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## **THE PARADOX OF U.S. HUMAN RIGHTS POLICY**

**Andrew Moravcsik**

Professor of Government and Director of the European Union Program  
Harvard University

### **ABSTRACT**

Why is the US so reluctant to ratify and apply multilateral human rights treaties? This is paradoxical for a country with robust traditions of domestic rights enforcement and unilateral action abroad to promote human rights. The most common explanations for this phenomenon stress the distinctively American “rights culture”. In this view, the US has a distinctive democratic commitment to popular sovereignty and local government, nationalist belief in the US constitution and political institutions, and libertarian conception of rights. This paper argues that a “pluralist” analysis of social interests and the institutions that represent them in the US suggests a more plausible explanation. This account rests on four general characteristics of the American polity—the extreme strength of its geopolitical position, the extreme stability of its domestic democratic institutions, the extreme conservatism of a vocal minority in the political system, and the extreme decentralization of its political institutions. The US is the only Western democracy with all four of these characteristics, and it is the only one with such a paradoxical policy mix.

*Please contact the author at [moravcs@fas.harvard.edu](mailto:moravcs@fas.harvard.edu) for an updated version before citing. Authors' cited publications are available at or [www.people.fas.harvard.edu/~moravcs](http://www.people.fas.harvard.edu/~moravcs)*

American “exceptionalism” in international human rights policy—the US aversion to formal acceptance and enforcement of international human rights norms—poses a paradox.<sup>1</sup> The paradox lies in the curious tension between consistent rejection of the application of international norms, on the one hand, and the strong US traditions of judicial enforcement of human rights at home and unilateral action to promote civil and political rights abroad, on the other. The US has, after all, the oldest continuous constitutional tradition of judicial enforcement of a written bill-of-rights in the world today. Nowhere in the world are civil liberties more robustly debated and defended in public and in court. From support for revolutionary France in the first years of the republic to military intervention in Haiti during the 1990s, moreover, American politicians and citizens recognized the integral link between the spread of civil liberties abroad and the defense of American ideals and interests. US efforts to enforce global human rights standards through rhetorical disapproval, foreign aid, sanctions, military intervention, and even multilateral negotiations are arguably more vigorous than those of any other country.<sup>2</sup> The US acts even where—as in Kosovo—the potential costs are high, and in some cases such leadership has been essential to the success of human rights enforcement.<sup>3</sup> Levels of overall US public support for international human rights policy, like support for multilateral commitments—and even its views on issues like the death penalty—are not strikingly unlike that of other advanced industrial democracies.<sup>4</sup> The US is, finally, the home of what the largest and most active community of non-governmental organizations and foundations devoted to human rights promotion in the world today.

Yet the US stands nearly alone among Western democracies in that it does not acknowledge the domestic reach of the global system of interlocking multilateral human rights enforcement that emerged and expanded since 1945. This phenomenon subsumes Michael Ignatieff’s categories of exemptionalism, non-compliance, non-ratification, and double standards, which are essentially different versions of the same thing, namely an unwillingness to apply to itself rules that the US in principle accepts as just.<sup>5</sup> True, the US has ratified one of the two UN Covenants, as well as conventions on political rights

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<sup>2</sup> For useful overviews of US unilateral policies, David Forsythe, “The United States, the United Nations, and Human Rights,” in Margaret Karns and Karen Mingst, eds., *The United States and Multilateral Institutions: Patterns of Changing Instrumentality and Interest* (Winchester: Unwin Hyman, 1990), pp. 261-288. The US is so active that some have interpreted global human rights regimes as the result of American hegemony. E.g. Tony Evans, *U.S. Hegemony and the Project of Universal Human Rights* (London: Macmillan, 1996).

<sup>3</sup> See Harold Hongju Koh, “Foreword: On American Exceptionalism,” *Stanford Law Review* 55 (2003), pp. 1479-1527.

<sup>4</sup> For a summary of poll results, see Edward C. Luck, *Mixed Messages: American Politics and International Organization, 1919-1999* (Washington: Brookings Institution Press, 1999), pp. 34-40. On the similarity of US and European views on the death penalty, see Moravcsik, “The New Abolitionism: Why Does the US Practice the Death Penalty while Europe Does Not?” *European Studies* (September 2001).

<sup>5</sup> Cite Ignatieff introduction.

of women, genocide, slavery, forced labor, racial discrimination, and torture.<sup>6</sup> It stands out, however, for not ratifying international instruments on discrimination against women (CEDAW), rights of the child, socio-economic rights, and migrant workers, as well as the relevant regional document, the American Convention of Human Rights. This level of rejection is unique. The Convention of the Rights of the Child, for example, has been ratified by every UN member except the US and nearly state-less Somalia.

Perhaps more importantly, in the few cases where the US does ratify human rights treaties, it has done so only after a long delay and with greater substantive and procedural reservations than any other developed democracy.<sup>7</sup> Domestically, the US stipulates in every case that human rights treaties are not self-executing. Internationally, the US flatly refuses to accept the jurisdiction of external enforcement tribunals. In contrast to all other Western democracies, the US offers its own citizens no opportunity to seek remedies for violations of internationally codified rights before either a domestic or an international tribunal.<sup>8</sup> Moreover, in contrast to nearly all European democracies, the US has incorporated few regional or international human rights norms into domestic law.<sup>9</sup> Indeed, the mere prospect of acknowledging and enforcing international human rights norms at home, triggers virulent partisan opposition—even in cases where the possibility of any change in US policy is remote.

The paradoxical international human rights policy of the US is widely criticized as embodying a double standard. The Lawyer's Committee on Human Rights has charged outright hypocrisy in the implicit view that "one set of rules belongs to the U.S. and another to the rest of the world."<sup>10</sup> Human Rights Watch and the American Civil Liberties Union denounced US ratification in 1992 of the UN International Covenant on Civil and Political Rights (ICCPR) on the ground that the reservations restricting domestic enforcement rendered it a "half step" based on "the cynical view of international human rights law as a source of protection only for those outside U.S. borders."<sup>11</sup>

How is this paradoxical policy mix to be explained? Explanations can be divided into two broad categories.

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<sup>6</sup> Jack Goldsmith makes much, perhaps too much, of this formal adherence. See Jack Goldsmith, "Should International Human Rights Law Trump US Domestic Law?", *Chicago Journal of International Law* 1 (2000), pp. 327-339.

<sup>7</sup> Louis Henkin, "US Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *American Journal of International Law* 89 (1995), pp. 341-349.

<sup>8</sup> See Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (2<sup>nd</sup> edition) (Oxford, U.K.: Oxford University Press, 2000), pp. 1049-1081.

<sup>9</sup> See Goldsmith, "Should International Human Rights Law Trump US Domestic Law?", pp. 335-36. Exceptions include several specifics of the genocide and torture conventions, adopted after some decades.

<sup>10</sup> Letter from the Lawyer's Committee on Human Rights to Senator Claiborne Pell, 2 March 1992, published in *Human Rights Law Journal* 14:3-4, p. 129; Tony Evans, *U.S. Hegemony and the Project of Universal Human Rights* (London: Macmillan, 1996), p. 189.

<sup>11</sup> *Human Rights Violations in the United States: A Report on US Compliance with the International Covenant on Civil and Political Rights* (New York: Human Rights Watch and the American Civil Liberties Union, 1993), p. 2.

In the first category are found those explanations that attribute this form of American exceptionalism to the enduring, broadly-based “rights culture” of the US. Such explanations view American exceptionalism in human rights as the result of broad-based, long-standing cultural values about procedural legitimacy that render international norms intrinsically unattractive to Americans. Among the norms that are often cited as explanations for American skepticism about human rights are popular sovereignty, local government, constitutional patriotism, nationalism, and libertarianism.

I shall consider these explanations in detail, but my primary purpose here is to present the arguments underlying, and the evidence supporting, a second category of explanations—explanations that prove in the end, I argue, to be more valid empirically. These explanations attribute the exceptional ambivalence and unilateralism of the U.S. human rights policy to the instrumental calculation of American politicians about the domestic consequences of adherence to international norms, which in turn reflects the distinctive structure of political interests and institutions in the US.<sup>12</sup> I maintain that *the US is skeptical of domestic implementation of international norms because it is geopolitically powerful, stably democratic, contains a concentrated, active conservative minority, and possesses politically decentralized and fragmented nature of American political institutions*. Superpower status means that the US has more credible unilateral alternatives to full participation in multilateral institutions than, say, the smaller democracies of Western Europe. The stability of its domestic democratic system means that, in contrast to postwar (and post-Cold War) Europe and contemporary Latin America, domestic actors lack the strongest self-interested motivation for implementing human rights norms, namely the defense of domestic democratic institutions. The existence of a vocal conservative minority in the US actively opposed to aggressive civil and political rights enforcement through judicial review makes domestic application more controversial than it is elsewhere. Finally, those structural aspects of American political institutions that create veto-groups and empowers minorities—in particular, supermajoritarian treaty ratification rules in the Senate, the federal system, and the strength of the judiciary—means that domestic legal reform via international treaties is much more difficult, yet also much more consequential, than it is elsewhere.

Any one of these four general characteristics—external power, democratic stability, conservative minorities, and veto-group politics—would be likely to render governments less likely to accept binding multilateral norms. *The United States is the only advanced industrial democracy that possesses all four characteristics—and hence it is predictably the country, among democracies, least likely to fully acknowledge the domestic force of human rights norms*. The conception of American “exceptionalism” advanced here is thus quintessentially social scientific: The US is exceptional not because American politics functions according to utterly unique rules, but because the US occupies an extreme position in four structural dimensions of human rights politics, from which we would expect extreme behavior. I seek to demonstrate here that this account is more plausible empirically than (and thus ought to be assigned more weight than) conventional cultural accounts.

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<sup>12</sup> This is not to say culture and values do not matter, only that “rights culture,” strictly construed, does not play the dominant role in explaining US policy in this area.

Before proceeding to the empirical evaluation of these explanations, it is useful to recall two methodological points. First, any explanation of US policy should be consistent not just with American exceptionalism with regard to domestic enforcement *per se*, but with the *paradox* of American exceptionalism—that is, it must subsume both the unwillingness of the US to domestically recognize and implement international norms, on the one hand, and the traditions of robust judicial enforcement of domestic civil rights standards and unilateral action abroad to enforce such rights, on the other. Many common explanations—for example, that the US is a nation of popular sovereignty averse to judicial power, or that the US has an entirely different notion of human rights from those elsewhere in the world—explain the first but are inconsistent with the second.

Second, any explanation should explain not just the gross fact of American exceptionalism, but particular details about the political process by which it comes about.<sup>13</sup> Here I would like to distinguish thin and thick explanations of the phenomenon. A thin explanation of US non-acknowledgement of international norms is one that offers a coherent prima facie motivation for US rejection of international human rights norms. Such explanations are easy to generate—all the cultural and political factors mentioned above easily meet this standard. Moreover, since any serious politician tends to voice multiple, redundant justifications for his or her actions, it is not difficult to find abundant rhetorical evidence of the importance of any number of factors. Such explanations are so easy to generate, they tell us little. A thick explanation, by contrast, accounts not just for the US rejection of the domestic application of multilateral norms *per se*, but must also be consistent with the more detailed aspects of the process and broader context of the policy: the substantive scope of US rejection, the more positive position of other countries, the domestic political cleavages, the rhetoric of opponents, and so on.<sup>14</sup> Each of these empirical indicators of motivation has its dangers, but taken together they provide a mass of evidence to weigh and evaluate alternative causes.

In the first section of this paper I evaluate “rights culture” explanations empirically. In the second section, I evaluate “pluralist” explanations that rest on instrumental calculation of social and political interests within existing political institutions. In the concluding section, I draw some more speculative and skeptical conclusions about the consequences of US non-compliance.

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<sup>13</sup> For detailed discussions on process tracing, see Andrew Bennett and Alexander L. George, “Process Tracing in Case Study Research” (MacArthur Foundation Workshop on Case Study Methods, October 17-19, 1997), and Alexander L. George and Andrew Bennett, *Case Studies and Theory Development* (MIT Press, forthcoming).

<sup>14</sup> Specifically, I examine the following: (1) *Scope* - US policy rejects domestic application across a wide range of both political and socioeconomic rights; (2) *Tactical Choices* - The US consistently contributes to the negotiation of human rights norms, engages in robust unilateral human rights enforcement policies, and has a strong domestic tradition of human rights enforcement, but does not permit domestic enforcement; (3) *Cross-national Comparison* - Other advanced industrial democracies have accepted international enforcement, while the US has not. (4) *Domestic Cleavages* - Human rights enforcement is a partisan issue, dividing US liberals and conservatives largely along ideological, and thus often partisan, lines. (5) *Rhetoric*: What specific substantive arguments have opponents of human rights enforcement employed?

## UNILATERALISM AND A DISTINCTIVE AMERICAN RIGHTS CULTURE

Many attribute U.S. domestic non-implementation of global human rights norms to a distinctive culture of American “exceptionalism”—that is, a pervasive sense of “cultural relativism”, “ethnocentrism”, or “nationalism”.<sup>15</sup> J.D. van der Vyver, for example, maintains that:

The American approach to international human rights is as much a manifestation of cultural relativism as any other sectional approach to international human rights founded on national ethnic, cultural or religious particularities. American relativism, furthermore, also serves to obstruct the United Nations’ resolve to promote *universal* respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>16</sup>

Natalie Kaufman, a leading historian of postwar Senate deliberations, characterizes consistent concern among American politicians to protect the sanctity of U.S. political institutions in a diverse world as evidence of “an ethnocentric world view, a perspective suspicious or disdainful of things foreign” dating back at least to the early 1950s.<sup>17</sup> David Forsythe points to “American nationalism...intellectual isolationism and unilateralism.”<sup>18</sup> Others charge the US with outright “hypocrisy.”<sup>19</sup>

Such rhetoric is often little more than normatively charged criticism of US policy, rather than an explanation for it. In the international legal community, in particular, labeling a policy as an instance of “cultural relativism” rather than adherence to a “universal” norm is a customary rhetorical means of delegitimizing it.<sup>20</sup> Still, such claims are sometimes meant also as rigorous causal explanations of US policy. To evaluate them as such, we must distill a more precise understanding of the “national ethnic, cultural and religious particularities,” the “cultural relativism,” and the “ethnocentrism” that, according to critics like van der Vyver, underlie American exceptionalism.

Here I construe these sorts of “political culture” arguments to distinguish those explanations for US “exceptionalism”, non-ratification and non-compliance that invoke the tendency of the Americans public, elite or leadership to interpret rights differently by virtue of ideological or cultural predispositions in favor of specific procedural forms. I mean thereby to distinguish cultural commitment to *procedure* from commitments,

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<sup>15</sup> This relates to another of Ignatieff’s six categories of “American exceptionalism.” As he notes, the “distinctive rights culture... is both an element of exceptionalism and a possible explanation for it.” Cite Ignatieff introduction.

<sup>16</sup> Van der Vyver, “Universality and Relativity,” 65.

<sup>17</sup> Kaufman, *Human Rights*, p. 45. Natalie Kaufman argues, for example, that Southern racism and Cold War McCarthyism came together in the early 1950s and set the rhetorical mold for subsequent debates.

<sup>18</sup> Forsythe, “The United States,” pp. 269, 282.

<sup>19</sup> Quote from Moravcsik, “Why is the US So Unilateralist?”

<sup>20</sup> For classical international lawyers, a nation either accepts, at least in principle, uniform application of all international human rights norms or it is “culturally relativistic”. This critique also assumes, without proof, that commitment to multilateralism is the most efficient means to promote global human rights. In real existing systems of international adjudication, such as the European Convention on Human Rights system, in fact the distinction is far less clear. All but the most essential human rights are interpreted with varying deference to a “margin of appreciation” retained by national governments in determining the precise scope and meaning of the right.

ideological or otherwise, to particular *substantive* policy outcomes, which might then lead domestic groups to interpret rights instrumentally in a distinctive way. The latter I shall treat below under “pluralist” arguments”. Thus a causal link between a widespread belief in “states’ rights” and US non-ratification of international instruments is a “rights cultural” explanation, whereas a predisposition to oppose abortion or to favor the death penalty as a policy, which then translates instrumentally into opposition to international norms (and perhaps also a defense of states rights domestically) is a pluralist explanation based on the strength of support for conservative policy outcomes *per se*. The two may be, as an empirical matter, quite difficult to distinguish, but as a theoretical matter, the distinction is nonetheless essential.

When analysts invoke “rights culture” as an explanation rather than simply as a normative criticism, they generally mean generally mean one or more of three things: (a) international obligations violate a widespread “reverence” toward the US Constitution and political institutions as “sacred symbols” among U.S. legal elites and citizens; (b) a long-standing American belief in “popular sovereignty” and “local government” predisposes Americans to oppose centralized judicial norms; and (c) a popular American “rights culture” of negative liberties rooted in an individualist world view is incompatible with international human rights obligations. Let us examine each in turn.

### **Constitutional Patriotism and Other Forms of Nationalism**

Do international obligations violate a general culture of “reverence” among American legal elites toward the US Constitution as a “sacred symbol”? The claim here is that Americans, and particularly its legal elites, are unusually attached to their Constitution. It is clearly true, as David Golove has written of human rights law:

Americans... are accustomed to thinking that our legal system, especially our constitutional commitment to fundamental rights, provides a model that other countries would be well advised to emulate. This confident, perhaps arrogant, self-conception as a moral beacon for the rest of the world has deep roots in U.S. history and seems as strong today as it has ever been. In contrast, many Americans are apt to be far less comfortable with the notion that when it comes to justice, we may have something to learn from other nations - that we may benefit from the importation, not just the exportation, of rights.<sup>21</sup>

The United States appears unusually committed to the sanctity of its constitution—as the current spread of “originalist” legal interpretation suggests. It is those who hold this view who are most critical of US application of international human rights norms.<sup>22</sup>

Why should this be so? Perhaps simply because the US constitution has been around so long.<sup>23</sup> Perhaps because Americans are, as Tocqueville noted, a nation of laws and lawyers, in which “hardly a political question ... does not sooner or later turn into a

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<sup>21</sup> David Golove, “Human Rights Treaties and the U.S. Constitution,” *52 DePaul Law Review*, (Winter 2002), p. 579.

<sup>22</sup> Rabkin, *Why Sovereignty Matters*

<sup>23</sup> Russett et al. *Triangulating Peace*

judicial one.”<sup>24</sup> Perhaps because, lacking a distinct ethno-national identity, Americans identify their nationality with a single liberal-democratic political creed to a greater extent than the citizens of other modern nations.<sup>25</sup> In *The Promise of Disharmony*, Samuel Huntington famously argued about this civic nationalism: “In the United States, as in no other society, ideology and nationality are fused and the disappearance of the former would mean the disappearance of the latter.”<sup>26</sup> As a result, Huntington argues, “the relation of its institutions [of] foreign relations to the ideals and values of its foreign policy” and, in particular, “to what extent should the United States attempt to make the institutions and policies of other societies conform to American values” become more serious problems for the United States than for most other societies.<sup>27</sup>

One version of this argument sees the constraint on US policy imposed by American “constitutional culture” as taking the form of diffuse views held among the mass public. Polls reveal that Americans possess a distinctive national pride in their political institutions, and that this makes them also much prouder of their country than publics in other advanced industrial democracies.<sup>28</sup>

Yet we encounter a number of difficulties linking this characteristic of public opinion to human rights policy. First, the public has generally viewed international human rights treaties, like multilateralism in general, considerably more positively than do decision-makers, particularly those in the Senate. In the 1950s, to take one prominent example, the Genocide Convention was backed by groups claiming a combined membership of 100 million voters, including veterans, racial minorities, religionists, workers, and ethnic Americans, while opponents could call on little more by way of organized groups than the American Bar Association.

Second, the scholarly research on US human rights policy, more broadly, suggests that elite rather than mass opinion guides US human rights policy. Human rights are not salient or high priority issues for either elites or the mass public—and, indeed, their salience has been declining since the end of the Cold War.<sup>29</sup> Such are the sort of issues on which the public is more likely to follow opinion leaders. (Over time, moreover, there is reason to believe that public opinion on issues like the death penalty tracks elite behavior and policy outcomes, rather than the reverse.<sup>30</sup>) Though mass and elite opinions tend to move in parallel and to respond to the same incentives, elite views tend to be more

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<sup>24</sup> *Democracy in America*, Vol. 1, Chapter XVI.

<sup>25</sup> See Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt, Brace, & World, 1955), and Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Cambridge: Harvard University Press, 1981).

<sup>26</sup> Huntington, *American Politics*, pp. 25-27.

<sup>27</sup> *Ibid.*, p. 236.

<sup>28</sup> Seymour Martin Lipset, *American Exceptionalism: A Two-Edged Sword* (New York: Norton, 1996), pp. 50-52.

<sup>29</sup> Ole Holsti, “Public Opinion on Human Rights in American Foreign Policy,” in David Forsythe, ed., *The United States and Human Rights: Looking Inward and Outward* (Lincoln: University of Nebraska Press, 2000), pp. 142ff.

<sup>30</sup> Until the mid-1970s support for the death penalty declined steadily to about 50% in both the US and Europe. European governments abolished it and support remained stable or trended slowly downward, while the US failed to abolish and the success of a state-level movement increased support over the next few decades. See Moravcsik, “The New Abolitionism.”



polarized and more coherent—that is, more consistently correlated with partisan considerations, domestic ideology, and positions on other foreign policy issues. In 1986-1990, for example, the difference between the level of poll support for human rights between Democrats and Republicans in the population was only 4%, whereas the difference between Democratic and Republican elites was 21-38%. Elite opinion was generally more tightly linked to belief systems about and other issues of domestic and foreign policy.<sup>31</sup> Differences in elite support for specific US international human rights policy is closely correlated both with “a general series of foreign and military issues” and with domestic political ideology.<sup>32</sup> The gaps in support for international human rights between liberal and conservative opinion leaders approaches 50% (e.g. 25% to 73% support for propositions like “too many Iraqis were killed in the [first] Persian Gulf War.”) Support for the right to dissent, school busing, abolition of the death penalty, the Equal Rights Amendment are correlated with support for US human rights policy.<sup>33</sup> In the minds of conservative opponents, what is most troubling about turning over judgment on human rights matters international courts is not that they are international, but that they are courts.

This leads us to a second, Tocquevillian variant of the “constitutional culture” explanation. Here the argument is that American elites are disproportionately comprised of lawyers, and American lawyers tend to revere the Constitution. At first glance, this explanation seems promising. During the Bricker Amendment controversy of the early 1950s—for some, the defining moment of postwar US human rights policy—we see such an alignment. Legal elites stood consistently at the forefront of opposition to the human rights norms, as against a broad coalition of religious, labor and civic groups. In this period, the American Bar Association (ABA) led the fight against human rights treaties, which fell short of Congressional ratification (in a watered-down form) by one vote. Moreover, the ABA defended its position by advancing arguments about the legitimacy of particular American constitutional elements, such as states’ rights.<sup>34</sup>

Yet a broader historical and comparative view calls the Tocquevillian view into question. The 1950s, it appears, were exceptional. The ABA was in fact strongly internationalist and favorable to human rights policy in the late 1940s, pushing for global bill of rights and a strong international court of justice. It shifted to opposition around 1950, but then shifted back to support for global norms in the late 1960s and 1970s in response to the civil rights movement. The ABA currently supports ratification of CEDAW, ICC, and the Convention on the Rights of the Child—though the US does not; it is open-minded with regard to domestic application of global norms.<sup>35</sup> A comparison with Canada is similarly instructive. Like its US counterpart, the Canadian bar

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<sup>31</sup> Holsti, “Public Opinion,” pp. 145-147.

<sup>32</sup> Forsythe, *Human Rights and US Foreign Policy*, 41. This is corroborated by the data in Holsti, “Public Opinion.”

<sup>33</sup> Holsti, “Public Opinion,” pp. 150-153.

<sup>34</sup> The ABA is the most influential legal organization in the US—over ½ of American lawyers are members, has taken an interest in international jurisprudence since it was founded in 1878.

<sup>35</sup> For complete background information on the ABA’s current positions, see <http://www.abanet.org/poladv/priorities/intltreaties.html#Background>. The ABA also supports financial assistance to promote human rights NGO activities and international rule-of-law initiatives aimed to strengthen independent judiciaries abroad.

association strongly opposed international human rights enforcement in the 1950s, but shifted in the two following decades. Canada reversed its position on global human rights norms under Prime Minister Pierre Trudeau, and today Canada ratifies treaties and accepts international jurisdiction—except that of the Inter-American Court of Human Rights. US policy, by contrast, moved only symbolically in response to the shift in legal opinion, suggesting that elite legal opinion is not the whole story. In the US, the political system generates outcomes more conservative than those preferred by legal elites.

The detailed history of the ABA’s position and the particular constitutional arguments advanced against applying global norms (in particular, the defense of states’ rights), the nature of the opposition (largely focused among Southern Senators), and its timing (in the 1950s, with a reversal when the civil rights movement gains ascendancy) suggests further that ideological positions taken by the legal elite, and the defense of the sanctity of the constitution itself, is not evidence of a unified cultural ethos, but a tactic to defend particular domestic political interests, notably segregation and other conservative positions on the rights of minorities. Many prominent opponents of international human rights norms are guided by conservative views about the proper role of the judiciary today. This is consistent with the established view that “originalism” in constitutional jurisprudence is driven, at least in part, by substantive commitment to a particular set of conservative policy positions.<sup>36</sup> The left would be aided in its efforts by the domestic application of international norms; the right would generally be impeded. In this sense, the particular form of legal doctrines—originalism, “sovereignism,” states rights—are epiphenomenal. The conflict, as we shall see in more detail when we turn to interests and institutions, is really a pluralist one between the left and right to influence judicial institutions—the left seeking to move the constitutional clock “forward” in accordance with international norms, the right seeking to turn it “back” to the 1920s.<sup>37</sup>

## Popular Sovereignty and Local Government

Appeals to democracy and alarms about an encroaching “democratic deficit” are often found in contemporary conservative criticisms of the expansion of the scope of international organizations—and, in particular, international tribunals.<sup>38</sup> Conservative politics rhetoric rarely fails to contrast unelected bureaucrats in international

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<sup>36</sup> For example: “Originalism is a political slogan that stands for strong disagreement with a particular subset of modern decisions, not an unqualified commitment to wholesale restoration of the Founders’ Constitution.” Larry Kramer, “Originalism and Historical Truth: On Finding (and Losing) our Origins,” *26 Harvard Journal of Law and Public Policy* 95 (Winter 2003), p. 107. This also dovetails with criticisms of Huntington’s interpretation for its exaggeration of the level of consensus in US society. For a critique that stresses underlying conflicts over competing ideals and interests—and, in particular, between liberals committed to equality and conservatives committed to liberty—see Rogers M. Smith, “The ‘American Creed’ and Constitutional Theory,” *Harvard Law Review* 95 (1982), pp. 1691-1702.

<sup>37</sup> Lest this seem hyperbolic, it is important to note that some critics of US application of international norms are quite explicit about their desire to roll back the shift toward federal power that resulted from the New Deal, the Cold War, and the civil rights movement. For an analysis of Jeremy Rabkin and William Cash, originally developed in debate at the American Enterprise Institute, see Andrew Moravcsik, “Conservative Idealism and International Institutions,” *Chicago Journal of International Law* (Autumn 2000). Against such claims, I argue that selectivity in the defense of “sovereignty” (e.g. the WTO and NATO are fine, but not the ILO or the UN) as a means to defend constitutional retrogression is a constant of conservative discourse in the US and UK.

<sup>38</sup> For a summary and critique, see Moravcsik, “Conservative Idealism.”

organizations with the legitimate role of constitutionally-elected domestic representatives.<sup>39</sup> One might believe that popular sovereignty is a curious cause for economic conservatives to be championing, but insofar as it is more than an objection to particular policy outcomes, the basis of the resulting critique—a critique shared by British Tory Euroskeptics—is that because there is no subjective sense of an international polity (a “*demos*”) there thus can not be, either in theory or in practice, democratic accountability. Global governance is distant, technocratic, and judicialized decision-making that encourages arbitrary rule by moralist or socialist elites.<sup>40</sup> It would seem to follow that Americans would be suspicious of all global human rights norms, and that the rhetoric of opposition to their application in the US would be, as it is, tinged with patriotism. Could a distinctively American (or Anglo-American) commitment to popular sovereignty be the source of American ambivalence with regard to the application of global human rights norms?

Certainly conservative critics of human rights treaties wrap themselves in the mantle of democracy, but is it in fact the source of their concern?<sup>41</sup> In certain respects, the US may be committed to popular sovereignty, but in comparative perspective, it is hardly an extreme case. The American constitution—with its checks and balances, federalism and, most importantly for our purposes here, strong judiciary—instantiates anything but the ideal of popular sovereignty. Most polities in Europe—notably the majority based on some notion of sovereignty by a directly-elected parliament—have political traditions far closer to that idea and, as a result intrinsically more hostile to checks and balances, judicial law-making, and individual litigation to resolve disputes in particular.<sup>42</sup> (The exceptions to this rule are almost all either constitutions rewritten or imposed on previously Fascist countries after World War II or a subsequent democratic transition.<sup>43</sup>) For most West European polities, international human rights systems are the only experience with *ex post* judicial review for human rights purposes they have ever had. If a commitment to “popular sovereignty” has led any region of the world to oppose human rights, it should have been Europe.<sup>44</sup> By contrast, the US is widely viewed as the classic example of a system in which the legitimacy of courts to overrule the popular will in defense of human rights is widely accepted. While scholars may debate the legitimacy of a “counter-majoritarian” institution like the Supreme Court, polls reveal high levels of perceived legitimacy for courts in the US.<sup>45</sup> Courts are often linked with commitments to individualism and “equality of opportunity.” As compared to the citizens of other countries, Americans may retain a “Lockean” suspicion of government coercion in

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<sup>39</sup> E.g. see Luck, *Mixed Messages*, pp. 45-46.

<sup>40</sup> Normative appeals to popular sovereignty are often found in policy analysis, political rhetoric, political philosophy, and occasionally in constitutional law scholarship surrounding rights claims. Cites.

For critiques of this notion, see Christopher Eisgruber

<sup>41</sup> I have discussed this issue in more detail in “Conservative Idealism and Human Rights.”

<sup>42</sup> On differential levels of litigiousness, see Lipset, *American Exceptionalism*, p. 50.

<sup>43</sup> Moravcsik, “The Origins of Human Rights Regimes.”

<sup>44</sup> And, indeed, in Britain, France, and Scandinavia, we see substantial opposition of just this type.

<sup>45</sup> Louis Henkin et al. classic casebook is premised on this view—a parallel unthinkable in most constitutional systems in the world. Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher, and David W. Leebron, *Human Rights* (New York: Foundation Press, 1999).

matters as taxation, government ownership, welfare and the managed economy, but few question the legitimacy of courts to render decisions on issues of human rights. Trust in the Supreme Court remains high.<sup>46</sup>

Alternatively, one might argue that Americans have a principled belief in local, small-scale democracy within a federal system, which predisposes them to reject centralized forms of rights enforcement, particularly at the international level. It is certainly true that Americans report suspicion about big government in Washington, and tend to trust state and local officials more.<sup>47</sup> The US has more elected offices *per capita* than any country in the world.<sup>48</sup> The practice of electing local judges, viewed with abhorrence in most of the developed world, is widely accepted in the US. Consistent with this view is the tendency of opponents of centralized judicial power in the US, many of whom also oppose international human rights enforcement, to stress the importance of “states’ rights.”

Yet an explanation based on localism runs into some of the same sort of objections as the arguments from democracy or constitutional patriotism. There are other political systems in the world, such as Italy, Germany, Belgium, and Spain, with substantial attachment to local government—though such systems are fewer than strong parliamentary systems—and they do not seem to translate these views into virulent opposition to multilateral treaties.<sup>49</sup> Moreover, we must ask whether those who criticize the Supreme Court in the US, and international tribunals by extension, do so primarily because they hold a particular philosophy of localism or because their substantive preferences in regard to political outcomes are better served by local government. How many principled defenders of “states rights” exist today, and how many support states rights because they favor a weakening of policies pursued by the federal government with regard to race, death penalty, criminal rights, and welfare? The intensely partisan nature of the disputes—Democrats tend to support federal civilian initiatives more than Republicans, consistent with their positions on international human rights issues—suggests a concrete underpinning to ideological positions. A full discussion of this issue is beyond the scope of this paper, but below we shall consider some more evidence that substantive issue positions are indeed dominant.<sup>50</sup>

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<sup>46</sup> On trust in the court, see <http://www.pollingreport.com/institut.htm>. On the tension between the egalitarian ideals of American society and the aversion to coercive government action to achieve them, see Seymour Martin Lipset, “Introduction,” *The First New Nation: The United States in Historical and Comparative Perspective* (New York: Norton, 1963/1979), pp. xxxiii-xxxiv; Seymour Martin Lipset, “The Paradox of American Politics,” *The Public Interest* (Fall 1975), pp. 142-165.

<sup>47</sup> <http://www.pollingreport.com/institut.htm>

<sup>48</sup> Lipset, *American Exceptionalism*, p. 43.

<sup>49</sup> We see something similar, perhaps, in the tension between the prerogatives of the German Bundesländer and that country’s commitments to the EU. Cite.

<sup>50</sup> The same question can be posed in historical perspective. Even if many conservatives oppose international human rights norms out of sincere commitment to certain procedural ideals, were the strength and maintenance of these ideals themselves a function of restricted institutional choices. I side with those who believe it is. See John W. Kingdon, *America the Unusual* (New York: Worth Publishers, 1999). For further discussion, see p. \_\_\_ below.

## Libertarianism and the Substance of Rights

A third and final “culturalist” conjecture holds that the US conception of “limited government,” understood as a libertarian preference for negative as opposed to positive rights, predisposes Americans to reject global human rights norms. This view rests on the classic understanding of “American exceptionalism” in political science and social history. This classic view refers to the absence of a true socialist party and extensive social welfare institutions present in nearly all other advanced industrial democracies.<sup>51</sup> In this view, the US rejects global human rights norms because they embody a different philosophical conception of rights—one skewed toward positive rights and duties rather than negative rights.

Certainly the divergence between the US and other advanced industrial democracies on the question of the scope of rights—and, in particular, the inclusion of social and economic rights—has influenced postwar international human rights policy. Recent historiography has revealed the important role of the Soviet bloc and the developing world (not least in Latin America) in the promoting positive duties and socioeconomic in the UN Universal Declaration.<sup>52</sup> In 1953, at the height of the Bricker Amendment controversy, a leading American opponent, President of the American Bar Association Frank Holman, wrote:

[The UN human rights system] would promote state socialism, if not communism, throughout the world...Internationalists...propose to use the United Nations...to change the domestic laws and even the Government of the United States and to establish a World Government along socialistic lines.... They would give the super-government absolute control of business, industry, prices, wages, and every detail of American social and economic life.

It is unclear to what extent this was a sincere expression of concern, a tactical effort by Southern segregationists (the core of opponents to international human rights in this period) to find allies among business-oriented Republicans, and a tactical use of McCarthy-era rhetoric—but it is certainly consistent with a libertarian ethos. To this day, the US has failed to ratify UN Covenant on Economic and Social Rights, even with reservations, and shuns more specialized treaties on subjects like the rights of migrant workers, as well as nearly the entire (rather large) corpus of the International Labor Organization.

There is, I shall argue, one more nuanced strand or interpretation of the libertarian vs. egalitarian argument for which there is substantial evidence. But before coming to it, however, let us set aside three simpler and more extreme interpretations for which there is less evidence.

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<sup>51</sup> For a recent review of this literature, see Seymour Martin Lipset and Gary Marks, *It Didn't Happen Here: Why Socialism Failed in the United States* (New York: W.W. Norton & Co., 2000); Kingdon, *America the Unusual*; Lipset, *American Exceptionalism*, pp. 88-109.

<sup>52</sup> For a systematic archival analysis, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999). For an overview focusing more on Eleanor Roosevelt, see also Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2000)

The first interpretation is that the main reason for US ambivalence lies in a cultural aversion to socioeconomic (“positive”) rights in the strong sense of welfare entitlements or labor rights. While the US and most of the rest of the Western world do differ on this matter, it has little relevance for the matter at hand. With the exception of the Universal Declaration, an unenforceable document, the international human rights system strictly separates civil and political rights from socioeconomic ones. The UN system, for example, distinguishes between the modestly enforceable Covenant on Civil and Political Rights, favored at the time of negotiation by Western governments, and what has remained a symbolic and rhetorical Covenant on Social and Economic Rights. Some Europeans aspire to extend the international enforcement of socioeconomic rights—an act that would be in their commercial interest as well—yet even the European Convention system and the EU do not effectively protect socioeconomic rights, and no serious effort has been made to have them do so. The US could, therefore, at any time simply ignore socioeconomic documents, while ratifying and implementing civil and political ones—as it has indeed done in the process of negotiation. This is why, beyond intermittent rhetorical excesses exemplified by the quotation from Frank Holman above, almost no attention has been paid to economic rights in US domestic debates. The exceptional level of US opposition is really all about civil and political rights.<sup>53</sup>

The second interpretation rests on the claim that US ambivalence rests on a culture of strict philosophical adherence to libertarian principles. Again this seems questionable on its face.<sup>54</sup> There is no clear correlation between libertarian philosophical foundations and issues that appear to motivate the most salient conservative criticism of international human rights norms—which is not surprising, given that economic rights have been taken off the table.<sup>55</sup> US critics of human rights treaties take an explicitly anti-libertarian position—that is, a position advocating government intervention to limit individual freedom vis-à-vis the state on matters of criminal defense, the death penalty, prison conditions, abortion, religious rights, prisoners of war, and, in the 1950s, segregation. Opposition to rights of equal opportunity (anti-discrimination) with regard to women, racial minorities, and gay people, as well as opposition to children’s rights, might be interpreted as consistent with a libertarian conception of negative rights, but these cases are ambiguous at best.<sup>56</sup>

The third interpretation holds that the US rejects international standards because they would undermine the high levels of existing protection afforded to particular

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<sup>53</sup> For a characteristic example of the rare domestic attention—usually in the form of an exhortatory law review article—is see Barbara Stark, “U.S. Ratification of the Other Half of the International Bill of Rights,” in David Forsythe, ed. *The United States and Human Rights: Looking Inward and Outward* (Lincoln: University of Nebraska Press, 2000), 75-93. Stark asserts that interest groups avoided the Economic Covenant “with its troubling foreign policy implications,” but provides no evidence of any such conscious strategy. Mostly groups simply paid no attention, as is often true domestically. Stark also asserts that the Cold War was the dominant factor pushing economic rights off the agenda in the US, but again she provides no evidence—and the reverse might equally well have been the case.

<sup>54</sup> I am indebted to Frank Michelman for encouraging me to render this section more precise.

<sup>55</sup> Nor is it surprising that that US conservatives would not be consistently libertarian, given the influence of various sets of Christian values.

<sup>56</sup> The case by critics against the International Criminal Court (ICC) is also puzzling from a libertarian perspective, as one would expect support for tight judicial control over military action.

individual rights by the more “libertarian” US system. True, in comparative perspective, the American constitution and jurisprudence do enshrine and interpret expansive conceptions of certain liberties—freedom of speech, freedom to bear arms, and procedural rights of the criminal defendant, to name three. Yet this is not the source of opposition. International human rights treaties ignore some of these issues (e.g. arms). Where they do, norms rarely undermine existing protections, in part because they are almost always enforced to set a floor on basic rights, and in part because of the widespread recognition of a “margin of appreciation” for state policy in international human rights jurisprudence.<sup>57</sup> And even if they were to do so, there is little evidence that such concerns are the source of domestic US opposition to international treaties. The American Civil Liberties Union and their liberal allies are not spear-heading the anti-human rights crusade! The concern of critics is not that judicially enforced rights will diminish, but that they will expand.

A fourth and final interpretation of “libertarian” rights culture links US ambivalence to a diffuse aversion to big government.<sup>58</sup> Specifically, Americans tend to shy away from state intervention to redress social inequality—now established in most advanced industrial democracies as the primary fiscal tasks of the state. The aversion to state intervention is a distinctively American trait as compared to the political cultures of other advanced industrial democracies, which tend to be far more egalitarian, redistributive, and social democratic.<sup>59</sup> This applies directly to human rights. The most salient and enduring concerns of US critics of international human rights treaties all share an explicit opposition to state intervention to promote equality. What appears to motivate supporters of international human rights standards for criminal defense, death penalty, segregation, anti-discrimination law, social welfare, and the rights of the child are largely based on an instinctive sense that the state can and should intervene to promote egalitarian social outcomes. What appears to link conservatives across a range of controversial and sensitive issues is a rejection of that premise.

Here the cultural arguments and the material and institutional arguments I term “pluralist” become difficult to disentangle. One might debate, and many have, to what extent these values are truly procedural and to what extent they reflect (or reflect a legacy of) distinctively American conceptions of appropriate desired substantive outcomes reflecting specific racial, class, or religious values. One might similarly debate the extent to which these policy preferences are autonomous or held in place by exogenous material, institutional, or ideational forces—or the legacy left by such forces in past time. Many scholars have made the case that much of the conservatism on which hostility to international human rights norms is the legacy of an anti-majoritarian US constitutional and federal structure, two centuries of Southern overrepresentation on US politics, the conservative influence of the judiciary, and so on. This is not the place to make a contribution to that venerable debate.

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<sup>57</sup> See Fred Schauer in this volume.

<sup>58</sup> Jed Rubinfeld, “The Two World Orders,” *Wilson Quarterly* 27 (Autumn 2003), pp. 22-36.

<sup>59</sup> This is the classic sense of “American exceptionalism”, dating back to the Werner Sombart’s classic query: “Why No Socialism in America?”

Still, we have learned that simple arguments based on a homogeneous American “political culture”, that is, the cultural or ideological preference of American elites or citizens for specific procedural forms, tend to display fatal weaknesses. Such accounts explain change and cross-national differences poorly.<sup>60</sup> Perhaps their most serious failing—and it is a classic failing of such theories—lies in the lack of an account for the extreme domestic cleavages over human rights. Rather than tracking broad ideological, professional or sociological strata—such as legal training—procedural beliefs seem to track pre-existing cleavages, often partisan ones, over concrete issues of race and class.<sup>61</sup> In other words, this issue pits liberals against conservatives. This opens up the possibility that a procedural ideology is in fact a tactical choice in partisan competition.<sup>62</sup> Supporters of segregation, for example, employed “states’ rights” and other constitutional objections as more politically acceptable justifications for limiting federal jurisdiction in matters of race.<sup>63</sup> All these reasons give us reason to be suspicious of ideological or cultural explanations of US human rights policy. They are, in the language adopted above, *thin* rather than *thick* explanations of US policy. We must seek other explanations that can account for the cleavages over specific rights that have emerged in the American pluralist system and ways in which concrete institutional mechanisms for articulating those preferences influence the outcome of political conflict.

## PLURALIST EXPLANATIONS FOR AMERICAN UNILATERALISM

The pluralist view stresses the interplay of interests and institutions in lieu of political culture. To restate its central claims in general (and thus implicitly comparative) terms: Opposition to domestic application of multilateral norms is less likely in countries that possesses strong unilateral bargaining power abroad, stable democratic institutions at home, preferences about substantive rights that diverge from the international consensus, and decentralized political institutions that empower small veto groups. The U.S. has been a liberal democracy with a history of intense concern about domestic civil rights and

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<sup>60</sup> The US culture of foreign policy in general, and international human rights policy in particular, has changed greatly over time. Not fifty years ago, the conventional view held that “Americans deprecate power politics and old-fashioned diplomacy, mistrust powerful standing armies and entangling peacetime commitments, make moralistic judgments about other people’s domestic systems, and believe that liberal values transfer readily to foreign affairs.” Within a few years, the policy was reversed—and the conventional view is now the opposite. Joseph Leggold and Timothy McKeown, “Is American Foreign Policy Exceptional? An Empirical Analysis,” *Political Science Quarterly* 110:3 (Autumn 1995), 369. For one cleverly (if only partially) cultural explanation, see Jack Snyder, *Myths of Empire*.

<sup>61</sup> I am indebted to Alex Keyssar for insights on this point.

<sup>62</sup> All assessments of motivation in politics require a measure of empirical inference, and any empirical indicator or technique for doing so has dangers. The most commonly employed indicator of motivation is public rhetoric—and it is probably the least reliable measure of motivation.

<sup>63</sup> In general, cultural accounts are so disproportionately dependent on an interpretation of policy-makers’ rhetoric—the slipperiest indicator of true motivation. Talk can be cheap, cheaper than other forms of political investment, and there are thus strong incentives for politicians to deploy rhetoric, especially public rhetoric, strategically to simplify, disguise, or diversify their motivations. Self-interest is often presented as principle, extremists target swing voters to build coalitions, and narrow purposes are often made to seem broad. At the very least, cultural explanations (e.g. “Americans are committed to local government”) is often simplified short-hand for a more complex process of political choice (e.g. “the US has a federal constitution with checks and balances that hampers the centralization of policy-making”). Very often politicians also diversify public justifications, leading to long lists of factors that are easy to cite but difficult to weight—some of which may have played little or no role in the ultimate decision. A skillful politician leaves many thinking they “caused” a decision to be taken. Finally, politicians are sometimes outright duplicitous.



a sense of solidarity with other liberal democracies, yet the fact that it occupies an extreme position with regard to every one of these characteristics—power, democratic stability, conservatism, and veto-group politics—explains America’s exceptional ambivalence toward international human rights norms. Let us consider each of these four characteristics in turn.

## The Ambivalence of the Great Power

The first general factor is *the superpower status of the US in world affairs*. A straightforward “realist” argument links power to unilateralism.<sup>64</sup> The costs of multilateralism for any given state lie in the necessity to sacrifice a measure of unilateral or bilateral policy autonomy in order to impose a uniform policy. All other things being equal, the more powerful (or isolated) a state—that is, the more efficiently it can achieve its objectives by domestic, unilateral and bilateral means—the greater these “sovereignty costs” are likely to be.<sup>65</sup> Powerful governments are therefore more often skeptical of procedural equality in international forums than their smaller neighbors. This is not to say that, on balance, great powers will always oppose multilateralism, for the benefits of intense cooperation may outweigh the costs. Indeed, these benefits may, as hegemonic stability theorists have argued, accrue to a superpower disproportionately.<sup>66</sup> Yet at the same time, the hegemon retains greater bilateral capabilities and bargaining power. There is reason to expect, therefore, that great powers will feel greater ambivalence toward multilateralism than their less powerful neighbors.<sup>67</sup> Great power ambivalence toward multilateralism seems to pervade many areas of US foreign policy, including trade, monetary, financial, and security policies. The US, a strong supporter of the GATT, the UN and the IFT’s at the beginning of the postwar period, has been a problematic participant prone to unilateral and even coercive diplomacy thereafter.

The same logic obtains for human rights policy. The US possesses a real choice between unilateral and multilateral means of promoting international human rights, both of which are viable. For human rights-conscious countries like Denmark, Chile, or South Africa, the choice is between a multilateral policy and none at all. We might expect great power ambivalence to be more pronounced in human rights than elsewhere, because the

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<sup>64</sup> “Realist” theories of international relations stress the impact of material power (above all military power) on interstate politics. They predict the recurrence of phenomena such as bids for hegemonic power, balances of power, and coercive bargaining. Such dynamics, realists argue, are particularly prevalent among the great powers. Since the early 20<sup>th</sup> century, the US has been one of the world’s great powers in political, military, economic, and even cultural terms; today, many argue, the US is the only remaining superpower in what some have described as a “unipolar” international system.

<sup>65</sup> For realist views, see James McCall Smith, “The Politics of Dispute Resolution Design: Explaining Legalism in Regional Trade Pacts,” *International Organization* 54:1 (Autumn 2000), pp. 137-180; Robert Gilpin, *War and Change in International Politics* (New York: Cambridge University Press, 1981); Kenneth N. Waltz, *Theory of International Politics* (Reading, Mass.: Addison-Wesley, 1979), p. 200.

<sup>66</sup> See Robert O. Keohane, “The Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967-1977,” in Ole R. Holsti, Randolph M. Siverson, and Alexander L. George, eds., *Change in the International System* (Boulder, Colo.: Westview Press, 1980), pp. 131-162.

<sup>67</sup> Since more powerful states also have more expansive socioeconomic and political-military interests, moreover, they may also benefit more from international cooperation. We therefore expect them to demand advantageous provisions and special exceptions. See Smith, “Politics of Dispute Resolution.”

typical model of multilateral human rights enforcement is often judicial rather than legislative. Whereas multilateral organizations like the WTO and UN essentially provide forums for legislation via interstate bargaining over new rules—a mode of interaction in which the powerful generally retain disproportionate influence—human rights norms are typically enforced through formal legal adjudication at the domestic or international level. To participate fully in such arrangements, in contrast to most legislative institutions, powerful countries must generally sacrifice some bargaining power.<sup>68</sup>

Certainly there is evidence that the superpower status of the US influences its attitude toward international human rights norms. Great powers—the US, Russia, UK, China, Brazil, Mexico, India—tend to view international human rights enforcement with skepticism.<sup>69</sup> The US has usually been backed by Britain, France, China and Russia in opposing efforts by smaller states, backed by international tribunals, to restrict the scope of permissible reservations to such treaties.<sup>70</sup> One might extend the argument by noting that—at least in the Cold War—the American balance of power strategy led it to defend non-democratic leaders of South Vietnam, Pakistan, Iran, the Philippines, Nicaragua, Chile, Taiwan, South Korea, Saudi Arabia, and even eventually the People’s Republic of China. Through the realist lens, by which “the enemy of my enemy is my friend,” these were viewed as essential “second best” tactics in the Cold War.<sup>71</sup> In this context, human rights was a propaganda tool. Even the Carter Administration, though ideologically sincere in its commitment to human rights enforcement, was famously selective—a policy culminating in the image of its National Security Advisor waving an M-16 at the Khyber Pass. This may help explain why the US seems slightly more willing to ratify multilateral human rights treaties now that the Cold War is over. The Senate ratified no legally binding treaty in the 1950s and one each in the 1960s, 1970s, and 1980s, but four during the early 1990s—though after 9/11 the US appears to have redoubled its traditional ambivalence.<sup>72</sup> When international human rights treaties—the Genocide Convention and the International Criminal Court (ICC), for example—raise the possibility, albeit remote, that U.S. soldiers might be prosecuted, the US consistently stands aloof. Is it just coincidence that the governments of countries with significant foreign military involvement or power projection capabilities—Russia, Israel, France,

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<sup>68</sup> The threat of unilateral non-compliance or withdrawal remains, but these are precisely the elements that comprise typical great power ambivalence.

<sup>69</sup> This supposition has commonly been advanced to explain why many great powers opposed strong enforcement within the UN system. Humphrey, Lauren. This explanation is, in my view, incorrect, for reasons set forth elsewhere. See Andrew Moravcsik, “The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe” *International Organization* (Spring 2000).

<sup>70</sup> Reservations are a means to unilaterally clarify or restrict the scope of a treaty. Reservations have legal standing if they do not contravene the explicit scope and purpose of the treaty—a quality itself open to dispute and adjudication. When treaties limit reservations, as with the ICC and land mines, for example, the US has stayed aloof. Regional powers, notably Brazil and Mexico in the Western Hemisphere, have made particularly extensive use of reservations, further confirming a general tendency for great powers to defend their discretion in the face of multilateral commitments. Ryan Goodman, “Human Rights Treaties, Invalid Reservations, and State Consent,” *American Journal of International Law* 96 (2002), pp. 531-560.

<sup>71</sup> Some realists predict that in a bipolar world, two superpowers will each be likely to view third states in zero-sum terms: For each, the enemy of an enemy is a friend. See Waltz, *Theory of International Politics*, for a more subtle and differentiated argument.

<sup>72</sup> Some have attributed this upward trend to the backlog of treaties, but with changes in the composition of the Senate, the trend does not continue into the mid-1990s.

Great Britain, and China—were among initial skeptics of a strong ICC, and continue to demand exceptional treatment now that it has been established?

Whereas the superpower status of the US may be an important consideration, it does not provide a satisfactory account of US policy overall. If geopolitical flexibility were the only goal of the US, any American administration could have its cake and eat it too by ratifying multilateral treaties *and* maintaining a parallel unilateral human rights policy, while aggressively employing reservations to cordon off specific areas of heightened concern. Such a combination—essentially that pursued by countries like France, Britain, Russia and even China with regard to many multilateral commitments—might indeed be viewed as more legitimate around the globe. Moreover, since the controversy over the Bricker Amendment, the locus of opposition has lain in the Senate, not with the presidency, who is traditionally responsible for maintaining geopolitical flexibility.<sup>73</sup> Similarly, if the problem for a small country is the lack of unilateral options, the country could—like the US often does—participate in an international organization but resist domestic implementation of its norms. If such opportunistic policy options remain viable, there is no particular reason why we should assume that a large country is less likely to sign onto a human rights treaty than a smaller one.<sup>74</sup>

The geopolitical account also fails to account for the virulently ideological and partisan domestic politics that surround international treaty ratification and in the US. Domestic U.S. debates on human rights issue do not simply track the conventional geopolitical concerns of a superpower.<sup>75</sup> For fifty years, domestic debates about adherence to treaties have been concerned almost exclusively with the *domestic* implications of adherence to human rights treaties.<sup>76</sup> If the US simply possesses a broader set of options, we should expect a measure of apathy or opportunism. The US overcame strong domestic opposition to enter into far more significant (although not unbounded) treaty commitments, such as NATO and other cold war military alliances, trade institutions (GATT/WTO), and international financial institutions (the IMF and World

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<sup>73</sup> The most powerful postwar movement in opposition to human rights treaties, the effort in the early 1950s to pass a Constitutional amendment (the so-called “Bricker Amendment”) limiting the domestic enforceability of treaties, came within one Senatorial vote of passage. On 20 January 1954 Senate debate began on a bundle of proposals generally referred to as the “Bricker Amendment.” The actual amendment proposed by Bricker failed after a receiving a vote of only 52-40 in favor. A weaker version proposed by Senator Walter George, a Democrat of Georgia, failed after receiving a vote of 61-30 in favor—one short of the 2/3 required for a constitutional amendment. Hence the received (but misleading) wisdom that the “Bricker Amendment” failed by one vote. See Kaufman, *Human Rights*, p. 34. The Bricker Amendment was a response to a real, if modest, trend in US jurisprudence during the 1940s and 1950s toward the enforcement of international standards. The rhetorical, political and legal focus of that episode lay almost entirely on the implications of human rights treaties for the U.S. legal system, not on the projection of American power abroad. Republicans and Democrats have accepted the desirability of adherence to human rights by other governments.

<sup>74</sup> This is so unless we assume that benefits of membership—influence over positions, agendas, or photo ops—will be rationed according to domestic compliance. There is little evidence that this is the case in any international human rights regime, but this may be a concern for some countries in, say, Northern Europe.

<sup>75</sup> This extreme hostility persisted, moreover, through the rise and the decline of the Cold War, even in periods when both political parties were generally internationalist and staunchly anti-Communist in foreign policy. To

<sup>76</sup> Kaufman, *Human Rights*, passim. See also, for example, U.S. Congress, Senate Committee on Foreign Relations, *International Human Rights Treaties: Hearings Before the Committee on Foreign Relations*, 96<sup>th</sup> Congress, 1<sup>st</sup> Session on Ex. C, D, E, and F, 95-2—Four Treaties Relating to Human Rights, November 14, 15, 16, and 19, 1979 (1980); United States, Senate Committee on Foreign Relations, *International Covenant on Civil and Political Rights: Hearing Before the Committee on Foreign Relations*, 102<sup>nd</sup> Congress, 1<sup>st</sup> Session, November 21, 1991 (1992).

Bank). To understand why American legislators are so hesitant to cede sovereignty, we must therefore turn to the domestic determinants of U.S. human rights policy.<sup>77</sup>

## The Ambivalence of Stable Democracy

A second factor contributing to US ambivalence toward multilateral human rights commitments is *the exceptional stability of democratic governance within its borders*. At first glance his assertion may seem puzzling. In the broad sweep of history, human rights are closely linked to liberal democracy. Established, stable democracies have long encouraged, assisted and even fought bitter wars to uphold democracy abroad, both for idealistic reasons and because they tend to view democracy—correctly so, it now appears—as integrally linked to world peace.<sup>78</sup>

Yet the relationship between stable democratic governance and international human rights regimes is typically (or, at least, was until recently) more ambivalent. While they support human rights in principle, and recognize a link between democracy and security, established democracies are often skeptical of enforceable international human rights norms. This underlying ambivalence, I have argued elsewhere, was particularly evident in the period from 1950 to 1980—the founding period of the major postwar international human rights regimes such as the European Convention on Human Rights, the American Convention on Human Rights, and the UN system. In the founding negotiations of these regimes, the most stable, well-established democracies, in alliance with repressive governments, consistently *opposed* effective enforcement of international norms.<sup>79</sup>

A simple theoretical insight drawn from “republican liberal” theories of international relations—and from well-established theories of domestic delegation to courts and administrative agencies—offers one reason why, namely that stable democracies gain little at home from such treaties.<sup>80</sup> Of course no national government likes to see its discretion limited through external constraints imposed by a judicial tribunal—whether international or domestic.<sup>81</sup> Why would a governments, democratic or

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<sup>77</sup> This is not to rule out a realist account entirely. Perhaps the practice of unilateralism in other areas “spills over” into human rights, or there is some more subtle link between adherence and membership.

<sup>78</sup> Most interpretations of international human rights regimes stress the spread of democratic ideas outward from liberal societies through the actions of NGOs and public opinion, as well as the direct exercise of state power by established democracies. Many well-established democracies are the strongest supporters of international human rights enforcement. Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Transnational Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1999); Thomas Risse, Kathryn Sikkink, Steven Ropp, eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca: Cornell University Press, 1995). Tony Smith, *America's Mission: The United States and the Worldwide Struggle for Democracy in the Twentieth Century* (Princeton: Princeton University Press, 1994); Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy & Public Affairs*, 12, nos. 3 and 4 (Summer and Fall 1983): 205-235, 323-353.

<sup>79</sup> Moravcsik, “Origins of International Human Rights Regimes.”

<sup>80</sup> On liberal theory generally, see Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics" *International Organization* 51: 4 (Autumn 1997), pp. 513-553.

<sup>81</sup> For a generalized game theoretical results arguing that the relationship between political volatility and credible commitment holds for central banks, independent agencies, prosecutors, and even post-war settlements, see Robert

not, risk the unpleasant possibility that actions of the government would be challenged or nullified when individual citizens bring complaints before a supranational body? The most important rational reason to nonetheless delegate authority to such an external institution—whether a domestic constitutional court, central bank or administrative agency, or an international counterpart—political scientists argue, is to “lock in” particular domestic institutions against short-term or particularistic political pressures.<sup>82</sup>

From this perspective, support for enforceable international human rights norms—at least in early phases of the development of a human rights system—can be seen, at least in part, as an act of calculated national self-interest designed to serve an overriding purpose, namely to stabilize and secure democratic governance at home against threats from the extreme right and left. What sort of country benefits most from such an arrangement in the area of international human rights? Certainly not authoritarian or totalitarian regimes, which bear the brunt of unwelcome enforcement efforts. Yet not the most stable democracies either, for to the extent they are already confident in the stability of democratic governance at home, they gain little additional support from international delegation. So for stable democracies, a strong normative empathy or interest in the stability of neighboring democracies, perhaps derived from potential security threats, is required overcome this essential lack of self-interest. On self-interested grounds, the major supporters are likely, therefore, to be the governments of newly-established and transitional democracies concerned about their future stability. They accept international constraints because they serve to stabilize their own democratic political systems, even at the cost of potential short-term inconvenience. At the founding of the European Convention on Human Rights, the most effective system of international human rights enforcement in the world today, for example, the governments of the every stably established democracy in Western Europe (Great Britain, the Netherlands, Sweden, Denmark, Norway, Belgium, and Luxembourg) sided with Greece and Turkey (and implicitly Spain and Portugal) against mandatory enforcement.<sup>83</sup> The supporters were instead those countries with a recent fascist or colonial past and/or a strong domestic communist threat in the present (Italy, Ireland, Iceland, Germany, Austria, France).

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Powell, “The Inefficient Use of Power: Costly Conflict with Complete Information,” (Unpublished Paper, University of California at Berkeley, August 2003). See also Rui de Figueiredo “Electoral Competition, Political Uncertainty, and Policy Insulation,” *American Political Science Review* 96 (June 2002), pp. 321-35.

<sup>82</sup> In international affairs, the goal of an international commitment is to lock a certain policy outcome. Each government may seek primarily to lock in policies in other countries (the classic prisoner’s dilemma) or to lock a certain policy in at home. Since human rights regimes restructure the relationship between a state and its citizens more than the relationship between states, we would expect the motivation to “self-bind” to be stronger relative to the motive to bind others. On self-binding, see Judith Goldstein, “International Law and Domestic Institutions: Reconciling North American “Unfair” Trade Laws,” *International Organization* 50:4 (Summer 1996), pp. 541-564; Robert D. Putnam, “Diplomacy and Domestic Politics,” *International Organization* 42:3 (Summer 1988), pp. 427-461; Andrew Moravcsik, *Why the European Community Strengthens the State: International Cooperation and Domestic Politics* Center for European Studies Working Paper Series No. 52 (Cambridge, MA: Harvard University, 1994).

<sup>83</sup> Critical for many new (or reemerging) democracies is the experience—as during the interwar period—of democratically elected extremists slowly undermining democratic institutions by curtailing human rights—something centrist European politicians also feared from the postwar Communist left. Recent research has uncovered similar patterns in the Inter-American and UN human rights systems, as well as many other international organizations, where transitional democracies, notably in Latin America, have consistently taken the lead. Moravcsik, “Origins of International Human Rights Regimes.” (The coding of Belgium has been revised.)

From this perspective, the US has long been a very stable democracy with a robust system of domestic judicial review.<sup>84</sup> In contrast to Europe in the 1950s or 1990s, and Latin America over the past two decades, there is no overarching sense of the need to protect domestic democratic institutions from right- or left-wing authoritarianism. Domestic observers have noted the consequences of the lack of a compelling domestic self-interest. Democratic Congressman Tom Harkin, a leader in the florescence of Congressional interest in human rights during the mid-1970s, noted a "disheartening change of attitude" on the issue in Congress beginning in 1978—the year of a strong mid-term electoral shift towards the GOP. In particular, Harkin sensed reluctance on the part of his colleagues "to make a closer connection between the promotion of human rights at home and abroad"—an attitude Harkin described as: "I've got mine, the hell with you."<sup>85</sup> This lack of self-interest on the part of established democracies may also help explain also why the rhetoric of opponents to human rights treaties in the US tends to be replete with praise of the strong U.S. domestic constitutional tradition, occasional concerns that international treaties might dilute domestic enforcement of individual rights, and skepticism toward the legitimacy and effectiveness of newly created international institutions. This may also help to explain why large coalitions of lukewarm supporters for human rights treaties (for example, the Genocide Convention) were consistently outmaneuvered by smaller but more intense opponents.

Yet the predictable stability of American democracy does not provide a fully satisfactory explanation for U.S. reticence to accept multilateral human rights commitments. Two anomalies are most striking. The first is comparative. The opposition of well-established democracies to binding human rights treaties may have been the norm between the 1950s and the 1970s, but it is no longer. The recent US opposition to the Convention on the Rights of the Child or the ICC places America in the company of rogue and failed states. Why has the US failed to evolve as far in the same direction as European governments? The second anomaly concerns domestic politics. US attitudes toward human rights treaties have not been characterized by apathy and ignorance, as one might expect if the problem were simply the lack of concrete benefits (or geopolitical alternatives). Instead, American domestic debate over human rights has been bitterly partisan and intensely ideological, and opposition is led by those who argued that international human rights norms posed a fundamental threat to the integrity of American political institutions.<sup>86</sup> Any explanation of U.S. policy must account, therefore, for the significantly greater intensity of opposition within the U.S. than within any other

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<sup>84</sup> In other Western countries, governments were either concerned about the stability of domestic democracy—as in postwar Germany, Italy, and arguably France, post-transition Spain and Portugal, and post-Cold War Eastern Europe—or they used international instruments to introduce a bill of rights or *ex post* judicial review for the first time, as in Britain, the Netherlands, and Scandinavia. Only in the US was there *both* a pre-existing system of *ex post* judicial rights enforcement *and* no concern about democratic stability.

<sup>85</sup> Sandy Vogelgesang, *American Dream, Global Nightmare: The Dilemma of U.S. Human Rights Policy* (New York: W.W. Norton and Company, 1980), p. 247. 1978 was also the year of a substantial midterm electoral swing against the Democrats in both houses.

<sup>86</sup> Further support for the distinctiveness of human rights comes from studies of US multilateralism, which see US multilateral commitments as generally weakening over the past few decades, whereas in the area of human rights, they appear to have strengthened slightly. See, for example, Margaret Karns and Karen Mingst, "The United States and Multilateral Institutions," in Karns and Mingst, eds. *The United States and Multilateral Institutions: Patterns of Changing Instrumentality and Interest* (Winchester: Unwin Hyman, 1990), pp. 1-24.

advanced industrial democracy—even as the latter become stably democratic. We must investigate the values and interests underlying the partisan nature of domestic cleavages on this issue.

### **The Ambivalence of Conservative Opposition**

The third general factor helping to shape US international human rights policy is *the existence of concentrated conservative opposition to an expansion of rights*. An “ideational liberal” (or “liberal constructivist”) perspective on world politics highlights the preferences of domestic groups concerning the provision of public goods—national identity, political institutions, socioeconomic redistribution—which underlie fundamental policy goals.<sup>87</sup>

From this perspective, tensions among distinctive national conceptions of rights create conflict concerning any effort to promulgate and enforce a common set of common international human rights standards. One expects those countries whose views about human rights are supported by a majority in the organization (the “median voter” in the international system, as it were) to be least inconvenienced by the imposition of multilateral norms, and therefore to be most supportive of them. Governments whose views are furthest from the global norm—and, in particular, those countries whose ideal conception of rights stand to be overturned—have sound reasons to be skeptical of the domestic application of binding international norms.

Such splits over human rights enforcement are generally reflected in partisan cleavages, with center-left parties supporting a more expansive enforcement of individual rights and center-right parties supporting the status quo.<sup>88</sup>

There are two substantive reasons for this. First, since the core corpus of international political rights law does not, as a rule, protect either property rights or rights to private education, both of primary concern to the postwar right, and since the basic right to practice religion is unchallenged in Western societies, there is little for a center-right or right-wing party to gain through such norms—except, as we have just discussed, if they fear for the stability of democracy, as did postwar Christian Democratic parties in many West European countries. Even more aspirational elements in international human rights law—such as socioeconomic rights under the UN Covenant, labor rights under the ILO, and various cultural rights—tend clearly to be favored more by the left than the right. Second, insofar as they remain controversial in stably established democratic societies, the basic corpus of international civil and political rights—the ban on torture,

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<sup>87</sup> Such arguments might be termed “ideational liberal” or “liberal constructivist.” Moravcsik, “Taking Preferences Seriously.” These sorts of “bottom-up” arguments about preferences have secured more empirical support than claims about top-down international socialization. See e.g. Katzenstein, Wendt. Cross-national studies reveal, for example, that social democratic governments feel a greater obligation to dispense development assistance than conservative ones. David Halloran Lumsdaine, *Moral Vision in International Politics: The Foreign Aid Regime 1949-1989* (Princeton: Princeton University Press, 1993).

<sup>88</sup> An exception is when both center-right and center-left are threatened by more extreme factions at home or abroad, in which case we find ourselves in the situation of a transitional democracy in the republican liberal theory.

freedom of expression, freedom of religion, freedom of association, due process and criminal defendant's rights, refugee rights, abortion rights, abolition of the death penalty, privacy and gay rights, and anti-discrimination rules regarding women and racial minorities are often viewed, as we saw in considering libertarian values above, as means to realize egalitarian policy goals generally favored by the left.<sup>89</sup>

American conservatives in the 1950s and 1960s viewed international human rights treaties as part of a broader movement to impose liberal federal standards—in particular, provisions banning segregation and other forms of racial discrimination—on the practices of certain states, notably those in the South. Civil rights has remained among the most salient issues in American politics since 1945, generating exceptionally strong domestic opposition and eventually triggering an epochal partisan realignment, international human rights proved bitterly controversial at home. Over the years, those who support or oppose aggressive federal enforcement of civil rights have tended, respectively, to support or oppose full adherence to international human rights norms.<sup>90</sup>

At the beginning, the most salient concern—clear even through the systematic tendency to obscure it with the legalistic language of states' rights and constitutionalism—was race.<sup>91</sup> From the 1940s through the 1960s, concerns about race were linked to the fear that other minorities, including but hardly primarily Communists, would mobilize around the race issue.<sup>92</sup> Already in Senate Foreign Relations Committee hearings on the UN Charter in 1945, Senator Millikin (R-CO) posed the thinly disguised questions to State Department officials to ascertain whether if there were “racial questions on the Southern shores of the Mediterranean that might have very explosive effects under some circumstances...this organization [the UN] might concern itself with

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<sup>89</sup> In particular, the abolition of discrimination against racial, gender and sexual-preference minorities, constraints on the police power of the state, and abolition of the death penalty, and immigrants' rights are all areas in which, at least until recently, the body of international human rights law creates an additional tool for the enforcement of the rights of relatively weak individuals vis-à-vis democratic majorities and the state.

<sup>90</sup> One might also mention religion. To a greater degree than is found in other advanced industrial democracies, American conservatives are closely allied to a highly organized and influential Protestant religious right. Such groups play an important role in US politics. The views of this group—suspicion of a secular state, skepticism of public (or any organized) education, support for the death penalty, powerful anti-Communism, and earlier support for racial segregation—find little parallel in other countries. In many postwar industrial countries, to be sure, right-wing parties have maintained close links to the Catholic Church, but these have also tended to be “catch-all” parties with a broad appeal. In cultural matters, as in socioeconomic ones, right-wing parties reached compromises with the secular state, and over the decades, Catholic beliefs have become less central to voting and party membership. The right-wing of the US political spectrum in the 20<sup>th</sup> century is thus nearly unique among advanced industrial democracies in that it contains self-conscious, intensely mobilized and influential groups representing the conservative Protestant religious groups, often allied with Southern conservatives. This raises a complex set of issues concerning the relationship between church and state.

<sup>91</sup> An example is the statement from Harry Berger, who represented the National Economic Council: The convention goes much further than to punish or prevent mass murder. It aims to regulate...the words and writings of individuals.... Thus, it is clear that...the refusal of employment, or blackballing a person for membership in a union or social club, or the publishing of any comment...with respect to any member of a minority, could be deemed by the “international penal tribunal”...to constitute “mental harm”...The slightest reference to a member of a minority race or religion—such as a newspaper article identifying a man under arrest as a Negro—might be deemed a punishable act. Kaufman, *Human Rights*, pp.43-44.

<sup>92</sup> One member of the ABA committee stated: “I leave to your imagination as to what would happen in...municipal law if subversive elements should teach minorities that the field of civil rights and laws had been removed to the field of international law.” Kaufman, *Human Rights*, p. 46.



them.” (The answer was affirmative.)<sup>93</sup> In discussions of the Genocide Convention in 1949—a series of hearings, one historian has observed, in which “the major arguments enunciated against *all* human rights treaties were first articulated”—one supporter observed: “You have to face that...in getting down to realities...the practical objection, the thing that is behind a lot of peoples’ minds on this convention is—is it aimed at lynching in the South. You have to face that.”<sup>94</sup> Not until the civil rights legislation of the late 1960s, which, along with the Vietnam War, inspired a new generation of Congressmen and Senators to support civil and human rights, did Congressional opinion shift at all.<sup>95</sup> In 1970, a letter from Richard Nixon renewed the request for Senate ratification of the Genocide Convention, only to see Southern Senators shoot it down—some arguing that “the convention would let Black Panthers and other ‘extremists’ bring charges against the president.”<sup>96</sup> The Carter Administration refused to push for ratification, preferring to save its political capital for higher priorities, like the Panama Canal Treaty. It was not ratified until 1986—almost 40 years after it was negotiated—and even then only with reservations so extensive that some believed that the US had not really ratified at all or should not have been permitted to do so.<sup>97</sup>

Overt opposition to civil rights may seem anachronistic today, but the underlying cleavages still dominate discussion of human rights. To be sure, once the Supreme Court reinterpreted the constitution to forbid segregation and once Congressional powers via the Commerce clause and the 14<sup>th</sup> Amendment were understood as broad enough to support civil rights legislation, then “the civil rights campaign in the United States became entirely domestic, any thought of effecting change in United States law by treaty was abandoned, [and....] the Bricker Amendment campaign became ancient history.”<sup>98</sup>

Why, then, did the Senate remain so recalcitrant? Historians and legal academics have appealed to mystical metaphors: “Senator Bricker's ghost has proved to be alive in the Senate, and successive administrations have become infected with his ideology.”<sup>99</sup> It is more plausible to argue that the aggressive enforcement of civil rights—or enforcement of norms of criminal law, housing, education, discrimination, privacy and religion connected to race—remains controversial, albeit in a more subtle form. And this calls international human rights treaties into question. In comparative perspective, this distinguishes the US from Europe.<sup>100</sup> Important cases before the European Court of Human Rights have tended to involve a handful of rather exceptional and isolated issues

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<sup>93</sup> Louis Sohn and Thomas Buergenthal, *International Protection of Human Rights*, cited in Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Clarendon Press, 1996), pp. 751-752.

<sup>94</sup> Kaufman, *Human Rights*, pp. 37, 56.

<sup>95</sup> On the shift, see Vogelgesang, *American Dream*, pp. 121-124.

<sup>96</sup> Vogelgesang, *American Dream*, p. 120.

<sup>97</sup> For a balanced review of the issues, see Matthew Lippman, “The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later,” *Arizona Journal of International and Comparative Law* 15 (Spring 1998), 415-514.

<sup>98</sup> Louis Henkin, “U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,” *The American Journal of International Law*, vol. 89 (April 1995), p. 341.

<sup>99</sup> Henkin, “U.S. Ratification,” p. 341. See also Kaufman, *Human Rights*, for a similar account.

<sup>100</sup> Perhaps this will change, as working class suspicion of immigrants and minorities increases in Europe, but for the moment, the enforcement of such rights remains relatively uncontroversial in Europe, particularly among elites.

such as due process under conditions of martial law (e.g. criminal and police procedure for Britain in occupied Cyprus and Northern Ireland), gay rights, corporal punishment, pornography, and the speed of trials in Italy. In the United States, by contrast, criminal procedure, police brutality, freedom of speech and religion, criminal defense, the death penalty, privacy and gay rights, prison conditions, the behavior of the armed forces abroad, and racial and gender discrimination—even when decided by domestic courts—have been and remain salient partisan issues. There is a substantial body of conservative opinion that rejects the entire rights revolution since the 1920s, driven by the New Deal, the Cold War, and the Civil Rights movement, and favors its reversal in favor of an “originalist” understanding of the constitution.<sup>101</sup> Naturally this would run counter to international norms.

Fear of international influences is not paranoia. Human rights advocates are quite explicit about their intention to use international norms to challenge US practices—precisely the threat that triggered Brickerism in the 1950s.<sup>102</sup> In 1993, as a response to US ratification of the ICCPR the previous year, Human Rights Watch and the American Civil Liberties Union jointly issued a report entitled “Human Rights Violations in the United States.” The list of violations focused, as it happened, almost exclusively on issues championed by the Democratic Party: discrimination against racial minorities, women, linguistic minorities, immigrants, as well as prison conditions, police brutality, the death penalty, freedom of information, and religious liberty.<sup>103</sup> Clearly the domestic application of international standards would favor one party over the other.

These structural constraints continue to influence the most recent debates, including that surrounding the Convention on the Rights of the Child (CRC).<sup>104</sup> CRC was adopted unanimously by the UN General Assembly in 1989. Within three years, it had gained 127 adherents. To date, 191 nations have ratified, including all but two UN member states—the United States and Somalia. The classic pattern of domestic partisan contestation dating back to the Bricker Amendment emerged, with more liberal, mostly Democratic, senators supporting ratification, and more conservative, largely Republican counterparts, opposing. President Bush refused to sign it or submit the treaty; in 1995, President Clinton signed and submitted the convention despite a Senate Resolution

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<sup>101</sup> For relevant citations and critiques, see Andrew Moravcsik, “Conservative Idealism and International Institutions,” *Chicago Journal of International Law* 1 (Autumn 2000), pp. 291-314; Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge, Mass.: Harvard University Press, 2001); and Larry Kramer, “Originalism and Historical Truth.”

<sup>102</sup> See, for example, *Human Rights Violations in the United States: A Report on US Compliance with the International Covenant on Civil and Political Rights* (New York: Human Rights Watch and the American Civil Liberties Union, 1993), pp. 5-8. The last of these, religious rights, might appear to be a concern of Republicans, but in fact the report calls exclusively for aggressive judicial enforcement of the Religious Freedom Restoration Act, a piece of legislation passed by a Democratic Congress and signed by President Clinton in late 1993. See p. 165ff. In addition, the authors of the report mention, but do not analyze in detail, some areas to which they believe the treaty would apply—notably discrimination against gays and lesbians, as well as against people with disabilities. See p. 4. The authors also mention policies on public and university education.

<sup>103</sup> *Human Rights Violations in the United States*, pp. 5-8. The last of these, religious rights, might appear to be a concern of Republicans, but in fact the report calls exclusively for aggressive judicial enforcement of the Religious Freedom Restoration Act, a piece of legislation passed by a Democratic Congress and signed by President Clinton in late 1993. See p. 165ff.

<sup>104</sup> This section follows Magge, “Vocal Opposition.”

sponsored by leading fellow Republicans, who controlled the Senate, urging him not to do so.<sup>105</sup>

Why has the Senate remained so skeptical? The issue has no geopolitical relevance. Nor does the regime have any institutions for effective enforcement. Hence the US would sacrifice little of its unilateral bargaining power in the (unlikely) event it sought to deploy it to promote the rights of children. Advocates argue that ratification would permit the US to participate in the CRC monitoring committee and would strengthen the US role as a world leader—the closest thing to a major foreign policy argument for ratification.<sup>106</sup> Consistent with the argument of this paper, most domestic debate (particularly domestic criticism) focuses instead on the substantive consequences of the treaty provisions in the US.<sup>107</sup> This is paradoxical, since the convention would seem to have relatively few domestic implications for a country where children’s rights are already strongly embedded in national law. Still, the issue triggers deep domestic ideological cleavages.

Supporters are led by human rights and child welfare activists, who maintain that governments should do more to combat the abuse and exploitation of children. Prominent supporters of the CRC have included Democratic politicians and political liberals, as well as human rights groups like Amnesty International, Human Rights Watch, and the American Bar Association; child welfare groups such as the Children’s Defense Fund; general humanitarian groups such as the American Red Cross; and over three hundred other organizations. Behind Republican Senators stand numerous conservative groups, of which the best-organized, best-funded, most vocal, and most influential are linked to religious groups—including the Christian Coalition, Concerned Women for America, Eagle Forum, Family Research Council, the National Center for Home Education, the John Birch Society, and numerous conservative think-tanks. Such groups maintain that the CRC is unnecessary, permits state policy (dictated by an international organization) to usurp the primary role of the family, and thus violates the concept of “parental rights” to make decisions regarding the upbringing of their children. The Family Research Council sets forth more concrete criticisms of the explicit rights promulgated in the CRC—in particular, ironically, the civil and political rights added in response to US pressure—might allow children to air their grievances against their parents in a legal forum, view “objectionable or immoral materials, often disseminated in schools,” forbid parents from sending their children to church if they did not want to attend, prohibit parents from preventing their children from associating with harmful company, and legalize abortion

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<sup>105</sup> With a Republican colleague, Senator Richard Lugar, Senator Bill Bradley drafted and secured passage of Senate Resolution 231, which urged the President to forward the CRC to the Senate for its consent. Bradley claimed bipartisan support for ratification and the Democrats controlled both houses. No response was forthcoming.

<sup>106</sup> The US, they argue, will lose credibility in the global community, both within the specific issue-area of human rights and more generally, if it refuses to ratify a popular document designed to protect children. Opponents challenge such arguments with their own alternative conception of the “national interest.” Ratification, they argue, would simply place the US under another UN regime dominated by developing nations with radical agendas. This may be a particularly important concern for Senator Helms, a prominent UN skeptic.

<sup>107</sup> Some opposition appears to reflect traditional conservative hostility towards human rights treaties in general. Moreover, whereas other countries may aim to exploit loopholes, they argue, the US tends to examine all existing federal and state laws closely in order to assure compliance. Conservatives charge that other nations ratified hastily, without reviewing the CRC thoroughly enough to understand its full implications.

without parental consent and homosexual conduct within the home. Supporters respond that that the US is generally already in compliance with the convention, in the sense that it has established social programs addressing the issues raised in the CRC, that the language of the convention and would be unenforceable without domestic law detailing more precise terms, and that reservations could handle specific concerns. They add that the CRC establishes standards for national policy to improve the condition of children all over the world, but creates few, if any, enforceable rights.

Whatever the substantive merits, the domestic debate over ratification of the CRC has been dominated by its opponents. The CRC has triggered visceral opposition among religious conservatives mobilized by any hint of a threat to their particular conception of family values. Hema Magge's research and interviews suggest that they appear to be better-organized, better-funded and more motivated than supporters. Some Senate staffers report that they receive 100 opposition letters for every letter of support of the CRC. While the general human rights community remains convinced of the importance of participating in the international promulgation of the rights of the child; the bulk of liberal public and elite opinion remains uninformed and apathetic. One particular reason for the imbalance between supporters and opponents is the lack of a compelling domestic justification for US adherence. Many of the most important child advocacy groups, such as the Children's Defense Fund, perhaps the most prominent such group, focuses primarily on the direct provision of services to children, rather than lobbying for rights—and have therefore been criticized for placing a low priority on ratification of the CRC. According to one leading activist, partisan Democrats simply do not care enough about the issue to move it up on the agenda.

A parallel divergence between the U.S. and other Western governments lies in the status of socioeconomic rights. In comparative perspective, the US has a relatively informal and underdeveloped (i.e. non-solidaristic) conception of economic rights, particularly in the areas of labor and social welfare policy.<sup>108</sup> There has long been opposition, not least in the South and West, to aggressive centralized enforcement of labor and welfare rights.<sup>109</sup>

For a half century, these sort of issues—racial discrimination and the legacy it has left, labor rights, and various life-style related issues—has placed the U.S. outside the mainstream of the global consensus on the definition of human rights. The result has been intense partisan conflict. Strong conservative opposition on such issues means that firm adherence to international human rights norms does not command support from a broad centrist coalition, as is generally true in Europe, but instead created a deep left-right split between liberals and conservatives—one that fell increasingly during the post-World War II period along strict party lines. Partisan opposition in the 1950s was led by Southern

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<sup>108</sup> Since Werner Sombart's classic 1906 book, *Why No Socialism in America?*, commentators have recognized that the U.S. is the only advanced industrial country without a significant socialist movement or labor party. For an analytical overview of this phenomenon, see Seymour Martin Lipset, "American Exceptionalism Reaffirmed," in Byron Shafer, ed. *Is America Different? A New Look at American Exceptionalism* (Oxford: Clarendon Press, 1991), pp. 1-45.

<sup>109</sup> Some have linked this tendency in the 1950s to McCarthyism, in part sparked by the Truman Administration's anti-communist rhetoric, but opposition to socio-economic rights has long outlived this era. Cf. Kaufman, *Human Rights*, pp. 12-14.

Democrats opposed to federal civil rights policy; today it is led by Republican Senators, due to their (globally idiosyncratic) stand on socioeconomic and racial rights, and also religious, educational and cultural issues. In general, support for international human rights treaties comes disproportionately from Democratic presidents and members of Congress, while opposition comes disproportionately from Republican presidents and members of Congress.<sup>110</sup> As David Forsythe's study of legislative behavior concluded, "human rights voting in Congress is largely ... a partisan and ideological matter."<sup>111</sup>

The decisive importance of partisan cleavages over human rights becomes immediately evident if we examine the record of executive submission and Senate consent of the 12 most important human rights treaties over the past 50 years. Strong Democratic control of the Senate appears to be a necessary condition for the ratification of such treaties, even in a watered-down form. 10 of 11 initial submissions to the Senate for advice and consent were made by Democratic presidents, 8 of 12 postwar agreements were signed by Democrats and, most strikingly, *the Senate has never ratified an international human rights treaty (even with reservations) when Democrats held fewer than 55 seats.*<sup>112</sup> This suggests that partisan control of the Senate and, secondarily, the presidency, imposes a binding constraint on US policy.

[ SEE TABLE ONE ]

Yet in order to explain U.S. human rights policy fully we need to go beyond the power of a concentrated conservative minority in America. Even taken together with the two other factors discussed above (superpower status and stable democratic institutions), this explanation leaves critical questions about support for U.S. human rights policy unanswered. As we are about to see in more detail, ratification of human rights treaties has at times been supported by a coalition of interest groups claiming to represent over half the U.S. public, as well as by over half of incumbent Senators. Presidents, even Republican presidents, have been at times relatively supportive.<sup>113</sup> On a number of issues,

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<sup>110</sup> In contrast to the way this issue is often presented, this central cleavage does not primarily divide isolationists and internationalists. Major opponents of international enforcement of human rights—from Henry Cabot Lodge, John Bricker, and Henry Kissinger to Jesse Helms—have not been isolationist.

<sup>111</sup> Forsythe, *The US and Human Rights Policy*, p. 50.

<sup>112</sup> This record cannot be attributed to background conditions. Democrats commanded a majority of at least 55 votes only 50% of the time (14 sessions out of 28). The Senate contained a Democratic majority for 19 sessions and a Republican majority for 9 sessions, while each of the two parties commanded the presidency for roughly equal periods since 1947. Note also that the pattern of submission and ratification does not follow from the (somewhat exogenous) timing of negotiation and signature, since those presidents who submitted the treaties were not typically the same presidents who signed the respective agreements. The Helsinki Treaty, which generated considerable conservative support, did not apply to the US. On the Torture Convention, the Senate consented in 1990 subject to subsequent passage of implementing legislation, which passed four years later. No US implementing legislation has ever been passed for the UN Covenant on Civil and Political Rights.

<sup>113</sup> We have also seen that Republican presidents in three cases—Eisenhower with the Supplementary Slavery Convention and the Convention on the Political Rights of Women, and Bush with the Rights of the Child—were unable or unwilling to block the negotiation of international human rights treaties, even though they made no subsequent effort to secure ratify them. Indeed, until the recent treaty establishing the ICC, no American government appears to have voted in an international forum against a human rights treaty that passed—though U.S. negotiators have attempted to water down a number of provisions. This suggests that centrist presidents (and even a conservative like Ronald Reagan) and advocates of human rights treaties alike labor under tight political constraints imposed by decentralized American political institutions.

US and European publics converge. On the death penalty, for example, a plurality on both sides in nearly all Western countries has traditionally supported retention or reestablishment.

<b>TABLE ONE</b> <b>The US and Multilateral Human Rights Treaties, 1945-2000:</b> <b>Executive Action and Congressional Consent</b>			
	<b>Negotiated (US Vote)</b>	<b>Transmitted to the Senate</b>	<b>Senate Consent (Seats / Majority)</b>
<b>Genocide Convention</b>	Truman (Y)	Truman/ <i>Nixon/</i> <i>Reagan</i>	1986 (55 Dem)
<b>Convention on the Political Rights of Women</b>	Truman (Y)	Kennedy	1974 (56 Dem)
<b>Supplemental Slavery Convention</b>	<i>Eisenhower</i> (Y)	Kennedy	1967 (68 Dem)
<b>ILO Convention on Forced Labor</b>	<i>Eisenhower</i> (Y)	Kennedy	1991 (56 Dem)
<b>Convention on Racial Discrimination</b>	Johnson (Y)	Carter	1994 (57 Dem)
<b>Covenant on Civil and Political Rights</b>	Johnson (Y)	Carter / <i>Bush</i>	1992 (56 Dem)
<b>Optional Protocol to the ICCPR</b>	Johnson	NO	NO
<b>Covenant on Economic and Social Rights</b>	Johnson	Carter	NO
<b>American Convention on Human Rights</b>	Carter (Y)	Carter	NO
<b>Convention to Eliminate Discrimination Against Women (CEDAW)</b>	Carter (Y)	Clinton	NO
<b>Torture Convention</b>	<i>Reagan</i> (Y)	<i>Reagan</i>	1990 and 1994 (55 and 57 Dem)
<b>Convention on the Rights of the Child</b>	<i>Bush</i> (Y)	Clinton	NO

Yet these majorities of legislators, voters and public opinion in favor of stricter adherence to international human rights norms have failed to gain their objective. One explanation is simply that, as we have discussed in this section, conservative activists appear to feel more intensely about the issue. Another, to which we will now turn, is that they are privileged by existing US constitutional procedures.

## The Ambivalence of Checks and Balances

The fourth and final determinant of US human rights policy is *the fragmented nature of American political institutions*. It is a cliché of comparative politics that the American system of government stands out in comparative perspective for its extreme commitment to the Madisonian schema of “separation of powers” and “checks and balances.” All other things equal, the greater the number of “veto players,” as political scientists refer to those who can impede or block a particular government action, the more difficult it is for a national government to accept international obligations.<sup>114</sup> The U.S. political system is in most respects exceptionally decentralized, with the consequence that a large number of domestic political actors must approve major decisions. Three such characteristics of the US political system are of particular importance for understanding US human rights policy: super-majoritarian voting rules and the committee structure of the Senate, federalism, and the salient role of the judiciary in adjudicating questions of human rights.

*The Senate:* The most immediate veto group in considering human rights treaties, a 1/3 minority of recalcitrant Senators, is created by the unique US constitutional requirement of a 2/3 “super-majority” vote to advise and consent to an international treaty. This is a threshold than higher than in nearly all other advanced industrial democracies, which generally ratify international treaties by legislative majority.<sup>115</sup> It is hardly surprising, therefore, that the primary barrier to the ratification of human rights treaties has been the inability to muster the necessary super-majority in the Senate. The decentralized US electoral system rarely generates a sufficiently decisive partisan majority (in recent decades, Democratic, and before that, a majority sufficient to circumvent Southern Democrats and their allies). The need to secure the support of the Foreign Relations Committee chairman may render ratification doubly difficult if that position is held, as it generally has been in the postwar period, by a politician with extremely conservative views.<sup>116</sup> Overriding the decision of a committee chairman to block consideration of a treaty on the floor is nearly impossible.

The resulting history of senatorial suspicion to liberal multilateralism spans the 20<sup>th</sup> century—from the debate over Woodrow Wilson’s proposal for a League of Nations in 1919 to the present.<sup>117</sup> Its decisive importance for US human rights policy is illustrated by the failure of the Senate to ratify ratification in many cases where there existed

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<sup>114</sup> Putnam, “Diplomacy and Domestic Politics.” Cf. Lisa Martin, *Democratic Commitments: Legislatures and International Co-operation* (Princeton: Princeton UP, 2000).

<sup>115</sup> Switzerland requires a referendum for certain commitments.

<sup>116</sup> This may help explain why large Democratic majorities, the Watergate generation of legislators, the civil rights movement, and the rise of public interest groups in the late 1960s and early 1970s did not lead to the ratification of many international human rights treaties in the US. These groups controlled the House of Representatives, where they were able to influence foreign policy through appropriations, but they had far less influence on the Senate. Cf. Norman J. Ornstein and Shirley Edler, *Interest Groups, Lobbying and Policy-Making* (Washington: Congressional Quarterly Press, 1978), pp. 4-7.

<sup>117</sup> For an engaging overview, on the role of conservative Southern Democrats, see Robert Caro, *Master of the Senate: Lyndon Johnson, Vol. III* (New York: Knopf, 2002).

(simple) majority support in the Senate. This was true of the League of Nations, which was blocked by a Senate minority. We have seen that groups totaling 100 million members supported the Genocide Convention, yet what mattered most were the attitudes of the Senators themselves, who are disproportionately representative of conservative Southern and rural Midwestern and Western states.<sup>118</sup> Over 50 Senators publicly declared their support for the Convention to Eliminate Discrimination against Women (CEDAW), yet this treaty long remained bottled up in committee by Senator Helms and appears to lack the requisite 2/3 support needed to pass on the Senate floor.<sup>119</sup> The unique constitutional role of the Senate helps explain why robust US action to support international human rights norms—whether unilateral or multilateral—tends typically to originate in either the Executive Branch or the House of Representatives, and has often uses budgetary, regulatory, or diplomatic instruments, rather than the process of treaty ratification and domestic legal change.<sup>120</sup>

*The States:* Constitutional separation of powers also establishes important prerogatives for the states vis-à-vis the federal government, and this in turn permits conservative opponents to resist federal and global human rights norms. States' rights, as we have seen, has been an important tool for domestic opponents to international human rights treaties, and underlying this apparently principled defense of states' rights was a distinct substantive agenda. The legal structure of federalism is nonetheless a distinctly favorable institutional context in which to oppose the imposition of human rights norms.<sup>121</sup>

Perhaps the most striking example of the decisive importance of federal institutions is the nagging issue of capital punishment. As near as we can tell, the historical fundamentals of public support for the death penalty among Americans is not strikingly different from that of Europeans. Support slowly declined from over 60% to just 45% during the 1960s and early 1970s. (Only in the late 1970s, with intense organization around the issue, did US public opinion support rise once again.) This is more or less the pattern in Europe, where support for the death penalty has declined, but it nonetheless continues to command plurality support. Even today, after a generation of abolition, a plurality or majority of Canadians (70%), Britons (65-70%), Austrians and Italians (50%), and Swedes and French (49%) favor the reinstatement of the death penalty.<sup>122</sup>

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<sup>118</sup> Kaufman, *Human Rights*, p. 37-38.

<sup>119</sup> Cited in Hema Magge, "Vocal Opposition and Fragmented Support: The US Failure to Ratify the U.N. Convention on the Rights of the Child" (Harvard University: unpublished paper, May 2000).

<sup>120</sup> Forsythe, "The United States," pp. 271-272; Vogelgesang, *American Dream*.

<sup>121</sup> The overt concern with race is one important reason—a reason perhaps more important than commitment of principle—why "the main opposition to the treaty was rooted in states' rights." Kaufman, *Human Rights*, pp. 52-53. Some Southerners went further, claiming that "the abrogation of states' rights was the major objective of the genocide treaty." Certainly much of the Senate debate concerned these constitutional issues. Kaufman, *Human Rights*, pp. 44-63

<sup>122</sup> For a more detailed analysis, see Andrew Moravcsik, "The New Abolitionism: Why Does the US Practice the Death Penalty while Europe Does Not?" *European Studies* (September 2001); "The Death Penalty: Getting Beyond Exceptionalism (A Response to Silvia and Sampson)," *European Studies* (December 2001).



The difference between the continents lies in the response of political institutions. In Europe, one ruling party after another abolished the death penalty in the 1970s and 1980s, despite near 2/3 majorities in favor of its retention—whereupon the issue disappeared as a matter for public contestation. Surely this was possible in part because, as compared to the federal and separation-of-powers system in the US, European parliamentary systems tend to discourage regional and single-issue politics and to create clearer partisan majorities unhampered in this area (even in federal states) by sub-national prerogatives. Regional institutions like the EC and ECHR have further entrenched and extended European abolitionism.

In the US, by contrast, abolition of capital punishment would require fundamental constitutional change in a system where such change is near impossible. Any federal action to limit capital punishment would face the de facto super-majoritarian rules in the Senate and would in any case be limited to federal crimes. Criminal law is largely the province of the individual states, and any effort to standardize state policy must therefore coordinate legislative, electoral (notably referenda) and judicial action in the 38 states that currently impose the death penalty. The only centralized political instrument able to achieve abolition would therefore be a declaration that capital punishment is unconstitutional. In the US during the 1970s, the US Supreme Court came close to abolishing the death penalty, which had in any case fallen into disuse at the federal level. (At last count, only 19 of over 3,700 American death row prisoners are in federal prison, and there were no federal executions between 1963 and the recent executions of Timothy McVeigh and Juan Raul Garza.) Yet the US court backed down in the face of a state-level movement beginning with the most conservative areas of the country. The only remaining recourse would be a constitutional amendment, which would be impossible without even broader support—3/4 of the state legislatures or a similar Congressional supermajority. State courts, though often more liberal, have been even less willing to act, perhaps because many judges on the state bench are elected and abolitionist actions can trigger successful efforts to defeat or recall judges. The result: State politicians and publics are empowered to set death penalty policy in accordance with local preferences—which encourages its perpetuation.<sup>123</sup>

The basic lesson to be drawn from the case of capital punishment is thus the decisive importance of the incentives and opportunities created by political institutions. This suggests two corollaries. The first, contra Cass Sunstein in this volume, is that we should be cautious about attributing too much impact to a single contingent decision by political actors at once point in time—in this case, the Supreme Court’s reversal on the death penalty in the 1970s.<sup>124</sup> It is true that a bolder Supreme Court might have abolished the death penalty for good. Yet the deeper lesson of this episode is that most of the time in the US political system, this will not occur, because the conservative position is favored by federal prerogatives and political opportunities, by Senatorial stasis, and by the intensity of feeling among a conservative minority. What is striking is not that the Supreme Court did not act, but that the structural window of opportunity was so brief—and that similar windows are so rarely seen in other areas of human rights.

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<sup>123</sup> This argument follows Moravcsik, “The New Abolitionism.”

<sup>124</sup> Sunstein chapter in this book. Also Ignatieff intro to this volume.

The second corollary to draw from the case of capital punishment is that we should be suspicious of facile claims about the autonomous importance of shared values or public opinion. The evidence suggests both that the death penalty is an issue of little salience, as compared to bread-and-butter issues of taxing and spending, and that public opinion on such issues can and is often manipulated. Public opinion on the death penalty tends to track national political decisions, political manipulation by politicians, and pressure from small intense interest groups. So in Europe, where the institutions do not facilitate mobilization on the death penalty, the issue has little salience and public opinion is adapting—albeit slowly. In the US, where institutions permit decentralized action, long-term trends in public support for the death penalty appears to have been buoyed up by pressure from intense conservative minorities.

*The Courts:* The decisive basis of most successful international adjudication and judicial enforcement systems lies with the domestic judiciary.<sup>125</sup> The US system of *ex post* constitutional review for conformity with individual rights guarantees is distinctive in comparative perspective. Combined with the relative paucity of promising institutional opportunities for mass collective action to promote social policy, it places the courts at the center of domestic redistributive conflicts in a way unmatched in other Western democracies.<sup>126</sup> To a certain extent, then, Americans might be said to be more ambivalent about international human rights enforcement because it is more controversial, and it is more controversial because, given the preferences of the American electorate and the nature of American judicial system, it matters more in the US than elsewhere. This is why the American judiciary is the subject of political conflict to an extent unmatched among advanced industrial democracies.

The decisive importance of a domestic judiciary became clear in the immediate post-war period, as the federal and state judiciaries began to shift their role from that of a conservative to that of a reformist force in US politics. Accordingly, in the early 1950s numerous Senators opposed the application of international human rights norms because of the quite immediate threat of judicial challenges to the policies of the states, notably those having to do with race. Such challenges had already arisen, most notably in the California state court system. Of course such critics voiced fears that a ban on discrimination might be imposed by an international organization (“world government”) in which the U.S. possessed a “distinctly minority vote.”<sup>127</sup> Yet this was largely for rhetorical effect. The real fear was that documents like the Genocide Convention and the UN Covenants would be exploited by plaintiffs and the federal judiciary at the expense of

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<sup>125</sup> Anne-Marie Burley and Walter Mattli, “Europe Before the Court: A Political Theory of Legal Integration,” *International Organization* 47 (Winter 1993), pp. 41-76; Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, “Legalized Dispute Resolution: Interstate and Transnational,” *International Organization* 54 (Summer 2000), pp. 457-488.

<sup>126</sup> In recent years, the spread of systems of post-authoritarian or international *ex post* judicial review has generated some similar dynamics in South Africa, Britain, the European Union, and elsewhere.

<sup>127</sup> Kaufman, *Human Rights*, p. 45.

specific civil rights policies.<sup>128</sup> In the 1950s, ABA spokesmen made the link to civil rights plain:

Minority groups in this country are not vigorously seeking to have...discrimination abolished by Federal legislation. Can there be any reasonable doubt that if Congress fails to enact the civil rights laws now being urged upon it and if this convention is ratified as submitted, members of the affected groups will be in a position to seek legal relief on the ground that this so-called Genocide Convention has superceded all obnoxious state legislation.<sup>129</sup>

In scenarios such as this, the primary fear of conservatives was that individuals would seek legal relief *before US courts*. In recent years, similar rhetoric has been employed to oppose the International Criminal Court—with the specter of a kangaroo court of international technocrats sitting in judgment over GIs—whereas the primary (if often unspoken) fear is that US military prosecutors would be forced to prosecute US soldiers under US law to preempt international action. Similar concerns have been voiced about abortion, the death penalty, and other issues.<sup>130</sup>

## DOES IT MATTER?

Let me add one brief provocation. It is natural to ask: What are the consequences of US “exemptionalism” and non-compliance? International lawyers and human rights activists regularly issue dire warnings about the ways in which the apparent hypocrisy of the US encourages foreign governments to violate human rights, ignore international pressure, and undermine international human rights institutions. In Patricia Derian’s oft-cited statement before the Senate in 1979:

Ratification by the United States significantly will enhance the legitimacy and acceptance of these standards. It will encourage other countries to join those which have already accepted the treaties. And, in countries where human rights generally are not respected, it will aid citizens in raising human rights issues.<sup>131</sup>

One constantly hears this refrain.

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<sup>128</sup> Kaufman, *Human Rights*, pp. 10-12. As we have seen, many Senators—most notably Senator Bricker—were deeply concerned about the tendency of state and federal courts in the late 1940s to cite international treaty commitments in support of domestic human rights claims. His fears were well-grounded to the extent that the federal courts, in alliance with the executive branch, was emerging as an important venue for pressing claims of federal power over the states, not least in the area of civil rights. There was a convergence of interest between the judiciary and the executive in favor of expanded federal power that Senator Bricker, an opponent of the emerging “national security state” in the Cold War, feared in foreign affairs. Despite the opposition of the Eisenhower Administration, which dropped its support for all international human rights treaties to undermine Bricker’s support, the Amendment—albeit in a watered-down form—failed by only a single vote in the Senate. For an interesting political history, see Caro, Vol. 3.

<sup>129</sup> George Finch, cited in Kaufman, *Human Rights*, p. 54.

<sup>130</sup> The failure of the Supreme Court to abolish the death penalty, and the launching of a state-level movement in certain parts of the country to expand its use owes much to the opportunities created by state and local government. See Moravcsik, “The New Abolitionism.”

<sup>131</sup> Patricia Derian, cited in U.S. Congress, *International Human Rights Treaties*, p. 33.

Yet there is little empirical reason to accept it. Human rights norms have in fact spread widely without much attention to US domestic policy. In the wake of the “third wave” democratization in Eastern Europe, East Asia, and Latin America, government after government moved ahead toward more active domestic and international human rights policies without paying much attention to US domestic or international practice.<sup>132</sup> The human rights movement has firmly embedded itself in public opinion and NGO networks, in the US as well as elsewhere, despite the dubious legal status of international norms in the US. One reads occasional quotations from recalcitrant governments citing the American non-compliance in their own defense—most recently Israel and Australia—but there is little evidence that this was more than a redundant justification for policies made on other grounds. Other governments adhere or do not adhere to global norms, comply or do not comply with judgments of tribunals, for reasons that seem to have little to do with US multilateral policy. Perversely, anti-Americanism may indeed fuel the solidarity of others behind the promulgation multilateral human rights norms—as appears to have been the case in the closing days of the ICC negotiations.<sup>133</sup>

The pluralist account defended in this paper suggests instead that the winners and losers of US non-adherence to international norms are *American citizens*.<sup>134</sup> This is so for two reasons. First, adherence to international human rights regimes would signal a significant symbolic shift—and likely have an eventual practical impact—on the nature of human rights enforcement in the US, not least by courts.<sup>135</sup> Jack Goldsmith has argued:

A domesticated ICCPR would generate enormous litigation and uncertainty, potentially changing domestic civil rights law in manifold ways. Human rights protections in the United States are not remotely so deficient as to warrant these costs. Although there is much debate around the edges of domestic civil and political rights law, there is broad consensus about the appropriate content and scope of this law...built up slowly over the past century. It is the product of years of judicial interpretation of domestic statutory and constitutional law, various democratic practices, lengthy and varied experimentation, and a great deal of practical local experience. Domestic incorporation of the ICCPR would threaten to upset this balance. It would constitute a massive, largely standardless delegation to federal courts to rethink the content and scope of nearly every aspect of domestic human rights law.<sup>136</sup>

Conservatives critics like Goldsmith may hold extreme views (in global and domestic perspective), but they are not, given the power of the judiciary in the US, deluded as to the potential practical risks of signing such treaties. The political conflict that results from this prospect is the most important root cause of the paradox of US human rights policy.

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<sup>132</sup> Some argue that the recent democratic waves that swept through Eastern Europe and Latin America in recent decades were facilitated by civil society networks that were, in turn, fostered by international regimes. But this argument has little to do with US domestic practice.

<sup>133</sup> Lawrence Wechsler, “Exceptional Cases in Rome: The United States and the Struggle for an ICC,” in Sarah B. Sewall and Carl Kaysen, eds., *The United States and the International Criminal Court: National Security and International Law* (Lanham, Md.: Rowman & Littlefield, 2000).

<sup>134</sup> For a more detailed argument, Moravcsik, “Why is US Human Rights Policy So Unilateralist?,” pp. 364-370.

<sup>135</sup> For various scenarios, see Goldsmith, “Should International Human Rights Law Trump US Law?” pp. 332-335. For a detailed and definitive treatment of “judicial cross-fertilization,” see Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, forthcoming).

<sup>136</sup> Goldsmith, p. 332.

Second, non-adherence may undermine the ability of the US to use multilateral human rights institutions to further its own foreign policy goals.<sup>137</sup> Human rights advocates consistently maintain—in the words of Assistant Secretary of State for Human Rights Patricia Derian twenty years ago—that “failure...to ratify has a significant negative impact on the conduct of [US] human rights policy,” undermining its “credibility and effectiveness.”<sup>138</sup> While there is little evidence to suggest the impact is great, there are some reasons to believe that US influence in particular cases would be greater if it were able to more credibly work internationally. Before ratifying the ICCPR, for example, the US could neither vote for members of its Human Rights Committee, nor have its citizens either serve on the committee or petition it. In May 2001, the US failed to be re-elected to the 53-member UN Human Rights Commission in Geneva—according to Philip Alston “the single most important United Nations organ in the human rights field.”<sup>139</sup> The US had held a seat continuously since the Commission was established in 1947. Many human rights activists attributed this rebuff to the poor US voting record on human rights issues.<sup>140</sup>

## CONCLUSION

I have argued that rights-cultural explanations for US opposition to the domestic application of global human rights norms—explanations based on diffuse cultural commitments to procedural values like popular sovereignty, democratic localism, constitutional patriotism, national particularity, and negative rights—are at best somewhat vague and at worst empirically unconvincing. Some such explanations fail to provide even a “thin” *prima facie* explanation for the rhetoric employed by politicians, and most that do fail to provide a “thick” explanation that can also account for the nature

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<sup>137</sup> Moravcsik, “Why is US Human Rights Policy So Unilateralist?” pp. 366-368. I am indebted to conversations with Harold Koh on this point.

<sup>138</sup> Statement of Patricia Derian, Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State, in U.S. Congress, Senate Committee on Foreign Relations, *International Human Rights Treaties: Hearings Before the Committee on Foreign Relations* (96<sup>th</sup> Congress, 1<sup>st</sup> Session on Ex. C, D, E, and F, 95-2—Four Treaties Relating to Human Rights, November 14, 15, 16, and 19, 1979 (1980), p. 33. In the same Senate hearings, Morton H. Sklar, Chairman of the U.S. Helsinki Watch Committee, asserted that, absent ratification of formal treaties, “our efforts abroad to achieve human rights and a greater commitment to the principles of freedom and democracy and human dignity will be very severely damaged.” This view is echoed by many major legal scholars. Statement of Morton H. Sklar, Chairman, Washington, D.C. Office of the Helsinki Watch Committee for the United States, in Senate Foreign Relations Committee, *International Human Rights Treaties*, p. 261. See, for example, J.D. van der Vyver, “Universality and Relativity of Human Rights: American Relativism,” *Buffalo Human Rights Law Review* (1998), 64-66; Henkin, “US Ratification”; Peter Malanczuk, “The International Criminal Court and Landmines: What are the Consequences of Leaving the US Behind?” *European Journal of International Law* 11:1 (March 2000), pp. 77-90; U.S. Hurst Hannum and Dana Fischer, eds. *Ratification of the International Covenants on Human Rights* (Washington: The American Society of International Law, 1993), pp. 285-289.

<sup>139</sup> Philip Alston, “The Commission on Human Rights,” in Alston, ed. *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992), p. 126.

<sup>140</sup> “US thrown off UN human rights body” *BBC News Online* (Thursday, 3 May, 2001) reported that “France, Australia and Sweden were elected to the three seats allocated to Western countries....Joanna Weschler, the UN representative of Human Rights Watch, told Reuters news agency that many countries on the Economic and Social Council, whose members elect the commission, resented the poor US voting record on issues like land mines and the availability of AIDS drugs.” Kenneth Roth of Human Rights Watch has mentioned also the US cast nearly the only vote against a declaration of the right to food. (Speech at Harvard Law School, 4 May 2001).

of domestic cleavages, change over time, and the elements that make US behavior paradoxical, namely the strong domestic tradition of rights enforcement and bold unilateral and sometimes multilateral policies to promote human rights abroad.

Insofar as empirical evidence supports any rights-cultural explanation, it is not those variants that stress broadly-held procedural norms of constitutional patriotism or popular sovereignty, but that variant stressing the existence of an intense minority in the US committed to a series of conservative positions allied with, but not derived from, skepticism about state power. This is, of course, closely related to the classic and undisputed description of American political exceptionalism, namely the lack of a socialist movement—and thus a social welfare state—in America. (The close link to such a widely documented aspect of American political life should give us greater confidence in the basic claim.) From 1945 to 1970, the dominant substantive concern motivating such conservative opposition was undoubtedly race and, like conservative opposition to expansion in the jurisdiction of the federal government, it aimed primarily to defend segregation and racial discrimination. Since then the relevant conservative agenda has broadened to include issues often connected with race, but also with lifestyle issues of greatest importance to a religious minority: abortion, the traditional family, religion, capital punishment, and criminal procedure.

It is important to note that this variant of a rights-cultural argument, as opposed to more purely procedural variants, is consistent with—indeed, in some respects indistinguishable from—what I have termed a “pluralist” explanation based on the substantive interests of powerful minorities as filtered through political institutions. Indeed, scholars disagree as to whether the persistence and power of conservative views ought to be viewed as an autonomous cultural phenomenon at all, or whether it reflects the combined power and historical legacy of moneyed interests, minorities organized around intense concerns, and political institutions like the Senate and federalism that have long magnified conservative influence. The case of the death penalty suggests that public opinion often reflects, rather than drives, institutional and policy shifts.

For this reason and others, pluralist explanations of American ambivalence with regard to international human rights commitments—US power, democratic stability, conservative extremism on particular issues, and fragmented American political institutions—offer a theoretically more precise and empirically more plausible explanation for the extraordinary status of the US. No other nation in the modern world is characterized by the same combination of geopolitical power, democratic stability, conservative ideology, and institutional decentralization, and no other country pursues as ambivalent and unilateralist a human rights policy as the US.

This is a sobering conclusion, for it suggests that US ambivalence toward international human rights commitments is not a short-term contingent aspect of specific American policies, but it is woven into the deep structural reality of American political life.<sup>141</sup> This is so not, for the most part, because international human rights commitments

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<sup>141</sup> I am indebted to Michael Ignatieff for posing the question of structure and contingency more sharply.

are inconsistent with a particular understanding of democratic ideals like popular sovereignty, local control, or expansive protection of particular rights shared by most Americans. It is true, rather, because a conservative minority favored by enduring domestic political institutions has consistently prevailed in American politics to the point where its values are now embedded in public opinion and constitutional precedent. The institutional odds against any fundamental change in Madison's republic are high. To reverse current trends would require an epochal constitutional rupture—an Ackermanian “constitutional moment”—such as those wrought in the US by the Great Depression and the resulting Democratic “New Deal” majority, in Germany, France and Italy by the end of World War II, and in all European countries through a half-century of European human rights jurisprudence. Short of that, this particular brand of American ambivalence toward the domestic application of international human rights norms is unlikely to change anytime soon.

American "exceptionalism" in international human rights policy—the U.S. aversion to formal acceptance and enforcement of international human rights norms—poses a paradox. The paradox lies in the curious tension between the consistent rejection of the application of international norms, on the one hand, and the venerable U.S. tradition of support for human rights, in the form of judicial enforcement of human rights at home and unilateral action to promote civil and political rights abroad. The United States has, after all, the oldest continuous constitutional tradition of judicial enforcement. Clair Apodaca demonstrates that the history of American human rights policy is a series of different paradoxes that change depending on the presidential administration, showing that far from immobilizing the progression of a genuine and functioning human rights policy, these paradoxes have actually helped to improve the human rights protections over the years. Readers will find in a single volume a historically informed, argument driven account of the erratic evolution of US human rights policy since the Nixon administration. Understanding U.S. Human Rights Policy will be an essential supplement to any classification of rights in the United States Constitution is called the Bill of Rights. The Bill of Rights is actually a list of amendments to the first Constitution of the United States. Read More. Asked in Political Parties. When was Human Rights Party - United States - created? Human Rights Party - United States - was created in 1970. Read More. Natalie Kaufman Hevener has written: 'The Dynamics of Human Rights in United States Foreign Policy' 'Diplomacy in a Dangerous World' Read More. Asked in History of China. How did the US gain trading rights in China? One way that the United States secured its trading powers with China was to initiate the Open Door Policy in 1899 and 1900. Read More. Asked in History of the United States, US Constitution, Bill of Rights.



