

AMERICAN IDENTITY POLITICS AND INTERNATIONAL LAW

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It has long been conventional in our public morality to assume that special interest groups play a destabilizing role in shaping international law. In the United States, commentators are quick to point to a solution: increase transparency and try to engage the larger voting public regarding the moral and economic merits of legal globalization. This Article argues the opposite: if the American experience with international trade controversies is any guide, moral inflation and appeals to mass politics are more likely to increase the role of identity politics in international law and render beneficial and durable bargains more difficult. The problem is that when economic and cultural cleavages happen to overlap, as they often do in the United States, disagreements over relatively mundane and technical issues between narrow groups in international law can sometimes be converted into high stakes contests over social identity that divide wide swaths of the population into rival camps. To illustrate these claims, this Article uses the recent controversy over the renegotiation of the North American Free Trade Agreement (NAFTA) and the American experience with tariff disputes in the late nineteenth and early twentieth century.

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I. INTRODUCTION

The tumultuous events that have rocked the global economic order in the United States and elsewhere over the past few years has led to a significant degree of soul searching by elite politicians and practitioners. Many have attributed the persistence of a populist backlash against globalization to some kind of democratic deficit in the making of international law,¹ as well as the excessive influence of special interest groups.²

Commentators are quick to point to a solution: encourage wider engagement by the voting public regarding the moral and economic merits of international law. In this picture, the hope is that if the process of making international agreements becomes more transparent and inclusive, it will open the political space for more deals that will be viewed as more

¹ See, e.g., Trade Transparency Act of 2015, S. 1381; Press Release, Senators Manchin and Warren Introduce ‘Trade Transparency Act,’ May 19, 2015, <https://www.manchin.senate.gov/newsroom/press-releases/senators-manchin-and-warren-introduce-trade-transparency-act> (introducing a bill that would require the President to release the scrubbed bracketed text of any trade agreement at least 60 days before Congress grants fast track authority); Melissa J. Durkee, *International Lobbying Law*, 127 YALE L. J. 1742, 1746-62 (2018) (discussing the privileged access that business groups often have to international organizations and law makers, and painting a picture that is at odds with the claim that access rules make international law making more democratic); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007) (discussing the democratic deficit in international law generally). But debates on the democratic deficit in certain international institutions like the World Trade Organization have been longstanding. See Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT’L ECON. L. 841, 862 (2003); Daniel C. Esty, *The World Trade Organization’s legitimacy crisis*, 1 WORLD TR. REV. 7, 15–16 (2002). For calls for more democratic transparency in international law, see ANNE PETERS, *TOWARDS TRANSPARENCY AS A GLOBAL NORM* 534 (Andrea Bianchi & Anne Peters eds., 2013).

² Indeed, tales about how selfish protectionists conspire to block socially beneficial international agreements are a staple item in both the popular and academic literature. See Ernst-Ulrich Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 EUROP. J. INT’L L. 161 (1995) (“[G]overnments risk to become prisoners of the siren-like pressures of organized interest groups unless they follow the wisdom of Ulysees and tie their hands to the mast of international guarantees.”); see also John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 521-25 (2000) (describing the logic of WTO as benefitting all countries at the expense of special interest groups); Nita Gei, *Small Special Interests, Big Influence*, US NEWS AND WORLD REPORT, Oct. 24, 2106, <https://www.usnews.com/opinion/economic-intelligence/articles/2016-10-24/international-trade-too-vulnerable-to-special-interests>. Alternatively, others have argued that groups that benefit the most from globalization do not internalize the full costs of their policy choices. See discussion in text at *infra* notes 171-73.

legitimate.³ Put differently, once issues of international law can be made salient for the average voter, narrow interest groups will presumably have less wiggle room to manipulate international rules to their advantage, or disrupt mutually cooperative bargaining among nation states.⁴

This Article argues the opposite: if the American historical experience with international trade controversies is any guide, moral inflation and appeals to mass politics are more likely to increase the stakes of politics in international economic law and render beneficial and durable bargains more difficult. Thus, rather than encourage cooperation or productive deliberation, greater public engagement is more likely to transform international law into another arena in which polarizing and zero-sum conflicts over status, social identity, and moral prestige can be projected.

There are two plausible reasons why even mundane international trade controversies may be particularly susceptible to moral inflation and high-stakes identity politics. First, since international trade and cultural cleavages in the United States often overlap, and these cleavages also tend to have a strong geographical aspect, one's position on international trade may prove valuable as a marker of group boundaries. Second, if the contending groups are closely matched, inflaming the scope of intergroup differences in international trade may be a good strategy for bolstering group solidarity, which can then be mobilized in the struggle for power. The result is that group hostility over international trade can escalate—not only because of its intended material results (which may not be significant)—but also because it serves as a useful tool for venting against one's cultural and political adversaries.

Here is the hitch. In a polarized society like the United States, when one side stridently invokes the need to overcome special interests in debates over international economic law, it is not likely to be received by the political opposition as an invitation to deliberate over common goals. Rather, it will likely be interpreted as a threat or as a call to arms. It implies that the side engaging in moral inflation is no longer willing to continue to bargain in good

³ See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 55-56 (2005) (“If the WTO is to survive as a legitimate institution that effectively liberalizes trade it will need the direct support of consumers and citizens. Until now, export-driven, producer interests with allegedly only majority interests in mind have dominated the agenda at the WTO, effectively isolating the issues from a broader political debate; this will no longer suffice

⁴ Thus, many of the reform proposals focus on tilting the balance of power in favor of less organized groups, whose interests have been supposedly neglected by these international agreements. See Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985 (2017); Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1 (forthcoming Jan. 2019) (available at <http://ssrn.com/abstract=3217392>); Theodore T Lee, *Comment: Building the Political Will for Accountable, Equitable, Trade Policy Making*, 128 YALE L.J. 1439 (2019).

faith with its opponents over mundane and low stakes material issues. Instead, it is seeking to provoke and intensify a war of attrition over status or social identity, and expand the realm of political conflict over international law to a wider and more unpredictable range of participants.

The problem is that although this strategy may sometimes yield political benefits in the short term, it is often socially wasteful for all sides over the long run. The reason is simple: the expressive and high stakes approach to international economic law tends to lead to volatility across electoral cycles as each side tries to undo the policies of the other side once it comes into power. If groups fighting over international law become polarized along a fault-line of social identity, treaties and policies passed by prior regimes might be undermined or renegotiated, and new ones tailored to the expressive demands of the new government put in its place. However, once such wild swings in international economic policy occur, everyone may easily end up worse off. In other words, faced with chronic uncertainty about the future of the global regime of economic law, neither the export oriented nor protectionist industries will be able to plan adequately because they do not trust the government can commit to a coherent policy strategy.

To be clear, those who favor more popular participation and elevating moral rhetoric are not necessarily mistaken when they assume that the particularism of special interests can sometimes be a threat to beneficial international cooperation. However, in promoting a greater role for moral identity or mass politics in international law, they risk escaping one danger only to be overrun by an even greater one.

This Article is primarily about the fragility of widespread popular engagement with international law in the United States. However, as a remarkable illustration of that problem, the focus will primarily be on international trade controversies. Since international trade law often involves rather mundane and technical issues affecting narrow groups, it is very useful in illustrating the nature of moral inflation. In this case, claims that may otherwise involve commensurable material interests affecting few groups are transformed into popular contests over incommensurable values.

The rest of the Article proceeds as follows. Part II elaborates in more detail on the logic of moral inflation in international law, by examining its scope, its enabling conditions, and the benefits to politicians. On the latter issue, the benefits to politicians are usually functional: when the fault line in an international economic controversy overlaps with a group's social identity, then it may be profitable for a politician to escalate the stakes by using moral rhetoric in order to galvanize segments of the population who could then be deployed in a struggle for power. In this respect, moral inflation is likely to be most useful when elections are closely contested and where it serves as a credible marker of the boundaries between culturally hostile coalitions.

Part III turns its attention in detail to one historical and one contemporary illustration of moral inflation gone wrong in the United States. Each one of these illustrations implicated legal and political controversies involving the adjustment of international trade barriers, and the expressive and identity dimension of the conflicts came to overshadow the material and legal issues at stakes. The first involves tariff policy disagreements in the late nineteenth and early twentieth century. The second involves the high stakes politics governing the negotiation and recent renegotiation of the North American Free Trade Agreement (NAFTA). In both of these cases, the public choice account of narrow special interest groups foisting their material preferences on the rest of the population does not adequately account for what transpired. All these controversies commanded significant popular engagement, divided large swath of the population along geographical or other identity lines, were unusually intense, and threatened to result in policy volatility across electoral periods.

Part IV explores how moral inflation elevates the stakes of mundane economic disputes, and can lead to instability of international law and trade policy. It also explores how moral inflation can also have a destabilizing effect on the constitutional separation of powers in international trade. Finally, it argues that increasing the element of identity politics may immerse international courts and other arbitral bodies in the kinds of high stakes claims about intangible and abstract harms that are not ordinarily suitable for adjudication.

Nevertheless, can the intensity born by identity politics also have beneficial effects for international economic law? Part V explores this question at some length, and contends that on balance, any such benefits are unlikely to outweigh the costs. Even when intensity or dogmatic resolve may sometimes be desirable as a source of energy in international law, the particular kind of intensity unleashed by high stakes identity politics is most likely not. Part VI concludes.

II. ESCALATING IDENTITY POLITICS: THE ROLE OF MORAL INFLATION

Proposals for greater transparency and inclusion in international trade law and policy are both intuitively appealing and enjoy a long lineage in democratic theory. This Part suggests some grounds for skepticism. Such proposals are likely to encourage politicians to engage in moral inflation by framing relatively mundane disagreements over trade policy as zero-sum contests between rival groups over social identity and status. Simply put, to encourage popular engagement with international law, political entrepreneurs often need to play up a “devil figure” or an

adversary against which their favored group may mobilize, and the search for such adversaries may itself have destabilizing effects.

A. *Searching for Adversaries: The Perils of Moral Inflation and Greater Transparency*

In much of international legal theory, there is an implicit assumption that groups motivated by narrow economic interests will be too particularistic, and thus they will be blind to the possibility that their preferences may conflict with the interests of others. This observation is often touted as a self-evident proposition that requires little justification. The obvious corollary is that groups that have broader horizons and scope will be less self-regarding and take into account more clearly any harm inflicted on third parties.⁵

In response, various mechanisms have been justified as tools to expand the horizons of officials by entrusting more authority in entities who are likely to be more responsive to unorganized majorities. These are the conditions in which some commentators praise granting more authority over international law to the President at the expense of Congress.⁶ In direct tension with this prescription is the idea that giving Congress a greater role

⁵ On this point, Schattschneider's comparison between groups motivated by social and material self-interest is worth quoting at length:

It is possible to distinguish between the "interests" of the members of the National Association of Manufacturers and the members of the American League to Abolish Capital Punishment? The facts in the two cases are not identical. First, the members of the A.L.A.C.P obviously do not expect to be hanged. . . Anybody can join A.L.A.C.P. Its members oppose capital punishment, although they are not personally likely to benefit by the policy they advocate. The inference is therefore that the interest of the A.L.A.C.P is not adverse, exclusive, or special. It is not like the interest of the Petroleum Institute in depletion allowances.

E. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE* 26 (1975).

⁶ See, e.g. DOUGLAS IRWIN, *FREE TRADE UNDER FIRE* 221 (2009) ("The RTAA delegated authority and agenda setting power to the president, who represented a broad based coalition and was therefore more likely than Congress to favor lower tariffs"); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1226-30 (2006) (expressing skepticism of the prevailing view that the president will pursue policies that advance the aggregate good, while members of Congress will pursue provincial policies); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35 (1995); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) ("[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105-06 (1994) ("[B]ecause the President has a national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—it appears to operate as an important counterweight to factional influence over administration.").

in shaping international law will encourage legal regimes that have the widest possible appeal, even if efficiency is sacrificed in the process.⁷

All these prescriptions assume that expanding one's political horizons, and encouraging the engagement of the unorganized public with international law, is necessarily desirable.⁸ Paradoxically, however, expanding the horizons of groups in international law beyond narrow material interests may sometimes have the opposite effect: it may both raise the stakes of politics considerably beyond normal bounds and further obscure the harms that a group's political preferences may inflict upon others. There are two related features associated with groups that should make us wary that expanding their horizons will necessarily lead to socially desirable effects. Both of these features distinguish very large collectivities such as nations and ethnic groups from small groups in very crucial ways.

First, to overcome collective action without the appeal of selective incentives like material resources, very large groups often need enemies. For a small group, such as a steel industry coalition, the mere prospect of narrow

⁷ See Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CAL. L. REV. 583, ___ (2019) ("[T]he President's trade policy can be captured by interests just as parochial as those that capture Congress. Giving the President control of trade policy, as under the foreign affairs paradigm, neither ensures implementation of a policy that maximizes national welfare nor does it comport with the constitutional structure."); see Daniel Griswold, *Can Congress reclaim its powers over trade and tariffs?*, WASH. EXAMINER, March 15, 2018, available at <https://www.washingtonexaminer.com/opinion/can-congress-reclaim-its-powers-over-trade-and-tariffs>. ("Congressional leaders should move quickly to negate the steel and aluminum tariffs announced by President Trump. Such action would protect the economic interests of the United States while also guarding the clear constitutional authority of Congress to determine U.S. trade policy."); Theodore Kupfer, *Will Congress Reassert Its Constitutional Authority to Impose Tariffs?*, NAT'L REV., March 7, 2018, available at <https://www.nationalreview.com/2018/03/congress-constitutional-authority-tariffs/>. A different prescription takes a more legalistic approach, in which the adjudication of trade disputes is lauded as a device for taking certain issues out of the realm of politics, and thus making it less likely that narrow groups will capture the policy-making process. See John O. McGinnis & Mark L. Movsesian, *Commentary, The World Trade Constitution*, 114 HARV. L. REV. 511, 521-25 (2000) (describing the logic of WTO as benefitting all countries at the expense of special interest groups).

⁸ See Shaffer, *Retooling Trade Agreements*, *supra* note 4 at 1-3; Meyer, *Saving the Political Consensus*, *supra* note 4 at 987; Meyer & Sitaraman, *Trade and the Separation of Powers*, *supra* note 8 at ___; Margot E. Kaminski, *Don't Keep the Trans-Pacific Partnership Talks Secret*, N.Y. TIMES, Apr. 14, 2015, available at <https://www.nytimes.com/2015/04/14/opinion/dont-keep-trade-talks-secret.html>. A similar logic underpins the proposal that non-parties be allowed to submit amici briefs to international adjudication and arbitration. See Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS U. L. REV. 927, 949-50 (2004); Richard Blackhurst & David Hartridge, *Improving the Capacity of WTO Institutions to Fulfill Their Mandate*, 7 J. INT'L ECON. L. 705, 708 (2004) (arguing that "the WTO needs an efficient-size sub-group of members for the purpose of discussing, debating and negotiating draft decisions that can be put to the entire membership for adoption [on a basis that is] fully transparent, predictable, equitable and legitimate in the eyes of all WTO Members").

economic rents secured from a piece of a trade treaty or legislation may be sufficient to motivate significant political action.⁹ For a very large group, such as an ethnic, national or regional group, the promise of economic resources may not be enough: individual members of the group will have an incentive to free ride and not much will be achieved. However, the more threatening to an in-group's identity and social status that an outgroup appear to be, the easier it is to convince members of large groups to make the kinds of sacrifices to their personal interests necessary to achieve collective goods. Even the economist James Buchanan, normally a skeptic of the ability of large groups to overcome collective action problems, makes an exception when the large group is under threat: "During period of extreme stress, such as was apparently evidenced by the British during World War II, behavior characteristic of small groups may have extended over almost the whole population."¹⁰

Second, and more importantly, political leaders are likely to gamble that groups motivated by threats to their identity and social status will exhibit greater solidarity and political endurance than groups motivated by mere material payoffs.¹¹ In the civil war literature, for instance, it has been shown that warring groups motivated by short term economic rewards display less commitment and resolve than groups motivated by identity, status, or other long term objectives.¹² The important insight here is that you need to convince the in-group that not everyone shares the wonderful values that they hold so dearly, and thus there must be an outgroup that despises those values.¹³ Moreover, whether the evidence bears out this conjecture may be beside the point. In his analysis of social conflict, Coser is emphatic that the lure of an enemy can facilitate group cohesion, even if the members of the group lack a full grasp of reality: "all that is necessary is for the members to perceive or be made to perceive an outside threat to 'pull themselves

⁹ MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53 (1965).

¹⁰ JAMES BUCHANAN, THE DEMAND AND SUPPLY OF PUBLIC GOODS 91 (1968).

¹¹ See MASON, UNCIVIL AGREEMENT, *infra* note 17 at 107 ("Social psychologists have already discovered that when people identify with a group of other people they are more likely to take political action on behalf of that group, particularly when that group is under threat.").

¹² See Jeremy Weinstein, *Resources and the Information Problem in Rebel Recruitment*, 49 J CONFLICT RESOL. 598 (2005).

¹³ To engage in effective mobilization, Berry alludes to the political utility of provoking an emotional reaction among your targeted audience in direct mail appeals:

The key to direct mail is to make the reader angry or scared. To do so, says Roger Craver, 'You've got to have a devil. If you don't have a devil, you're in trouble. The "devil" in these letters is some person or group that is visibly and actively working against the soliciting group's interests.

JEFFREY BERRY, THE INTEREST GROUP SOCIETY 84-85 (1984).

together.' Threats may or may not exist in objective reality, but the group must feel that they do."¹⁴

Given both of these considerations, one can infer that moral inflation in international law performs a very distinct political function: to generate sufficient hostility against an outgroup in order to mobilize large swaths of the population to fight over their cultural identity and social status.¹⁵ In this case, once differences in trade policy can serve as a credible marker of identity, it may take on a life of its own regardless of how far apart the groups may be. To achieve this objective, romantic imagery of long-established identities may be invoked either in favor or against an international economic treaty or legislation, although any connection of such imagery to the very specific provisions of the treaty or legislative language may be opaque.

Where the political and cultural mythologies that define certain communities are bundled together with the material considerations from an economic treaty, the citizens so mobilized may tend to display a certain kind of dogmatic disregard towards the outgroup,¹⁶ and this disposition is likely to undermine bargaining and increase volatility across international legal regimes. Indeed, the participants in this ritual are likely to take a jaundiced view of any politician making claims that their particular trade policy will be mutually beneficial; on the contrary, a useful rule of thumb may be that anything that hurts the opposing side is beneficial for group seeking to instigate moral conflict.

Finally, another defining hallmark of moral inflation is that it tends to be invoked defensively: in other words, the party inflating the stakes usually insists that it is necessary to do so in order to rectify a prior grave injustice or status harm inflicted by one's opponents.¹⁷ The obvious

¹⁴ LEWIS COSER, THE FUNCTION OF SOCIAL CONFLICT 104 (1956).

¹⁵ Social psychologists have pointed out how even in the absence of past hostility or any serious conflict of interests, people belonging to groups can quickly favor their member against others, especially when motivated by an underlying need for self-esteem. See Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 SC. AMER. 96 (1070); John C. Turner, *Social comparison and social identity:Some prospects for intergroup behavior*, 5 EUROPEAN J SOC. PSY 3 (1975).

¹⁶ To be sure, some of these beliefs will also be shaped by political entrepreneurs. As Tajfel observes elsewhere: "[T]his need [for social identity] is fulfilled through the creation of intergroup differences when such differences do not in fact exist, or the attribution of value to, and the enhancement of, whatever differences do exist." Henri Tajfel, *Social Identity and Intergroup Behavior*, 13 SOC. SC. INFORM. 65, 75 (1974).

¹⁷ A primary insight from the social identity literature is that individuals may tend to view groups with which they associate with positive status or self-esteem, and may often use out-groups to benchmark their quest to achieve such self-esteem or status. See Henri Tajfel & John C. Turner, J. C. 1979. *An integrative theory of inter-group conflict*, in W. G. Austin & S. Worchel (Eds.), THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS: 33 (1979); see also Michael A. Hogg and Deborah J. Terry, *Social Identity and Self-Categorization Processes in Organizational Contexts*, ACAD. MANAGEMENT REV 121 (2000). But given that

inference is that if one allows the prior status or identity harm to go unavenged, it will be taken by the other side as a sign of weakness, and then one will be setting themselves up to be taken advantage of once again.¹⁸ Thus, only upon reversing or renegotiating the offending treaty or legislative action can the political system be restored to its proper balance or natural harmony.

The underlying intuition that encouraging greater transparency and public engagement with international trade can be counterproductive has some support in the literature. Stasavage has argued that transparency encourages representatives to adopt an aggressive form of posturing during international negotiations, which can then lead to bargaining breakdowns.¹⁹ Vermeule contends that increasing the visibility of the policymaking process can often make politicians more entrenched in their positions as they play to the gallery.²⁰ Finally, Prat has examined circumstances where greater transparency may cause a political agent to disregard useful private information that may help his principal.²¹ The argument here builds upon these approaches but emphasizes a somewhat different mechanism; in other word, the focus here is not so much on the effect that transparency has on negotiators or politicians, but the effect it has on domestic audiences. In other words, the claim is that the politicization caused by greater transparency in international trade can tilt the balance in favor groups who profit from high stakes confrontation over zero-sum goals at the expense of those who prefer low stakes bargaining.

In the next couple of sections, I will seek to unpack moral inflation in international trade policy and the role it has played in mobilizing American identity politics under three topics: scope, benefits to politicians, and enabling conditions.

social status is often fixed in supply, it may usually imply that one group's rise in status implies a decline in the status of the outgroup.

¹⁸ See LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 108 ("Partisans should be more likely to participate in politics not simply because the party holds sympathetic issue positions but also because the party is their team, it is under threat, and they are compelled to do something to maintain its status."); Wendy Brown, *Wounded Attachments*, 21 POL. THEOR. 390, 406 (1993) (describing situations where groups mobilized by identity become invested in a politics of recrimination rather than focusing their energy in addressing the underlying injustice).

¹⁹ David Stasavage, *Open-Door or Closed-Door? Transparency in Domestic and International Bargaining*, 58 INT'L ORG. 667 (2004).

²⁰ See ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 181-87 (2007). For a general overview of the debates over the value of transparency, see Mark Fenster, *The Opacity of Transparency*, 91 IOWA L REV. 885 (2006).

²¹ Andrea Prat, *The Wrong Kind of Transparency*, 95 AM. ECON. REV. 862 (2005).

B. The Scope of Moral Inflation

Before proceeding further, some clarifications over terminology are in order. Moral inflation in international economic law is used here as a shorthand for all those circumstances in which politicians deploy highly evocative moral rhetoric over international agreements that govern minor economic or technical disputes. For instance, such inflation may occur when disagreements over minor adjustments in tariff schedules or antidumping duties are reframed as if they represent two polarizing and fundamentally incompatible views of the world.

Thus, one characteristic feature of moral inflation is that the expressive language deployed tends to be grossly disproportionate to the otherwise technical and mundane issues at stake. When it works, the goal of moral inflation is to convince wide swaths of the population that their sense of political identity or status can either be enhanced or threatened by adopting a specific position on a treaty or an international legal controversy. In other words, it is meant to lend the impression that since more important issues than just money or material resources are at stake, a much more intense and uncompromising position on the international law issue is necessary. Thus, an international economic agreement that is tilted against agriculture in favor of industry, for instance, may no longer viewed simply as a case of redistribution of resources from one sector to another. Instead, it is to be viewed as a ruse by the industrial region of the country to establish political dominion over the agricultural region, and thus deprive it of status and political privileges.

In this picture, it is not that the material interests regulated by the treaty or legislation cease have been simply displaced by non-economic considerations. On the contrary, the concern is that the political stakes might be amplified significantly by having one's position on international trade also serve as a marker of status between two culturally hostile groups. As Tajfel suggests, this kind of conflict or competition is one "where a material reward to some extent valued of itself serves as a token or symbol of a value-differential associated with a possible social comparison between groups."²²

One implication of this insight is that when fights over international law become partly rooted in non-economic factors like social identity, then efforts to mollify the losers by economic transfers might not work. In such cases, debates about how much certain communities ought to receive in economic assistance due to trade dislocation may actually trivialize the issue, especially if such communities have also witnessed an erosion of status against a culturally despised competitor.²³ As Riker cogently explained

²² Tajfel, *Social Identity and Intergroup Behavior*, *supra* note ____ at 86.

²³ As Diana Mutz has argued, such concerns about loss of social status might have trumped economic considerations as a factor in the 2016 presidential elections. See Diana C. Mutz, *Status threat, not economic hardship, explains the 2016 presidential vote*, 115

many years ago: “[I]losses of roughly the same scale are worse in a political context than in an economic context . . . For economic groups and regional coalitions, losing a series of elections so that government policy is tilted against the losers is worse than losing jobs and business contracts.”²⁴

C. The Political Benefits of Moral Inflation

The question nonetheless remains: why would moral inflation over an issue like international trade have such potency to stir up such intense and divisive feelings in the American public, whereas in many other countries trade is treated as an un-inspiring or even a nonpolitical issue? Are these debates over international trade simply another manifestation of what Hofstadter described disparagingly as the “paranoid style of American politics”?²⁵ Perhaps. Nevertheless, a more subtle explanation may lie elsewhere.

Such an explanation may simply reflect an artifact of American political life: social identity is a significant motivator of political action. In the United States, for instance, where one stands on the international trade issue may act as a reliable proxy for that person’s attachment to a cultural or social identity, which renders the issue particularly ripe for manipulation.²⁶

Viewed this way, the politicization of international trade is instrumental: in a politically competitive environment, where reliable tools for mobilizing groups along geographical, cultural, and ethnic lines are hard to find, one’s position on international trade can serve as a credible touchstone of social identity. Thus, the politicians who deploy these escalation tactics are not simply mistaken or ignorant, and neither are their followers. At bottom, moral inflation allows them to redirect some of a group’s energies by changing the terms of the debate over international trade from narrowly material concerns to ones that are fraught with much more expressive meaning.

In this calculus, trying to harness the energy and anxieties of groups motivated solely by short-term economic concerns will not do. Such groups may be unwilling to devote the necessary commitment and zeal to disrupt conventional power structures. After all, if all that is at stake are cheaper

PROCEEDINGS OF NAT’L ACAD. SCI. E4330, May 8, 2018, available at <https://www.pnas.org/content/115/19/E4330>.

²⁴ WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND SOCIAL CHOICE 202 (1982).

²⁵ See RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS, IN THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 3 (1965).

²⁶ One branch of the social identity literature posits that social categorization can itself generate rivalry for status and esteem between members of the in-group and out-group, since the self-concepts of various individuals are now bundled up with the various groups to which they now belong. See John C. Turner, *The Experimental Social Psychology of Intergroup Behavior*, in INTEGROUP BEHAVIOR (J.C. Turner & H. Giles Ed., 1981)

automobile parts from Mexico or adjustment in wages due to dislocation from globalization, then why rock the political boat too hard? However, groups who believe their social identity is under threat face a different calculus. Since social status and one's sense of political identity are positional goods, and such a sense of loss might be the product of several electoral cycles, sometimes the only way to obtain relief is to try to disrupt existing political power structures, and not by making policy compromises. Thus, the political stakes for such groups are often much higher.

Why would it be rational for voters to succumb to such moral inflation over their identity and status, and not seriously interrogate the possibility that it may sometimes come at the expense of their material self-interest? Does this mean that unscrupulous politicians deceive voters, and better voter education and information will break the mold of expressive conflict over international law?

There are reasons to be skeptical that better voter education is a solution. In the past few years, Kahan and others have uncovered behavioral patterns that are of considerable relevance to the analysis here: individuals tend to credit and reject evidence in ways that reflect their commitments to their specific identities or cultural groups.²⁷ Moreover, individuals who are better educated do not tend to be less immune to these forces; on the contrary, the evidence suggests that they actually seem to be more susceptible.²⁸ Why this may be the case is hard to know for sure. Hobbes believed that status seeking was a kind of superior good that was likely to be in greater demand among the well to do: "All men strive for honor and preferment; but chiefly they, who are least troubled with caring for necessary things."²⁹

More speculatively, there may be other good reasons for moral inflation over international law to have a strong pull among the urban well educated. If they recognize that their individual fates in the competition for the benefits of globalization are linked to their collective standing and the status of others who are similarly situated, it might reinforce the need for a sense of solidarity among them that is stronger than one driven purely by material interests. Moreover, to the extent that such elites tend to cluster together geographically, and are aware that their status may be begrimed by others, they may conclude that identity arousal is a necessary weapon for the group's self-protection, even when it comes at the expense of their

²⁷ See Dan Kahan, *Misperceptions, Misinformation, and the Logic of Identity-Protective Cognition*, Cultural Cognition Working Paper No. 164, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2973067.

²⁸ See *id.* at *1 ("Indeed, the members of the public who are most polarized over [decision relevant science] are the ones who have the highest degree of science comprehension, a capacity that they actively employ to form and persist in identity-protective belief.").

²⁹ THOMAS HOBBS, LEVIATHAN 190-91 (M. Oakshott, ed., 1962; originally published 1651).

individuality. Indeed, as Kahan recently put it, “[i]f a person’s view is contrary to her group’s, he or she faces the prospect of losing all manner of peer support, psychic and material.”³⁰

In any event, this strategic use of status and symbols to elevate relatively mundane concerns to issues over which a great number of people are prepared to fight intensely is hardly unique in American history. In his account of the role that status politics played during the temperance movement in the early twentieth century, Gusfield elaborates on its centrality as a tool in American political conflict:

Far from being a pointless interruption of the American political system, it has exemplified one of its characteristic processes. Since governmental actions symbolize the positions of groups in the social structure, seemingly ceremonial or ritual acts of government are often of great importance to many social groups. Issues which seem foolish or impractical items are often important for what they symbolize about the style or culture which is being recognized or derogated. Being acts of deference or degradation, the individual finds in governmental action that his own perception of his status in the society are confirmed or rejected.³¹

D. The Conditions that Make Moral Inflation Likely

On a somewhat speculative note, there are three conditions that may make the use of moral inflation to arouse identity politics in international economic law more attractive.

First, to the extent that the issues at stake in the dispute over the international law treaty strongly correlate with other geographic, partisan, and ethnic cleavages, then moral inflation is likely to be more effective. In polarized societies, there are often geographical, ethnic, or even religious identities that may closely track the fault lines in international economic law disputes. Of all the various cleavages, however, the geographical one may be the most pronounced, because it may be the one in which it may be easiest to overcome collective action problems. When such reinforcing cleavages occur, it may be easy to stoke sectional or ethnic rivalries by reframing the dispute as an attack on the identity of all the members of the relevant community, rather than simply a mundane dispute between narrow groups over resources.

Second, if the primary role of moral inflation in international trade is to mobilize identity groups in pursuit of political power, then it is likely to

³⁰ See Dan Kahan, *Misperceptions, Misinformation, and the Logic of Identity-Protective Cognition*, Cultural Cognition Working Paper No. 164, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2973067.

³¹ JOSEPH GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 11 (1969).

be most valuable as a device when two political coalitions have roughly equal political power, and they are worried that elections will be tightly contested. If one group is clearly dominant and is reassured of electoral victories in the future, then investing in polarizing rhetoric over international trade may seem both unnecessary and unhelpful. However, if the fault line of conflict between the two political coalitions is well defined and they are closely matched, then political entrepreneurs may believe that their best bet in winning elections is to increase turnout among their base supporters, or to divide existing coalitions. However, in order to succeed, it may help if the rhetoric over international trade is especially polarizing, purports to divide the camps on the basis of fundamentally irreconcilable principles, and presents the only alternative to victory as subservience to the social and economic whims of a culturally detested opposition.

Third, moral inflation is also likely when politicians are able to link the future to past grievances over economic resources and status, and thus intensify the politics of the present. Our intuitions may lead us to believe that broadening our time horizons makes us more willing to compromise and accommodate others in a dispute over identity and economic resources. But such a move may have the opposite effect: it may actually exacerbate the stakes of politics today.

The building block for this insight comes from Skaperdas and Syropoulos.³² They argue that cooperation in long-term relationships might be significantly undermined when there are compounding rewards for defecting in the present. Thus, in a land dispute, if one rival ethnic group can grab more land or resources today, it may increase the chance it will have more of the resources tomorrow, and thus it intensifies the stakes for that group in the present. In any event, such appeals to future time horizons are more likely to work when there is a past track history of grievances between two or more groups and such groups have a longstanding and coherent sense of identity. Thus, in an international trade controversy, a current threat or harm to the steel industry today might be politically reframed as an attack on the future way of life of workers in that industry, because any losses suffered by that industry today in a current trade controversy might be multiplied over time.

At various stages in American history, all of these conditions have been in place with respect to international trade, which is one of the reasons conflicts over trade can be particularly intense. In the late nineteenth and early twentieth century, the issue of international trade barriers in the United States neatly divided the country along purely sectional lines, with the south being overwhelming low tariff and the north being high tariff. In addition, during that period, the elections were usually closely contested, and both

³² See Stergios Skaperdas & Constatinos Syropoulos, *Can the Shadow of the Future Harm Cooperation*, 29 J ECON. BEHAV. & ORG. 355 (1996).

sectional groups had a history of sharply defined grievances. What is the modern day equivalent? There are certain parallels in modern American life, but the fault line may be slightly different today than it was in the late nineteenth century.³³ Today, the fault line that divides large swaths of the population along culture and identity may be more rural/rust belt versus urban elites rather than between different sections of the country. However, the use of moral inflation, and its role in distorting the stakes in legal or political controversies in international trade and investment, nonetheless remains. The next section will turn to examining these historical and contemporary examples in more detail.

These conditions helped elevate the decisiveness of political conflict. If any of prevailing groups prevailed were able lock in its advantages, they could setback the power of their opponents way into the future. With this toxic medley in place, routine negotiations over tariff levels or provisions in international commercial agreements tended to be particularly fraught and could easily degenerate into a high stakes battle over the identity of an entire region. In the end, that is precisely what happened.

The next Part will turn to examining these historical and contemporary examples in more detail.

III. EXAMPLES OF MORAL INFLATION

To summarize, the goal of moral inflation is to revise upwards the stakes of politics over international trade, and to transform mundane issues such as the adjustment of tariffs into markers of identity that can divide large swaths of the population into hostile camps.

How well does this describe American political and legal approach to international economic law? The most obvious examples might be gleaned from contemporary disputes in American politics over the North American Free Trade Agreement (NAFTA) and the late nineteenth and early twentieth century divisions over tariff schedules. In both cases, group positions on international trade tended to correlate strongly with cultural and sectional identities, and the accompanying moral inflation tended to be highly divisive.

A. *The Late Nineteenth and Early Twentieth Century American Experience with Tariffs*

At first glance, trade politics in the late nineteenth and early twentieth century might not seem to have much relevance for modern legal and political controversies. Nevertheless, the experience of the United States during this period produced the richest and most extensive evidence of moral inflation over international trade policy gone overboard. It is the evidence of the struggles in that era that permits us to reconstruct, at least in very broad

³³ See discussion in text at *infra* notes ____

strokes, the tendency of international economic policy in the United States to sometimes boil over, and bleed into other polarizing battles over culture and social identity.

But there are other close similarities between the late nineteenth century and the modern era: in both periods, the salience of the international trade issue intruded into the politic scene quite suddenly and unexpectedly, the divisions over trade policy were bound up with core issues of social and cultural identity, such as the rise of anti-immigration sentiments.

In the late nineteenth and twentieth century, escalating moral rhetoric in favor of protectionism in the United States was defined by two overarching purposes: to forge a unique identity and brand for northern Republicans, and to marginalize Southern agriculture as a dominant political force in American politics. However, it was not always that way, and so how international trade suddenly became so salient starting in the late 19th century is somewhat of a puzzle. How did this all come to past?

Here is the short answer. To counter the rising power of Southern Democrats after reconstruction, the Republicans needed a new and compelling message that could resonate with their sectionalist constituencies.³⁴ Promises of generous pensions to civil war veterans carried some weight, but that alone was insufficient.³⁵ The spoils of the federal public service could help a little, but owing to the Pendleton reforms of 1883,³⁶ that option was largely foreclosed. What was left over was to imbue

³⁴ As one commentator put it:

As the reconstruction problem began to recede into the background in the 1870s, national politics became increasingly devoid of clear-cut issues upon which the two major parties were forced to take stances. In the decade of the 1880s, the only issue upon which the Republicans and Democrats clearly differed was the tariff.

James L. Baumgardner, *The 1888 Presidential Election: How Corrupt?*, 14 PRES. STUD. Q. 416, 419 (1984).

³⁵ See Larry Logue, *Union Veterans and Their Government: The Effects of Public Policies on Private Lives*, 22 J. INTERDISC. HIST. 414, 425-26 (1992) (analyzing how political entrepreneurs tried to frame antagonism towards civil war pensions as a Democrat issue); see also Jeffrey E. Vogel, *Redefining Reconciliation: Confederate Veterans and the Southern Responses to Federal Civil War Pensions*, 51 CIV. WAR HIST. 67 (2005) (describing sectionalist tensions over civil war pensions). For an earlier and critical discussion of the role of civil war pensions in the party politics of the era, see Donald L. McMurry, *The Political Significance of the Pension Question, 1885-1897*, 9 THE MISS. VALLEY HIST. REV. 19 (1922).

³⁶ See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* 68 (1982) (arguing that Democrats backed the Pendleton civil service reform initially in order to break the spoils system that Republicans used to consolidate their dominance in the White House and Congress). The partisan explanation gets more complicated, however, as Skorownek explains that Republicans later jumped on board the reform bandwagon when they themselves started to fear that Democrats would eventually use the spoils system against them. *See id.* at 68-74. But prior to the Pendleton reforms, the spoils system often loomed large in the national electoral psyche, sometimes even eclipsing issue politics. As one historian described the

the issue of the tariff in international trade with a strange kind of political aesthetic; at bottom, such an aesthetic involved convincing voters of an entire region that their sense of social identity as a northerner could be bound up with whether they approved of high tariffs. Pulling off such a feat would require a great deal of imagination, and perhaps a considerable distortion of economic reality, yet the leaders of the Republican Party managed to make it work.³⁷

Before elaborating further, it might be useful to give some context as to how these developments unfolded. The rendition of history that follows is necessarily stylized and somewhat contentious, but it sketches in broad outlines the sources of the politicization of international trade policy during that era.

In the aftermath of the civil war, but prior to the late 1880s, the issue of the tariff and international trade policy had ceased to have much political salience for either party. To be sure, it had been a deeply divisive political issue for the regions in the years leading up to the civil war. However, once many of the key northern industries that supported the Republican Party became more export oriented and the high tariffs from the post-civil war era created a significant revenue surplus, the tariff lost its force as a defining political concern. The divisions between the parties on the issue ceased to be significant; on the contrary, the platforms of both parties of that era were not that far apart in the immediate years after the civil war, especially on the need for tariff reform.³⁸ The election of 1884, as one commentator observed, “was marked by a striking consensus [by both parties] concerning the tariff.”³⁹ In response to concerns over a growing budget surplus, it was the Republican administration of Chester Arthur in 1882 that set up a tariff commission which recommended an across the board tariff cut of 20 percent.⁴⁰

politics of that era, “The presidential election became a quadrennial ‘event,’ with [patronage] as the prize.” CARL RUSSEL FISH, THE CIVIL SERVICE AND THE PATRONAGE 158 (1905).

³⁷ For a more detailed description of the party politics around the tariff during that era, see RICHARD BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900 124-32 (2000).

³⁸ In his recent magisterial treatment of American trade conflicts, Douglas Irwin also echoes this view:

In addition partisan differences on the issue were less sharply defined after the Civil War than they had been before the war. The South’s opposition to protective duties had weakened, while northern Democrats had come to support existing duties. George Atkinson (R.WV) summarized the position of the two parties in saying that : “the Democratic doctrine is a s tariff for revenue with incidental protection, while the Republicans advocated a tariff protection with incidental revenue.”

DOUGLAS IRWIN, CLASHING OVER COMMERCE 237 (2017).

³⁹ JOANNE REITANO, THE TARIFF QUESTION IN THE GILDED AGE 5 (1994).

⁴⁰ *See id.* at 4.

However, the electoral insignificance of the tariff and international trade policy was suddenly and dramatically altered in 1888. From that year up until the early 1930s, the tariff issue featured prominently in the platforms of both parties, and the rhetoric became progressively more aggressive, moralistic and polarizing. Take, for instance, this dramatic shift from the language in the Republican Party Platforms on tariffs between 1880 and 1888:

We affirm the belief, avowed in 1876, that the duties levied for the purpose of revenue should so discriminate as to favor American labor [Republican Party Platform of 1880].⁴¹

We, therefore, demand that the imposition of duties on foreign imports shall be made, not "for revenue only," but that in raising the requisite revenues for the government, such duties shall be so levied as to afford security to our diversified industries and protection to the rights and wages of the laborer; to the end that active and intelligent labor, as well as capital, may have its just reward, and the laboring man his full share in the national prosperity. [Republican Party Platform of 1884].⁴²

We are uncompromisingly in favor of the American system of protection; we protest against its destruction as proposed by the President and his party. They serve the interests of Europe; we will support the interests of America. We accept the issue, and confidently appeal to the people for their judgment. The protective system must be maintained. Its abandonment has always been followed by general disaster to all interests, except those of the usurer and the sheriff. We denounce the Mills bill as destructive to the general business, the labor and the farming interests of the country, and we heartily indorse the consistent and patriotic action of the Republican Representatives in Congress in opposing its passage. [Republican Party Platform of 1888].⁴³

As though to match the Republicans in their intensity and moral outrage, the Democrats also upped the ante on the issue, and their platforms became more strident in the opposite direction. For instance, the 1892 Democratic Party Platform described "Republican protection as a fraud, a robbery of the great majority of the American people for the benefit of the

⁴¹ *Republican Party Platform of 1880*, THE AMERICAN PRESIDENCY PROJECT (June 2, 1880), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1880> (last visited February 12, 2019).

⁴² *Republican Party Platform of 1884*, THE AMERICAN PRESIDENCY PROJECT (June 3, 1884), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1884> (last visited February 12, 2019).

⁴³ *Republican Party Platform of 1888*, THE AMERICAN PRESIDENCY PROJECT (June 19, 1888), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1888> (last visited February 12, 2019).

few.”⁴⁴ That same platform went on the stress that any tariff not for revenue purposes was unconstitutional, and alluded to the McKinley Tariff of 1890 as “as the culminating atrocity of class legislation.”⁴⁵

So what exactly happened around 1888 that so significantly transformed the political landscape on tariff and international trade policy? How did it suddenly rise to become one of the most defining and polarizing issues for both of the parties over the next few decades? Moreover, why was the rhetoric over the tariff so unremittingly negative and moralistic?

The answer can be traced loosely to two different but closely related developments: (1) the capture of the Democratic Party by the South and the loss of Republican dominance in presidential politics; and (2) the introduction by Congressman Roger Mills, Democrat of Texas, of a legislative bill in 1888 that would cut average tariffs from 47 percent to 40 percent.⁴⁶ The Mills bill, as it was colloquially known, had been largely endorsed by President Cleveland, who had made tariff reform a keystone of his annual December message to Congress on December 6, 1887.⁴⁷

The extraordinary intensity with which the Republicans responded to Mills’s legislative proposal was astonishing, even by the standards of American political rhetoric. By all appearances, the bill seemed rather dull and unambitious: after all, it had sought to cut average tariffs by only 7 percent even though there was widespread agreement at the time that the budget surplus was spiraling out of control.⁴⁸ Its partisan posture also seemed unremarkable: the previous Republican administration of Chester Arthur had proposed similar if not even higher tariff cuts to address the same surplus problem.⁴⁹ Moreover, by the fall of that year, it had become somewhat moot: although the bill had made it out of the House, it had died unceremoniously in the Senate where a Republican majority blocked it. Nonetheless, this failed piece of legislation quickly unleashed a political firestorm and became a central issue during the 1888 presidential election.

⁴⁴ *Democratic Party Platform of 1892*, THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/1892-democratic-party-platform> (last visited February 13, 2019).

⁴⁵ *See id.*

⁴⁶ For a discussion of the Mills Bill, which historians have termed the “The Great Tariff Debate of 1888,” see REITANO, *supra* note ____ at 98-106; F. W. TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES 254-56 (1914); EDWARD STANWOOD, TARIFF CONTROVERSIES IN THE NINETEENTH CENTURY, VOL II, at. pp 234-56. (1901).

⁴⁷ See Grover Cleveland, *Third Annual Message (first term)*, Dec. 6, 1887, THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/third-annual-message-first-term>. (last visited February 13, 2019).

⁴⁸ *See* IRWIN, CLASHING OVER COMMERCE, *supra* note ____ at 233-35; REITANO, *supra* note ____ at 4-6; GREGORY J DEHLER, CHESTER ALAN ARTHUR: THE LIFE OF A GILDED AGE POLITICIAN AND PRESIDENT 127 (2011).

⁴⁹ *See* IRWIN, CLASHING OVER COMMERCE, *supra* note ____ at 233-35.

As one commentator observed, it prompted “the longest debate of any bill in U.S. history to that time.”⁵⁰

Nevertheless, why would Republican politicians deliberately go out of their way to try to distort this partisan spat over the Mills bill? Why transform what up to then seemed to be imperceptible differences over tariff preferences, into the impression that the parties had diametrically opposed views of trade policy, rooted in fundamental and irreconcilable moral principles?

The explanation is straightforward: moral inflation over the tariffs was deployed as a tool for intensifying group attachments along north and south lines, with the expectation that such attachments could be mobilized for political purposes. Its immediate political appeal to both parties was that it could play on the inherited geographical and cultural divide that had sharply defined American politics since the 1830s; in other words, neither side had to invent new deep-seated identities that they could exploit.

The political specter of the solid south loomed on the horizon, and it gave the Republicans a safe target against which they could vent and organize. After all, Mills was a former confederate veteran of the Civil War, and Cleveland’s election in 1884 was largely an artifact of the political rise of the South.⁵¹ In addition, the reason why the tariff was largely non-salient from the end of the civil war until 1888 was that it could serve no useful purpose; simply put, the South had been rendered politically impotent during Reconstruction so there was really nothing for the Republican Party to rally against.⁵² During those immediate post-civil-war years, both the Republicans and northern Democrats had the luxury of approaching the tariff simply as an economic policy issue,⁵³ which could be evaluated pragmatically in cost-benefit terms.

⁵⁰E. DOUGLAS BOMBERGER, "A TIDAL WAVE OF ENCOURAGEMENT": AMERICAN COMPOSERS' CONCERTS IN THE GILDED AGE XV (2002). As one commentator put it, “[t]he Mills bill debate was considered great because of the magnitude fop the subjects discussed., The New York World viewed the tariff as a new ‘irrepressible issue,’ and the New York Times called the Mils bill “by far the most important measure brought before Congress since the close of the war.” REITANO, *supra* note ___ at 19.

⁵¹ See REITANO, *supra* note ___ at 19-31.

⁵²See IRWIN, CLASHING OVER COMMERCE, *supra* note ___ at 232-33. Writing in 1891, Taussig emphasizes the fact the turn of the Republican Party to a high tariff posture was a recent development:

The present attitude of the Republican party, committed as it is to the rigid maintenance and wider extension of the protective policy, was not clearly assumed until within the last ten years. As late as 1872, its leaders were active in trying to bring about a reduction of the customs duties; and in the campaigns of 1876 and of 1880 the protective question played no considerable part.

F.W. Taussig, *The McKinley Tariff Act* , 2 ECON. J. 326, 327 (1891).

⁵³ REITANO, *supra* note ___ at 5 (observing that in 1884, “[p]rotection was so volatile that no party dared support it outright, and both sought the mantle of reform”).

However, once national elections became competitive again in the 1880s, the Republicans needed a political brand that could distinguish them. To accomplish this goal, they sought to dramatize their differences with a disfavored outgroup that also happened to be their primary competitor for national power: the Southern Democrat. Old sectionalist antipathies between the regions were carefully stoked and revitalized, which was accompanied by the increasing unwillingness of either side to tolerate internal heterogeneity on the tariff issue.⁵⁴ Partisan purity and sectional solidarity on trade policy almost became their own ends regardless of their connection with economic reality; indeed, departure from the party line on tariffs became increasingly rare.

Before the debate over Mills bill, for instance, high tariff Democrats in Congress were hardly rare and one could easily find many congressional Republicans who championed tariff reform.⁵⁵ However, that all changed in 1888. Taussig observed that when the Mills Bill came up for a vote, for instance, only 4 Democrats out of 169 broke ranks and every single Republican in the House voted against it.⁵⁶ By contrast, two years earlier in 1886, 26 out of 169 Democrats in Congress were willing to adopt a protectionist stance and voted against tariff reform.⁵⁷ The trend towards partisan purity along sectionalist lines continued; as Benjamin Fordham observes in a recent piece: “[m]ore than 99 percent of Republicans voted for

⁵⁴ See IRWIN, CLASHING OVER COMMERCE, *supra* note ___ at 236-37. Other commentators have suggested that the use of the tariff as a branding issue for the political parties started earlier and only became solidified in the 1880s. See TOM E. TERILL, THE TARIFF, POLITICS, AND AMERICAN FOREIGN POLICY 1874-1901 14-36 (1936).

⁵⁵ As Edward Stanwood, himself a protectionist advocate, wrote in 1901, Western Republicans had been agitating for tariff reductions in the immediate post-civil war era:

Republican and Protectionist were no longer convertible terms. There was a strong contingent of members of both branches of Congress, chiefly but not altogether western members, whose support was not available for any increase of protection, nor even for an improvement of the tariff unless the improvement took the form of a reduction. Most of them protested that they were not free traders, and it is simple justice to them to believe that they were not. On nearly every tariff question that arose they voted against high duties, in company with the whole body of Democrats. They were certainly not in line with their party. Perhaps it would be truthful to characterize them as extremely moderate protectionists, who were convinced that the policy had already been carried too far. It was never claimed by them or for them that their course was dictated by a wish to save the system from destruction and overthrow by preventing its radical adherents from going to extremes. Nevertheless there is no doubt that they did in a measure avert that danger. They restrained their party in 1870; to a certain extent they prevented the success of radicalism in either direction; when the question came up in a new form and in changed circumstances, a goodly “number of them showed that their protestations of faithfulness to protectionist principles were sincere.

EDWARD STANWOOD, TARIFF CONTROVERSIES IN THE NINETEENTH CENTURY, VOL II, AT P. 168 (1901).

⁵⁶ TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES, *supra* note ___ at 254.

⁵⁷ *Id* at 253-54. As Taussig also observed, in an 1884 reform bill, 151 Democrats voted in favor of tariff reductions, while 41 voted against. See *Id.* at 253.

trade protection between 1888 and 1897. Less than 4 percent of Democrats took this position.”⁵⁸

Others have also echoed the notion that these early tariff debates had a distinctly political flavor that loomed larger than economic considerations. Barely three years after the Mills bill was proposed, Taussig would write, “[t]he ties of party attachment, which are immensely strong in the United States, held many thousands to the Republican Party by force of tradition. These voters have been protectionists because they are Republicans, and not Republicans because they are protectionists. This rooted hold among the ‘respectable ‘classes of the North was reinforced in 1888 by other causes.”⁵⁹ Richard Bensel, the political historian, also argued that political rather than economic factors explained the Republican Party’s stance towards the tariff.⁶⁰

Similarly, Southern politicians also clung unto anti-tariff and free trade rhetoric, even when it did not seem it was in their narrow self-interest to do so.⁶¹ Indeed, the appearance of group cohesion and consensus on the tariff in the South seems to have taken on a logic of its own; thus, even when certain states like Louisiana might have profited from Republican policies that favored higher tariffs on sugar, for instance, their sectionalist loyalties continued to keep them tied to the Democratic Party. Taussig also observed this peculiar pull of Southern identity politics on the tariff: “in the South, always the main seat of the political strength of the Democrats, the tariff question had been holding its dominant place largely as a matter of tradition.”⁶² Nor can one credibly argue that these sentiments were rooted in deep philosophical disagreements between the North and South over how the economy actually works. As Louis Hartz put it, “[the South] were grim

⁵⁸ Benjamin O. Fordham, *Protectionist Empire: Trade, Tariffs, and United States Foreign Policy, 1890-1914*, 31 STUD. AMER. POL. DEV. 170, 175 (2017).

⁵⁹ F.W. Taussig, *The McKinley Tariff Act* , 2 ECON. J. 326, 329 (1891).

⁶⁰ See RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900 458 (2000).

⁶¹ To be sure, it might be that the intense loyalty of some in the South to the Democratic Party was driven by other factors, which loomed larger than their preferences on the tariff. In Louisiana, for instance, the Republicans tried to make inroads among sugar growers who would have profited from high tariffs, but they apparently faced other obstacles: As Uzee suggests:

In the 1896 election, the Republican party acquired some new adherents in the person of influential sugar planters and business men, all of whom had been Democrats. Since 1877, the party had tried to attract men of this type because they believed in the Republican principles of protective tariffs and internal improvements. Yet, because of social pressures they would not join the "Negro" party.

Philip Uzee, *The Republican Party in the Louisiana Election of 1896*, 2 LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION 232 (1962).

⁶² F. W. Taussig, *The Tariff Act of 1897*, 12 Q J. ECON. 43 (1897).

empiricists undermining the school of Adam Smith, but the principle of free trade itself was one of the dogmas by which they lived.”⁶³

So what does one make of this likely role of identity politics in shaping tariff preferences? In his discussion of the power of nationalism, Benedict Anderson tried to illuminate the difference between the intense sacrifices one is willing to make in the service of an imagined community such as a nation or an ethnic group versus those groups that simply pursue material or narrow social objectives:

Dying for one’s country, which usually one does not choose, assumes a moral grandeur which dying for the Labour Party, the American Medical Association or perhaps even Amnesty International cannot rival, for these are all bodies one can join or leave at easy will. Dying for the revolution also draws its grandeur from the degree to which it is felt to be something fundamentally pure. (If people imagined the proletariat merely as a group in hot pursuit of refrigerators, holidays, or power, how far would they, including members of the proletariat, be willing to die for it?).⁶⁴

In the late nineteenth and early twentieth century, sectionalist conflicts over tariffs might be said to have come as mirroring the purity of the kinds of romantic group allegiances that Anderson describes. After all, the American civil war had already demonstrated clearly that a great number of people were willing to die for the cause of the South and the North. Eugene Genovese had argued that Southern elites had been willing to go to war to defend slavery not because of its economic merits, but because their social identities had become inextricably intertwined with the peculiar institution.⁶⁵ By the late nineteenth century, the issue of the tariff had

⁶³ LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 180-81 (1954).

Kindelberger, the prominent economic historian, also marveled at the political hold of sectionalist mindset over international trade policy, even when the economic reasons for such rhetoric no longer seemed relevant:

With the rise of large-scale manufacturing to world dominance in World War I, big American business was on the whole slow to recognize that its interest lay in low tariffs and free trade. For example, Senator Robert Taft from Cincinnati, which exported machine tools throughout the world, remained a staunch protectionist through cultural lag, much as Senator Walter George of Georgia remained a free-trader long after cotton growing had moved to Texas and California and his state was knee-deep in textile plants that would benefit from protection.

See Charles P. Kindleberger, *International Trade and National Prosperity*, 3 CATO J. 623, 629 (1983-84).

⁶⁴ BENEDICT ANDERSON, IMAGINED COMMUNITIES IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 148 (Rev Ed. 2006).

⁶⁵ EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH (NEW YORK: RANDOM HOUSE, 1965). To be sure, Genovese’s thesis that slavery was no longer profitable at the time of the civil war was subsequently challenged. See ROBERT W. FOGEL AND STANLEY ENGELMANN, TIME ON THE

become so central to the identities of both sides of the sectionalist divide that the political imagery it conjured was no longer of the kind susceptible to cost-benefit analysis. Given what was at stake, if a legal controversy over the tariff reared its head during that era, politicians seemed to be willing to take the kinds of risks that defied economic logic.

B. A Modern Example: Contemporary Disputes over NAFTA

To recapitulate, the Republicans in the late nineteenth century faced a dilemma: the great dividing issue of slavery had disappeared, the politics of reconstruction had grown weary, and so they needed to find an alternative but deeply divisive issue with which they could win. Ideally, such an issue would exploit and exacerbate already existing identity fault lines between the regions. They found it in the tariff.

Today, the current political battles over international trade in the United States are somewhat distinguishable from those of the late nineteenth century: the identity fault line is no longer between the north and south, but rather between working-class communities in the rust belt and rural areas and highly mobile and middle class urban communities.

Nonetheless, the pattern of politics in both eras is somewhat similar. Take, for instance, the ongoing controversy over the renegotiation of NAFTA. Prior to 2016, NAFTA had ceased to become a salient issue in American presidential elections; indeed, it had all but disappeared from the lexicon of the platforms of both parties since 1992 when it was passed. Of course, the question of NAFTA's costs and benefits would occasionally come up as an issue during the presidential primaries for the Democrats,⁶⁶ but it was invariably a non-issue in the general elections. In 2008, for instance, President Obama criticized NAFTA during the Democratic Party primaries, but then a leaked memorandum from his campaign disclosed that his stand on the campaign trail was supposedly "more reflective of political maneuvering than policy."⁶⁷ More broadly, on the issue of international trade, the primary message of both the Republican and Democratic parties had essentially converged: both party platforms espoused vaguely worded commitments to enter into more regional free and fair trade agreements.⁶⁸

CROSS: THE ECONOMICS OF AMERICAN SLAVERY (1974). For a critique of Fogel and Engelmann, see HERBERT GUTMAN, SLAVERY AND THE NUMBERS GAME: A CRITIQUE OF "TIME ON THE CROSS." (1975).

⁶⁶ See e.g., *Where Clinton and Obama Really Stand on NAFTA*, Feb. 26, 2008, <https://www.npr.org/templates/story/story.php?storyId=19357468>

⁶⁷ Michael Luo, *Memo Gives Canada's Account of Obama Campaign's Meeting on Nafta*, NY TIMES, MARCH 4, 2008, available at <https://www.nytimes.com/2008/03/04/us/politics/04nafta.html>.

⁶⁸ See e.g., *Republican Party Platform of 2004*, THE AMERICAN PRESIDENCY PROJECT (August 30, 2004), <https://www.presidency.ucsb.edu/documents/2004-republican>

When regional trade agreements came up at all, the context has often been whether to extend NAFTA to a hemispheric economic pact.

In 2016, however, then candidate Trump decided to attack NAFTA in the Republican presidential primaries, and suddenly a dramatic debate about the future of NAFTA ensued.⁶⁹ What initially seemed to be a fringe issue was suddenly catapulted unto forefront of a national political discussion; and soon prominent politicians on both sides of the aisle were staking out positions as to whether NAFTA was a mistake.⁷⁰ Even after the elections, the rhetoric continued to escalate. At a March rally in Kentucky in 2017, for instance, President Trump denounced NAFTA as “the worst trade deal ever made by any country, I think, in the world.”⁷¹ As if to outdo Trump in his anti-NAFTA denunciations, the Democrats unveiled a new trade plank in the summer of 2017, which they called “A Better Deal for Trade and Jobs.”⁷² Among other things, it recommended a renegotiation of NAFTA

party-platform (last visited February 12, 2019) (“We support the Administration’s comprehensive strategy to promote free trade, exemplified by the launch of the Doha negotiation of the World Trade Organization (WTO), regional and sub-regional initiatives such as the Central American Free Trade Agreement, the Free Trade Area of the Americas”); *Republican Party Platform of 2000*, THE AMERICAN PRESIDENCY PROJECT (July 21, 2000), <https://www.presidency.ucsb.edu/documents/2000-republican-party-platform> (last visited February 12, 2019) (The Republican Party will “advance a Free Trade Area of the Americas to take advantage of burgeoning new markets at our doorstep.”); Democratic Party Platform of 2004, THE AMERICAN PRESIDENCY PROJECT (July 27, 2004), <https://www.presidency.ucsb.edu/documents/2004-democratic-party-platform> (“We will work to expand free and fair trade in the Americas as well.”). One notable exception where reform to NAFTA was addressed was in the Democratic Platform of 2008, Democratic Party Platform of 2008, THE AMERICAN PRESIDENCY PROJECT (August 25, 2008), <https://www.presidency.ucsb.edu/documents/2008-democratic-party-platform>, (last visited February 12, 2019) (“We will work with Canada and Mexico to amend the North American Free Trade Agreement so that it works better for all three North American countries..”).

⁶⁹ Neil Irwin, *Donald Trump Trashes Nafta. But Unwinding It Would Come at a Huge Cost*, NY Times, Oct. 3, 2016, available at <https://www.nytimes.com/2016/10/04/upshot/donald-trump-trashes-nafta-but-unwinding-it-would-come-at-a-huge-cost.html>.

⁷⁰ Dan Roberts and Ryan Felton, *Trump and Clinton’s free trade retreat: a pivotal moment for the world’s economic future*, THE GUARDIAN, AUG. 20, 2016, <https://www.theguardian.com/us-news/2016/aug/20/trump-clinton-free-trade-policies-tpp> (observing that “[Clinton] has made another awkward reversal on the North American Free Trade Agreement (Nafta), negotiated by George HW Bush and enacted in the 1990s by her husband, former president Bill Clinton.”).

⁷¹ Trump Rally in Louisville, Kentucky, March So, 2017, available on CSPAN at <https://www.c-span.org/video/?425711-1/president-trump-promises-pass-health-care-bill-in-form>.

⁷² See *A Better Deal on Trade and Jobs: Fighting Back Against Corporations that Outsource American Jobs and Countries that Manipulate Trade Laws*, available at <https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Trade-and-Jobs-FINAL.pdf>.

because “Many NAFTA provisions empower corporations to erode U.S. laws through international tribunals and put profits before people.”⁷³

What exactly changed in 2016 that transformed NAFTA into an issue that aroused such intense passions? There was no immediate or pending economic crisis that could explain this dramatic turn of events; on the contrary, the presidential campaign was taking place in the midst of an economic upswing in which unemployment was declining. Indeed, it is hard to find to discern any obvious economic explanation. First, of all, the overall economic stakes of NAFTA were simply not that significant; indeed, one recent estimate suggests that the efficiency gains for NAFTA in the United States amounted to no more than 0.08 percent.⁷⁴ Yet the rhetoric over NAFTA has escalated significantly on both sides, seemingly way out of proportion to any material effects it might have. Nor can one claim that voters suddenly discovered the treaty’s distributional effects; indeed, claims about its plausible adverse effects on certain communities had been around for a long time, yet had not seemed to trigger any significant political response. Nevertheless, the best evidence of what we now know of NAFTA’s distributional effects do not seem to map unto the political backlash it has generated.

The politicians stoking anti-NAFTA sentiments have focused their political energies on the rustbelt states like Pennsylvania, Michigan, and Ohio.⁷⁵ However, one of the most extensive studies to date suggest that the places most vulnerable to NAFTA have been blue collar industries in North Carolina, Georgia, South Carolina and Indiana.⁷⁶ These latter states are hardly political swing states or hotbeds of labor union activity: on the contrary, most of them are safely red states that have strong right to work laws, which have a reputation for having a political culture that is distinctly unfriendly to unions. Indeed, viewed strictly from the perspective of the likely economic losers, the political distribution of congressional votes in

⁷³ *Id.*

⁷⁴ Lorenzo Caliendo & Fernando Parro, *Estimates of the Trade and Welfare Effects of NAFTA*, 82 REV ECON STUD. 1, 3 (2015).

⁷⁵ For the most part, the Democrats from union-strongholds were supposed to oppose NAFTA. See Ross K. BAKER, HOUSE AND SENATE 226 (2nd ed. 1995) New York: Norton ("Among the journalists, lobbyists, and members of Congress I spoke to, there was a unanimous opinion that the relationship between House Democrats and the union movement was the key to understanding the intensity of the pressure applied to defeat NAFTA"). Some have suggested that the political opposition in these states does not match the economic realities. See Politics meets facts on free-trade deals in Michigan, Aug. 4, 2016., https://www.mlive.com/politics/index.ssf/2016/08/politics_meets_facts_on_free-t.html; see also John G. Murphy, *Which States Would Be Hit Hardest by Withdrawing from NAFTA?*, Nov 17, 2017, <https://www.uschamber.com/series/modernizing-nafta/which-states-would-be-hit-hardest-withdrawing-nafta>.

⁷⁶ Shushanik Hakobyan and John McLaren, *Looking for Local Labor Market Effects of NAFTA*, 98 REV. ECON. & STAT. 728, 735 (2016).

favor of NAFTA when it was first passed in 1993 is hard to explain. For instance, while a majority of Democrats in Congress opposed NAFTA when it came for legislative approval under President Clinton's administration, Southern Democrats played a key in support of the agreement;⁷⁷ thus, the actually negative effects of NAFTA do not seem to account for the distribution of political support for the deal.⁷⁸ Democrats from regions that were most vulnerable to NAFTA did not necessarily oppose it.

Second, the issues actually on the agenda for the NAFTA renegotiations have been relatively dull, technical and bureaucratic. For instance, one of the most significant negotiating points achieved in the NAFTA renegotiation talks of 2018 was the requirement that 75 per cent of a car's parts be North American -- an increase from the 62.5 per cent requirement in the original agreement.⁷⁹ While a 12.5 percent increase in regional local content for automobiles might seem significant to a car dealer, it is hardly the stuff of transformative politics. Another significant change is that the scope of the Chapter 11 dispute resolution mechanism, which allowed investors to sue states directly, has been curtailed between the U.S. and Mexico, while being scrapped between the U.S. and Canada.⁸⁰ Nonetheless, the tone of the public debates have often made it seem that what was at stake was much larger, and involved fundamentally opposite and polarizing views of the goal of trade agreements.⁸¹ Finally, even the change in the name of the agreement from NAFTA to the United States Mexican

⁷⁷ C Don Livingston & Kenneth A Win, *The Passage of the North American Free Trade Agreement in the U.S. House of Representatives: Presidential Leadership or Presidential Luck?*, 27 PRES. STUD. Q. 52, 63 (1997) ("Southern Democrats did tend to support NAFTA at greater rates than did others, but this could be a result of their predispositions rather than Clinton's ability to negotiate with fellow southern Democrats.").

⁷⁸ To be sure, there are notable exceptions where politicians from the affected states seemed to have reversed their support for NAFTA as a result. For instance, Senator Burr (Rep.) of North Carolina announced his opposition to NAFTA in 2016. Maggie Ybarra, *In Senate race, Burr and Ross clash over trade deal they both oppose*, <http://www.mcclatchydc.com/news/politics-government/congress/article96382297.html>

⁷⁹ George Petras, *From NAFTA to USMCA: Key changes on trilateral trade pact*, USA Today, Oct. 1, 2018, <https://www.usatoday.com/story/news/2018/10/01/comparison-nafta-and-usmca-trade-agreements/1487163002/>

⁸⁰ See Shawn Donnan, Andrew Mayeda, Jenny Leonard and Jeremy C.F. Lin, *Trump's 'Historic' Trade Deal: How Different Is It From Nafta?*, BLOOMBERG, Oct. 2, 2018, available

<https://www.bloomberg.com/graphics/2018-nafta-vs-usmca/?srnd=politics-vp>

⁸¹ Of course, the original negotiation of NAFTA turned out to be highly salient event in 1992, but it was not even clear that the insiders appreciated how politically sensitive it would turn out to be. See FREDERICK MAYER, *INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS* 248-50 (1998).

Canada Agreement (USMCA) was supposed to be an expressive statement of sorts, although the new agreement did not entail any dramatic changes.⁸²

One plausible explanation of NAFTA's recent salience is that it was a recent political contrivance meant to mobilize identity politics. In his analysis of herethetical devices in politics, Riker suggests that the intrepid political entrepreneur may have an incentive to introduce into the political agenda a novel issue that splits apart existing coalitions, which then provides previous political losers and outsiders a new opportunity to win.⁸³ In other words, by restructuring the political agenda, political entrepreneurs can raise brand new issues or redefine previous ones in such a way that they galvanize the previously disinterested voters and disrupt the political status quo.

One can glimpse aspects of identity politics of NAFTA in the very rhetoric that the politicians deploy. One standout feature of anti-NAFTA rhetoric is that it has been usually couched in relentlessly anti-special interest (or anti-pluralist) language. Thus, such treaties are generally denounced for not being transparent enough, for being negotiated under a cloak of secrecy, and for catering to privileged special interests. In other words, bad process, secrecy, and lack of transparency are the presumed culprits in this equation, and greater public participation is the answer.

What was at stake for the unions in the NAFTA debate might not have been simply the threat of wage compression or loss of jobs. NAFTA might have come to signify something even bigger and more disconcerting: the further political marginalization of organized labor in the United States.⁸⁴ In the struggles that ensued during the NAFTA debates of the early 1990s, the unions fought hard to block the treaty, but ultimately lost. Moreover, the residue of that experience might help explain why NAFTA might have taken on its expressive role as a tool of status dissent in 2016. Had organized labor groups won the battle to block NAFTA in 1993, it would have demonstrated that they still had sufficient political influence to retain their position as a critical coalition in the Democratic Party. However, they did not. In the immediate aftermath of the passage of the treaty, the unions were treated somewhat as a spent political force.

⁸² See Mike Callaghan, *NAFTA to USMCA – what's in a name?*, <https://www.lowyinstitute.org/the-interpreter/nafta-usmca-what-in-name> (“But Trump does like renaming things and the main attribute of the new trade deal as far as Trump is concerned is that it is not called NAFTA”); see also The Baltimore Sun Editorial Board, Just don't call it NAFTA — the sole focus of Trump's trade negotiations, in a nutshell, BALT. SUN, Aug. 28, 2018, available at <https://www.baltimoresun.com/news/opinion/editorial/bs-ed-0830-nafta-20180828-story.html>.

⁸³ WILLIAM H. RIKER, AGENDA FORMATION 2 (1993). In another work, Riker illustrates agenda manipulation with some examples from American history, see Riker LIBERALISM AGAINST POPULISM, *supra* note ___ at 213-14.

⁸⁴ For a detailed argument about the role that symbolic politics played in the organized labor's opposition to NAFTA, see FREDERICK MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS 224-26 (1998).

When NAFTA's passage seemed inevitable, for instance, the unions lobbied hard for the inclusion of strong labor standards backed by credible sanctions. In the end, the only concession that was made to them in the treaty was a side agreement on labor and environmental standards, albeit one with weak enforcement provisions.⁸⁵ In theory, when such side agreements are subject to robust third party enforcement they might come close to performing a bonding function for such groups: it is like lodging a certain sum of trade concessions with a neutral third party. But if a state party does not live up to its promises to enhance labor standards, some portion of the trade concessions can be temporarily forfeited until the scofflaw state brings its behavior back in line.

In any event, compared to the scorched earth approach that characterized the north-south divide over international trade in the nineteenth century, today's battlefield over NAFTA and future trade agreements is simultaneously different and similar in certain respects. On the one hand, organized labor in the United States recognizes its functional interdependence with management, and thus it is not in its interests to resist cooperation at all costs during international trade negotiations. Moreover, since the primary goal of unions is to enhance their bargaining leverage over wages, there are devices such as side agreements that can help reduce the threat posed by international agreements. On the other hand, there is a greater risk that the multiplicity of affiliations to which an individual may belong may continue to reinforce rather than offset each other. Moreover, when such allegiances to multiple group identities converge, we may experience the kinds of disruptive and pathological conflicts that make inter-group cooperation over international law more difficult to achieve.

IV. IMPLICATIONS FOR INTERNATIONAL AND CONSTITUTIONAL LAW

Having explored the various ways moral inflation can elevate identity politics and encourage usually strong group attachments, we are now in a position to evaluate its specific impact on international economic legal regimes and constitutional law.

The focus will first be on three broad categories of concern. The first holds that the intensity of group attachment encouraged by moral inflation tends to lead to significant volatility in international economic law. The second is that increasing the element of identity politics may cause disruptions on the margins of the President's constitutional authority over

⁸⁵ As one commentators observed, 'the dispute resolution mechanisms [under these side agreements] were designed to fail and have in fact proven too cumbersome to implement.' Isabel Studer, *The NAFTA Side Agreements: Toward A More Cooperative Approach*, 45 WAKE FOR. L REV. 469, 475 (2014).

international trade. Finally, by focusing on expressive harms, identity politics introduces controversies that are not easily susceptible to adjudication or other forms of legal dispute resolution.

A. Increasing Volatility in International Economic Law

The following argument presumes that legal instability across electoral cycles is undesirable because it makes long-term economic and policy planning difficult.⁸⁶ Holmes famously embraced the principle of predictability as a core objective of any legal regime.⁸⁷ Moreover, in *Kemble v Marvel Entertainment*, the Supreme Court itself weighed in on the virtue of stability in the law: “[I]t is usually more important that the applicable rule of law be settled than that it be settled right.”⁸⁸

The reason why the stability of international law is complicated by identity politics is simple. When an international law dispute is enmeshed with grievances over social status or identity, it is likely to be transformed into a high stakes zero-sum game, rather than simply a divisible one involving material stakes. In other words, it encourages the participants to adopt an inflexible either-or rather than a more or less stance towards their policy objectives.⁸⁹ Thus, in such cases, the relevant actors might prefer to stake out hardline positions from which they believe they cannot retreat without shame, even if it comes at the expense of durable compromise.

Take, for instance, the recurring role that sectionalism played in late nineteenth and early twentieth century trade policy in the United States. How did it affect the durability of the tariff? The contending groups simply engaged in a form of census voting along north south lines, where one regional majority (once it became a temporary national majority) would impose its trade preferences against the other regional majority, only to revert to the status quo once they were out of power. Thus, the result was rapid

⁸⁶ See RUSSEL HARDIN, INDETERMINACY AND SOCIETY 47 (2003) (“[W]e need legal rules that allow us to act in the confident expectation that our actions will stand against legal attack so that we may sensibly and confidently invest in our projects and our lives”); Stefanie Lindquist & Franck C. Cross, *Stability, Predictability, and the Rule of Law: Stare Decisis as a Reciprocity Norm*, working paper, 2012, available at <http://www.utexas.edu/law/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> (accessed Feb. 15, 2019) (discussing why stability and predictability are a fundamental aspect of the rule of law); WILLIAM N. ESKRIDGE JR. AND PHILIP P. FRICKEY, HART AND SACK’S THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 568 (1994) (same).

⁸⁷ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L REV. 457, 457 (1897).

⁸⁸ *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015).

⁸⁹ Hirschman described political disputes over money or resources (such as those covered by investment/trade treaties) as “more or less” conflicts, while labeling those over moral and social values as “either/or” conflicts. See Albert O. Hirschman, *Social Conflicts as Pillars of Democratic Market Society*, 22 POL. THEOR. 203, 214 (1994).

swings in tariffs, where reform under a Democratic administration (dominated by the South) was quickly followed by a reversal once the Republicans (dominated by the North) came to power.⁹⁰ Initially, the election of 1888 brought the effort to pass the Mills Bill, which sought to lower tariffs by an average of seven percent. In response, the Republicans raised tariffs in 1890 under the McKinley Tariff. Over the next couple of decades, the tariffs continued to seesaw widely across electoral cycles, sometimes escalating, sometimes moderating.⁹¹

To be sure, there were certain presidents who believed they could stand above the crude fray of destabilizing identity politics. Take, for instance, President's Wilson's attempt at reform with the Underwood Tariffs of 1913. Decrying the economic trusts that he regarded as the epitome of special interests, he sought to spur economic competition by lowering tariffs from 40 to 25 percent. In his speech to Congress about the need for reform, he also extolled the virtues of predictability and stability in tariff policy: "in order that the business interests of the country may not be kept too long in suspense as to what the fiscal changes are to be to which they will be required to adjust themselves."⁹²

In hindsight, President Wilson's confidence that his tariff reforms would defy the odds and escape revision was puzzling, especially given the regional nature of his political support. The persuasiveness of his rhetoric in favor of reform might have been stronger had it not happened to coincide so well with the political interests of the South. Indeed, even before he was elected in 1912, the Republicans were already dismissing talks in Congress of tariff reform as "sectional."⁹³ In addition, given the relative dominance of the Republican Party in presidential politics during the period, it would have been easy to foresee troubles down the road. In any event, whatever Wilson's views, it is clear the Republicans did not even pretend that his reforms were locked in. Deploying characteristically charged language, the Republican Platform in 1916 denounced Wilson's initiative: "The Underwood tariff act is a complete failure in every respect . . . The welfare

⁹⁰ For a discussion of the tariff politics of the era, see DOUGLAS IRWIN, CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY 221-370 (2017).

⁹¹ These crucial swings in tariffs occurred in 1894 (Wilson Gorman--lowering tariffs), 1897 (Dingley—raising tariffs), 1909 (Payne Aldrich---lowering tariffs); 1913 (Underwood—lowering tariffs); 1921 (Emergency Tariff—raising tariffs); 1922 (Fordney McCumber—raising tariffs); and 1930 (Smoot Hawley—raising tariffs).

⁹²Woodrow Wilson, *Address to a Joint Session of Congress on Tariff Reform* April 8, 1913, <http://www.presidency.ucsb.edu/ws/?pid=65368>

⁹³See *Republican Party Platform of 1912*, THE AMERICAN PRESIDENCY PROJECT (June 18, 1912), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1912> (last visited February 12, 2019) ("[w]e condemn the Democratic tariff bills passed by the House of Representatives of the Sixty-second Congress as sectional, as injurious to the public credit, and as destructive to business enterprise.").

of our people demands its repeal and its substitution of a measure which in peace as well as in war will produce ample revenue and give reasonable protection.”⁹⁴

So what does one make of all these dramatic tariff swings from one administration to another? If the policy changes were relatively rare events, it would be easier to ignore them as being inconsequential. However, given the regularity with which these reversals on substantive economic policy issues occurred, it might be reasonable to speculate that they likely made it harder for investors and commercial agents across the United States to plan for the future. Of course, it is hard to know the counterfactual, but there is now growing evidence that political polarization leads to instability, which tends to have an adverse effect on economic growth.⁹⁵

Moreover, once new treaties or tariff policies are put in place, there are likely to be significant transition costs as relevant actors try to adapt themselves to the regulatory demands of the new regime. In this formulation, the high stakes identity approach to international trade policy might even risk becoming a self-fulfilling prophecy. In other words, if everyone expects the system to be unstable because of social tensions, then both business and political actors might become more resigned to the inevitability of instability.

But what happens when foreign countries could not anticipate when disruptions in American trade policy were likely to occur? In other words, if the source of the disruptions were primarily due to economic shocks, then foreign commercial partners might be able to anticipate them and take necessary remedial measures. However, when the disruptions were partly rooted in matters of social identity and status, which could not be predicted easily in advance, then there was a greater likelihood that other countries would be caught off guard. This might explain the foreign reaction to the McKinley Tariff of 1890. As one historian noted, “[t]he bill’s passage sent economic and political shockwaves across the globe.”⁹⁶ The global fallout caused by the McKinley Tariff not only caused global economic dislocations, it also had a substantial impact on the local politics of other countries: “the instability arising from the tariff’s reciprocity provisions regarding Cuba’s sugar exports, upon their revocation in 1894, led to increased anti-colonial agitation and rebellion.”⁹⁷

⁹⁴ *Republican Party Platform of 1916*, THE AMERICAN PRESIDENCY PROJECT (June 7, 1916), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1916> (last visited February 12, 2019).

⁹⁵ See Timothy Frye, *The Perils of Polarization: Economic Performance in the Postcommunist World*, 54 WORLD POL. 308 (2002).

⁹⁶ William Marc-Palen, *Protection, Federation and Union: The Global Impact of the McKinley Tariff upon the British Empire, 1890–94*, 38 J. IMPER. & COMMONWEALTH HIST. 395 (2010).

⁹⁷ See *id.* at 397.

In any event, many of the likely dangers posed by chronic tariff instability were even obvious to contemporaries, which is why they sought out institutional remedies like the establishment of an international trade commission. Roger Porter, a Republican member of the Tariff Commission of 1882, and a self-described protectionist, harbored no illusions about the likely pernicious effects of dramatic tariff fluctuations:

The protectionist points to the facts and vehemently declares that the prosperity of the country depends absolutely upon his policy. The free trader unfolds his theories, and with equal vehemence contends we can have no permanent prosperity until trade is free and all custom-houses abolished. And while the two sides are loudly proclaiming, the country is suffering from a more serious complaint than whether the duty on tooth brushes shall be 26 or 30 per cent., namely, an utter lack of business stability. These tariff hearings and threatened changes and actual changes of methods of collecting duties, of classification, and of rates of duty are simply playing havoc with business generally. Such never ending changes must stop, and some sort of certainty be inaugurated before we can hope for permanent prosperity.⁹⁸

Could the current phase of moral inflation over international trade policy in the United States trigger a similar round of instability in the global economic order? It is difficult to say, but there are certain ominous signs. First, the ongoing rhetoric in the United States continues to invoke the anti-pluralist imagery of a clean break with the past in which negotiations of trade agreements are no longer going to be tainted by special group influence. This make kind of populist rhetoric characterized international trade policy in the turbulent decades after 1887. Here is the problem: If an incumbent administration views any treaty it passes primarily as a tool to suit the ideological ambitions of its core constituents, which he believes happens to correspond with the public interest, then a future administration will likely feel no obligation to keep such a treaty in place.

Second, if the social identity element in the current trade debates continues to escalate, then it is likely to unleash forces powerful to create trouble for future economic treaties, but not materially vested enough to internalize the costs of chronic instability. This particular outcome is more likely when ideological, religious, or nationalist groups have been mobilized in favor or against a treaty, especially when a politician has determined that expanding social conflict over international trade to include such groups will yield short-term electoral benefits. In this respect, it may not matter whether such groups adopt a nationalist or internationalist orientation. As long as they lack any economic “skin in the game,” they may believe it worth their

⁹⁸ Robert Porter, *The Dingley Tariff Bill*, 164 The NORTHERN AMER. REV. 576 (1897).

while to disrupt current arrangements and gamble that they can produce a new treaty that is more suited to their expressive preferences. Indeed, undoing the other side's treaty may take on a certain urgency because its very existence may come to symbolize defeat or humiliation to one's very identity.

B. Destabilizing Settled Understandings over Constitutional Structure

In the United States, the process of negotiating trade treaties has been significantly facilitated by a bipartisan agreement over the "rules of the game" when it comes to division of the authority between the President and Congress.⁹⁹ In this case, norms of deference to the executive branch on these issues have tended to exhibit resilience over time.¹⁰⁰ But once identity politics becomes infused into international trade policy, there is a greater risk that any bipartisan agreement reached over the appropriate scope of presidential trade authority will collapse, and in its place the contending factions will adopt a more myopic and pathological view of the separation of powers. In other words, the collective action problem that normally plagues Congress in foreign affairs issues may be overcome,¹⁰¹ although one suspects that it will likely weaken once again after the euphoria of identity politics dies down.

⁹⁹ Under the Constitution, Congress has the power to "regulate commerce with foreign nations," "to lay and collect taxes, duties, imposts and excises." U.S. Const., art. I, sec. 8. The Constitution also provides that "all bills for raising revenue shall originate in the House of Representatives." U.S. Const., art. I, sec. 7. But given that the President is required to negotiate with foreign countries, it has been commonly understood that she ought to have the flexibility to give and expect something in return. Confronted with the difficulties of conducting foreign negotiations with the intrusion of a multi-member body, political actors across the aisle have over time tended to opt for the politically efficient option of increasing presidential flexibility in international trade. For a detailed description of these constitutional innovations and changes, see Jide O. Nzelibe, *The Illusion of the Free-Trade Constitution*, 19 N.Y.U.J. LEGIS. & PUB. POL'Y 1, 32-43 (2016) *see also* Meyer & Sitaraman, *Trade and the Separation of Powers*, *supra* note 8 at ___ (describing historical evolution of the constitutional regime of international trade in the United States).

¹⁰⁰ And the reason why is simple: the political party out of power is reassured that such flexibility will also offer it chances to shape trade policy once they eventually win the White House. Thus, the pathological logic of institutional flip-flops has been largely avoided. *See* Eric A. Posner & Cass R. Sunstein, *Institutional Flip Flops*, 94 TEX L REV. 485 (2016).

¹⁰¹ For a discussion of Congress's collective action problems in foreign affairs generally, see Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT'L L 517, 518 (2013) ("Congress is hobbled, however, by collective action problems as well as by the high transaction costs of responding both to the executive's unilateral actions and to the constitutional arguments made by the executive branch); Jide Nzelibe, *Our Partisan Foreign Affairs Constitution*, 97 MINN. L. REV. 838, 847 (2013) ("{T}he prospect of facing frequent elections and collective-action problems often make it unlikely that members of Congress will have an incentive to protect or expand their constitutional prerogatives in foreign affairs.").

At first blush, instigating such conflict between the political branches might seem like a good idea. After all, competition is likely to increase policy options, and such a development should inure to the benefit of voters.¹⁰² Nevertheless, there are reasons to be wary.

First, when Congress has chosen to be more assertive in international trade, it has often resulted in a *status quo* bias and inability to adapt to the changing policy environment.¹⁰³ This observation does not necessarily imply that Congress is inherently parochial. On the contrary, it may simply reflect that Congress is a heterogeneous body serving multiple constituencies, and any attempt to treat it as a unitary actor that can act decisively to counteract the President's trade policies is inapt. Because there is little collective agency in Congress, and the risks of polarizing conflict are high, there may be a greater tendency for members to opt for the course of least resistance. Paradoxically, identity politics in international trade may prompt members of Congress to be more assertive against the President, but once they assume a greater role, much less may get accomplished.

To be sure, the risk of such policy inertia in international trade may be an inherent feature of the organizational structure of Congress. The intrusion of identity politics, however, is likely to make an already difficult situation worse. Whereas in a previous era, polarization along sectional lines tended to lead to volatility in trade policy in Congress, in the modern era it is more likely to lead to policy stalemate. The difference is that with contemporary international trade policy, the problem is no longer that the material stakes to society for policy inaction are too high, but that they are often too low. The default condition when Congress refuses to act is no longer a regime of rampant protectionism which may impose significant social costs, but the continuation of an old trade regime that may not be that

¹⁰² Moreover, a recurring complaint is that executive-dominated trade policy is undemocratic, often presenting Congress with the *fait accompli* of bargains that have been completed elsewhere, usually among interest groups behind closed doors. See Hal Shapiro & Leal Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands more than a Name Change*, 35 Geo. Wash. Int'l L. 1, 4 (2003) (“Perhaps the greatest irony of fast track is that it has come under attack as being undemocratic and for undermining public accountability when it was actually designed to do just the opposite.”); see also); *see also* Timothy Meyer, Meyer & Sitaraman, *Trade and the Separation of Powers*, *supra* note 8 at ___(expressing concerns that executive dominance in international trade might be undemocratic).

¹⁰³ Congress may still endorse new international trade agreements, but as Claussen has pointed out, such agreements may tend to be boilerplate and bereft of any innovation. See Kathleen Claussen, *Separation of Trade Powers*, 43 YALE J INT'L L 315-19; 351-53 (2018) (arguing that the increased role of Congress in negotiating treaties tends to retard innovation because Congress is not adept at reacting to a changing domestic and global environment).

significantly different from the new one being proposed.¹⁰⁴ Thus, there is often little cause for Congress to adopt a sense of urgency about international trade reform.

Since Congress does not have to worry about catastrophic economic costs from dragging its feet on international trade, groups motivated by identity and non-economic factors will have more leeway to indulge more fully in their ideological passions.¹⁰⁵ However, with the introduction of the confrontational style of identity politics, there will even less room by the contending groups in Congress to engage in compromise without losing face.¹⁰⁶ Put differently, one likely effect of identity polarization is that it may actually lead to even more congressional inertia, at least in the short term.

The contrary effect, however, is that legislative coalitions, once they do manage to overcome resistance and push through their preferred international trade programs, may be even more intransigent and less accommodating to their opponents. In response, anti-globalization groups may then resort to the offensive veto, where they seek ways to impose structures that thwart the passage of international agreements even when these agreements do not harm them, as long as it imposes costs on those with whom they are competing for status.¹⁰⁷ The sum of these effects over time

¹⁰⁴ In the United States and other industrialized states, the wholesale revision of the international trade regime is rarely up for grabs. Rather, the question is usually about the desirability of marginal adjustments around the edges of existing regimes. Of course, other forces may also contribute to the lack of congressional energy to adopt a comprehensive strategy in this area. *See MICHAEL HART ET AL, DECISION AT MIDNIGHT : INSIDE THE CANADA-US TRADE NEGOTIATIONS* 41-53 (1994) (bemoaning congressional laxity during the US-Canada trade negotiations in the 1980s and attributing it to variety of institutional and economic factors).

¹⁰⁵ In a different context, Hirschman has described a similar dynamic with respect to the unintended adverse effects of competition on public demand for infrastructure reform in developing countries:

The presence of a ready alternative of rail transport makes it less, rather than more, likely that the weakness of the of the railways will be fought rather than indulged. With truck and bus transportation available, a deterioration in rail service is not nearly so serious a matter as if the railway held a monopoly for long-distant transport—it can be lived for a long time without arousing strong public pressures for the basic and political difficult reforms . . . that would be required.

ALBERT O HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 44 (1970).

¹⁰⁶ As Schelling put it: “[i]f national representatives can be charged for appeasement for every concession, they place concession visibly beyond their own reach.” THOMAS C. SCHELLING, *THE STRATEGY OF SOCIAL CONFLICT* 29 (1960).

¹⁰⁷ Indeed, the one-off nature of many international trade agreements, and the reality that certain groups stand to gain substantially, may make them particularly prone to the offensive veto. Barry has defined the offensive veto as when people threaten to veto policies to which they might be indifferent in order to extract large side payments from those who benefit substantially. *See BRAIN BARRY, POLITICAL ARGUMENT* 245-50 (1965). The flipside is that globally oriented groups may then prefer international agreements that do not yield significant material benefits, especially if it entrenches a norm of

may then be a process that promotes more international trade policy incoherence, with a smattering of legislative provisions meant to assuage those who favor more globalization, which are then layered on top of other provisions meant to frustrate them.¹⁰⁸ Policymaking of this kind is obviously not meant to be particularly effective, but neither is likely to be mutually satisfactory to all the contending factions.

Second, if members of Congress attempt to obstruct actively the President's trade agenda, it is possible that the President will prefer a showdown with Congress rather than a mutually face-saving arrangement that allows each side to get some spoils in return. The President might gamble that over the long run he is likely to prevail. In the modern era, for instance, members of Congress have tended to exhibit notoriously short time horizons on issues of foreign policy and international economic law, and when they eventually pull back or lose interest, they may leave behind an executive branch that is even stronger and more assertive.

The nature of these struggles underscores some of the weaknesses currently faced by our system of separation of powers in international trade. The gap on trade policy between President Trump and key members of his own party in Congress is growing.¹⁰⁹ The President is not committed to staying the course of international trade policy developed over decades, and the dominant wing of his own party in Congress is not committed to respecting the longstanding tradition of legislative acquiescence to the President on international trade. This state of affairs can breed mutual distrust.

To soothe the accumulated grievances of those groups who feel left behind and socially marginalized, the President might revert to more unilateral actions, and attempt to bypass consultations with Congress

further globalization and imposes expressive harm on their cultural adversaries. In a recent article, Martz and Kim observe that intergroup competition often causes Americans to prefer trade policies that hurt the outgroup and favor the ingroup over trade policies could be mutually beneficial for their own country and the foreign country. *See* Diana Mutz and Eunji Kim, *The Impact of Ingroup Favoritism on Trade Preferences*, 71 INT'L ORG. 827 (2017).

¹⁰⁸ Terry Moe has argued elsewhere that politicization often leads members of Congress to implement bureaucracies that are designed to be ineffective. Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 277 (John E. Chubb & Paul E. Peterson eds., 1989) (“[O]pponents will also tend to have a say in structural design, and, to the degree they do, they will impose structures that subvert effective performance and politicize agency decisions.”).

¹⁰⁹ See Stephanie Dhua & Kayla Tausche, *As Trump ponders auto tariffs, free-trade Republicans push back*, <https://www.cnbc.com/2019/02/15/as-trump-ponders-auto-tariffs-free-trade-republicans-push-back.html>; Phil Mattingly, Lauren Fox and Ted Barrett, *Congressional Republicans lining up against Trump on trade*, May 31, 2018, <https://www.cnn.com/2018/05/31/politics/republicans-gop-react-tariffs-trade-trump-aluminum-steel-imports/index.html>

altogether.¹¹⁰ Such unilateral assertiveness by the President might be more likely when certain groups perceive that their social or political status has come under threat. Indeed, there is already evidence that President Trump has started down this path. In a recent episode, for instance, he took the unusual step of imposing tariffs of 25 percent on steel and 10 percent on aluminum by invoking his authority under Section 232 of the Trade Expansion Act of 1962,¹¹¹ which allows the President to sidestep both the International Trade Commission and Congress and impose tariffs unilaterally by executive order.¹¹²

However, administering international trade policy purely by executive decree is fraught with its own drawbacks. Foreign trade partners may lose confidence that the President's trade initiatives enjoy broad support from other key domestic political actors; more specifically, they may be wary that any new international reforms imposed by unilateral action may face a short political shelf life. In this case, once there is a turnover in the White House, they be concerned that a new administration may decide to reverse course completely. Moreover, such concerns might be justified.

In this respect, the current political climate is reminiscent of the tumultuous years from 1887 through 1932, which created a deep-seated inclination for political actors to favor or reject constitutional norms regarding the separation of powers in international trade based on narrow calculations regarding which coalition was likely to capture the White House. At the time when Republicans dominated the White House up until the Great Depression, it was the free trade Democrats who came to disfavor a strong presidential role in shaping trade policy. The protectionist Republicans, on the other hand, favored concentrating more international trade policy in the hands of a presidency that they expected to control, at least for the foreseeable future. The delegation of presidential authority in the McKinley Tariff of 1890 was challenged, for instance, and eventually upheld by the Supreme Court in *Field vs Clark*.¹¹³ And in the Fordney-McCumber Tariff of 1922, the President was delegated the authority to change tariff rates as much as 50 percent to account for costs differentials between foreign and

¹¹⁰ Typically, the conventional wisdom assumes that voters will resist unilateral action by the President, and prefer a robust system of checks and balances. But commentators have also observed that voters may sometimes endorse unilateral presidential actions that bypass the legislature, especially if they believe gridlock benefits elite interests. See Daron Acemoglu, James Robinson & Ragnar Torvik, *Why Do Voters Dismantle Checks and Balances?*, 80 REV. ECON. STUD. 845 (2013).

¹¹¹ 1962 Trade Expansion Act § 232.

¹¹² For a discussion of the legal background of the President's policy discretion, see *See Meyer & Sitaraman, Trade and the Separation of Powers*, supra note 8 at ____.

¹¹³ 143 U.S. 649, 680 (1892).

domestic production, and that delegation was upheld in the 1928 *J.W. Hampton* case.¹¹⁴

It is noticeable that free trade Democrats viewed both of these pieces of tariff legislation and the accompanying delegation provisions, as ploys to entrench protectionist policies. Indeed, a peculiar paradox of late nineteenth century politics is that Republicans favored reciprocity as a tool for protectionism, and eagerly sought out treaties to entrench their preferences, while free trade Democrats were skeptical about both reciprocity and the trade agreements it produced.¹¹⁵ Today, one often thinks that reciprocity, delegation, strong presidential authority, and the frequent passage of trade agreements are all tools that favor free trade groups. But the experience of the late nineteenth century and early twentieth century turn this conventional wisdom on its head; in other words, when Republican protectionists were a dominant political force, all these institutional tools were pressed into the service of protectionism.

These institutional preferences by the major parties started to flip in the 1930s. Take, for instance, the case of Congressman Cordell Hull, a free trade Southern Democrat, who was a strong and forceful opponent of delegation during the hearings over the 1930 Smoot-Hawley tariffs.¹¹⁶ However, once the Democratic Party became dominant in 1932, he quickly changed his tune. Having shed his prior qualms about unconstitutional delegation when he was a Congressman, Hull, as the Secretary of State in Roosevelt's cabinet, helped set in motion his own scheme of legislative delegation. Moreover, once President Roosevelt was granted sweeping tariff revision powers under the Reciprocal Trade Agreement Act of 1932, it was the Republicans' turn to denounce delegation of trade authority to the President as unconstitutional.¹¹⁷ The Republican Party platform of 1936 not only vowed to repeal the RTAA,¹¹⁸ but also "condemn[ed] the secret

¹¹⁴ 276 U.S. 394, 401 (1928).

¹¹⁵ See Jide O. Nzelibe, *The Illusion of the Free-Trade Constitution*, 19 N.Y.U.J. LEGIS. & PUB. POL'Y 1, 32-43 (2016).

¹¹⁶ See Editorial Research Reports 1929 (Vol. 2), The Tariff Commission and the Flexible Tariff (1929), available at <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1929052900#.Ujy4aZzCa3o> ("The opponents of the plan contend that the flexible system can never be made to work as a "scientific" method of tariff revision, and that the delegation to the President of broad power to alter tariff duties is an undesirable innovation in the plan of government established under the Constitution of 1789. This position was taken during the House debates by Rep. Cordell Hull, D., Tenn., member of the Ways and Means Committee.").

¹¹⁷ See Nzelibe, *The Illusion of the Free Trade Constitution*, *supra* note ____ at 40-43.

¹¹⁸ See Republican Party Platform of 1936, THE AMERICAN PRESIDENCY PROJECT (June 9, 1936), <http://www.presidency.ucsb.edu/ws/index.php?pid=29639#ixzz1RR7G6ga4> (last visited Sept. 14, 2013) ("We will repeal the present Reciprocal Trade Agreement Law. It is futile and dangerous. Its effect on agriculture and industry has been destructive. Its continuation would work to the detriment of the wage earner and the farmer.").

negotiations of reciprocal trade treaties without public hearing or legislative approval.”¹¹⁹

In sum, the identity politics of international trade in the late nineteenth and early twentieth century introduced a factor that significantly increased the premium of holding presidential power: *the perceived threat of presidential trade policy to the status of subnational majorities*. Thus, when citizens in the north and south were mobilized based on their regional allegiances, they had an incentive to weaken policy discretion for those officeholders they believed the opposition would control in the near future. Moreover, given the stakes, president’s likely felt duty bound to skew international trade policy in favor of those loyal client groups who were willing to fight for the presidents’ institutional prerogatives.

Of course, it is too early to tell how the current political schism over international trade policy will play out. One plausible outcome is that polarization over the President Trump’s trade policy initiatives will intensify and lead to deadlock between the political branches. The litany of growing legislative complaints against President Trump’s trade policies, often reinforced by the popular press, include his decision to impose 30 percent tariffs on imported solar panels and washing machines, his proposal to impose steep tariffs on steel and aluminum imports, and his threat use a national security law to impose widespread tariffs on foreign cars.¹²⁰ In response, certain members of Congress might refuse to play by the old rules and norms that have historically granted the President significant leeway in international trade; instead, they might attempt one again to revitalize dormant veto points, and block the President’s recent initiatives by any means necessary.

Take, for instance, a recent legislative bill proposed by Senator Mike Lee (R-UT) to curb the President’s trade authority. Named the Global Trade Accountability Act (S. 177), it supposedly would empower Congress to approve all tariff increases or other “unilateral trade actions.”¹²¹ However, even if such legislation is passed, and is able to overcome the President’s inevitable veto, is it likely to have any bite? Moreover, setting aside the question of feasibility, is it is desirable for Congress to wield such authority in international trade? In a recent piece, Meyer and Sitaraman defend greater congressional involvement largely on democratic grounds.¹²² They suggest

¹¹⁹ See *id.*

¹²⁰ William Mauldin and Siobhan Hughes, *Trump Identifies His Trade Weapon of Choice, to the Dismay of Congress*, WALL STR. J, MAY 24, 2018.

¹²¹ Global Accountability Act of 1017, S.177, <https://www.congress.gov/bill/115th-congress/senate-bill/177>

¹²² See Meyer & Sitaraman, *Trade and the Separation of Powers*, supra note 8 at *45-*58. For other commentary on Congress’s role in international trade, see Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 TEX. L. REV. 1495, 1498 (describing two approaches to trade policy: American global

that the time is ripe for greater congressional assertiveness in international trade,¹²³ especially if one wants to have trade policies that command wide American support.

In any event, prospects for a showdown between the political branches now seem more likely. If moral inflation over international law is used to stir mass audiences on the basis of social identity and threats to their status, it may be sufficient to propel the political branches into intense conflict—at least for a short period. Any presidential initiative that significantly increases popular agitation against a class of foreign exporters, for instance, might also unleash resistance from groups that benefit from such exports, especially when material benefits are used to reinforce group identities. In these circumstances, each side in this identity contest might try to shore up the leverage of the political branch in which it is perceived to have an advantage at the expense of the other.

C. Complicating the Role of Courts and Legal Enforcement

Another significant shortcoming with moral inflation is that it interjects considerations into legal controversies that may not be easily amenable to adjudication. The workability of international courts and tribunals, such as the World Trade Organization (WTO), often turns on having their dockets restricted to issues that do not evoke more abstract and expressive harms, such as threats to national honor or one's social identity.

Three key characteristics of identity politics are likely to create obstacles for rule-based adjudication. First, there is the complication that positional goods like political power, status, and identity tend not to be easily susceptible to measurement, which muddles any effort to resolve disputes about them in a courtroom.¹²⁴ In the United States, for instance, the requirement that parties demonstrate “concrete and particularized” harms has

leadership and American political autonomy); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1298-1301 (2008) (describing how the separation of powers in international trade evolved); see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 824, 827, 847-51 (1995) (same); Harold Hongju Koh, Congressional Controls on Presidential Trade Policymaking after *INS v. Chada*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1192-1193 (1986) (noting that trade is divided between Congress and the presidency in constitutional scheme).

¹²³ See Part III.C.

¹²⁴ According to Coser, “[s]ince power can only be appraised in its actual exercise, accommodation may frequently be reached only after the contenders have measured their respective strengths in conflict.” LEWIS COSER, THE FUNCTIONS OF SOCIAL CONFLICT 135.

long been recognized as an important (if not indispensable) consideration for standing to bring claims.¹²⁵

Second, the mixture of expressive and material claims may also distort the effectiveness of legal enforcement. Take the WTO dispute resolution mechanism, for instance. What aspects make that regime self-enforcing? One likely factor turns on the nature of the interests at stake. If a plaintiff state has been materially injured by a scofflaw state's violations of its trade obligations, it may retaliate against the scofflaw state by withdrawing equivalent trade concessions. The adequacy of that mechanism and its deterrent effect presupposes that the stakes for both sides in the dispute are symmetric, and thus the material damages that the scofflaw states incurs are roughly equivalent to the harm suffered by the plaintiff state.

But what if the scofflaw state stands to gain other intangible benefits as well from breaching, such as the pursuit of social identity or national honor? In that case, the scofflaw state's readiness to withstand economic sanctions in order to vindicate other non-economic goals might undermine the enforcement mechanism. To be sure, any resultant failure to comply is not necessarily an indictment of the system. Instead, one might view it as an instance of an efficient breach,¹²⁶ where the scofflaw state has simply

¹²⁵ For instance, in the 2016 case of *Spokeo vs. Robbins*, the Court reaffirmed that a plaintiff had to demonstrate that not only he had suffered a "particularized" injury, but such an injury was "concrete" in the sense of "actual[]" or real." 136 S.Ct. 1540, 1548 (2016). Such an understanding informs much of the Supreme Court's view of standing which requires parties to demonstrate a "concrete, particularized" injury that must be "redressable by a favorable ruling." *Spokeo*, 136 S. Ct. at 1547 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.(TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Lujan*, 504 U.S. at 560-61). As one commentator recently observed, these requirements of concreteness and specificity are "often conceptualized in terms of those commensurable with money, quantifiable, or susceptible to evidentiary proof." Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WILLIAM & MARY L REV. 2285, 2292 (2018). In any event, such requirements are not likely to be met when the allegation is about a threat to one's social identity or political status. Of course, difficulty does not necessarily imply impossibility, and commentators continue to wrestle with the question of how to compute the expressive harms caused by the loss of political power. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

¹²⁶ See, e.g., Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System*, 31 J. LEGAL STUD. 179, 182-85 (2002) (arguing that the WTO endorses the notion of an efficient breach, which suggests that the WTO rules do not deter the breach of an underlying trade agreement where the breach offers the scofflaw state a politically superior outcome); Alan Sykes, *The Remedy for Breach of Obligations under the WTO Dispute Settlement Understanding: Damages or Specific Performance?*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 349, 352-54 (Marco Bronckers & Reinhard Quick eds., 2000) (same); but see Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in The World Trade Organization's Dispute Resolution Mechanism*, 6 *THEORETICAL INQUIRIES L.* 215, 242-45 (2005) (suggesting that specific performance and not compliance is the goal of the WTO's enforcement mechanism, and thus the mechanism does not endorse efficient breaches).

calculated that the gains from breaching exceed the costs. However, any such non-compliance will only be tolerable when there is not too much of it. The capacity of courts to standardize expectations in ways that render non-compliance exceptional is what make them useful to litigants. If breaches routinely occur, and there is no compliance after adjudication, then the parties may start to lose faith in the system.

Third, when concerns of social identity and national honor are at stake, the parties may tend to adopt a more stubborn and inflexible posture, which makes conventional dispute resolution more fragile. At some level, such obstinacy is understandable: since social identity and national honor tend to be lumpy goods, where one side's gain implies a loss to others, the expected benefits from resisting and hoping for a total victory may outweigh any harms inflicted on the integrity of the international adjudicatory body.¹²⁷ Simply put, increasing the supply of status goods among multiple contestants is simply out of the question. At the end of the day, since one side gets to win the other must therefore lose.

Given these realities, one might speculate that a certain degree of indifference to the WTO by officials at the upper rungs of government should be welcome. For as soon as the President or leading members of Congress become intensely engaged, it is usually a sign that public opinion has been mobilized.¹²⁸ Moreover, once that happens one should expect the inevitable intrusion of expressive or identity politics. By contrast, when the workings of the WTO are largely or exclusively the preoccupation of business people and career USTR bureaucrats, the technocratic element and the workaday problems of international trade are likely to take priority.¹²⁹ In such circumstances, legal stability and the desire to maintain good working relationships with WTO officials are likely to be at a premium.

The plausibility of this claim can be shown by the fact that when the WTO has seriously captured the White House's attention, it has not usually

¹²⁷ See generally Michael Taylor & Hugh Ward, *Chickens, Whales, and Other Lumpy Goods: Alternative Models of Public-Goods Provision*, 30 POL. STUD. 350 (1982) (describing the concept of lumpy goods).

¹²⁸ The notion that intense interest at the highest levels of government could lead to politicization of the WTO has been made by others. See Arie Reich, *The Threat of Politicization of the WTO*, 26 U. PA. J. INT'L ECON. L. 779, 800 (2005) ("[T]his type of diplomacy [at the WTO] was considered "second-class," not worthy enough for high-level Foreign Ministry diplomats, and considered "low politics" as compared with "high politics" that dealt with security and "real" foreign policy. It was relatively ignored by the media, which also allowed a quiet and professionally oriented business environment.").

¹²⁹ See *Id* at 800-803; see also Joseph Weiler, *The Rule of Lawyers and Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 194-95 (2001) ("The GATT successfully managed a relative insulation from the "outside" world of international relations and established among its practitioners a closely knit environment revolving round a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term first-name contacts and friendly personal relationships.").

fared well.¹³⁰ Lacking any direct oversight, presidents have tended to resort to blunt procedural obstacles in their attempts to control the WTO. This pattern is amply illustrated by recent developments. Frustrated with a recent spate of WTO decisions, especially those involving China, President Trump has blocked the appointment of new judges to the Appellate Body. He also unilaterally sanctioned China for alleged violations without first bringing a claim before the WTO, and has invoked a national security exception under the WTO that is so open-ended that it might have the effect of obviating the enforcement mechanism altogether.¹³¹ President Trump's heavy-handed forays into the WTO's decision-making were hardly unique. The Obama administration also took the unusual step of using its veto authority to block the reappointment of a Korean and an American judge at the WTO's Appellate Body, and blocked the new appointment of a Kenyan academic.¹³² By refusing the appointment of new judges, some have argued that the White House has opted for an indirect strategy of subjugating the WTO to a slow death by a thousand cuts.¹³³

The upshot is that the modern resilience of the WTO's Appellate Body might have been sustained by a norm favoring judicial independence.

¹³⁰ To be sure, there might have been occasions when the WTO has been trumpeted as being useful to a President's agenda, such as when President Clinton believed WTO might be used to narrow the US trade deficit with China. But far more often, the politicization afforded by presidential attention has been a bane to the WTO.

¹³¹ John Brinkley, *Trump Is Close To Shutting Down The WTO's Appeals Court*, FORBES, Sept. 27, 2018, available at <https://www.forbes.com/sites/johnbrinkley/2018/09/27/trump-is-close-to-shutting-down-the-wtos-appeals-court/#28179e0d7ab6> ("The Appellate Body has seven seats, but three of them are empty, because the Trump administration has refused to allow the appointment of judges to fill them"); Jacob M. Schlesinger, *How China Swallowed the WTO*, WALL ST. J., Nov. 1, 2017, <https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308> ("The Trump administration has escalated the Obama administration's battle over the appellate body, blocking appointments of any new judges and sparking fights even with members sympathetic to the U.S. campaign against China"). For a discussion of the self-judging national security exception under the GATT/WTO, and why countries have been reluctant to invoke it for concerns about politicizing the WTO, see Roger P. Alford, *The Self-Judging National Security Exception*, 2011 UTAH L. REV. 697 (2011).

¹³² The Kenyan blocked from the WTO appointment was a law professor, James Gathii, and the American and Korean judges whose reappointments were blocked were Jennifer Hillman and Seung Wha Chang. *United States Blocks Reappointment of WTO Appellate Body Member*, 110 AM. J. INT'L L. 573 (2016) (Ed. by Kristina Daugirdas & Julian Davis Mortenson).

¹³³ Sabri Ben-Achour, Daniel Shin, and Redmond Carolipio, *The Trump administration is trying to "effectively kill" the WTO's Appellate Body*, Oct. 18, 2018, available at <https://www.marketplace.org/2018/10/18/world/wtos-appellate-body-danger-being-choked-death>. Although some of the political forces that led to the weakening of the WTO preceded the Trump administration. See Kyle Bagwell and Chad P. Bown, & Robert W. Staiger, *Is the WTO Passé?*, 54 J. ECON. LIT. 1125 (2016).

Nonetheless, this norm proved to be somewhat vulnerable. In the end, its pull was weakened what it was confronted with a deeply held norm of another kind—that born of identity politics in the United States (manifested as the desire outdo one’s foreign rival), a norm that becomes all the more formidable when it is reinforced by intense engagement by the occupant of the White House.

V. ARE THE BENEFITS OF IDENTITY POLITICS WORTH THE COSTS?

The bulk of this Article has focused on why efforts to engage in moral inflation and appeal to mass politics in international law might ultimately lead to disappointment. Against this position, one could argue that the identity politics unleashed by moral inflation in international law might have some countervailing benefits. Indeed, there is good reason to think that the mobilization of intense group identities can sometimes be deployed for a good cause.

Two kinds of benefits immediately come to mind. One plausible use for identity politics is that the social solidarity created by the appearance of a common enemy might harness the energy necessary to advance socially beneficial goals in international law. The other benefit is that identity politics might provide some respite from the excessive influence of narrow economic groups in international law. Each of these supposed benefits is analyzed in more detail below.

A. *Can Identity Politics Provide the Solidarity to Secure Global Collective Goods?*

One conceivable use for the kind of identity politics fueled by the perceived threat of a despised outgroup is that may it help furnish the requisite energy to engage in international law reform. As Elster has observed, “[t]he simplest improvements in social condition require so large an effort on the part of society that full awareness of this proportion would be most discouraging and would therefore make any social progress impossible.”¹³⁴

Thus, when substantial obstacles to international law reform exist, a party may deploy a reputation for being passionate about its social identity to good advantage. If all goes well, the intensity of resolve fostered by identity politics may then open up avenues for reform that previously seemed politically unattainable. In the early twentieth century United States, for instance, the gradual expansion of free trade probably owed less to the political wisdom of government officials but because Southern Democrats,

¹³⁴ JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY _____ (1983).

for their own provincial and tactical purposes, sought to use it as a weapon to erode the dominance of northern Republicans. More broadly, the role of external adversaries in fostering nation building and beneficial social reform is a staple item in political sociology.¹³⁵

But there are limits to the notion of the socially beneficial enemy. First, there is no guarantee that the participants in this sociological ritual to manufacture group cohesion will keep the intensity of conflict within reasonable bounds; and when they do not, all may end up worse off. In other words, if one side indulges in moral inflation, it will likely result in a defensive response by the other side, which may then trigger a spiral of further moral inflation that will leave both sides entrenched and unable to compromise on fairly rudimentary issues. The recent resort to increasingly negative and highly moralistic rhetoric in the United States over relatively mundane trade treaties may be an apt illustration of this dynamic.

Second, and more importantly, even if the requisite goal of social cohesion through enemies is achieved, it may often come at the cost at other values that others may find more compelling. At first glance, if free trade groups happen to embrace their cause with an irrational and fervent passion, then it may seem like a bonus if they happen to succeed. Nevertheless, the matter is not that simple when the political status of other groups is also at stake. Groups that profit from the new and more efficient regime may seek to convert their economic gains into greater advantage in the political arena, and thereby politically enfeeble other groups. If that occurs, much of one's normative judgment about the new regime may also turn on what one think of the values and interests of the groups being politically marginalized; in other words, it is not only economic gains that are at stake, but also the new political advantages that these economic gains may bring.

Take, for instance, the case of southern whites in the United States in the late nineteenth and early twentieth century. To these groups, the embrace of free trade and the identity politics of subordinating African Americans had a symbiotic relationship, rooted in the quest for cheap labor that fueled cotton exports. In this picture, the economic rents that southern whites received from promoting export access likely reinforced their political power and weakened those forces fighting for civil rights for African-Americans. In this case, one might conclude that the social costs of free trade during that era easily trumped its economic benefits.¹³⁶ To be sure, the

¹³⁵ For instance, Boudin is quoted as saying: “the best way of preserving a state, and guaranteeing it against sedition, rebellion, and civil war is to. . .find an enemy against whom [the subjects] can make common cause.” Quoted in Jack Levy & William F Mabe Jr., *Politically Motivated Opposition to War*, 6 INT’L STUD. REV. 65, 65 (2004).

¹³⁶ As Rodrik put it, “[w]hatever its other economic consequences, free trade in nineteenth century America would have further reinforced and strengthened slavery as a social and political institution. The damage that it could have done to the development of political institutions can only be guessed at, but the picture is unlikely to be a pretty one.”

perceived dual threat of northern Republican dominance and the social rise of African Americans might have gone a long way in cementing the solidarity of southern whites; indeed, such solidarity might even have allowed them to secure collective goods, including the eventual lowering of trade barriers.¹³⁷ However, very few today would doubt that this political maneuver came at too high a social cost.

In a more contemporary illustration, others have fretted that in reinforcing the power and solidarity of management in large companies, the move to free trade might have weakened the political bargaining power of labor groups in the United States. Acemoglu and Robinson summarize one view of this move's social costs: “[s]tarting in the 1970s, policies that encouraged free trade increased the level of competition in the US economy, undercutting the ability of a number of private sector unions to raise wages. . . The decline in union membership may have had various important consequences, for example, as an important contributing factor to the rise in income inequality.”¹³⁸

B. Can Identity Politics Undo the Damage Caused by Narrow Economic Groups?

One plausible use for identity politics is to offset the excessive political influence of narrow economic groups in international law. Recent academic and popular commentary has focused on the tendency of political elites to underestimate economic globalization's social costs, which have been said to include the disappearance of entire industries, the demoralization of organized labor, and increases in economic inequality.¹³⁹ The core idea is that if moral inflation can expand the horizons of politicians beyond the narrow material interests of their constituents, it may help them take a more comprehensive view of both the costs and benefits of globalization. However, any moderating effect of identity politics is likely to occur when

DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 29-30 (2011). Indeed, various contemporaries tended to link the Southern embrace of free trade with resistance to civil rights. As one commentator observed regarding the political environment during the Great Tariff Debate of 1888: “Free trade was described as a regressive measure to harm free labor and cripple progress, while protection was tied to prosperity and advancement—even for the “negro race.” REITANO, *supra* note ____ at 95.

¹³⁷ As Coser observes: “This pervasive fear among many Southerners of the Negro’s aggressive violence serves an important functions in maintaining the rigid social status system...” COSER, THE FUNCTION OF SOCIAL CONFLICT 109.

¹³⁸ Daron Acemoglu & James Robinson, *Economics versus Politics: Pitfalls of Policy Advice*, 27 J. ECON. PERSP. 173, 179 (2013).

¹³⁹ Pol Antràs, Alonso de Gortari, & Oleg Itskhoki. *Globalization, Inequality and Welfare*, 108 J. INT’L ECON. 387 (2017); RODRIK, THE GLOBALIZATION PARADOX 190-200 (discussing various ways in which globalization impinges on valuable democratic choices);

citizens belong to cross cutting cultural and economic groups and are pulled in different directions.¹⁴⁰

The possibility that the dynamic will unfold in this benign way is highly questionable. Indeed, it is probably more likely that the elements of social identity and material self-interest will tend to reinforce and exacerbate each other. For instance, in the examples discussed above from American history, there was usually a high incidence of overlap between moral-cultural and economic cleavages over economic globalization, which tended to increase polarization and disintegrative social conflict.

Nevertheless, one might argue that even if the escalating rhetoric over tariffs in the United States was destabilizing during the late nineteenth and early twentieth century, there is no reason why it needs to be so today. At first glance, the free trader in the modern era does seem to have the rhetorical upper hand. In sharp contrast to the global economic controversies of that past era, today's reformers are free from the burdens of having justifications for free trade muddled together with the issues of civil rights in the deep South, the status of free labor, revenue collection, or the support of infant industries. With all these moral and policy pretexts that once supported protectionism safely out of the way, the reformer is now free to defend free trade and open foreign investment in pure and transparent terms, without having to resort to subterfuges and other defensive stances. In addition, once the voters have been exposed to the competing moral rhetoric of all sides, they will presumably have an opportunity to evaluate them carefully, and those that seem to serve only narrow and excessively selfish interests will be revealed.

Upon further examination, however, the free trader's rhetorical advantage might be overstated. The challenge is that rhetorical appeals to the universal ideals advanced by free trade, such as the spread of human rights and an increase in global economic welfare, are often not that compelling.¹⁴¹ To appeal to the American voter, free trade often needs to be wrapped in the mantle of nationalism, and its benefits have to be couched in the language of self-interest.¹⁴² For the average American voter, the

¹⁴⁰ See SEYMOUR MARTIN LISPET, *POLITICAL MAN: THE SOCIAL BASIS OF POLITICS* 88-89 (1960).

¹⁴¹ For the argument that free trade promotes human rights, see EMILIE M. HAFNER-BURTON FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS (2009).

¹⁴² As Krugman once put it,

Anyone who has tried to make sense of international trade negotiations eventually realizes that they can only be understood by realizing that they are a game scored according to mercantilist rules, in which an increase in exports—no matter how expensive to produce in terms of other opportunities foregone—is a victory, and an increase in imports—no matter how many resources it releases for other uses—is a defeat. The implicit mercantilist theory that underlies trade negotiations does

avowed purpose behind NAFTA cannot be to improve the fortunes of the Mexican or Canadian industrial worker, or even to improve global welfare. Instead, free trade is often justified primarily in terms of its benefits to the American businesses and the workers they hire. It is the language of nationalism as mutual benefit, and not sacrifice for the good of others, which free market politicians tend to pitch.

However, playing the nationalist card in favor of open markets is tricky. Put simply, once the heavy machinery of nationalistic rhetoric has been deployed in the service of free trade, then the rhetorical playing field is levelled. The rhetoric of economic nationalism is a two way street: it can be invoked to further the goals of breaking into foreign markets, but it can also be enlisted to protect local markets from foreigners who do not play by the rules.¹⁴³

In any event, the ailing or protectionist industry has two powerful responses, which may offset any rhetorical advantage enjoyed by export groups. First, those who envision international trade primarily as a mutually cooperative enterprise tend to discount the lure of national competition in the public imagination. Even President Reagan's attachment to free trade, some scholars have argued, "came to reflect an intuitive sense of the Darwinian process and America's ability to come out as Number One."¹⁴⁴ However, is not only national leaders who may feel that way. If the desire for status is as pervasive among groups as it is among individuals, then some voters may not only be motivated by the benefits of mutual cooperation, but may also prefer to enhance the relative economic position of the United States. In other words, they may want United States to have a trade surplus with China, and not the other way around.¹⁴⁵

Second, and more relevant to the modern international legal regime, is the rhetorical force of fairness. The appeal to fairness and the resilience of

not make sense on any level, indeed is inconsistent with simple adding-up constraints; but it nonetheless governs actual policy.

Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LIT. 113, 113 (1997).

¹⁴³ Of course, appeals to nationalism have their limits. To the average voter, the specter of powerful American businesses clamoring for special treatment through trade barriers may still rankle. Cass Sunstein has criticized the quest for naked preferences in the political sphere on a variety of moral, constitutional, and policy grounds. Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984). When it comes to the most transparent and most blatant forms of protectionism, voters may tend to agree. See Daniel Kono, *Optimal Obfuscation: Democracy and Trade Policy Transparency*, 100 AM. POL. SC. REV. 369, 369-70 (2006).

¹⁴⁴ Jagdish Bhagwati and Douglas Irwin, *The Return of the Reprocitarians—US Trade Policy Today*, 10 WORLD ECON. 109, 124 (1987).

¹⁴⁵ See Mutz & Kim, *The Impact of Ingroup Favoritism on Trade Preferences*, supra note ___ at 827-30 (observing that for an international trade policy to win public support, American voters not only want the United States to gain, but also that the trading partner loses so that the United States has a greater relative advantage).

the American worker against foreign competition has a certain patriotic ring, and it may resonate well with certain segments of society. To obtain the desired rhetorical effect, however, it may not be necessary that all these claims of foreign countries cheating and breaking the trading rules be clearly demonstrated. It may be sufficient that they be plausible. With respect to transparent and wealthy trading partners with a long democratic culture, the claim of discrimination may be much harder to sustain. In other words, the optics look less convincing if the American politician accuses Canada of routinely running roughshod over workers in the United States.¹⁴⁶ However, with respect to countries like China, Russia, and even Mexico, the story is different. Countries that neatly fit what one commentator called the politician's "enemy image" may be more vulnerable to being denounced or not trusted to play by the rules.¹⁴⁷ In a 2012 Pew Foundation Survey, for instance, over two-thirds of the American public say China cannot be trusted too much or at all; indeed, only 26% said that China could be trusted a great deal or a fair amount.¹⁴⁸

Nonetheless, for economists, who regard themselves as practical problem solvers, the obsessive focus by politicians on reciprocity and rivalry in international economic agreements might still seem largely misplaced. The view expressed by Bhagwati and Irwin is somewhat typical. "Reciprocity," they argued, "turns rapidly into a negation of an open trading system, making fair trade an enemy of free trade, not its ally."¹⁴⁹ To be sure, if the only purpose of invoking reciprocity and rivalry in these debates is to enlist them in the service of consumer welfare, then this skepticism is warranted. However, if certain voters happen to value the appearance of equity and fairness more than efficiency of the market, then this criticism misses the mark.

What counts as cheating or not playing by the rules with respect to export subsidies is, of course, the crucial question. Take, for instance, the

¹⁴⁶ According to one commentator's analysis of the World Values Survey, Americans trust Canadians, whom they are likely to perceive to be much like themselves . . . Canadians rank higher than American Hispanics, who are slightly more trusted than Mexicans, who rank at about the same level as "most people." We are constantly less likely to trust people who look different from ourselves or live in societies that have traditionally been at odds with our own, for instance the Chinese and the Russians.

ERIC M. USLANER, THE MORAL FOUNDATIONS OF TRUST 29, n.23 (2002). The most natural reading of the Uslaner's summary is that by Americans in this survey, he is referring to white Americans. *See also* Paul Brewer, et al, International Trust and Public Opinion about World Affairs, 48 Amer. J. Pol. Sc. 93 (2004).

¹⁴⁷ Duncan Snidal, *Relative Gains and the Pattern of International Cooperation*, 83 AM. POL. SC REV. 701 (1991).

¹⁴⁸ U.S. Public, Experts Differ on China Policies, PEW RES. CTR., <http://www.pewglobal.org/2012/09/18/chapter-1-how-americans-view-china/>.

¹⁴⁹ Bhagwati & Irwin, *The Return of the Reciprocitarians*, *supra* note ___ at 127.

question of government subsidies to increase export output. This is a recurring accusation lobbied by American politicians against the Chinese government.¹⁵⁰ By their very nature, if they occur, such subsidies distort the normal operations of the market. Since they lower the costs of Chinese firms, they will provide them an economic advantage over American firms in terms of output and access to foreign markets.¹⁵¹ If the subsidies are sufficiently high, then it may even be possible for the Chinese firms to export its products to the United States at below cost. In the short run, the consumers in the United States may enjoy the benefits of lower prices, but suffer in the long run if the sector becomes monopolized by the foreign manufacturers who then charge higher prices.¹⁵²

Nevertheless, these subsidies can also be notoriously hard to verify and detect. On the one hand, their difficulty of detection increases the chance that one side can use it as a ruse to retaliate by claiming the other side is playing loose with the rules. Insofar as the accusation by American politicians of Chinese cheating is a form of cheap talk—because it cannot be easily verified, then it may pay the American politician to invoke it whenever they would like to pacify a local industry by erecting barriers against Chinese exports. In other words, since it will be sometimes difficult to verify whether a violation of the subsidies' rules is taking place, it will also be difficult to verify whether the accusation of a violation is also true. To summarize, this difficulty of detection can then lead to an oversupply of cheap-talk accusations.

¹⁵⁰U.S. Trade Representative, *2017 USTR Report on China's WTO Compliance*, January 2018, p. 2, <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>. (“[I]t seems clear that the United States erred in supporting China’s entry into the WTO on terms that have proven to be ineffective in securing China’s embrace of an open, market-oriented trade regime.”)

¹⁵¹ For a helpful background on the China’s economic policies and the peculiar challenges they have posed to the WTO’s legal mechanism, see Mark Wu, “*The ‘China, Inc.’ Challenge to Global Trade Governance*, 57 HARV. INT’L L REV. 261 (2106).

¹⁵² Usha C.V. Haley and George T. Haley, *How Chinese Subsidies Changed the World*, HARV. BUS. REV. , Apr 25, 2013, available at <https://hbr.org/2013/04/how-chinese-subsidies-changed> (“Some have argued that Chinese subsidies help consumers by keeping prices low. Our research leads us to conclude that like other monopolies, Chinese companies will raise prices as international competition retreats.”). But some have argued that in a second-best world with trade barriers, export subsidies may sometime be welfare enhancing. See Alan O. Sykes, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, 2 J LEG ANALYSIS 505, 516 (2010) (“As noted earlier, if trade barriers cause the volume of trade to be inefficiently small, export subsidies can enhance welfare by expanding the volume of trade.”); Andrew Green & Michael Trebilcock, *Enforcing WTO Obligations: What Can We Learn from Export Subsidies?*, 10 J INT’L ECON. L 653 (2007) (“The prohibition [subsidies under the WTO] itself is controversial as, at first glance, export subsidies seem only to increase trade and harm only the subsidizing country”); Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT’L L 127, 133 (2007) (calling the ban on export subsidies under the WTO “a puzzle.”).

On the other hand, because cheating by using subsidies is harder to detect and easier to hide, governments may be more likely to deploy it. It is argued, for instance, that because the harmful effects of tariffs are easier for voters to understand politicians may have an incentive to replace them with less transparent non-tariff barriers.¹⁵³ The argument with respect to complex export subsidies may not be entirely dissimilar, although for export subsidies the goal for eluding transparency may be to deceive potential plaintiffs rather than voters.

However, that begs the question: if such subsidies are hard to detect, do we really have any idea how extensively it is being used by countries like China? It is hard to say, but a recent interesting article sheds some light. Kalouptsidi deploys a clever econometric model to try to estimate the extent of Chinese intervention in the ship building industry, and concludes that Chinese subsidies reduced shipyard costs by 13-20 percent between 2006-2012; which amounted to about 1.5-4.5 billion US dollars in assistance.¹⁵⁴ She conjectures that the effect of these disguised subsidies played a significant role in the expansion of the Chinese shipping industry at the expense of the lower-cost Japanese and Korean shipyards.¹⁵⁵ Thus, in at least one case, hidden subsidies might have an important effect in shaping global demand for products away from the covered sector in one country to another.

One might suggest the following response: if American politicians are worried about China and other countries subsidizing exports, why do not they simply bring more claims before the WTO? Why resort to heated public and morally charged denunciations about cheating and then attempt to retaliate unilaterally? The short answer is that many such claims have been brought before the WTO; indeed, in response to one such claim in 2016 China agreed to dismantle certain aspects of its export subsidy program.¹⁵⁶

Nonetheless, one may reasonably argue that there are limitations to what one may expect from WTO enforcement. First, the detection problem in export subsidies will likely remain a problem in the near future; in other words, there is likely to be a gap between the scope of plausible claims that can be brought for violating the export subsidy rules and what can be proven

¹⁵³ See Kono, *Optimal Obfuscation*, supra note__ at 369-70.

¹⁵⁴ Myrto Kalouptsidi, *Detection and Impact of Industrial Subsidies: The Case of Chinese Shipbuilding*, 85 REV. ECON. STUD. 1111, 1113 (2018).

¹⁵⁵ See *id.* at 1113.

¹⁵⁶ Diane Bartz, *U.S. says China to scrap some export subsidies*, Reuters, April 14, 2016, available at <https://www.reuters.com/article/us-usa-china-trade-idUSKCN0XB1UQ>; James Bacchus, Simon Lester, and Huan Zhu, *Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented*, POL. ANALYSIS, Nov. 15, 2018, <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa856.pdf> (alluding to some of the WTO claims brought to challenge China's export subsidies).

competently before an adjudicatory body.¹⁵⁷ Second, whenever certain kinds of offenses prove to be hard to detect, economic theory suggests that the sanctions for those offenses ought to go up.¹⁵⁸ For instance, under domestic American law, higher criminal sanctions are imposed by those in positions of trust who because of their position commit crimes that are hard to detect.¹⁵⁹

Alas, there are no available mechanisms for including punitive sanctions under the WTO, so this option is not available. In the presence of what seems like a remedial gap in the WTO, it may be then be tempting for certain governments to resort to “*extra legal*” measures to offset any negative effects of hard to detect subsidies. Of course, with enough creative interpretation, some form of legal authority will usually be marshaled to support any such unilateral action.

To recapitulate, there is no reason to think that in the foreseeable future free trade groups will have a clear rhetorical advantage over their protectionist counterparts, especially when one considers the expressive pull of rivalry and fairness in the imagination of American public. As the circumstances now stand, the combination of accusation by American politician of cheating by certain countries on export subsidies and the lack of trust towards said countries make the environment ripe for all kinds of moral inflation.

¹⁵⁷ According to the WTO, “[c]omprehensive information on the use of subsidies is hard to come by, either because governments do not systematically provide the information or because multiple data sources use different definitions and classification systems.” See WTO Director-General, WTO Annual Report 2006: Exploring the links between subsidies, trade and the WTO xxx (2006), https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf.

¹⁵⁸ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 174 (1968) (observing that crimes that are difficult to detect warrant more severe sanctions).

¹⁵⁹ As Judge Posner observed in a mail fraud case:
Frauds at the top of the range are harder to pull off and it is there that we would like defrauders to concentrate their efforts-beating their heads against a stone wall most of the time. Frauds at the bottom of the range are easier to pull off and less likely to be detected and punished, and so we want a higher than average punishment for these defrauders. . . .
United States v. Grimes, 173 F.3d 634, 638 (7th Cir. 1999).

VI. CONCLUSION

In the United States, whenever the distributional concerns about international law are highlighted, a common response is to recommend mechanisms that expand the horizons of politicians and encourage popular participation. This Article suggests why these efforts in favor of further publicity and transparency in international law may backfire. Thus, rather than curb destabilizing forces in international law, these proposals are more likely to do the opposite: they may covert low stakes disagreements over material gains into high stakes fights over social identity.

To be clear, the strategic use of status and symbols to elevate relatively mundane concerns to issues over which a great number of people are prepared to fight intensely is hardly unique in American political development. In Federalist 10, Madison warned, “where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts.”¹⁶⁰ However, a deeper problem with moral inflation in international law is that it might be used to sate the short-term preferences of those with a high demand for expressive goods, while imposing significant downstream costs on groups that have interests that are more material at stake. These costs may come in two ways: first, there are costs in terms of legal volatility, where international law and constitutional norms may swing widely from one electoral cycle to another. Second, there are costs in terms of institutional fit. International courts and tribunals may not be particularly equipped to handle the kinds of high stakes claims that are typical of groups that are embroiled in disagreements over social status and identity.

¹⁶⁰ THE FEDERALIST No. 10 (JAMES MADISON).