The Domestic Origins of International Agreements

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I. INTRODUCTION

The use of international agreements as a means to influence domestic policy is often underemphasized in the growing dialogue between international relations and international law theorists. This interdisciplinary approach typically emphasizes the problem of interstate cooperation in an anarchic international environment. Governments—pursuing unchanging national interests—can improve their national welfare through international cooperation. They might, for example, benefit from reciprocal trade liberalization or a multilateral agreement to reduce pollution. International agreements are portrayed as a means to facilitate international cooperation. By clarifying state obligations and providing information about state behavior, international agreements enable states to pursue reciprocal strategies that enforce cooperative behavior. International agreements are thus welfare-maximizing contracts that enable states to reap the benefits of cooperation. By focusing primarily on cooperation, the current interdisciplinary approach neglects the domestic policy motivations for forming international agreements. This research agenda needs to be supplemented by an analysis of the domestic and distributional politics of international law.

What the current approach does not contemplate is that international agreements are substitutes for ordinary statutes. The statutory law-making system and international agreement negotiations are separate, but sometimes rival, processes for setting national-level policy. Domestic political battles over national regulation affect both processes.

From the perspective of domestic interest groups, international agreements have several advantages over domestic statutes. Under U.S. law, international agreements can entrench policies that might otherwise be subject to change; they can transfer agenda-setting power from the Congress to the President; and they can delegate authority to international organizations. Each of these effects can lead domestic interest groups to seek international negotiations rather than domestic legislation. Little difference exists between the politics of international and domestic law: Interest groups may lobby for either the former or the latter, depending on which more effectively achieves their policy objectives.

The goal of this project is to examine the influence of domestic
interest-group demands on the U.S. government's decision to engage in treaty agreements. It does not aim to explain all American treaties—some treaty types may not be influenced by domestic lobbying efforts. For instance, extradition and arms control treaties may be better explained by state-to-state cooperation than by interest-group activity. But the fact that some agreements have an international cooperative rationale is not a setback. This project does not seek to reject the cooperation-based insights of the current international legal literature, but to broaden that literature's focus by highlighting domestic and distributional motivations for treaty formation.

Nonetheless, my approach challenges conventional wisdom in several ways. First, it shows that the structure of domestic law-making influences a government's decision to engage in international negotiations. Cross-national differences in law-making processes generate different incentives for interest groups and their governments to prefer either international or domestic legislation. Second, treaties do not necessarily enhance national welfare because they are vulnerable to the same interest group rent-seeking as domestic statutes. Governments adopt international laws, like domestic laws, to maximize political support.

The following sections present an interest group approach to understanding the domestic demand for treaty law and argue that this model highlights important causal relationships between domestic politics and international law neglected by the current literature. Section I reviews the current international law approach to understanding why states form international agreements. The standard account is that governments form treaties when there are joint gains from exchange. Coordinating state activity can produce benefits to signatory states, but there are obstacles to effective cooperation. International agreements can facilitate cooperation by clarifying state obligations, monitoring state compliance with those obligations, and permitting states to adopt reciprocal strategies to promote compliance. International agreements are thus solutions to collective action problems. In this account, states are unitary actors seeking greater national welfare through international cooperation.

The next three sections discuss the differences in the law-making processes between international agreements and statutes that make international law attractive to interest groups. The aim of these sections is to identify conditions under which domestic groups will demand international obligations.
Section II begins by arguing that international agreements are a means of entrenching policies preferred by domestic interest groups. International agreements can have advantages over statutory rule-making by raising the audience costs of legislatively changing the international rule. In addition, judicial doctrines that privilege international law over statutory law provide additional protection against statutory override of international rules. International agreements are not the only way, and may not always be the optimal way, to entrench a policy. For many policies, however, international agreements are useful because they can be more difficult to amend legislatively or implicitly repeal than statutory law.

Section III addresses the agenda-setting aspect of international law. Article II, Section 2 of the United States Constitution provides the President with the exclusive power to negotiate international arrangements and thus allows the President to set the agenda for international commitments in a manner he could not for statutes. Agenda control gives the President significant power in choosing national policy when multiple policy proposals could defeat the status quo. Taking advantage of this agenda-setting power is particularly attractive to domestic interest groups who have reason to believe that the executive, as an institution or as a party representative, is more likely to support their position than the legislature.

Section IV discusses the significance of the President’s power to use international agreements to delegate to international institutions. International delegation differs from domestic delegation in important ways that can benefit domestic interest groups. First, it increases the control of the executive branch over rule-making within a given issue area. The executive can oversee the development of substantive rules internationally and then use international organization decisions to constrain subsequent legislative action and oversight. Second, international agency rule making is less accessible and less transparent to the general public than similar domestic agency decision making. Consequently, only well-organized groups can effectively lobby these organizations, and the decisions of international organizations are shielded from public scrutiny. Thus, certain domestic groups can use international delegation to shape the development of substantive international and domestic law more effectively than through domestic delegation.

Section V concludes by discussing how an interest group approach to government action changes our conception of international law. First,
this approach highlights the importance of domestic politics on the
government's decision to act internationally. The structure of the
domestic political system influences the government's decision to
address some issues at the international versus the domestic level. If the
domestic political structure is a causal factor in international
agreements, then there should be variance between states, even
democratic states, in demand. Second, the interest group approach
forces us to question whether international agreements are uniformly
welfare enhancing. If international agreements reflect interest group
lobbying, they may create transfers of wealth between groups that result
in dead weight losses to the nation. Finally, the interest group view of
international agreements may lead us to question whether international
agreements are appropriate for all issues. International agreements
circumvent the normal legislative process and delegate power to
international institutions, which may be intentionally unresponsive to
subsequent domestic pressures. Consequently, we may have democratic
concerns about using international agreements for some domestic issue
areas, particularly if there is reason to suspect that the agreement does
not enhance national welfare.

II. WHY DO STATES FORM INTERNATIONAL AGREEMENTS?

States form hundreds of international agreements every year.
Between 1939 and 1989, the United States alone entered into 702
Article II treaties and over 11,000 other international agreements.1
International legal studies scholars have long been interested in
examining the content of these agreements and the resulting obligations
on states but have not historically provided a strong theoretical
understanding of why these agreements are formed.2 More recently,

1. CONG. RESEARCH SERV., LIBRARY OF CONG., 106th CONG., TREATIES AND OTHER
INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 39 (Comm. Print
2001). I treat international agreements created either by consent of 2/3 of the Senate (Article II
treaties) or by a majority of both houses (congressional-executive agreements) as treaty law. Pure
executive agreements are not treated as treaties. For an explanation of the historical use of
different types of international agreements, see Bruce Ackerman & David Golove, Is NAFTA
branch considers when deciding how to present an international agreement, see John K. Sear, The
President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-
Executive Agreement, or Executive Agreement?, 31 J. LEGAL STUD. 5 (2002) [hereinafter Sear, The
President's Rational Choice].

2. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY:
COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS; Abram Chayes & Antonia
Handler Chayes, On Compliance, 47 INT'L ORG. 175 (1993) [hereinafter Chayes & Chayes, On
however, international law scholars have begun to draw on “institutional” scholarship from international relations to do so.  

Institutional theory describes international agreements as means of facilitating interstate cooperation. This approach has led legal scholars to conceptualize the demand for treaties as being driven by opportunities for mutual gain at the international level. As a consequence, legal scholars have tended not to examine either the domestic demand for international agreements or the domestic impact of creating international regimes. This section first reviews the basic tenets of institutional theory. It then discusses the implications of this approach for the current understanding of the demand for international agreements.

A. Institutional Theory

One school of international relations thought, institutionalism, argues that treaties are mechanisms by which governments can overcome collective action problems and achieve mutual gains from cooperation.

Compliance].


5. See, e.g., Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (1984). There is not uniformity of agreement on this point within the international relations literature. In contrast to institutionalism, the school of thought commonly referred to as structural realism or neo-realism argues that states do not cooperate and
States are assumed to be unitary and rational actors interacting with one another in a state of anarchy. Anarchy implies that there is no overarching authority that can enforce agreements between states. Consequently, states face a prisoner’s dilemma when considering whether to engage in international cooperation. States recognize that there are potential mutual gains from cooperation but there are also incentives to defect and no means for enforcing inter-state contracts. The prospect of greater gains from cooperation will not always be sufficient to overcome states’ incentive to defect.

States can attempt to overcome the collective action problem by forming international institutions through treaty arrangements. International institutions can remedy this “political market failure” by collecting and distributing information on the prospective partners, linking issues (easing side payments in ex ante bargaining and reducing the risk of ex post defections), and decreasing the cost of additional negotiations by keeping the same institutional framework for many issues. Most importantly, institutions assure future interaction that permits states to adopt conditional strategies basing their behavior on the behavior of other actors. In sum, treaty regimes allow governments to achieve the efficiency gains of cooperation.

thus, treaties serve no lasting function. It maintains that state behavior is entirely determined by the competitive pressures of the international environment. If states do not act to preserve their power, then they will be selected out of the international system—the outcome most feared by all states. International institutions are irrelevant to state behavior because they do not change the prospects for state survival and are simply reflections of the current international balance of power. This pessimism on the independent impact of institutions derives from structural realism’s implicit assumption that growing powers will always be able to reshape institutions to suit their own interests. Structural realists advise governments not to waste resources on international institutions but have difficulty explaining why governments ignore their advice and create institutions regardless. For the classic statement of structural realism, see KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979). For a structural realist critique of the impact of institutions on international relations, see John Mearsheimer, The False Promise of International Institutions, 19 INT’L SECURITY 5 (1994).

6. KEOHANE, supra note 5.
7. For a discussion on the ability of actors to sustain cooperative behavior in a system where promises or expectations are not enforceable through a third party, see ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984). For further discussion of which patterns of cooperation are likely to emerge from an evolutionary approach, see Paul G. Mahoney & Chris W. Sanchirico, Competing Norms and Social Evolution: Is the Fittest Norm Efficient?, 149 U. PA. L. REV. 2027 (2001).
8. See KEOHANE, supra note 5.
9. See id.
B. Institutionalism in the Study of International Law

Institutionalism provides a basis for international legal scholars to argue that international law has independent effects on state behavior. Without treaty arrangements, states would have more difficulty maintaining cooperative relationships since the international system is riddled with informational asymmetries and high transaction costs. With international legal regimes, states will engage in more cooperative agreements leading to greater aggregate welfare gains.

This approach has had a strong and beneficial impact on the international law literature. Conceiving of treaties as mechanisms to overcome prisoner’s dilemma or other mixed-motive situations has provided legal scholars with a better handle on the incentives of states to form agreements as well as potential compliance issues. The institutionalist model has been used to explain negotiations for environmental agreements and the strong record of compliance in trade issues. By describing state behavior as unitary and emphasizing the political bargaining only at the international level, however, this approach has underemphasized the diverse domestic sources of government action.

Institutional theory has led legal scholars to focus on treaties primarily as a solution to international collective action problems. We expect that states will form an international agreement whenever there is the possibility of efficiency gains through cooperative behavior. Consequently, the international legal literature has viewed treaties as the responses of governments attempting to achieve welfare-enhancing solutions to international level prisoner’s dilemmas. How domestic


13. See Guzman, Compliance-Based Theory, supra note 3, at 1851-53.

14. Not all international legal scholars ignore the domestic level aspects of treaty agreements. For a public choice analysis of why government leaders supply international agreements, see Stephan, Accountability and International Law-making, supra note 4. Stephan’s article focuses on
level political battles and policy goals influence international bargaining is generally neglected.\textsuperscript{15}

Even scholars who discuss the relationship of domestic politics to international politics neglect how interest groups can use international agreements as a means of reaching domestic policy ends. For instance, Anne-Marie Slaughter argues that liberal states—states with democratic institutions—are likely to cooperate more with one another than with non-liberal states\textsuperscript{16} and are more likely to comply with international law generally\textsuperscript{17} at least in part because domestic interest groups lobby government leaders.\textsuperscript{18} Professor Slaughter, however, does not go far enough in considering the domestic motivations for forming international rules. Under her framework, domestic politics leads only to differences between liberal and non-liberal states: She does not address how the structure of domestic law-making creates variation

the supply side, but briefly discusses the demand side of treaty law stating that:

As an initial matter, however, one should note the importance of the demand function. The fundamental virtue of international rules, and one of the reasons that the demand for them is as great as it is, is that they may serve as beneficial solutions to collective action problems.... Of course, not all cooperation is beneficial. When discussing the demand for domestic rules, a conventional analysis incorporates the insights of public choice theory. This body of thought specifies the conditions under which cohesive minorities may obtain laws for their discrete benefit to the detriment of unorganized majorities. Similarly, any analysis of the demand for international law must account for rent-seeking by interest groups.

Id. at 694.

15. For an example from the political science literature on how inter-branch political dynamics can influence the government’s international negotiating position, see Judith Goldstein, International Law and Domestic Institutions: Reconciling North American “Unfair” Trade Laws, 50 INT’L ORG. 541 (1996). Andrew Moravcsik has argued that the European human rights regimes were formed to cement these policies domestically. See Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 INT’L ORG. 217 (2000).


18. See Burley, Law Among International States, supra note 16. This “liberal” approach has been criticized as not being useful to the study of state action because it cannot generate ex ante predictions about state behavior and only provides situation specific explanations of government decision-making after the fact. See Guzman, Compliance-Based Theory, supra note 3; Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 YALE L.J. 1935, 1952-55 (2002).
between liberal governments' actions in the international system. This approach emphasizes how cross-national differences in law-making processes generate different incentives for interest groups to use international law to achieve domestic policy goals.  

This project extends the inclusion of domestic politics in the study of international politics by focusing on the motivations of interest groups to lobby for international agreements. Domestic groups demand international agreements as a source of international law and domestic law. International agreements create rules for member governments in their interactions with one another internationally and for the citizens and government agencies domestically. The recognition that international agreements regulate domestic relationships, as well as international ones, changes our expectations about the demand for international agreements in several ways.

First, we should not expect treaty regimes to emerge wherever there is the possibility for overcoming collective action problems. Treaty arrangements need domestic support and not all agreements that enhance general welfare will be able to garner such support. 20 Second, we should expect treaty negotiations to be influenced by the distributional demands of domestic groups. Even if the treaty arrangement can produce efficiency gains, we should expect those governments responsive to interest groups to be very concerned with what proportion of the gains they can acquire for such groups. 21 Finally, we should expect that interest groups may demand international agreements for the domestic legal effects, in addition to international political effects, where treaty law has advantages over, or can supplement, statutory law.

19. Paul Stephan has additionally examined why government leaders may want to supply international agreements to improve their prestige at home, but he does not focus on the interest group demand for international agreements. See Stephan, Accountability and International Law-making, supra note 4. My approach differs from his in emphasizing why domestic groups seek international law for their own policy reasons, rather than why government leaders might want to form international agreements for prestige value.

20. General welfare enhancing proposals may not gain majority support because of the nature of political decision making where small and well-organized groups are often able to gain the political support necessary to defeat the preferences of large but diffuse groups. See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1971).

This Article focuses on the domestic legal characteristics of international law compared to statutory law and argues that these differences increase the domestic political demand for treaty law. The international effects of treaty law are clearly important to interest group and governmental decision making. Treaty arrangements allow domestic groups some measure of assurance over the actions of other states and provide the potential for international gains. The international-level effects, however, are not the only reason that domestic groups may desire treaty law. National-level effects of treaty agreements will affect the demand for international agreements as well.

III. POLICY ENTRENCHMENT

The demand for international agreements is partly endogenous to domestic politics and law-making processes: International agreements potentially provide certain interest groups with policy advantages within the domestic political process as well as international gains. This section discusses how policies embedded in international agreements can be more stable than those imbedded in statutory law alone and thus can help entrench an interest group’s preferences.

A. Demand for Entrenchment

There is a fundamental tension between the idea of democratic accountability and political change, on one hand, and the desire for government commitment to policy goals on the other. It may be beneficial for governments to commit themselves to long-term policy goals for a variety of reasons, including undertaking the socially-optimal level of public works projects and providing citizens with stable expectations about government policies. But government preferences are subject to change. Democratic systems are designed so that legislators are responsive to their constituencies: As the demands of the constituency change, the preferences of elected officials should change

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23. See Timothy Besley & Stephen Coate, Sources of Inefficiency in a Representative Democracy: A Dynamic Analysis, 88 AM. ECON. REV. 139 (1998). For an analysis of why allowing governments to execute long-term contracts and be subject to reliance or expectation damages in the case of later government breach does not lead to socially-optimal levels of planning, see Wickelgren, supra 22, at 121-24.
as well. Allowing the current government to bind the hands of its successor will interfere with the ability of subsequent legislators to act in a democratically accountable manner.  

This tension between democratic change and policy commitment creates political uncertainty for domestic interest groups. The current government can enact policies but domestic interest groups do not know how long these policies will last. The next set of elections may usher in a government that no longer supports those policy commitments. Elections thus necessarily create uncertainty about the future of current policies. This poses a dilemma for domestic groups: The gains that an interest group receives from lobbying today may be distributed to a different group tomorrow. To protect their gains against electoral change, interest groups will attempt to entrench their preferred policies once enacted.

Several formal mechanisms within our separation-of-powers system already exist to make domestic policies difficult to change. Bi-cameralism and presidential presentment require that multiple governmental bodies consent to any changes in existing statutory law. Consequently, a policy that has lost majority support in the populace may nonetheless be difficult to alter if a sufficient minority of legislators or the president continues to support the policy. The courts can further cement a policy by continuing to enforce it after it has lost legislative support.

Policies can also be politically entrenched when their alteration is particularly costly. Whenever an existing policy is altered or completely

24. See Terry M. Moe, Political Institutions: The Neglected Side of the Story, 6 J.L. ECON. & ORG. 213 (Supp. 1990); see also Hadfield, supra note 22, at 519-22 (analyzing how government contracts interfere with legislative freedom).

25. See Moe, supra note 24. For the proposition that this uncertainty may lead interest groups to engage in less lobbying since the expected benefits of any policy are diminished by political uncertainty, see William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & ECON. 875 (1975).


29. For the argument that the judiciary is independent to enforce legislative deals, even after those deals have lost current legislative support, see Landes & Posner, supra note 25.
withdrawn, there are costs to legislators. The enactment of a government policy creates a constituency for that policy: the individuals or groups who receive a benefit and resist subsequent changes to the benefit. The political costs of policy alteration will depend on the political weight, either through voting or contributions, of the resisting constituency. The more costly policy change is to legislators, the more entrenched current policies are.

For example, the costs of changing the Social Security system are thought to be very high because of the voting power of Social Security recipients. While Social Security recipients are a disperse group, many members of this large group are well organized. This group is in a position to punish legislators who alter Social Security benefits by withdrawing campaign contributions and votes. Legislators are thus reluctant to propose and support any downward modifications of the Social Security system.

Entrenchment is a matter of degree—how procedurally difficult or politically costly it is to alter the policy once it is the status quo. International agreements can entrench policies more than federal statutes, holding the subject matter constant. This occurs through two mechanisms: (1) the costs of violation, withdrawal, or alteration of a treaty and (2) the judicial interpretation of international agreements which erects additional barriers to legislative violations of treaty obligations.

B. External Barriers to Treaty Change

The first mechanism by which international agreements entrench policies is the expected costs of international sanctioning or other responses to a treaty violation. When governments enter into treaty commitments, they become obligated under international law to abide by the terms of the agreement. This obligation—the international legal principle of pacta sunt servanda—exists even when popular support for the treaty is lost. In other words, international law does not create an exception to treaty compliance rules for democratic policy change.

30. Social Security is often referred to as the “third rail” because legislators do not touch it out of fear of a voter backlash. E.g., Sen. Don Nickles, Retiring America: Why the United States Needs a New Kind of Social Security for the New Millennium, 36 Harv. J. on Legis. 77, 108 (1999) (noting that “lawmakers fear modifying [Social Security], reforming it, or even talking about it because of the political risks they associate with such action”).

31. Chayes and Chayes refer to this principle as a fundamental norm of international law. Chayes & Chayes, On Compliance, supra note 2, at 185.
When international commitments are violated, states may respond in a variety of ways ranging from proportional sanctioning to abrogation of related treaty commitments. In short, domestic violation of treaty commitments can result in internationally imposed costs on the national government that are additional to any domestic political costs.

Policies enacted by treaty, like policies enacted by statute, can be overridden by a later act of Congress. This "last-in-time rule" makes it possible for the federal government to violate treaty agreements by statute notwithstanding international law obligations to abide by international agreements. While international agreements are not in violation, altering international agreements may be politically more difficult than changing statutory law, because of the additional costs imposed by the international audience. International agreements are unique in that they have two audiences: domestic constituencies and other states party to the treaty. Both can impose costs upon alteration. The additional threat of externally imposed costs raises the marginal costs of policy change.

International agreements are not always more costly to change than domestic policies in other issue areas. In many cases, the domestic costs of changing in one policy area will be greater than the combined international and domestic costs of changing in another policy area. Going back to my earlier example, the costs of changing the Social Security system, while purely a domestic cost, will almost certainly be greater than the sum of the international and domestic costs of changing tariff levels.

Instead, incorporating a domestic policy into a treaty simply raises the costs of policy change within a given issue area. For instance, legislatively lowering the capital requirements for banks operating domestically will trigger domestic and international responses if the policy is established by international agreement. Domestically, consumer groups (if this increases the risk on deposits) and foreign-based banks (if foreign capital requirements are higher) will protest this change in banking policy. These costs alone might be enough to keep policymakers from increasing capital requirements. If the change violates an international agreement, then policymakers will face

33. See Whitney v. Robertson, 124 U.S. 190, 193-95 (1888).
international costs as well. Foreign governments may threaten retaliatory action against other financial services, which can injure domestic industries that provide such services to the sanctioning states. 34 Now policymakers face additional political costs in terms of a worsened relationship with foreign governments and protests from related domestic financial services groups. 35 The costs of altering banking policy will thus be higher if the policy is part of an international agreement than if it were national legislation alone. The threat of an international response to treaty breach raises the marginal costs of domestic policy change and leads to greater policy entrenchment.

In short, policies that are included in international agreements are more costly to change than the same policies enacted as purely domestic law. The former are more entrenched because any alteration of the policy will lead to international costs in addition to any domestic costs. The international costs will raise the cost of legislative policy change and increase the policy’s entrenchment.

There are several instances where domestic groups have used treaty arrangements to embed policies in the domestic political system. As a general matter, whenever an international agreement fixes a minimum standard that is higher—or a maximum level that is lower—than current national standards, that treaty is establishing new national regulatory policy. In addition, whenever national standards are fixed as a minimum in an international agreement, the standard is more costly to alter even for domestic purposes.

In the trade area, the General Agreement on Tariffs and Trade

34. Parties can choose in the treaty agreement to restrict the conditions for sanctioning and the subsequent remedies. For instance, the World Trade Organization treaty requires that states make formal complaints to the organization and receive a judicial finding of violation before adopting retaliatory measures. See Warren F. Schwartz & Alan O. Sykes, The Economic Structure of Renegotiation and Dispute Resolution in The World Trade Organization, 31 J. LEGAL STUD. 179 (2002) (discussing when governments will want to allow for efficient breach and thereby limit sanctions to expectation damages rather than the damages necessary to deter breach).

35. How costly treaty violation will be to the breaching government depends on several factors. First, retaliation may be costly to the sanctioning state; thus the exact level of sanctioning can be hard to predict. Retaliation can have “rally around the flag” benefits for elected officials but can also led to economic injury. Second, the costs of the sanctioning will depend on the response of the domestic policymaker’s constituencies. Since the costs will vary between legislators, it is difficult to specify ex ante what the political costs to the collective national government will be. Third, some treaties are very specific on the procedures and remedies for treaty violations. These procedures will make the costs of violation more definite—in terms of whether other states will sanction and what the sanction will be and thus should raise the expected costs of treaty violation.
(GATT), now part of the World Trade Organization (WTO), established a system where governments lock their tariffs into a set schedule and can then only reduce tariff levels on an unconditional basis. This agreement involves an international component—exporting industries gain greater access to foreign markets—and a domestic component—manufacturing industries lock tariff levels on input goods into a decreasing schedule. The GATT alters the national regulation of tariff levels and entrenches a lower tariff policy by making it domestically and internationally costly to change.

One objection might be that the goal of GATT negotiations is not domestic regulatory change. Lowering our own tariff levels is not an attempt to entrench lower input prices for domestic manufacturers, but rather a bargaining chip to achieve lower barriers to trade in foreign markets. The structure of the GATT system, however, indicates that the domestic component does shape international trade negotiations. The GATT requires states to adopt "unconditional Most Favored Nation" (MFN) policies where all states are given the benefit of a government’s trade concession to any other state. For instance, if the United States agrees to lower its barriers to German steel, then it must extend that same concession to Polish steel. Unconditional MFN is arguably not the best means of opening up other states’ markets to one’s exporters. If states were able to condition any concession on a reciprocal concession, then the United States could use its tariff on steel to open up the Polish market as well as the German one. The unconditional structure instead assures domestic producers of the lowest input prices. Producers who use steel domestically get the benefits of the lowest possible tariff rate on steel imports from any state.

The WTO’s institutional structure also protects exporters’ preferred trade policies in domestic politics by isolating trade from other issues. The Dispute Settlement Understanding of the WTO allows other governments to challenge more effectively national laws that have a discriminatory effect—a measure that makes it more difficult for Congress to adopt statutes which use trade policy to achieve other goals. For instance, if Congress attempts to tie trade concessions to


37. See Schwartz & Sykes, Towards a Positive Theory, supra note 36 (arguing that discrimination is beneficial under certain conditions).
environmental regulations, a WTO panel or the Appellate Body can find
the statute to be a violation of international agreements.

In the Shrimp/Turtle decision, the WTO Appellate Body did just that. There, Congress's attempt to link trade status to shrimping practices
was declared invalid, even though it was aimed at protecting an
endangered species. The Appellate Body determined that in theory a
government could take unilateral measures to address global
environmental problems, but the specific measure adopted by the United
States was unjustifiable and arbitrary. The decision was based on
several grounds, but it signaled that governments have to be very careful
if they want to use trade measures to reach other national concerns.

The result is that trade policy cannot be used domestically to achieve
non-trade ends. The isolation of international trade rules from other
national policies is one of the points of the WTO. It serves both a
domestic purpose—stopping Congress from using trade policy to affect
other political goals—as well as an international purpose—decreasing
other governments' barriers to trade.

Entrenchment through international agreements can also be a federal
agency tool. Agency officials can use international negotiations to
establish national regulations, which are then difficult for subsequent
agency heads to change. For instance, in the Basel Accords, the United
States Federal Reserve entered into an agreement with other central
banks to establish minimum reserve requirements on all deposits
including the international branches of national banks. The minimum

38. See WTO Panel Report, United States—Import Prohibitions of Certain Shrimp and

39. See Paul B. Stephan, Sheriff or Prisoner? The United States and the World Trade
In short, the Appellate Body did not forbid the use of trade sanctions to advance
environmental ends, but it did contain that option. Its restrictions encumber an
environmentally minded government principally by making it difficult to bundle other
interests, such as regional security, immigration policy, or human rights, with
environmental concerns. These limitations make it harder for governments to assemble
domestic political coalitions to pursue environmental objectives, and they frustrate
efforts to use environmental measures to exercise international influence, whether for
environmental or other ends.

Id. at 56.

40. Andrew Guzman has noted this effect, stating that "much of the criticism leveled at the
WTO stems from the perception that the liberalization of international trade has received
inappropriate prominence, and that other values have been sacrificed." Andrew T. Guzman,
abstract_id=321365).

requirements serve an international function—coordinating regulation on overseas banks to prevent inadequate reserves—and a domestic political function—imposing a new regulation on all banks operating nationally. Before the Accords, banks based in foreign states could maintain differing reserve levels for deposits, which permitted them to offer lower interest rates on loans. After the accords, all banks were required to keep a certain reserve level, thereby decreasing the competitive advantage of the “low reserve” banks. American banks supported this move since there was growing domestic pressure for increased regulation, and the Basel Accord made the new regulations applicable to all international banks. This policy was entrenched against later central bank change because other central bankers would view such alterations as a violation of the agreement. Domestic change is not prohibited but it is far more costly than it would be in the absence of this international agreement.

There are two possible objections to this entrenchment analysis. First, governments can withdraw from treaty obligations or alter treaty terms ex post. Second, not all treaties are “self-executing,” and thus might not entrench policies for domestic groups. These objections are addressed in order.

1. Withdrawal

Governments can withdraw from international agreements if policymakers wish to change a policy but not violate any international agreements. While this solution may appear to lower the costs of changing domestic policies embedded in treaties, it is not clear that this strategy will be less costly in many circumstances. First, the government would need to withdraw from the entire treaty (unless there was a clause specifically permitting withdrawal from one section of the agreement) and would lose all of the benefits of the agreement. Because treaties are often agreements on multiple issues, legislators cannot simply change just one aspect of the agreement—as they could if the policy was

43. Banks compete on several different levels, and the capital reserve requirement is only one factor. Since different national governments provide different levels of bail-out protection and regulate banks differently, establishing a uniform capital requirement alone does not create a level playing field. See Hal S. Scott, The Comparative Implications of the Basle Capital Accord, 39 ST. LOUIS U. L.J. 885, 888-92 (1995).
44. See REINICKE, supra note 41, at 109.
45. Vienna Convention, supra note 32, art. 56, 1155 U.N.T.S. at 345, 8 I.L.M. at 692.
established as a statute.

Moreover, treaties are not necessarily discrete instruments. The existence of one treaty may be important for the maintenance of other international agreements. Thus when considering termination, a government will have to consider whether withdrawal from one treaty will prompt other states to withdraw from other treaties. This linkage between treaties can be formal or informal. Some treaty arrangements make acceptance of several agreements mandatory. For instance, parties to the WTO must accept the minimum intellectual property standards under the Trade Related Intellectual Property Rights Agreement and cannot terminate that agreement and still retain the other WTO trade benefits.\(^{46}\) In other areas, such as arms control, treaties are only politically related: The termination of one agreement may lead other governments to consider terminating other agreements. For instance, while the Bush administration was considering terminating the Anti-Ballistic Missile Treaty, in response, the Russian government threatened to terminate the START I and II agreements.\(^{47}\)

States can also seek to alter the text of a treaty if the policymakers seek to change domestic policy and yet not violate international agreements. Treaties, however, are notoriously difficult to alter. While each agreement may specify its own rules for altering the agreement, the default rule is unanimity. Thus the difficulty of changing the text will be positively associated with the number of parties to the agreement and the heterogeneity of their preferences. Of course, a state may be able to reach agreement by offering side payments (or on a more sinister note, threaten the withdrawal of other cooperative actions) but these actions are themselves costly. Either buying other states' assent or issuing threats to reluctant treaty partners raises the costs of the changing domestic policies and slows the process.

2. *The Execution of Treaties*

Under the American legal system, not all international agreements are automatically given the status of federal statutes in the domestic legal


\(^{47}\) Robert Burns, *Putin Digs in Heels on Missile Defense*, CHI. SUN-TIMES, Aug. 14, 2001, at 27. Russian President Vladimir Putin was quoted as saying, "You know our attitude toward the ABM treaty of 1972. For us, it's unconditionally linked with both the START I and START II treaties. I would like to underline that." *Id.*
system. An international agreement must be “executed” to be judicially enforceable. Execution can occur in one of two ways. The agreement can be self-executed by its own terms or it can be executed through subsequent implementing legislation. It is difficult to predict when a treaty will be determined to be self-executing, unless the text of the agreement explicitly addresses execution. The intent of the negotiators to create immediate and directly enforceable rights is the standard for determining self-execution, but this is an inherently ambiguous standard. Courts have gone back and forth on whether a specific agreement qualifies. In one case, the Supreme Court originally found a treaty with Spain to be non-self-executing but four years later found the opposite. While not consistent, courts have generally been more willing to find bilateral agreements self-executing than multilateral agreements.

Nevertheless, non-self-executing treaties can also entrench policies within the domestic political system even without direct enforcement by courts. Government leaders and agencies follow the terms of international agreements, self-executing or not, because of the political costs, foreign and domestic, inherent in changing these policies. Treaties can establish political stable policy outcomes without judicial enforcement. In this manner, non-self-executing treaties are analogous to statutes that do not provide for a private right of action or issues falling under the political question doctrine. The unavailability of judicial enforcement does not make these policies and principles irrelevant. Rather they are supported by other political factors.

For example, consider the GATT rules on tariff levels. The GATT is considered to be non-self-executing and thus cannot be judicially enforced;
enforced by private parties injured by a government violation. Consequently, domestic producers who use foreign inputs in their manufacturing process and are economically injured by higher tariff levels on those inputs have no right of action against the government’s treaty violation. If the GATT agreement was judicially enforceable, tariff policy could only be changed by a subsequent act of Congress. Nevertheless, the high domestic and international political costs of violating the GATT tariff schedule significantly limits when the government will vary from the schedule, even without access to the national court system.

Moreover, government agencies incorporate international rules into their decision making processes, which embed internationally established policies even in areas where private parties would not have standing to challenge agency decisions. For instance, the Basel Accords are a purely executive agreement between the central banks of various states over banking requirements.54 While the Federal Reserve has significant discretion in setting banking standards and could always choose to deviate from the international agreement without private judicial recourse, the very incorporation of the international accords in the agency’s decision making process entrenches the policy domestically. Similarly, the incorporation of “legal reviews” in the Defense Department’s military arms acquisition process, cements arms control agreements domestically even if no private party would ever have standing to challenge arms purchases.55

Non-self-execution may prevent entrenchment where sub-national governments are responsible for complying with the international agreement. State or local government leaders do not face international repercussions from violating international rules and thus may not follow the rule even if it imposes a cost on the federal government. For instance, governors do not face international costs from violating the Vienna Convention on Consular Relations, but the federal government does.56 Consequently, state police regularly violate the treaty’s

54. See JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 104, 117 (2000); Scott, supra note 43, at 885.
55. The Department of Defense requires a legal review of any new weapon or weapons system for consistency with our international obligations. See W. Hays Parks, Memorandum of Law—Review of Weapons in the Advanced Combat Rifle Program, ARMY LAW, July 1990, at 18.
56. See, e.g., Bream v. Greene, 523 U.S. 371 (1998) (finding that an order by the International Court of Justice demanding a stay of execution for an inmate whose rights under the Vienna Convention were violated did not require the State of Virginia to grant such a stay). After the Bream decision, then Secretary of State Albright made a separate plea to the governor
obligations. If the Vienna Convention were to be found self-executing, the state police would face judicial enforcement of the treaty obligations and most likely would comply more often. 57

Since most civil and economic human rights issues relate to state procedure—such as criminal law—there may not be significant demand in the United States for human rights treaties. To the extent that these agreements do not hold the potential for changing domestic rules, domestic groups may not pour as much effort into these ventures as other policies which the federal government can enforce, such as minimum ages for service in the military. 58 This is contrary to the European experience where the direct domestic effect in most states has led to a complex and fuller set of human rights agreements. 59

C. Internal Barriers to Treaty Change

Treaty rules are additionally protected from alteration by internally-imposed judicial rules that construe other federal law to be consistent with our treaty obligations. Under the Charming Betsy canon, federal courts interpret any ambiguity in federal statutory law to be consistent with existing international obligations. 60 For instance, if there is any ambiguity concerning whether Congress intended to violate an existing trade agreement, the court will interpret the statute in a manner that does


57. Current Supreme Court precedent states that treaty law preempts contrary state law even in areas where the states have primary policymaking authority. See Missouri v. Holland, 252 U.S. 416, 433-34 (1920) (finding that the treaty-established federal policy on migratory birds trumped state law on this issue even if the federal government could not have regulated this area in the absence of an international agreement). The Supreme Court has not reconsidered this rule since it held that Congress exceeded its Commerce Clause authority in passing the Gun-Free School Zones Act in United States v. Lopez, 514 U.S. 549 (1995).

58. The federal government can comply with international agreements such as the Convention on the Rights of the Child’s Protocol on the Involvement of Children in Armed Conflict. The protocol requires states to take all feasible measures to keep all members of the military under the age of eighteen out hostilities. See Michael J. Dennis, Newly Adopted Protocols to the Convention on the Rights of the Child, 94 Am. J. Int’l L. 789, 791 (2000).

59. The European human rights treaties set out far more rights than other agreements and have more remedies for private citizens whose treaty rights have been violated by their own governments. See Helfer & Slaughter, supra note 17, at 293-97; see also Moravesik, supra note 15, at 220 (arguing that these human rights treaties were created to prevent subsequent national governments from lowering human rights standards).

60. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); see RESTATEMENT (THIRD), supra note 32, § 114.
not violate the international agreement. The canon has the effect of preventing other domestic laws from violating treaties unless the statute can overcome the additional bar of congressional intent to violate international law.\textsuperscript{61}

The \textit{Charming Betsy} canon is generally understood as a means to keep the federal courts from creating foreign policy controversies not intended by Congress.\textsuperscript{62} Under the last-in-time rule, the political branches can choose to violate the terms of a treaty by enacting new legislation and the federal courts will give force to the most recently enacted federal law, notwithstanding international law. The last-in-time rule creates the possibility that the federal courts, in the interpretation of statutes, will violate treaty commitments where the political branches did not intend a violation. Consequently, federal courts could create an international controversy, possibly leading to sanctions or other diplomatic problems, and thus interfere with the political branches’ conduct of foreign relations. The \textit{Charming Betsy} canon prevents this situation by requiring clear congressional intent to violate international law, regardless of whether the treaty in question is self-executing.\textsuperscript{63} The canon preserves the legislative powers of the political branches but creates a higher bar for statutory repeal of treaty law.

By construing statutes to be consistent with treaty obligations, the \textit{Charming Betsy} canon erects an additional hurdle to domestic policy change. Domestic groups who wish to change the treaty-enacted policy not only need to secure enough political support to enact a contrary policy, but Congress must also clearly demonstrate a desire to violate the specific treaty obligations. Strictly applied, the canon is a substantial barrier to treaty change, but even in a weaker form, entrenches treaty law to a greater degree than does domestic legislation alone.

\textbf{D. Conclusion}

The legislative process can be described as a competition among interest groups for policy outcomes. Interest groups not only want legislators to provide favorable policies, they also want those policies to be electorally stable. International agreements can provide greater


\textsuperscript{62} See Curtis A. Bradley, \textit{The Charming Betsy Canon and the Separation of Powers: Rethinking the Interpretive Role of International Law}, 86 Geo. L.J. 479, 495-97 (1998) (discussing the “legislative intent conception” of the canon). Bradley proceeds to defend the canon based on the role of the judiciary within the separation of powers.

\textsuperscript{63} See id. at 483.
entrenchment by raising the costs of policy alteration. While this may be problematic from the standpoint of democratic change and accountability, greater policy entrenchment has a value to interest groups. Interest groups thus may prefer treaty agreements on traditionally domestic issues, such as industry regulation, because of the national effects of the treaty arrangement. This does not mean that interest groups may not desire effects at the international level as well. For instance, there may be benefits to having other states adopt similar regulations. However, the national-level effect of the agreement can significantly increase the expected gains from the lobbying and make the United States more likely to engage in treaty negotiations.

IV. PRESIDENTIAL AGENDA-SETTING

Negotiating treaties is one of the rare constitutionally-specified executive functions where the President is not an agent of Congress.64 The power to negotiate gives the President agenda-setting control over the international law process, a control that the President does not have in the domestic legislative process. While this power, at first, may not appear to confer any particular benefit to interest groups, the President’s agenda-setting control allows him to have significant influence on the content of the resulting policy. The differences in the law-making process may also create a demand for treaty obligations among domestic groups. Taking advantage of this agenda-setting power is particularly attractive to domestic interest groups who have reason to believe that the executive, either as an institution or as a partisan representative, is more likely to consistently support their position than the legislature.

In this section, I first review the public choice literature on the importance of agenda control. I then examine the United States’ treaty process and discuss which groups are advantaged by presidential agenda control.

A. The Importance of Agenda Control

Agenda control generally refers to the power to initiate and control the evolution of policy proposals. This power is substantively significant when there are multiple policy proposals that could defeat

64. See JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAWS 131 (1997).
the status quo because it allows the agenda-setter to select the proposal closest to her policy preference from the set of viable policy alternatives.

For a policy to be enacted into law, it must be able to garner support from at least a majority of legislators over the status quo. While different legislative bodies can require greater levels of support—for example, the Senate’s filibuster rule effectively requires a supermajority support for a policy—I use a majority rule system for simplicity. It does not detract from the theoretical point, and the agenda-setter’s power actually increases with the severity of the supermajority requirement. 65 If no one person had exclusive power to propose a policy alternative, we might, at first, imagine that the legislature would adopt the policy that most legislators preferred over the status quo. 66 This policy would be one preferred by the median voter—the legislator whose policy preference is in the exact middle of all legislators. 67

To see why, consider a situation where a legislator proposes a policy different from the median voter’s ideal policy. For instance, consider a situation where the median voter wants to spend $50 million on a food stamp program and the program is currently funded at $40 million. If Legislator A proposed increasing funding to $45 million, this proposal would get a majority of support—the median voter and everyone to the left of him would support the increase in funding—but the $45 million proposal would not be an equilibrium because it would be defeated by another proposal closer to $50 million. Legislator B could propose spending $52 million and this would then garner majority support over the $45 million proposal—the $52 million proposal is closer to the ideal policy of the median voter and everyone to his left. Alternative proposals could go back and forth until someone proposes exactly $50 million. The $50 million proposal could not be defeated by an alternative because a new proposal would never be able to garner a majority of votes—the median voter and all of the voters to one side of him would not support any policy proposed funding other than $50 million.

The agenda-setter has substantive policy power because she has the exclusive ability to select the policy that is proposed as an alternative to

65. See SHEPSLE & BONCHEK, supra note 26, at 422-28.
66. For this to be true, legislators’ preferences must be single-peaked and issues must be addressed one at a time. I address these complications in the following paragraphs.
the status quo.\textsuperscript{68} If legislators are not free to propose new policies, then the agenda-setter can select a policy that is different from the one preferred by the median voter. Consider the food stamp proposal again. If the program is currently funded at $40 million, then the agenda setter can propose spending $45 million and this policy would be an example of an equilibrium. The median voter and all of the legislators to his left prefer this policy to the status quo and thus will vote for it. The policy will not be defeated by an alternative proposal for $50 million because no one is able to make that proposal—only the agenda-setter can propose policy. Consequently, the agenda setter is able to influence the policy outcome: The food stamp program receives $5 million less.

Under this model, the agenda-setter can influence policy outcomes in two ways. First, any policy she proposes between the status quo and the median voter’s indifference point will garner a majority of support. In the example, the median voter prefers spending $50 million on food stamps but will accept any change over the status quo up to $60 million. Beyond $60 million, the median voter prefers to keep funding at $40 million. In this situation, the agenda-setter can select any level of funding between $40 and $60 million and have it receive a majority of legislator support. Second, the agenda-setter can prevent a change in the status quo by refusing to propose an alternative to the status quo. For example, if the agenda-setter would like to fund the food stamp program at $35 million, then she can simply refuse to propose an increase in funding and thus keep the legislators from increasing the level of funding above current levels.

The agenda-setter’s influence is even greater when legislators’ preferences cycle.\textsuperscript{69} Legislative cycling requires a more complicated model of legislator preferences. The median voter model assumes that legislators’ preferences are single-peaked—legislators are assumed to always prefer policies closer to their ideal point—but legislators do not always prefer policies closer to their ideal points.\textsuperscript{70} For instance, some legislators might prefer to fully fund a food stamp program at $70 million, but if full funding is not politically feasible, then they do not want to fund it at all. Funding it at an intermediate level of $45 million would be the last choice. In this situation, intermediate funding of $45

\textsuperscript{68} See Shepsle & Weingast, supra note 28, at 511-14.


\textsuperscript{70} See HINICH & MUNGER, supra note 69, at 92; MUELLER, supra note 69, at 63-65.
million is closer to the legislators’ ideal point of $70 million, but they prefer nothing over $45 million. When a sufficient number of legislators have these double-peaked preferences, then a cycle can occur.

A cycle is a situation where there is no policy that will consistently garner majority support—policy proposals can go around and around with no end. Kenneth Arrow demonstrated in his “impossibility theorem” that even where members of a society are rational, there may not be one set of policy outcomes that will necessarily be chosen by majority rule. Instead of determinative outcomes, collective decision-making can result in a situation where every policy proposal (including the status quo) can be defeated by another policy proposal in a majority rule voting system. Any number of policy options could be selected by a legislature, and which policy wins is simply a function of the order in which policy alternatives are considered—a procedural issue that the agenda-setter controls.

Returning again to the food stamp example, suppose that there are three groups of legislators. Group One prefers to fully fund the program, but would prefer no funding to intermediate funding. Group Two prefers to fund the program at $45 million but would choose $70 million second and no funding last. Group Three prefers to eliminate the program and would support intermediate funding over full funding. In this situation, the groups will not be able to agree on a level of funding in a majority rule system. Full funding of the program will win if matched against no funding since Groups One and Two will vote for it. No funding will win if matched against intermediate funding, since Groups One and Three will vote for it. Finally, intermediate funding will win if matched against full funding, since Groups Two and Three will vote for it.

In a cycle, the agenda-setter can select the outcome unilaterally by setting the order in which alternatives are considered. For instances, if the agenda-setter wanted intermediate funding for the food stamp program, she would make sure that no funding and full funding were considered against each other first, and then the winner (full funding) was matched against intermediate funding. By determining the order in which alternatives are considered, the agenda-setter can make sure that intermediate funding is the selected outcome.

Cycling can exist when issues are considered one at a time, but

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71. See ARROW, supra note 69.
72. See HINICH & MUNGER, supra note 69, at 92; MUELLER, supra note 69, at 63-65.
quickly occurs when several issues are considered together.\textsuperscript{73} The finding that majority rule decision making produces cycles is a major theme of the public choice literature.\textsuperscript{74} It highlights the difficulty of making statements about the majority intent or popular will and underscores the importance of the decision making process in selecting policy outcomes.\textsuperscript{75}

Agenda control stops cycles from happening even if legislators' preferences would allow a cycle to occur. This explains why collective bodies in democratic governments appear to make decisions on a daily basis without falling into the cycling patterns.\textsuperscript{76} Public choice scholars argue that this apparent stability is a result of procedural rules, most notably agenda-setting control, adopted by collective bodies to prevent a cycle.\textsuperscript{77} Where legislators have preference distributions susceptible to cycling, the agenda-setter has the greatest power to select the content of policy by structuring voting to achieve her most preferred policy.\textsuperscript{78}

The implications of cycling to majority rule voting have been summed up by Kenneth Shepsle, who argues:

In the context of majority rule voting, this theorem implies that it is not possible to guarantee that a majority rule process will yield coherent choices. Put differently, if the preferences of the members of a voting body display a modicum of diversity, then majority voting need not generate a transitive ordering of the alternatives available for choice; the alternatives cycle, even though individual preferences are quite coherent. Indeed, incoherence will often take the form of the nonexistence of a collectively “best” alternative; the final outcome may be arbitrary (for example, a function of group fatigue) or determined by

\textsuperscript{73} See Hinich & Munger, supra note 69, at 50-57.
\textsuperscript{74} See Mueller, supra note 69, at 88.
\textsuperscript{75} See Shepsle & Bonchek, supra note 26, at 241-48.
\textsuperscript{77} See Kenneth A. Shepsle, Congress is a “They,” Not an “It”: Legislative Intent as Oxyron, 12 Int’l Rev. L. & Econ. 239, 244-48 (1992) [hereinafter Shepsle, Congress is a “They”]; Tullock, supra note 76.
\textsuperscript{78} See Mueller, supra note 69, at 64. Richard McKelvey has demonstrated how powerful the agenda-setting power can be by proving that whoever controls the agenda can unilaterally choose the final policy outcome. This finding requires that actors not vote strategically. See R. D. McKelvey, Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control, 12 J. Econ. Theory 472, 481 (1976). Put differently, if there is one agenda-setter for all issues, there is not a substantive difference between majority rule decision making and dictatorial decision making. See Hinich & Munger, supra note 69, at 161.
specific institutional features of decision making (for example, rules governing the order of voting on motions). 79

B. The Presidential Agenda Power with Treaties

Agenda-setting power can be significant in influencing the direction and content of policy change. Altering which political actor has the power to control the agenda, from congressional committees to the President, can lead to radical differences in policy outcomes. This section discusses how vesting the President with agenda control by proposing policy changes as treaty agreements, rather than federal statutes, influences the content of domestic law. The section first discusses agenda-setting in the statutory process and then addresses how the process changes for international agreements.

1. Agenda-Setting Power in the Legislative Process

In the federal legislative process, the President has no formal agenda-setting power. Article I vests Congress with the power to initiate legislation. While the President can request that a congressional committee consider his policy proposal and this request may be particularly persuasive to members of the President’s party, the executive cannot control the committee’s agenda. Even if the President’s proposal is presented to the congressional committee, the committee chairperson can permit amendments to the proposal and can determine the order in which competing proposals are considered.

The President also cannot control the legislative agenda through the veto power. The threat of a veto can provide the President with legislative bargaining power, but it is a difficult threat to manage. Rational choice theories of inter-branch bargaining predict that the President’s veto threat will be credible only when he actually prefers the status quo to the bill. 80 Otherwise legislators and the President understand that a veto will impose political costs on both: The congressional backers of the proposal are worse off, and the executive also has to live with a status quo until the Congress can put forward a new proposal which may be little better than the vetoed proposal. Consequently, congressional leaders are unlikely to accommodate the

79. Shepsle, Congress is a "They", supra note 77, at 241-42.
President’s policy preference, notwithstanding the threat of the veto, if the President prefers the bill to the status quo.\textsuperscript{81} Even when the President’s veto threat is credible, legislators will change the policy only to the point where the President minimally prefers it to the status quo, not to the President’s ideal point.

2. \textit{Agenda-Setting Power in the Treaty Process}

By comparison, the President has significant agenda-setting power over the treaty-making process. The power to initiate treaty negotiations and to control the content of the treaty agreement is vested entirely with the executive.\textsuperscript{82} While the President must gain the consent of other states to the treaty text, the Executive has control over the government’s negotiating position and can determine to what foreign demands the government will concede.\textsuperscript{83} Moreover, the Executive has access to information regarding foreign negotiating positions, which legislators lack, thereby making it difficult for legislators to second-guess the treaty negotiations.\textsuperscript{84}

Presidential control of the negotiating process does not necessarily mean that the treaty text will be ratified. As treaty agreements must be approved by legislators to become law, the President must negotiate against the backdrop of legislative presentment.\textsuperscript{85} Nonetheless, the ability to exclude other governmental actors from the negotiating process is an important power. By providing the President with the exclusive power to negotiate the terms of the international agreement, the President has the ability to determine which policy alternative will

\textsuperscript{81} Professors Eskridge and Ferejohn use this assumption when designing the model for their Article I, Section 7 “game.” See Eskridge & Ferejohn, \textit{supra} note 27, at 530.

\textsuperscript{82} U.S. CONST., art. II, § 2, cl. 2.

\textsuperscript{83} The President is engaged in a two-level game where he is negotiating with the other state and keeping an eye towards the limits of legislative acceptability. See Robert D. Putnam, \textit{Diplomacy and Domestic Politics: The Logic of Two-Level Games}, 42 INT’L ORG. 427, 429 (1988).


\textsuperscript{85} Whether the treaty agreement will require 2/3 approval by the Senate or a majority of each house depends on whether the agreement is presented as an Article II treaty or a congressional-executive agreement. The goal of this project is not to explore how treaty agreements will be presented to Congress. Purely executive agreements do not require any legislative approval. Under some circumstances, executive agreements can override statutory provisions. See Dames & Moore v. Regan, 453 U.S. 654, 677 (1981).
be matched against the status quo in a final vote. The threat of legislative rejection of the treaty agreement, like the presidential veto, can be difficult to use credibly to influence negotiations. 86

3. Reservations and “Fast-Track” Delegation

Legislators can attach reservations to treaty agreements as a condition of their consent, but this power does not significantly diminish the agenda-setting power of the executive. Reservations act as amendments to the treaty agreement: The reservations condition legislative acceptance of the treaty on exceptions to the current text or specific understandings of the interpretation of some treaty clauses. Reservations have the potential to undermine the President’s agenda-setting power because the legislature can eliminate line-by-line aspects of the agreement that legislators do not support.

There are several important limits on the ability of legislators to attach reservations, however. First, reservations cannot be so broad as to defeat the purpose of the agreement. 87 Second, the drafters of the treaty agreement may identify specific provisions that cannot be subject to reservations. Consequently, the Executive can specify in international negotiations which issues cannot be amended. Many treaty agreements include these “no reservation” clauses for provisions that are necessary to securing international agreement or are considered central to the purpose of the agreement. 88 Finally, the President can be delegated ex ante the power to negotiate an agreement that will not be subject to any reservations. 89 For example, “fast-track” delegation requires that Congress consider the treaty agreement within a certain amount of time and vote up or down on the entire treaty text. Often the Executive, or

86. The President also has agenda-setting power with treaties in that he can refuse to engage in international negotiations. Like a committee chair who refuses to allow a bill to be considered, the President can effectively keep the nation from entering into treaty agreements, thus preserving the status quo even when a majority of legislators who would prefer an international agreement.

87. Vienna Convention, supra note 32, art. 19(c), 1155 U.N.T.S. at 337, 81 I.L.M. at 687; see also RESTATEMENT (THIRD), supra note 32, § 312(3) (recognizing that the United States is bound to this rule as customary international law).


89. The Executive could also attempt to enter into a sole executive agreement. These agreements are not presented to the legislature and, therefore, are not subject to reservations or any other conditions. These agreements have an uneasy place in federal law, however, and thus are not an effective method of securing international agreements into domestic law.
other states, will not enter into international negotiations regarding trade agreements without fast-track delegation.\textsuperscript{90} Trade negotiations require hundreds of small and large concessions to secure agreement by each side. The possibility that a legislature could subsequently veto many of these concessions decreases the credibility of the negotiators and makes other states unwilling to make politically unpopular concessions of their own. As a result, Congress is often, but not always, willing to bind itself to not attaching reservations to the treaty text. When Congress denies the President fast-track authority, it is commonly understood that no trade negotiations will occur.

In sum, while reservations may limit the President's power to tightly control the substance of the treaty text paired against the status quo in the congressional ratification vote, the President retains significant agenda-setting powers. The limits on the scope and the substance of reservations assure that the treaty provisions central to the purpose of the treaty cannot be altered. Moreover the President can require that certain provisions not be altered either by marking those provisions during the treaty negotiations as not subject to reservations or by receiving fast-track delegation. These limits to congressional amendment of treaty agreements allow the Executive to retain significant agenda control over the text of the treaty agreement.

C. Which Groups Benefit?

The President's agenda-setting power with international agreements is a significant power in law-making. By controlling which of many alternatives is matched against the status quo in a final vote, the President has enormous power to determine the content of international law and, thereby, domestic law. Domestic groups who have reason to believe that the Executive, rather than the legislature, is more likely to support their position will have an interest in using the treaty power to secure their preferred policies. The question then is what groups benefit by executive control of the law making agenda? Groups may seek treaty law, rather than statutory law, for the agenda-setting advantage because the Executive, as an institution or partisan representative, will be more sympathetic to these policies than either house of Congress. In the former case, we should expect that these groups lobby for treaty law

\textsuperscript{90} Potential trade partners refused to enter into trade negotiations with the Clinton administration once fast-track authority was removed. In contrast, the Bush administration insisted on fast-track authority before engaging in FTAA negotiations. See Raymond Colitt, \textit{Brazilian Leader Urges US to Lower Trade Barriers}, \textit{FIN. TIMES}, Aug. 7, 2002, at 1.
over statutory law regardless of the administration in power. In the latter case, the benefited groups will vary based on the party of the administration.

First, the presidency, as an institution, is likely to systematically prefer certain groups regardless of political party. The presidency is a nationally elected office and thus has a national constituency. By comparison, members of Congress are elected either by state or sub-state districts and are thus responsive to a much smaller constituency. The difference in the size of the constituency creates different policy concerns for the two institutions. Most notably, the President has a greater propensity to support groups that have a national constituency but suffer from collective action problems on a state level than individual legislators.

For instance, in trade policy, the President is consistently more supportive of trade liberalization than legislators regardless of party affiliation. President Clinton criticized the North American Free Trade Agreement (NAFTA) on environmental and labor grounds while governor, but as President supported the Agreement over the vigorous opposition of his own party. NAFTA subsequently passed with the support of Republican legislators.

The consistent executive branch support for trade liberalization is conventionally explained by the different pressures that face the President and members of Congress. Individual legislators are pressured by local constituencies to protect home district industries and can push much of the costs of this protection onto other districts. By contrast, the President cannot move the costs of protection onto groups to whom he is not electorally accountable. In addition, the President is often

92. See Lohmann & O’Halloran, supra note 91, at 598.
94. See id. at 222-28.
96. See Lohmann & O’Halloran, supra note 91, at 598-99.
97. The President, however, can try to push the costs of protection onto foreign economies by enacting an optimal tariff, at no cost to the domestic economy. See AVINASH DIXIT & VICTOR NORMAN, THEORY OF INTERNATIONAL TRADE 150-52 (1980). Presidents generally do not attempt to do this for two reasons. First, the state is not always a sufficiently large player in a certain good to be able to achieve an optimal tariff. Id. Second, other states may respond by enacting retaliatory tariffs which do impose a cost on the domestic economy, thereby offsetting any benefits. See John A.C. Conybeare, Public Goods, Prisoners’ Dilemmas and the
judged on the performance of the national economy, which is improved on an aggregate level by a greater degree of free trade. The President’s national constituency thus makes him less responsive, compared with legislators, to local industries that may be injured by increased competition.98

Trade agreements allow the President to set the agenda in trade policy, which has a significant effect on the content of U.S. policy.99 The President can present Congress with any agreement that he prefers to the status quo even if that agreement is far more liberalizing than the median voter or relevant committee would have selected. Consequently, domestic groups who advocate for trade liberalization are likely to prefer executive, rather than legislative, control of trade policy. This institutional advantage creates a demand for international trade agreements any time a domestic group wants to alter trade policy, even if the change could be made unilaterally.

Second, the President is also a member of a political party and will be influenced by this allegiance. When the government is divided between political parties, the President will have policy preferences that differ from one or both houses of Congress. This differential in policy preferences can create a demand for international agreements. Interest groups with partisan views similar to those of the President may prefer a treaty to a statute since the President can control the law-making process.

For instance, Democratic presidents tend to prefer more environmental regulation than Republican legislators in a divided government are likely to support. If the President controls the environmental agenda, he may be able to design an agreement that the legislature would accept—if it is preferable to the status quo—but that more heavily regulates the environment than the median legislative voter or relevant committee would have adopted.

D. Conclusion

The content of federal law will be heavily influenced by whether the legislature or the President has control of the agenda. The President has far greater control over the agenda and thus has greater control over the

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\[Note: \text{International Political Economy, 28 INT’L STUD. Q. 5, 10 (1984).} \]

98. See Lohmann & O’Halloran, supra note 91, at 599.

99. See id. at 596; O’HALLORAN, supra note 91, at 17; Judith Goldstein, Ideas, Institutions, and American Trade Policy, 42 INT’L ORG. 179, 191-92 (1988) (discussing presidential control of tariff-making authority and the provision of escape clause aid to domestic parties).\]
content of federal law when a policy is established through a treaty as opposed to a statute. In those situations where the President is likely to be more sympathetic to an interest group’s preferred position, that group has an incentive to demand treaty law. The demand is in part the result of domestic rules—such as the presidential agenda-setting power—in addition to any advantages of addressing this issue at the international level.

V. DELEGATION TO INTERNATIONAL ORGANIZATIONS

Treaties additionally allow domestic interest groups to delegate rule-making power to international organizations, rather than domestic agencies. This international delegation has two advantages over domestic delegation. First, international delegation increases the control of the executive branch over rule-making within a given issue area. The President or executive agency can advise and negotiate over substantive rules internationally but then use international organization decisions to constrain legislative activities. Second, international agency rule-making is less accessible and less transparent to the general public than similar domestic agency decision making. Consequently, only well-organized groups can effectively lobby these organizations and the decisions of international organizations are shielded from public scrutiny. These characteristics of international delegation provide interest groups with a more effective means to shape the development of substantive international and domestic law.

A. The Decision to Delegate Domestically

In the domestic sphere, legislators can set the details of policy in one of two ways: Legislators can write the specifics of the policy themselves or they can provide for agency rule-making. Why do legislators often choose the latter option of delegating legislative authority to bureaucracies? Explanations are both managerial and political. Managerial explanations focus on agency expertise and public access.100 First, legislators may want to delegate to agencies when the policy environment is complex and legislators are uncertain how well specific

proposals will affect social and economic conditions. Agencies are arguably better rule makers because they can develop expertise, collect information, and translate this data into policy more quickly and precisely than a congressional committee. Managerial explanations also focus public access to agency decision making. Private citizens and domestic groups have more access and can better comment on policy proposals and can more easily lobby for policy change when rule-making is done by agencies rather than Congress. The managerial rationale leads to predictions that legislators will retain control over rule-making only in simple informational environments.

Political explanations offer an alternative approach that emphasizes the legislators’ goal of maximizing political support. Morris Fiorina argues that legislators will delegate rule-making to agencies primarily as a means of shifting political blame, rather than a means to develop policy expertise. Peter Aranson, Ernest Gellhorn, and Glen Robinson extend this reasoning and argue that legislators prefer delegation where interest groups are the net beneficiaries of specific policies. These groups are sufficiently sophisticated to credit legislators for the private benefits of agency rules, while the costs are dispersed among the larger public who blame agency actors instead of elected representatives. Where policies provide benefits to a larger constituency and the costs are concentrated, legislators do not delegate because delegation would shift the credit for policymaking away from legislators and to agencies.

Under either theory of delegation, the legislature retains the ability to monitor agency action. Congress can use its statutory power, oversight, and appropriations power to regulate agency action. Domestic groups and the media can also monitor agency action and alert legislators to

101. See Schuck, supra note 100, at 778.
103. See Schuck, supra note 100, at 781-82.
104. See id.
107. Id. at 57-60.
108. Id.
109. See Epstein & O’Halloran, The Nondelegation Doctrine, supra note 100, at 967; Schuck, supra note 100, at 783-87.
divergent behavior. In addition, private groups can force domestic agency decision making to be transparent, using federal sunshine statutes, such as the Freedom of Information Act.

B. The Advantages of Delegating to International Organizations

The choice to delegate is similar in the international arena. Governments face a choice of whether to write out the specifics of the international agreements ex ante, reserve issues for later intergovernmental consultation, or delegate to international agencies. The managerial explanations for international delegation mirror those of domestic delegation. International agencies can develop an expertise in factually complex environments. Agency rule-making may thus better address international developments than ex ante rule-making and may respond more quickly and effectively than governmental consultation. In addition, governments may delegate issues that could not be resolved as a means of achieving consensus.

Delegation to an international body, however, is qualitatively different on a political level than delegation to a domestic agency. First, delegating rule-making power to an international agency puts the issue within the executive’s policy competence. Unlike executive agencies, the President is not an agent of Congress when negotiating internationally. The President can not only select the representatives to the organization, but is also able to control what policy proposals are presented to the international agency. By comparison, the President’s major power in the domestic delegation process is the ability to appoint agency heads. In addition, Congress’s oversight power is limited to international agencies because no one government is the sole principal of an international agency. Congress can demand, through its


111. See Schuck, supra note 100, at 789.


113. See id. at 103; see also Geoffrey Garrett, The Politics of Legal Integration in the European Union, 49 INT’L ORG. 171 (1995) (arguing that the European Court of Justice provides important incomplete contracting functions).

114. See Epstein & O’Halloran, Divided Government, supra note 102, at 379.

oversight power and subsequent statutes, that domestic agencies follow its legislative will, but its monitoring ability in international agencies is curtailed.116 Consequently, the power of the Executive in this area is expanded through formal means, such as having sole negotiating power under the Constitution, and informal means, such as limiting congressional oversight of international agency decision making.

The President can thus preserve his agenda-setting power in treaty negotiations to international agency decision making, but can shift much of the blame for unpopular policies. Like legislators in the Aranson, Gellhorn, and Robinson model, the President can leave international agreements ambiguous on issues that are likely to reduce his domestic popularity, and delegate rule-making power over many of these issues to international agencies. The agencies then take much of the domestic blame for the subsequent policies.

For instance, the United States has de facto delegated significant rule-making power to the World Trade Organization (WTO) by negotiating for and establishing the Dispute Settlement Understanding (DSU). When domestic rules and practices are challenged under the DSU, the Executive has exclusive control over how to handle the litigation. If the DSU Appellate Body subsequently makes a ruling adverse to the United States, the WTO, not the President, is blamed for the policy decision. In the Shrimp Decision, for example, the Appellate Body determined that an American regulation prohibiting the import of shrimp caught by nonturtle safe nets was a violation of international trading rules.117 The United States subsequently changed its regulations, but the WTO was widely blamed for this decision.

Second, international delegation differs from domestic delegation in that well-organized groups, advantaged by the international agreement, may have more control over subsequent policy development. International organizations, like domestic agencies, may move policy away from the preferences of the enacting governmental coalition.118 Domestically, we predict that this movement will follow the policy preferences of the current legislative majority since the current majority exercises oversight power.119 Internationally, it is less clear how

118. Cf. Moe, supra note 24, at 225-26 (discussing the problem of "bureaucratic drift"); Moe & Caldwell, supra note 26, at 175-77 (discussing structural tools for agency control).
119. See McNelligast, Administrative Procedures as Instruments of Political Control, 3 J. L.
agencies will drift, but interest groups who supported delegation may have an advantage in influencing any policy development because they have comparatively better access and organization. The general public does not have access to international agencies to the extent that they do to domestic agencies. International organizations are often located in foreign cities and do not circulate proposed regulations and decisions the same way that domestic agencies do. Consequently, only well-organized and well-funded groups have the resources and information to show up to these meetings and effectively lobby.

International agency decision making is also less transparent and thus provides domestic opposition groups with less information about the policymaking process. International organizations need not disclose their decision making process since transparency makes it harder for governments to compromise. The promise that all deals will be kept behind closed doors arguably allows governments to reach agreements that would not be possible otherwise.

VI. IMPLICATIONS FOR THE USE OF INTERNATIONAL AGREEMENTS

Governments may form treaties for many of the same reasons that they enact statutes—to achieve domestic goals. This approach differs from that of the current international law literature, which views treaties as qualitatively different from domestic law. While it is generally accepted that domestic law reflects interest group lobbying, treaties are conceived as the products of unitary state-to-state relations, immune from the vagaries of domestic politics. This section draws out several implications of the interest-group approach that are neglected in the conventional approach. First, because the structure of the domestic political system affects constituent demand for treaty law, government decisions to enter into treaties reflect the domestic rules governing lawmaking. Second, the interest-group approach leads us to question whether international agreements will uniformly enhance general welfare. Finally, because treaties can circumvent established legislative procedures, we might be concerned about the unrestricted use of treaty law to govern domestic relationships. This procedural concern is heightened because there are few guarantees of the positive welfare effects of international agreements.

A. The Decision to Address Issues Internationally

When treaties are conceived of as the product of interaction among internationally-focused governments, the reasons for forming them appear straightforward. Governments form treaties to achieve mutual gains from coordinated or cooperative activity at the international level. Without such gains, there is no reason for governments to enter into treaties. This approach ignores the domestic sources of government policy and, thereby, underemphasizes the impact of domestic lobbying and the structure of the domestic political system in foreign affairs.

An interest-group conception of government decision making provides a different explanation for treaties and highlights the influence of domestic rules on interest groups’ demand for treaties. The domestic demand for treaty law is not independent of domestic legislative and judicial rules but is tied to the status of treaties in the national political and legal system. Domestic rules create a demand for treaty law.

For instance, agenda-setting rules can influence the decision to pursue treaty agreements. The decision to pursue treaty agreements rather than domestic laws shifts agenda-setting power from the legislature to the executive. This shift creates a demand for treaties when domestic groups have greater influence with the executive than with the legislature. Agenda-setting rules can therefore create a demand for domestic issues to be addressed at the international level. This demand has consequences for inter-branch relations. If interest groups demand more treaty agreements to take advantage of presidential agenda-setting, then these rules grant the Executive greater power relative to Congress in determining the content of national laws.

Judicial doctrines that favor treaty law over statutory law can also influence the decision to pursue treaty agreements. The Charming Betsy canon construes statutes to be consistent with international obligations, which results in greater judicial protection to treaties than statutes.

When we view treaties as the product of domestic politics, the implications of the canon change. Judges and academics commonly defend the canon as a means of preventing the national government from inadvertently violating international law. What is less well-recognized is that the canon affects the demand for international agreements. If international agreements are made independently of domestic politics, then the canon should have no effect on demand. But if treaties are a means of entrenching domestic policies, then the canon should increase the demand for (and hence the supply of) international agreements. By providing greater entrenchment, the federal judiciary
has created domestic rules that encourage interest groups to pursue their goals at the international level.

An interest group approach thus highlights the importance of domestic political and legal systems in explaining why states form international agreements. National judicial and legislative rules influence the choice of whether to pursue domestic or international lawmaking.

This analysis also leads to some comparative government hypotheses about the domestic demand for international agreements. Viewing international commitments through the optic of interest group demand leads to the expectation that the structure of domestic regimes will affect how states interact in the international environment. If the demand for treaties is partly endogenous to the national political structure, then there should be variance between states.\textsuperscript{120}

First, the domestic demand for international agreements should be higher in states where domestic policy change occurs frequently and international agreement automatically become domestic law. For instance, in Westminster-style parliamentary systems, domestic policy is relatively easy to change since laws need only be passed by one body. This ease in changing policy should lead to increased demand for entrenchment for the domestic groups currently in power. International agreements can most readily meet this demand if the agreement automatically becomes law in the domestic legal system. Consequently, all else being equal, domestic groups in states with parliamentary systems should demand more international agreements.

Second, the domestic demand for international agreements should also be higher where the treaty-making process shifts decision making power to a different governmental actor. For instance, in presidential systems, entering into treaty negotiations shifts agenda-setting power from the legislature to the Executive. In contrast, in parliamentary systems, the head of the ruling coalition retains agenda power in the international forum, so there would be no agenda-setting advantage to international agreements. As a result, all else being equal, domestic groups should demand more international agreements in national systems where agenda-setting power shifts in international negotiations.

By conceptualizing the demand for treaties as causally related to domestic political structures, this interest group approach leads us to expect that states with different governance structures will demand

\textsuperscript{120} Cf. Moe & Caldwell, supra note 26, at 172 (arguing that agency structure is endogenous to the domestic political system).
international agreements to varying degrees. Anne-Marie Slaughter predicts that liberal states view international law differently than non-liberal states, and my approach leads to the expectation that there should also be variance between liberal states. This approach does not produce unambiguous predictions for comparative treaty demand—parliamentary systems might create more of a demand for international agreements than presidential systems on the basis of entrenchment but less on agenda-setting grounds. But this approach does put forward testable hypotheses for why even liberal states may act differently in international fora. While these hypotheses are not tested in this paper, this approach is potentially more useful than the current approach in describing why some governments may be more or less willing to form international agreements.

B. The Welfare Effects of Treaties

An interest-group approach to international agreements also leads us to question the welfare effects of international agreements. The current approach focuses attention on the possibility of cooperative gains, which are typically assumed to enhance general national welfare. For instance, scholars often portray treaties as a means of limiting arms races or promoting more liberal trade policies. In both of these examples, treaties provide efficiency gains to the national economy, leaving more funds available for other uses and providing lower prices for consumers. Hence, under this view we have little reason to worry that international agreements will decrease national welfare because governments will not enter into such agreements.

If we instead conceptualize treaties as the product of interest group lobbying, then national welfare concerns come to the forefront. If governments are not unitary, and treaties reflect the same domestic pressures as other types of law, then treaties are susceptible to the same sorts of interest group rent seeking as statutes. Thus, instead of generating greater national welfare, treaties, like statutes, may simply redistribute gains among domestic or foreign groups.

The fact that treaties may not enhance general welfare is not itself a reason to condemn treaty law. If democratic political systems naturally favor well-organized groups over diffuse or difficult-to-organize groups,

122. These forms of cooperation will also have distributional consequences (distributing away from arms makers and import-competing sectors) that are considered to be Kaldor-Hicks efficient.
then any lawmaking process may produce economically suboptimal results. In this sense, the treaty process is no different from domestic lawmaking: It is simply not immune from the detrimental aspects of interest group activity.

C. The Appropriateness of Treaties

The interest group view of treaties may further lead us to question whether treaties are appropriate for all issues. There have been few calls from judges or academics within the United States to limit the extent to which international agreements can be used. This broad acceptance of treaties is in part connected to the belief that international agreements promote international cooperation for the enhancement of general welfare. Yet we may have procedural and substantive concerns about the use of treaties.

Part of the attraction of treaty law to domestic groups may be that they circumvent the established legislative processes. The treaty process is controlled by the President and does not involve the legislature to the same extent as domestic lawmaking. Moreover, these agreements can be more difficult to subsequently alter than statutes. The threat of international sanctions, along with a protective judicial canon, creates barriers beyond the bicameral support and presidential presentation requirements necessary to change domestic law. Even more problematic is international delegation, where the international organization may intentionally be shielded from later domestic oversight.

The extent to which treaty law can be used to bypass domestic legislative processes poses problems with democratic accountability. Treaties allow states to credibly commit to policies, but this commitment can limit the range of policy options for future governments. Tying the hands of future governments is not costless. The policy preferences of the national populace change, and limiting their ability to subsequently change national policy imposes a cost on the nation. Such concerns about a "democratic deficit" are commonly heard with regards to the European Union, where the power of national governments to act in numerous areas has been restricted by treaty obligations.

Concerns about the treaty process are heightened if we suspect that

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123. Some judges have been suspicious of and refused to enforce reservations which demand domestic legislative change before the treaty can go into effect. See, e.g., Power Auth. of New York v. Fed. Power Comm’n, 247 F.2d 538 (D.C. Cir. 1957) (refusing to enforce a treaty reservation that required Congress to change regulations regarding the Niagara River).
the agreement is redistributive. It is difficult to predict \textit{ex ante} which types of treaties will be general welfare enhancing. Trade treaties are commonly cited as examples of agreements where states can attain efficiency gains by eliminating governmental barriers to the free flow of goods and services. Interestingly, these agreements are seen as a means to counteract inefficient rent-seeking by import-competing groups in domestic law-making. If international agreements were restricted to those that enhance welfare, then the procedural concerns might be balanced by benefits to the general public. But if international agreements simply redistribute and impose dead-weight losses on the nation, then we should be more concerned about the difficulty of changing the policy. In these situations, there may be reason to restrict the subject matter that treaty agreements can cover.

\section*{D. Conclusion}

International agreements clearly are used to promote international cooperation, but this is not the sole motivation for forming international agreements. The goal of this article is to examine the influence of domestic interest group demands on the government’s decision to engage in treaty agreements. The relative importance of international and domestic motivations will vary between agreements. This approach is an attempt to bring the question of motivation to the forefront.