimal allocation of presidential authority. More importantly, the conflicting preferences of these judges may correspond loosely to those of the elected officials who are seeking to manipulate the scope of presidential authority to their advantage.<sup>58</sup>

Third, if an incumbent regime persists in advancing a particular vision of presidential authority over multiple electoral periods, interest groups and political coalitions may eventually adapt to that particular vision and thus become less interested in changing what has essentially become the new status quo.<sup>59</sup> Alternatively, the new vision of presidential authority may itself create a new set of political forces that have both a vested interest and sufficient political leverage to prevent any further changes.<sup>60</sup> And although the distribution of costs and benefits of the status quo allocation of presidential authority may sometimes be radically asymmetric, those societal groups who prefer the status quo may be more influential than those who favor change.<sup>61</sup> Finally, if politicians are sufficiently uncertain as to whether a proposed revision of a constitutional norm governing presidential authority will generate the benefits they

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57. 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, 180-82 (1999) (arguing that the APA was created to “hard wire” New Deal policies).

58. Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1019-20 (2004).

59. See Levinson, *supra* note 27, at 686-87 (“Examples of asset-specific investments in structures and processes of political decisionmaking are legion. Political parties that grow up around and shape themselves specifically to systems of federalism or separation of powers, or to electoral arrangements such as proportional representation, will resist any change in these structural arrangements. Investment by advocacy groups in legal expertise and influence will give these groups a stake in defending the policymaking authority of independent courts.”).

60. See *id.* at 686-88.

61. See *id.* at 687-88 (noting that cap-and-trade has more political traction than the more efficient carbon tax because it is supported by interest groups with a large stake in the current system).

expect, or if they are uncertain about the likely identities of future beneficiaries of the revision, then there may exist a bias towards the status quo.<sup>62</sup>

Nonetheless, one should be circumspect about the possibility of stable interpretive conditions regarding the scope of presidential authority. In the real world, the conditions that induce such stability may often be fragile, which is why debates about the appropriate scope of presidential authority often seem to be chronic and never ending.

### III. IMPLICATIONS

The partisan preferences framework generates a variety of implications that may be pertinent to ongoing debates regarding constitutional design, especially with respect to separation of powers.<sup>63</sup> Generally, the prevailing literature tends to cast the relevant tradeoffs in the expansion of presidential power as involving competing concerns of representation, governance, and accountability.<sup>64</sup> By contrast, the partisan framework developed here suggests that specific kinds of allocation of presidential authority may also generate distributive costs and benefits for various societal groups. Moreover, under certain circumstances, this framework suggests

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62. Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 290 (2009) (explaining that individuals will tend to prefer the status quo over uncertain future gains).

63. For a good picture of the debates over separation of powers, see generally M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

64. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 63-64 (2005) (arguing that separation of powers not only prevents tyranny but also facilitates a division of labor that promotes government efficiency); THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”); Martin H. Redish & Elizabeth J. Cisar, *“If Angels Were To Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 487-505 (1991) (advocating the enforcement of separation of powers to prevent tyranny and bolster democracy); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 43 (1985) (“[T]he separation of powers scheme was designed with the recognition that even national representatives may be prone to the influence of ‘interests’ that are inconsistent with the public welfare.”). However, some scholars have questioned the merits of the strong emphasis on political accountability, especially with regard to political oversight of the administrative state. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462-63 (2003).

that an expansive vision of presidential power may generate intracoalitional conflict between a President and his copartisans in Congress.

Prior to sketching out the precise nature of the political gains and losses associated with changes in presidential authority, it may be worthwhile to point out how increasing polarization by the respective bases of the Democratic and Republican parties may affect this dynamic. A growing political science literature suggests that both the elites and core supporters of the two major political parties have grown increasingly polarized on a wide range of policy issues since the Nixon era.<sup>65</sup> As relevant to the question of institutional design, polarization entails a diminution in the range of issues on which elites and core supporters in the two major political parties may share similar or common preferences.<sup>66</sup> If one assumes that party leaders place a high priority on retaining office and that future prospects of staying in power depend on hewing closely to the preferences of one's core supporters,<sup>67</sup> then party leaders are likely to be mindful of how institutional arrangements are likely to influence policy outcomes favored by their supporters. And when institutions like the allocation of presidential authority make it more or less likely to achieve these policy outcomes, we may anticipate party leaders to develop increasingly polarizing preferences over such institutions.

In any event, there are two types of political gains that a specific partisan regime might reap from an instrumental allocation of presidential authority. First, if a party is able to choose strategic constraints on presidential discretion depending on the underlying issue, that party can make it easier to accomplish its favored policy objectives and make it less likely that the opposition can pursue its policy objectives. In this picture, the political parties are simply acting as policy maximizers with the end of putting in place the institutional structures that make it most likely that they will attain their preferred policy outcomes.

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65. See Ryan L. Claassen & Benjamin Highton, *Policy Polarization Among Party Elites and the Significance of Political Awareness in the Mass Public*, 62 POL. RES. Q. 538, 588-89 (2009); see also Devins, *supra* note 16, at 395-96.

66. See *supra* notes 40-47 and accompanying text.

67. See *infra* note 89 and accompanying text.

Second, and less obviously, an instrumental allocation of presidential authority may also enhance a party's electoral objectives. If voters believe that institutional constraints will make certain policy outcomes less likely, then it is rational for them to discount the relevance of such policies when they head to the voting booth. In this picture, incumbents may actually try to shape the electoral agenda by promoting institutional constraints that lock out those issues that are considered electoral assets for the political opposition while enhancing those issues that they view as electoral assets.<sup>68</sup> On the other hand, if an issue owned by a party becomes an electoral liability, then the party might actually welcome the imposition of more constraints with respect to that issue. When right-leaning parties may be associated with an unpopular stance, such as retrenchment of long-held welfare entitlements, they may actually prefer the existence of institutional constraints that make it less likely that welfare retrenchment will be on the electoral agenda. However, relaxing constraints on the President's discretion on certain issues can be a boon when the party's owned issues are viewed as electoral assets. Thus, if the Republicans think that they can win more votes when national security is at the top of the electoral agenda, then they may have an incentive to increase presidential flexibility with respect to national security issues.

The foregoing analysis suggests that the party's office-seeking objective need not always overlap with its policy-seeking objective, because it is plausible that a party will seek institutional arrangements that increase its chances of securing power even if doing so may come at the expense of achieving its preferred policies. Imagine, for instance, that the median voter tilts to the right on issues of national security but has fairly liberal preferences on the issue of abortion. Let us also assume that the voter gives slightly more weight to her preferences on abortion than national security. When the voter goes to the polls, she may want to know how likely it is that the Republicans will be able to accomplish the various issues on their platform given the existence of mediating political

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68. The political science literature has examined other ways politicians try to prime and increase the salience of issues they own. See James Druckman et al., *Candidate Strategies To Prime Issues and Image*, 66 J. POL. 1180, 1180-84 (2004) (arguing that candidates will strategically tailor issues to the parameters of public opinion and the opportunities offered by the political conditions of their time).

and institutional constraints. Thus, in weighing her options, the rational voter will not focus simply on the Republican positions on abortion and national security, but will also consider the likely path from platform rhetoric to policy outcome. For instance, given the various Supreme Court rulings that protect the right of a woman to have an abortion, she may wonder whether it is realistic that the Republican Party will be able to successfully push its pro-life agenda. If the voter believes that the institutional obstacles to a Republican pro-life agenda seem somewhat insurmountable, she may safely discount the Republican position on abortion as a factor at the ballot box and simply vote on her national security preferences.

In this hypothetical example, it is plausible that the Republican Party might welcome, for electoral reasons, the Supreme Court's decision in *Roe v. Wade*,<sup>69</sup> even though that decision makes it less likely that they will accomplish policies consistent with their ideological or policy preferences.<sup>70</sup> A Republican politician may safely try to mobilize the base by staking out a strong antiabortion position, but nonetheless remain confident that a median voter who has pro-choice preferences will discount his abortion stance as a form of cheap talk. Correspondingly, the Democratic Party's leaders might be similarly conflicted by the Court's two recent gun rights decisions, which concluded that the right to bear arms was a federally protected right that could be asserted against the states and authorities in federal enclaves.<sup>71</sup> In this picture, certain

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69. 410 U.S. 113 (1973).

70. Jack Balkin has made this point elsewhere, although he did not cast it necessarily in terms of policy versus electoral objectives:

There is some evidence that overturning *Roe* would be a disaster for the Republican Party's electoral prospects for many years, even if pro-life Republicans continued to control the judiciary. The reason is that if criminalization of abortion were possible, it would split the party's coalition of pro-life conservatives and moderates, business conservatives, defense hawks, and libertarians.

Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 583-84 (2008).

71. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (holding that the right of an individual to "keep and bear arms" as protected by the Second Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and therefore applies to the states); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that the Second Amendment to the United States Constitution protects an individual's right to possess a firearm for private use within the home in federal enclaves).

Democrats from pro-gun districts may very well welcome that decision because it freezes out from the electoral agenda an issue that might be ostensibly viewed as a political liability, even if the decision might have been inconsistent with the policy outcome favored by many Democrats.<sup>72</sup>

Finally, one significant wrinkle to the partisan framework is that the institutional preferences of the President might sometimes conflict with those of the party of which he is the official leader. More specifically, Presidents who desire to build a lasting historical legacy might sometimes consider the party dogma too restrictive.<sup>73</sup> Indeed, as Stephen Skowronek suggests, some divergence between a President's partisan and leadership roles might be inevitable: "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>74</sup> Thus, partisanship might not always prove to be a reliable proxy for presidential policy preferences, especially when the demands of bold leadership dictate that Presidents deviate from policy agendas inherited from party platforms. Take, for instance, the post-World War II controversies over the ratification of human rights treaties. In that case, President Eisenhower's institutional preferences for foreign policy flexibility trumped the preferences of his copartisans in the Senate to restrict the scope of the treaty power in the 1950s.<sup>75</sup> Nonetheless, one should not exaggerate the tension between the President's dual roles of party and national leader. Presidents still rely significantly on partisan support to accomplish most of their programmatic policy goals, especially when parties continue to play such a dominant role both in the selection of presidential candidates and in aggregating voter preferences in presidential elections in a semicoherent manner.<sup>76</sup>

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72. Indeed, in a blog posting in 2008, a leading liberal commentator endorsed the Court's *Heller* decision precisely because it would remove gun control from the electoral agenda. See Sandy Levinson, *Scholars and Political Partisanship*, BALKINIZATION BLOG (July 4, 2008, 5:18 PM), <http://balkin.blogspot.com/2008/07/scholars-are-political-partisanship.html>.

73. JAMES W. CEASER, *PRESIDENTIAL SELECTION* 36-38 (1979) (discussing Woodrow Wilson's view of the tension between partisanship and presidential leadership).

74. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 50 (1997).

75. See *infra* text accompanying notes 135-48.

76. See Wayne P. Stoyer, *Who Wins Nominations and Why? An Updated Forecast of the*

#### IV. HOW TEMPORAL HORIZONS AFFECT THE LOGIC OF DISTRIBUTIVE PRESIDENTIAL AUTHORITY

Conflicting partisan visions of presidential authority are unlikely in circumstances in which actors across the political spectrum perceive that both the long-term and short-term benefits of changing the status quo are uncertain or, at best, highly speculative. On the other hand, if actors perceive that a specific expansion or contraction of presidential authority will yield either significant long-term or short-term distributive consequences, the political pressure to stake out conflicting visions of presidential power is likely to be high. But groups threatened in the short term by a particular vision of presidential authority may sometimes calculate that such a vision will yield net distributive benefits in the long term. Conversely, a group that benefits from a particular vision of presidential authority in the short term may consider such a vision a threat over the long term. For instance, whereas right-leaning groups may favor greater presidential flexibility in providing protectionist benefits when their copartisan occupies the White House, they may also conclude that such flexibility will be ultimately damaging to their party's long-term ideological and electoral objectives. Such a dynamic is likely to be true when the core supporters—such as labor groups—affiliated with the Democratic Party reap greater benefits from protectionist policies than supporters affiliated with the Republican Party. When such conditions hold, one is likely to witness intrapartisan conflict between political actors who take the long view and those primarily concerned with more immediate and visible political benefits. In other words, when investigating the conditions that permit partisan conflict over the scope of presidential authority, one has to be mindful that copartisans may not share similar discount rates.

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*Presidential Primary Vote*, 60 POL. RES. Q. 91, 92-93 (2007) (noting the important role party elites play in the candidate selection process).

### V. THREE PATHS TO PARTISAN PRESIDENTIAL POWER WITH ILLUSTRATIONS

The possible disconnect between the long-term and short-term distributive effects of institutional change suggest three broad paths to manipulating presidential power for partisan gain. First, there may be circumstances in which political actors perceive a short-term advantage to either a narrow or expansive vision of presidential authority, but are uncertain about the long-term benefits of such a vision. Second, there may be circumstances in which political actors perceive concrete distributive benefits of a particular vision of presidential authority in the short term, but conclude that the net effects of such a vision will hurt them over the long term. Finally, there may be circumstances in which partisan actors perceive the short-term benefits of a particular vision of political authority as uncertain or trivial, but calculate that such a vision will generate concrete distributive costs over the long term. Each path suggests a different logic as to when we expect parties to diverge in their views of presidential power, whether such divergence is likely to be temporary or long term, and whether we are likely to observe intrapartisan conflict between party leaders and rank-and-file politicians.

Below, I briefly sketch out three cases that correspond to each of the paths described above. In each of these examples, political officials sought to adopt a vision of presidential power that aimed either to block out issues which were owned, or favored, by the political opposition, or to make it easier to carry out issues or policies they owned.

#### *A. Short-Term Horizons: Presidential Influence over Administrative Agencies*

When the policy effects of a long-term change in presidential authority are likely to be symmetric across the issues owned by both major political parties, partisan differences in efforts to permanently expand or contract presidential authority should occur infrequently because the benefits of such revisions are likely to be unpredictable and opaque. In such circumstances, political actors

are likely to adopt a more myopic approach to their preferences over the scope of presidential authority. Simply put, such actors may favor broad presidential authority on the relevant policy dimension only when their copartisan occupies the White House, but oppose it otherwise. Thus, we would expect to observe Democratic politicians disfavor expansive presidential authority on certain issue dimensions under a Republican President, and vice versa.

A recent essay by Cary Coglianese on the politics of presidential oversight of administrative agencies illustrates how such a myopic partisan vision of presidential authority may work in practice.<sup>77</sup> Coglianese implicitly takes much of the conventional wisdom to task for failing to recognize how many of the debates over the President's constitutional authority in the administrative state often disguise explicit partisan objectives.<sup>78</sup>

Coglianese's arguments are based upon an insight that is both simple and sound. Members of Congress, he suggests, may be more open to greater presidential influence over administrative agencies when their copartisan occupies the White House, but will be more solicitous of independent agency decision making when the opposition is in power.<sup>79</sup> Coglianese marshals anecdotal evidence for this proposition by examining the divergence in views of how certain members of Congress treated attempts by both the Obama and Bush administrations to influence the Environmental Protection Agency's (EPA) decision to grant California's request for a waiver under the Clean Air Act.<sup>80</sup> When California originally sought and was denied the waiver to adopt more stringent automobile emission standards under the Bush administration, Congressman Waxman, a Democrat from California, lambasted the EPA Administrator, Stephen Johnson, for succumbing to influence from the White House.<sup>81</sup> But when the Obama administration subsequently exerted pressure over its EPA Administrator to reverse the Bush administra-

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77. Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637 (2010).

78. *See id.* at 645-46.

79. *Id.* at 642-44.

80. *Id.*

81. *See id.* at 643-44.

tion's waiver decision, Congressman Waxman's reaction was quite different; indeed, he was full of praise for President Obama.<sup>82</sup>

Whether Congressman Waxman recognized the irony of taking such drastically inconsistent positions on the propriety of presidential influence over agency decision making is hard to say. Nonetheless, it suffices to observe that politicians will tend to evaluate the merits of an institutional structure based on whether it is likely to improve the short-term policy objectives they most desire. In this picture, the opacity in the long-term benefits of greater presidential oversight of administrative agencies, or conversely, greater agency independence, will not inhibit politicians from endorsing an expansive vision of presidential authority in one electoral cycle and disavowing it in another. Moreover, the reality that neither party enjoys any obvious long-run advantages over the other with respect to a particular vision of presidential influence over issues like environmental protection means that both Republicans and Democrats will have symmetric preferences for expanding or contracting presidential authority depending on who is in power at the time.

*B. Differing Long-Term and Short-Term Horizons: Intraparty Conflict over Presidential War Powers*

When the benefits of a long-run expansion in presidential authority are moderately asymmetric between the two parties, we are likely to observe differences between copartisans who take the long view and those who are concerned about short-term political gain. For a politician who takes the long view, the short-term costs of granting greater policy flexibility to an opponent in the White House may be preferable to foregoing an institutional arrangement that is likely to yield net political benefits over multiple electoral periods. But rank-and-file party members facing short-term reelection pressures are likely to ignore any vision of presidential authority that undermines their political survival, even if such a vision generates policy benefits over the long term for their party.

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82. See *id.* at 644.

Take, for instance, the perennial debates over the scope of the President's war-making authority.<sup>83</sup> From a constitutional perspective, the textual authority on the allocation of war powers between the political branches is sufficiently opaque that officials have significant leeway to stake out visions of war powers that suit their political objectives. At first blush, we might anticipate that partisans from both sides of the aisle will privilege short-term objectives over long-term institutional considerations; in other words, politicians will favor greater presidential flexibility on war powers when their co-partisan occupies the White House, but otherwise they will oppose greater flexibility. Indeed, there is evidence that members of Congress approach the use of force with such a view of short-term partisan objectives.<sup>84</sup> As William Howell and Jon Pevehouse put it:

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

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83. For the pro-presidential view, see Yoo, *supra* note 31, at 303-04; see also William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695, 697 (1997) (listing those scholars who advocate a pro-presidential view of war powers). For the pro-Congress view, see JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 4 (1993) ("[A]uthorization by the entire Congress was foreseeably calculated, for one thing, to slow the process down, to insure that there would be a pause, a 'sober second thought,' before the nation was plunged into anything as momentous as war." (quoting William Van Alstyne, *Congress, the President, and the Power To Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 20 (1972))); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 205-07 (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); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 72 (1981) (observing that one of the goals of the separation of war powers was to ensure "democratic control" over the war-making process).

84. See William G. Howell & Jon C. Pevehouse, *Presidents, Congress, and the Use of Force*, 59 INT'L ORG. 209, 215 (2005) ("If they take any stance or introduce any substantive legislation, copartisans in Congress are more likely to demonstrate solidarity with their president, authorizing the use of force or appropriating the funds needed to carry it out."). Moreover, one might think the long-term effects of a long-term expansion of the President's war powers might be symmetric across both parties. After all, Democrats might sometimes prefer greater institutional flexibility to pursue certain kinds of wars, such as humanitarian interventions, but disfavor flexibility in other kinds of military engagements. Conversely, one might think that Republicans will disfavor presidential flexibility to engage in humanitarian interventions, but favor more presidential flexibility in antiterrorism or anticommunist military initiatives.

plans to exercise force abroad, as members of the opposition either reserve judgment or voice opposition.<sup>85</sup>

But there is also reason to think that the long-term effects of an expansion of presidential war powers will not be symmetric across right-leaning and left-leaning parties. A growing literature in foreign policy shows that the use of force generates more electoral and ideological benefits for right-leaning governments than for left-leaning governments.<sup>86</sup> More specifically, Foster and Palmer argue that Republican Presidents in the United States are more prone to view the use of force as an instrumentally desirable political option because their core supporters are more likely to reward, and less likely to sanction, these Presidents for foreign military engagements than their liberal counterparts.<sup>87</sup> If this is the case, and if politicians are sensitive to the institutional conditions that make it more likely that they will achieve their favored policy objectives, then we would expect Republican politicians to generally prefer more presidential flexibility in the use of force. By contrast, we would expect left-leaning politicians to view expansive war powers as an obstacle to their preferred policy and electoral objectives. In other words, not only may Democrats prefer less presidential flexibility in war powers because of their supporters' dovish preferences, but they might also be concerned that if issues like national security and

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85. HOWELL & PEVEHOUSE, *supra* note 18, at 37.

86. 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) (discussing the influence of removal thresholds on right- and left-leaning government propensities to become involved in conflict). Indeed, one study suggested that because right-leaning governments are more likely to gain private benefits from the use of force, terrorists may prefer to target left-leaning governments rather than their conservative counterparts. See Michael T. Koch & Skyler Cranmer, *Testing the "Dick Cheney" Hypotheses: Do Governments of the Left Attract More Terrorism than Governments of the Right?*, 24 CONFLICT MGMT. & PEACE SCI. 311, 312 (2008).

87. Dennis M. Foster & Glenn Palmer, *Presidents, Public Opinion, and Diversionary Behavior: The Role of Partisan Support Reconsidered*, 2 FOREIGN POL'Y ANALYSIS 269, 274-75 (2006); see also Benjamin Fordham, *Partisanship, Macroeconomic Policy, and U.S. Uses of Force, 1949-1994*, 42 J. CONFLICT RESOL. 418, 419-21 (1998) (describing the effect of elite and public opinion on a President's decision to use force); Michael T. Koch & Patricia 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) ("Governments of the left become more likely to withdraw their military forces as their job approval ratings decline while right party executives become less likely to terminate military interventions as their popularity declines.").

antiterrorism dominate the political agenda, they will crowd out issues such as health care, education reform, or welfare in which Democrats are likely to have an electoral advantage over Republicans.<sup>88</sup>

The possibility that Republicans might obtain long-term benefits from more presidential flexibility in war powers does not mean, however, that there will be intrapartisan consensus on expanding presidential authority in the use of force. On the contrary, conflicting time horizons may pit party leaders, whose goal may be to maximize long-term electoral and policy objectives,<sup>89</sup> against rank-and-file politicians, who may be more concerned with short-term reelection objectives.<sup>90</sup> In other words, rank-and-file politicians are more likely to focus their energies on how to electorally exploit the fallout of a military engagement in the short term, rather than maximizing their party's programmatic policy goals.

A striking contemporary example of such intrapartisan conflict is the breakdown of a united Republican approach to the question of war powers during the Clinton administration. Whereas rank-and-file Republican members of Congress were frequently critical of President Clinton's exercise of his war authority during the Haiti,<sup>91</sup> Somalia,<sup>92</sup> and Kosovo<sup>93</sup> interventions, ultimate support for repealing the War Powers Resolution (WPR) during Clinton's admin-

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88. See Petrocik et al., *supra* note 33, at 599 ("Democrats have an electoral advantage when problems and issues associated with social welfare and intergroup relationships are salient.").

89. See Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 845 (2010).

90. *Id.*

91. With respect to the Haiti intervention, some commentators remarked on the reversal of roles between the traditionally hawkish Republicans and the 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.'").

92. 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, 689 & n.403 (1995) (noting the Republican opposition to Somalia and providing an example of that opposition).

93. See Nzelibe & Stephenson, *supra* note 31, at 641-42 & n.53 (framing Clinton's exercise of his war authority in Kosovo as a "unilateral action" that was without congressional approval and noting the "staunch Republican opposition" Clinton faced in Congress regarding Kosovo).

istration came from Republican party leaders, such as Congressman Henry Hyde, House Speaker Newt Gingrich and Senator Robert Dole. During the legislative debates over a bill that Congressman Hyde introduced, which would have radically narrowed congressional oversight of war powers and repealed the WPR,<sup>94</sup> Gingrich proclaimed:

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. And the President of the United States on a bipartisan basis deserves to be strengthened in foreign affairs and strengthened in national security. He does not deserve to be undermined and cluttered and weakened.<sup>95</sup>

Senator Robert Dole, the 1996 Republican presidential candidate, also proposed replacing the WPR with what he called the “Peace Powers Act of 1995,”<sup>96</sup> which in his words would “untie the president’s hands in using American forces to defend American interests.”<sup>97</sup> To be sure, the shadow of the 1996 presidential election might have largely influenced the Republican Party leaders’ strategy to repeal the WPR in 1995. Senator Dole was likely gambling on a victory against President Clinton in the next year’s contest. He might therefore have been simply hoping to lay the foundations for greater institutional flexibility for his *own* presidency. There is some cursory evidence that Senator Dole’s enthusiasm for expanding presidential war powers was not always consistent. For instance, although Dole was a keen supporter of Clinton’s 1999 decision to intervene in Kosovo,<sup>98</sup> he led an unsuccessful effort to curb the

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94. Ultimately, Congressman Hyde’s amendment to repeal the WPR failed by a narrow margin of 217 to 201. 141 CONG. REC. 15,209-10 (1995).

95. 141 CONG. REC. 15,209 (1995) (emphasis added).

96. ‘*We Will Continue in Our Drive To Return Power to Our States and Our People*,’ WASH. POST, Jan. 5, 1995, at A10.

97. *Id.*

98. See HOWELL & PEVEHOUSE, *supra* note 18, at 37.

President's powers to deploy troops to Haiti earlier in the Clinton administration.<sup>99</sup>

But the general insight nonetheless remains. In 1995, Republican leaders calculated that their institutional opportunities to strengthen the President's war powers varied inversely with their occupation of the White House. As Robert Goodin argues in explaining the logic of the so called "Nixon Goes to China" effect, "[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>100</sup> In this context, because Republican politicians might be expected to exhibit more hawkish policy preferences,<sup>101</sup> it might have been rational for them to seek greater presidential authority in war powers when it would have seemed most likely out of character to voters, that is, when the political opposition occupied the White House.

In any event, while Republican Party leaders were seeking to expand President Clinton's war authority, leaders within the Democratic Party took the opposite stance. They initially viewed Clinton's 1992 victory as a unique opportunity to constrain the President's authority and to strengthen the WPR. In late 1993, with President Clinton recently embroiled in troop deployments to Haiti, Somalia, and Bosnia,<sup>102</sup> Democratic Senate leaders, including Senate Majority Leader George Mitchell of Maine and Senator Sam Nunn of Georgia, announced that they would initiate legislative efforts to give more teeth to congressional oversight of war powers.<sup>103</sup> As Senator Nunn declared: "The War Powers Act has never worked, will not work. My general thinking is we need to move much more to a consultative mechanism so that the President consults with the Congress before making these decisions and not after that."<sup>104</sup> Again, these Democratic leaders knew that their long-term efforts to reshape war powers in Congress's favor would be

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99. RYAN C. HENDRICKSON, *THE CLINTON WARS* 54-55 (2002).

100. Robert E. Goodin, *Voting Through the Looking Glass*, 77 AM. POL. SCI. REV. 420, 421 (1983); see also Nzelibe & Stephenson, *supra* note 31, at 621.

101. See Koch & Cranmer, *supra* note 86, at 312.

102. See *supra* notes 91-93 and accompanying text.

103. Adam Clymer, *Democrats Study Amending War Powers Act*, N.Y. TIMES, Oct. 24, 1993, at L11.

104. *Id.*

more likely when their copartisan occupied the White House.<sup>105</sup> They likely calculated that they would be able to peel off enough Republican rank-and-file legislators who might be eager to constrain a Democratic President's war authority for short-term electoral reasons,<sup>106</sup> even if it meant that such a move would hurt the Republican Party over the long term. Moreover, these Democrats likely understood that the prospects of mobilizing a bipartisan coalition to strengthen Congress's war powers during a Republican presidency would be very slim.

Although the focus thus far has been on the actions of elected officials, there might be reason to think that courts can play a role in elevating a vision of presidential war powers authority that favors one of the major political parties' long-term preferences. To be sure, when judges rule on the scope of presidential authority during wartime, they are probably not behaving as single-minded maximizers of partisan objectives.<sup>107</sup> Nonetheless, judges, perhaps because of ideological preferences or cultural cognition biases,<sup>108</sup> might be predisposed to favor the institutional prerogatives of certain political parties.<sup>109</sup> For instance, in his extensive analysis of activist courts, Keith Whittington argues that a politically friendly Supreme Court can be useful to a ruling regime in overcoming domestic structural obstacles to that regime's objectives,<sup>110</sup> even if

105. See *supra* note 100 and accompanying text.

106. See Bar-Siman-Tov, *supra* note 89, at 845 (positing that rank-and-file party members are interested in pursuing policies that serve their personal policies and goals of reelection).

107. See Dan M. Kahan, "Ideology In" or "Cultural Cognition of" Judging: What Difference Does It Make?, 92 MARQ. L. REV. 413, 419-22 (2009) (examining how cultural values impact judicial decision making and distinguishing between conscious ideological biases and unconscious cultural biases).

108. *Id.*

109. Certain models of judicial behavior assume that judges are strategic when rendering decisions and try to anticipate how other political players are likely to react. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10 (1998) ("[J]ustices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act.").

110. See Keith E. Whittington, "Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 584 (2005); see also Gillman, *supra* note 56, at 512-13 (describing the expansion of federal judicial power at the end of the nineteenth century "as 'politically inspired' rather than 'court-inspired'"); cf. J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722, 741-42 (1994) (discussing party leader incentives to provide judges greater or lesser insulation from political control); Matthew C. Stephenson,

the Court is not behaving in a deliberately strategic manner. In the war powers context, a similar dynamic might be in play if we observe right-leaning judges supporting greater flexibility for Presidents across the political spectrum during wartime and left-leaning judges favoring more oversight. In *Campbell v. Clinton*, for instance, Judge Silberman, a conservative judge on the D.C. Circuit, sought to dismiss on political question grounds a challenge by members of Congress to President Clinton's air campaign against Serbia,<sup>111</sup> whereas Judge Tatel, a Clinton appointee, ruled that claims regarding the legality of Clinton's wars should be justiciable.<sup>112</sup> More recently, a conservative-leaning panel of the D.C. Circuit authored an opinion that stated that the plaintiff was wrong to think that President Obama's war powers "are limited by the international laws of war."<sup>113</sup>

*C. Asymmetries over Both the Long Term and Short Term:  
The Domestic Incorporation of International Human Rights  
Commitments*

When the likely policy effects of a change in presidential authority are radically asymmetric across the issues owned by the political parties in both the long and short terms, we should expect the political actors from the party benefiting from such a change to support it regardless of who is in power, whereas the losers will usually oppose it even when their copartisan occupies the White House. In this particular picture, one might anticipate less intrapartisan

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"*When the Devil Turns ...*": *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 71-73 (2003) (analyzing correlations of judicial independence with party risk aversion, party anticipation of future payoffs, political compensation, and judicial policy slant).

111. 203 F.3d 19, 24-25 (D.C. Cir. 2000) (Silberman, J., concurring) ("[I]n my view, no one is able to bring this challenge because the two claims are not justiciable. We lack 'judicially discoverable and manageable standards' for addressing them, and the War Powers Clause claim implicates the political question doctrine.")

112. *Id.* at 37-39 (Tatel, J., concurring) (discussing the competency and constitutionality of courts determining the existence of a war).

113. *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010). In denying an en banc rehearing of the case, seven out of nine judges declined to adopt this aspect of Judge Brown's opinion. See *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010); see also *id.* 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 Resolution]").

conflict within the disadvantaged party because staunch opposition might satisfy the preferences of both sets of relevant intraparty players: party leaders, who are likely to view the change as systematically biased against the party's long-term policy goals,<sup>114</sup> and rank-and-file politicians, whose core constituents might deeply dislike the policy implications of the particular vision of presidential authority.<sup>115</sup> More importantly, when the policy effects of the divergent visions of presidential authority are sufficiently asymmetric across party lines, there might be minimal short-term electoral benefits to rank-and-file politicians who buck the party line.

One contemporary illustration of this dynamic is the divergent position that Republican- and Democratic-leaning interest groups and activists have taken towards the domestic incorporation of international human rights obligations in the postwar era.<sup>116</sup> Although debates regarding the ratification and domestic incorporation of human rights treaties are often couched in high-minded language, they often implicate more mundane electoral or partisan considerations. In the United States, this dynamic often has played out against a background of increasing polarization in the so-called culture wars, in which each side attempts to shift policymaking to geographical venues in which it is likely to have an advantage over the political opposition.<sup>117</sup> For the left, moving policymaking to the international arena provides opportunities to increase the domestic influence of foreign actors with whom they share similar preferences on human rights,<sup>118</sup> as well as opportunities to isolate conservative opponents of progressive reform at home.<sup>119</sup> For the right, the same

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114. See *supra* note 89 and accompanying text.

115. See *supra* notes 89-90 and accompanying text; see also Fordham, *supra* note 87, at 419-20 (discussing political constituencies and their influence).

116. This illustration on the postwar partisan conflict over human rights treaties draws largely on work that has been developed elsewhere. See Nzelibe, *supra* note 9. For a good account of the postwar human rights controversies, see generally DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY (1988) (describing the Bricker Amendment's controversial attempt to limit international agreements' impact on America's domestic affairs). For a complementary analysis that discusses the Bricker Amendment in terms of the United States' uneasy relationship with human rights treaties, see Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHINESE J. INT'L L. 321, 335-38 (2010).

117. See Nzelibe, *supra* note 9, at 2.

118. *Id.* at 14.

119. See *id.* at 30.

dynamic suggests a preference for restricting social policymaking to state or local jurisdictions.<sup>120</sup>

But why would there be such strong distributional asymmetries in the likely effects of human rights treaties? The simple answer is that human and social rights treaties may tend to influence the electoral opportunity structure in ways that favor one party over another. First, such treaties or norms may appeal more to the interests of core supporters aligned with left-leaning political parties.<sup>121</sup> Although elected officials may often seek a very broad base of support for their policies in order to get elected, it is the support from the elected official's core constituency that is often most crucial.<sup>122</sup> In the United States, Democrats are more likely to have their winning coalition composed of voters and interest groups sympathetic to promoting social and economic rights across national boundaries.<sup>123</sup> In other words, because governments of the left are likely to be more responsive to coalitions that emphasize labor rights and fair treatment of minorities, they are more likely to embrace human rights agreements that not only reinforce their coalitions' policy preferences but also undermine those of the domestic conservative opposition.<sup>124</sup> Thus, although President Truman did not initially prioritize progressive civil rights issues early in his administration, towards the middle of his administration he faced mounting pressure from a well-organized African American constituency to take a more aggressive stance on desegregation.<sup>125</sup> For instance, a famous memorandum outlining a strategy for Truman's 1948 presidential campaign encouraged him to target the northern black vote: "[T]he northern Negro voter today holds the balance of power in Presidential elections for the simple arithmetic reason that the Negroes not only vote in a bloc but are geographically concentrated in the pivotal, large and closely contested electoral states such as New York, Illinois, Pennsylvania, Ohio, and Michigan."<sup>126</sup> Advocating for the progressive human rights agenda in various U.N.

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120. *Id.* at 13.

121. *See id.* at 14.

122. *See* Fordham, *supra* note 87, at 419-20.

123. Nzelibe, *supra* note 9, at 3.

124. *Id.*

125. *Id.* at 20 & n.76.

126. GARY A. DONALDSON, TRUMAN DEFEATS DEWEY 26 (1999).

human rights agreements promised to solidify the support of a group that proved to be important to Truman's electoral success in the 1948 presidential election and to whom he would undoubtedly turn for support in 1952.<sup>127</sup> Although the U.N. Declaration of Human Rights was not itself considered to be a legally binding document, there were two covenants drafted to implement the Declaration that could have been marshaled to the cause of progressive social policy.<sup>128</sup> But, because both of these covenants espoused a vision of positive socioeconomic rights,<sup>129</sup> they elicited strong opposition from business groups and other conservative domestic constituencies who viewed them as threats to the American free market system.<sup>130</sup>

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127. See Nzelibe, *supra* note 9, at 24.

128. In the end, rather than one Human Rights Convention, two separate conventions were drafted to implement the Declaration: the International Covenant on Civil and Political Rights and the International Covenant on Social, Cultural and Economic Rights. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 202 (2001).

129. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 25, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (declaring the right to a sufficient standard of living, including the right to health care). The International Covenant on Civil and Political Rights, which was submitted for signature years later, also protected a range of positive rights. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 50 (Dec. 16, 1966), *available at* <http://www2.ohchr.org/english/law/ccpr.htm> (recognizing rights to health care, education, and a living wage). The International Covenant on Economic, Social, and Cultural Rights provides the broadest statement yet of right to health care:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

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

International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 19, 1966, 993 U.N.T.S. 3. The United States signed the International Covenant on Economic, Social and Cultural Rights on October 5, 1977. *Chapter IV Human Rights: 3. International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Oct. 31, 2001).

130. See, e.g., Nzelibe, *supra* note 9; see also *Dangers Are Seen in the UN Rights Code*, N.Y. TIMES, Apr. 24, 1951, at 6.

Second, and relatedly, Democrats have an electoral advantage in issues implicating economic redistribution and intergroup relations.<sup>131</sup> Consequently, we should expect Democrats to have a greater incentive than Republicans to place issues related to championing the weak against the strong on the policy agenda, especially if they suspect doing so will shore up the base and also appeal to swing voters.

Given this dynamic, we might expect Republican or right-leaning constituencies to prefer a constitutional vision that would make it less likely that these human rights treaties would have any impact on domestic law. Left-leaning interest groups and academic activists, on the other hand, might prefer to construe the treaty power broadly and seek out strategies to overcome any institutional barriers through the use of courts.<sup>132</sup> But for both parties, a preference for or against greater constraints on the President's treaty power in human rights might not be driven by abstract convictions about the proper role of international law or global institutions in national politics. Rather, party leaders might have pushed for different visions of the treaty power in human rights because of perceptions about how such treaties would help or hurt their respective constituencies.<sup>133</sup> At bottom, both the left and the right tended to view these domestic institutional arrangements as a set of obstacles to be taken advantage of or maneuvered around in pursuit of political objectives.<sup>134</sup>

The famous postwar controversy surrounding Senator Bricker's efforts to amend the Constitution is an example of a partisan conflict concerning presidential authority over substantive human rights policies. Conservative senators in the early 1950s denounced the postwar draft U.N. human rights treaties as a partisan ploy by the left to get around domestic legislative obstacles to progressive legislation.<sup>135</sup> President Eisenhower empathized with his coparti-

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131. See Petrocik et al., *supra* note 33, at 599.

132. See *id.*

133. See Nzelibe, *supra* note 9, at 17.

134. *Id.*

135. See Arthur H. Dean, *The Bricker Amendment and Authority over Foreign Affairs*, 32 FOREIGN AFF. 1, 4-5 (1953); Nzelibe, *supra* note 9, at 23-24. Secretary of State John Foster Dulles also warned against "the trend toward trying to use the treatymaking power to effect internal social changes." *The Bricker Amendment: A Cure Worse than the Disease?*, TIME, July 13, 1953, at 20.

sans' hostility to these treaties. For instance, he appointed James Byrnes, a well-known human rights treaty skeptic and critic of Truman's internationalist and civil rights policies, to replace Eleanor Roosevelt as U.N. Delegate.<sup>136</sup> But this appointment—coupled with reassurances from President Eisenhower's Secretary of State, John Foster Dulles, that Eisenhower's administration would never negotiate or seek ratification of any of the draft U.N. human rights treaties—hardly satisfied Senate Republicans.<sup>137</sup> They wanted to take more concrete steps to forestall the possibility that any President would ever be able to negotiate these treaties and have them bind other domestic political actors.<sup>138</sup> Ultimately, the goal of these conservative senators was to overrule the Supreme Court's decision in *Missouri v. Holland*, which seemed to suggest that the scope of the treaty clause was not subject to the same Tenth Amendment constraints as regular legislation.<sup>139</sup> Senator Bricker, a former Republican nominee for Vice President and one of the leading legislative critics of the New Deal, sponsored an amendment that would have sharply curtailed the President's treaty power by requiring "that treaties shall only be implemented by legislation 'which would be valid in the absence of treaty.'"<sup>140</sup>

Although Eisenhower opposed ratifying these postwar human rights treaties, he also viewed Senator Bricker's proposal to amend the Constitution as an interference with the President's treaty power.<sup>141</sup> Nonetheless, an overwhelming majority of Republicans, as well as a number of southern Democrats in the Senate, eventually

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136. See CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955*, at 215-16, 241-42 (2003) (describing Eleanor Roosevelt's removal and reaction to James Byrnes's appointment).

137. More specifically, Secretary Dulles stated during congressional hearings on the Bricker Amendment:

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

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

138. See Nzelibe, *supra* note 9, at 29.

139. 252 U.S. 416, 434-35 (1920).

140. FRANK E. HOLMAN, *STORY OF THE "BRICKER" AMENDMENT 27* (1954).

141. TANANBAUM, *supra* note 116, at 66-67, 71.

supported Bricker's proposal.<sup>142</sup> By contrast, Eisenhower found his institutional interests being most vociferously championed in the Senate by Democratic Party leaders such as Lyndon Johnson of Texas.<sup>143</sup> At bottom, the Bricker Amendment would have increased the veto players required for domestically binding treaties by not only requiring separate legislation to implement the treaty but also by requiring that such treaties be subject to federalist constraints.<sup>144</sup>

Although Senator Bricker's proposed amendment narrowly failed to garner the two-thirds support required in the Senate to meet the first constitutional hurdle,<sup>145</sup> it set the stage, in part, for the United States' contemporary practice of attaching reservations or declarations to human rights treaties to ensure that such treaties have no domestic legally binding effects.<sup>146</sup> In the modern era, opponents of the domestic incorporation of human rights treaties have been able to achieve many of their objectives without having to resort to the kind of constitutional change Senator Bricker envisioned,<sup>147</sup> perhaps vindicating the view of some commentators that the amendment movement was a form of overkill.<sup>148</sup>

The broad Republican support in the Senate for constraining the President's treaty authority during the Eisenhower administration, even though a copartisan was in the White House, reflects the reality that most of the key right-leaning constituencies, including business and ideological groups, felt uniformly threatened by these postwar U.N. human rights treaties. In other words, there was no obvious intracoalitional division within the Republican Party because the core of the conservative base considered any political benefits from the domestic incorporation of these treaties to be

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142. See Nzelibe, *supra* note 9, at 24.

143. See TANANBAUM, *supra* note 116, at 145.

144. See *id.* at 44.

145. See *id.* at 179-80.

146. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1303-04 (2008).

147. See *id.* at 1304 (“[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.’”).

148. For instance, Edwin Corwin, a leading constitutional scholar in the 1950s, analogized the Bricker Amendment movements to “burn[ing] down the house to get roast pig.” TANANBAUM, *supra* note 116, at 124.

largely one-sided in favor of the left.<sup>149</sup> Even if these treaties were negotiated or ratified by a Republican administration, there was no reason to suppose that such an administration could shape them to be more solicitous to the human rights interests favored by certain right-leaning constituencies, such as stronger protection of individual property rights.<sup>150</sup> Indeed, some of the key state signatories who played an important role in drafting these U.N. conventions, such as the Soviet Union, had already ensured that such treaties eschewed property rights protections.<sup>151</sup> In sum, the perceived distributional policy effects of these U.N. human rights treaties were sufficiently asymmetric that Republican politicians saw neither short-term nor long-term benefits from making such treaties domestically binding. And for the most part, the right-leaning constituencies' perception of the U.N. treaties as an institutional structure that would yield unfavorable policy outcomes trumped any loyalty those constituencies had to the institutional prerogatives of their copartisan in the White House.

The illustrations above are generally consistent with a strategic partisan approach to presidential authority: elected officials seek to relax constraints on presidential authority with respect to issues in which they have an advantage over the political opposition, but seek greater constraints on presidential authority otherwise.

## CONCLUSION

Using examples drawn from postwar American history, this Essay seeks to contribute to the rational choice literature that explores the sources of political preferences for expansive or restrictive presidential authority. It argues that political parties may sometimes push for visions of presidential authority that

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149. For a discussion of how these U.N. rights interacted with the ideological preferences of American political parties, see Nzelibe, *supra* note 9, at 5.

150. *See id.* at 32.

151. Indeed, concerns about Soviet influence at the U.N. proved not to be entirely unjustified. Recent evidence suggests that the Soviet delegation played a key role in drafting portions of the U.N. Declaration and that the delegation considered the Declaration a vehicle for promoting its vision of positive social rights. *See* JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 93–96 (1999) (discussing the influence of communist states in drafting the nondiscrimination provision in the Declaration).

narrowly advance their electoral or policy objectives, especially when there is sufficient textual ambiguity over the Constitution's allocation of authority between the political branches. But such partisan logic to the evolution of presidential authority is in tension with the prevailing notion that the separation of powers embodies a stable institutional rule that constrains actors across the political spectrum. Finally, this partisan dynamic challenges the notion that instrumental revisions to presidential authority, to the extent they exist, stem almost exclusively from the conflicting institutional preferences between the occupant of the White House and members of Congress.

That is not to argue that the separation of powers is a charade. On the contrary, the veil of ignorance over the likely effects of a revision in presidential authority will often be thick enough that in many, if not most, circumstances politicians will be uncertain as to how such revision will influence future policies or electoral objectives. The analysis here simply suggests that, under certain conditions, the stability of any specific system of separated powers may sometimes be vulnerable to partisan factors, especially if the allocation of presidential authority can be unbundled on an issue-by-issue basis.