Dear Colleagues,

Many thanks for taking the time to read this draft. It is very much still a work-in-progress. In particular, we intend to undertake two tasks in our next round of revisions. First, we intend to shorten the draft during our next round of revisions, especially Part I. For those familiar with the history of how the United States has regulated international trade, much of Part I can be skimmed. I would especially welcome comments on the extent to which the history section, or particular parts therein, are valuable (or not). Second, this draft was written before President Trump announced tariffs on steel and aluminum pursuant to Section 232 of the 1962 Trade Expansion Act, which authorizes trade restrictions in the name of national security, and additional tariffs on Chinese products pursuant to Section 301 of the 1974 Trade Act. I’ll discuss how these actions fit within our framework—primarily the power to declare trade wars—in the talk.

I look forward to our discussion.

Best,
Tim Meyer
There are two paradigms through which to view trade law and policy within the American constitutional system. One paradigm sees trade law and policy as quintessentially about domestic economic policy. Institutionally, under the domestic economics paradigm, trade law falls within the province of Congress, which has legion Article I authorities over commercial matters. The second paradigm sees trade law as fundamentally about America’s relationship with foreign countries. Institutionally, under the foreign affairs paradigm, trade law is the province of the President, who speaks for the United States in foreign affairs. While both paradigms have operated throughout American history, the domestic economics paradigm dominated in the nineteenth century, and the foreign affairs paradigm from the mid-twentieth century.

Since the end of the Cold War, however, trade law and policy has become increasingly divisive and contentious. Trade law and policy entered a new era of liberalization, characterized by international organizations (like the WTO) and a shift to mini-lateral free trade agreements. By 2016, backlash was in full force, with candidates Donald Trump, Bernie Sanders, and Hillary Clinton all coming out against the Trans-Pacific Partnership (TPP). Since taking office, President Trump has instituted high tariffs on solar panels, threatened to withdraw from NAFTA, and sparked concern about a trade war with China.

This Article makes three contributions. First, we argue that the current discontent over trade is not just a matter of the distribution of economic gains and losses but a matter of the distribution of constitutional powers. We provide a thorough descriptive account of the two paradigms for trade within our constitutional system and show that trade has migrated from a domestic to a foreign affairs matter – and ultimately that it has becoming unhinged even from specific foreign affairs objectives. As trade drifted further away from the balance struck by our separation of powers and became increasingly rooted in the Presidency, agreements liberalizing trade rules became more viable – but at the cost of the political sustainability that comes with greater congressional involvement.

Second, we make a normative case for rebalancing trade within the constitutional structure. We argue that trade shares few similarities with other foreign affairs and national security areas in which the President is seen to have a functional advantage, and perhaps surprisingly given the conventional wisdom, that the parochial interests of Congress present strong benefits to trade policymaking that are widely undervalued.

Finally, we apply this rebalanced framework for trade law and policy to a variety of contemporary debates, including the role of fast track authority in negotiating and approving trade agreements, the President’s power to declare trade wars, the scope of the President’s authority to withdraw from trade agreements, the use of unorthodox international agreements in the commercial context, and the increasing conflict between trade agreements and state and local authority, which we term “trade federalism.”

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# TRADE AND THE SEPARATION OF POWERS

Timothy Meyer & Ganesh Sitaraman

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INTRODUCTION

There are two paradigms through which to view trade law and policy within the American constitutional system. One paradigm sees trade law and policy as quintessentially about domestic economic policy. Under this *domestic economics* paradigm, tariffs raise revenue to fund government programs, infrastructure, and social goods. Trade restrictions can encourage the development of infant industries, protect developed industries, and guarantee the robust industrial base often thought essential for homeland security and defense. Trade law also seeks to guarantee an egalitarian distribution of wealth and opportunities by safeguarding the wages and jobs of American workers. Institutionally, under the domestic economics paradigm, trade law falls within the province of Congress, which has legion Article I authorities, including the powers to regulate foreign commerce, set tariffs and imposts, and originate revenue bills. Congressional authority is desirable because domestic economic policy is appropriately pursued through a participatory and representative process that includes interest group bargaining, logrolling, and attention to regional diversity.

The second paradigm sees trade law as fundamentally about America’s relationship with foreign countries. Under the *foreign affairs* paradigm, tariff rates should be negotiated as part of agreements with foreign countries aimed at achieving international consensus on barriers to trade. Trade agreements are a tool of diplomacy and geopolitics, opening markets to countries that will side with democracy and human rights, asserting American leadership in setting the rules of the road for global commerce, and punishing those who violate international norms through sanctions. Trade agreements also seek to help American businesses go abroad in search of new markets and new consumers, while providing American consumers with access to cheaper goods. Institutionally, under the foreign affairs paradigm, trade law is the province of the President, who speaks for the United States in foreign affairs, serves as Commander-in-Chief, and is empowered under Article II to appoint and receive Ambassadors and to negotiate and make treaties with foreign nations. Executive power is desirable because the President is best positioned to assess geopolitical conditions, negotiate with foreign countries, and represent the interests of the nation as a whole.

These two constitutional paradigms have coexisted throughout American history, fading in and out of view as foreign affairs or domestic economic issues were most salient. But by and large, the domestic economics paradigm defined trade law from the founding into the early 20th century, with Congress in the driver’s seat. Successive tariff acts advanced a variety of goals crucial to the success of the new nation: generating revenue to fund the government, developing the West through internal improvements, protecting burgeoning industries from foreign competition, and safeguarding the interests of laborers from low-wage foreign workers. Over time, however, the foreign affairs paradigm came to dominate, with the President wielding greater and greater power over trade policy. With American manufacturing leading the globe, World War II leaving foreign countries in ruins, and the world locked in a contest between democracy and communism, trade was increasingly seen as a matter of foreign relations.
Since the end of the Cold War, however, trade law and policy has become increasingly divisive and contentious. Trade law and policy entered a new era of liberalization, characterized by international organizations (like the WTO) and a shift to mini-lateral free trade agreements. But even as President Clinton concluded agreements like NAFTA and negotiated China’s entry into the WTO, anti-trade advocates from Pat Buchanan to Ross Perot gained substantial followings. By the 2016 election, the political consensus over trade had broken down. Republican presidential nominee Donald Trump opposed the pending Trans-Pacific Partnership (TPP), as did Democratic-Socialist Bernie Sanders and even Democratic presidential nominee Hillary Clinton, who announced her opposition to the trade agreement despite having supported it as Secretary of State. President Trump has said that he will either renegotiate NAFTA or withdraw from the agreement, he has imposed 30 percent tariffs on solar panels and washing machines, and he has laid the groundwork to do the same for steel and aluminum.

There is also worry that the President will start a full-blown trade war with China.

With the potential for significant changes in trade policy on the horizon, many are scrambling to understand the limits of the President’s powers and whether Congress could block the President if, for instance, he tried to withdraw from NAFTA. Perhaps paradoxically, President Trump relies on expansive presidential power derived from the foreign affairs paradigm, but he does so in order to advance domestic economic goals that would traditionally be within the scope of Congress’s constitutional authority to make economic policy.

We make three contributions in this Article. First, we argue that the current discontent over trade is not just a matter of the distribution of economic gains and losses, but a matter of the distribution of constitutional powers. We provide a descriptive account of the two paradigms of trade under the Constitution from the founding until the present. This account explains the two paradigms and shows that the domestic paradigm dominated in the long 19th century until it was supplanted in the mid-20th century by the foreign affairs paradigm and the rise of

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3 Ana Swanson, *Trump Administration Proposes Stiff Penalties on Steel and Aluminum Imports*, N.Y. Times (Feb. 16, 2018).


We show that one of the fundamental challenges for contemporary trade law and policy is that over the last few decades, trade has increasingly become unhooked from either the domestic economics paradigm or the foreign affairs paradigm. The rise of presidential trade powers has meant that in the short-run, trade liberalization has proceeded expeditiously, but with little regard for either of these historic aims. And it has come at a long-term cost to the sustainability of trade policies within domestic politics. The causes of the current backlash over trade are, therefore, intimately tied to the distribution of constitutional powers and the statutory frameworks that implement those powers.

Second, we seek to make a normative case for rebalancing trade law away from the foreign affairs paradigm, which has all but drowned the domestic economics paradigm. We do not mean to suggest that trade should be seen as wholly domestic, subject only to the messy process of congressional horse-trading. Rather, we argue that some of the justifications for expansive presidential power in this arena are inapplicable and others are far weaker than conventionally assumed. In this sense, we seek to “normalize” trade within the constitutional system, rather than seeing it as exceptional simply because it touches on foreign affairs. We argue that many of the features that supposedly make “foreign affairs” different from “domestic affairs” do not apply, or do not apply so strongly, in the case of trade.

In addition, we question the oft-repeated claim that the “nationalist” president is better suited to making trade policy for the whole country. Considerable constitutional and democratic benefits, we argue, flow from Congress asserting its parochial interests. At the same time, we show that the downsides of congressional capture by interest groups must be compared with the downsides of presidential capture – and that contrary to the “nationalist” story, the institutional design of the trade presidency is one that heightens, rather than reduces, the risk of capture.

One of the implications of rebalancing trade in favor of the domestic economics paradigm, is that many puzzles and problems in contemporary trade and international economic law can be addressed by reference to “ordinary” domestic law principles, doctrines, and practices. Our third aim, therefore, is to illustrate the promise of taking a more balanced constitutional approach to trade law and policy in a variety of areas. First, we show, contrary to the conventional wisdom, how fast track authority—a legislative procedure by which Congress reviews and approves presidentially-negotiated trade agreements without the opportunity to amend the agreements or their implementing legislation—amounts to a cession of congressional power, rather than an exercise of it. Second, the expansion of presidential powers in trade has grown so significant that the President, we conclude, has considerable power to declare trade wars – even in spite of Congress’s powers under Article I. The reason is that Congress itself has abdicated the field, without even putting in place the checks and balances afforded

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to ordinary regulatory policymaking in the administrative state. Third, we explore the specific conditions under which the President has the power to withdraw from trade agreements, including NAFTA. Taking a normalized approach to the role of trade within the separation of powers requires focusing on specific statutory authorizations. This places us at odds with scholars who conclude the President has almost unlimited power in this arena, as well as those who hold the President has virtually no discretion. Finally, we discuss two developments related to international agreements – the recent trend toward soft law agreements and the impact of international trade agreements on states and local regulations. With respect to what we call “unorthodox international agreements,” trade sits uncomfortably. While these agreements have been concluded in a variety of areas – including the Iran Nuclear Deal and the Paris Climate Agreement – Congress’s Article I powers suggest greater caution in the use of such agreements on commercial matters. Another pressing issue is that international trade agreements increasingly threaten the traditional powers of states and local governments. We call this intersection “trade federalism” and discuss how the imbalance in the constitutional separation of powers on trade issues undermines the commitment to trade federalism embedded in the Constitution.

More broadly, our aim is to reintroduce foreign relations law and U.S. trade law. Foreign relations law scholars generally focus on the proper distribution of power between the branches of government, but have failed to apply this framework to international trade, one of the central policy issues of our time. Thus, while constitutional law scholars have occasionally addressed trade specifically, they normally focus on the role of treaties in the constitutional system, clumping together trade deals with other kinds of international agreements in spite of trade’s explicit and unique connections to Article I powers. So strong is the foreign affairs paradigm that some have noted that the foreign commerce power can get conflated with the treaty power.

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7 See Part III.C.
International trade scholars, for their part, focus on outcomes—trade liberalization or protection—and pay little attention to the domestic constitutional law framework. To the extent they focus on domestic considerations, they emphasize domestic political constraints on liberalizing trade, rather than the locus of constitutional authority over trade policy within American democracy. Focusing specifically on trade’s role within the separation of powers illuminates new issues and contributes to debates in both arenas.

The Article proceeds in three parts. Part I discusses the two paradigms for trade within the separation of powers and argues that the recent trends first toward the foreign affairs paradigm and then toward liberalization has unsurprisingly strained trade law and policy. Part II makes the normative argument against overly emphasizing trade’s relationship to foreign affairs. Part III discusses implications for a variety of debates in constitutional and statutory law. A brief conclusion follows.

I. TRADE AND THE SEPARATION OF POWERS: TWO PARADIGMS

Trade has been a central object of public policy since the founding of the country. It is no surprise, therefore, that the Constitution speaks directly on questions of trade, rooting considerable powers in Congress while reserving other powers to the President. The result is that trade exists in a precarious position in our constitutional system. From the founding through the early 20th century, trade was largely seen as a domestic economic issue, with its constitutional home in Congress. In the mid-20th century, trade became a foreign affairs issue and a new paradigm emerged, with authority shifting to the President. Today both paradigms have broken down, as trade policy is increasingly unmoored from either traditional domestic economic or foreign policy objectives. The result has been conflict and controversy. While many focus on the distribution of economic gains and losses associated with trade agreements, we argue here that drift from the distribution of constitutional powers is also a significant issue. As power has shifted to the president, trade policy has become less sustainable within domestic politics.

A. Trade as Domestic Economics: The Founding through the Long 19th Century

While scholars have recognized that trade law operates at the nexus of both domestic and foreign affairs, these two approaches to trade within the constitutional system have been surprisingly underdeveloped. We define the domestic economics paradigm to include three different components: (1) the goals of trade policy are focused on domestic economic issues, (2) the constitutional home for trade policy is within Article I, and (3) the functionally desirable locus of trade policy is in Congress.

Textually, Article I empowers Congress with a variety of tools to govern trade policy. The most obvious sources of congressional power are the power to “regulate commerce with foreign nations,” the powers to “lay and collect taxes, duties, imposts, and excises,” and the power to make any laws “necessary and proper” to its Article I authorities or any other grant of power elsewhere in the Constitution. In addition, the Origination Clause mandates that “all bills for raising revenue shall originate in the House of Representatives.” If generating revenue is the main purpose of a statute governing international trade, then the Constitution requires both houses of Congress to be involved (and, by implication, bars the use of the treaty power to accomplish the same goals).

Functionally, bargaining over economic policy has been understood as appropriately within the domain of Congress. Even at the Founding, the United States was a country of diverse economic interests, from bankers in New York to small farmers in New England to plantation owners in South Carolina. Today, of course, that diversity has been amplified both by the geographic growth of the United States and the staggering complexity of the world’s largest economy. Congress reflects this diversity of economic interests in a way that the President, elected both indirectly and nationally, cannot. Members of Congress have smaller constituencies, are elected directly by the people and (in the case of the House of Representatives) at great frequency. As a result, the legislature is well-suited to capture the diversity of preferences and interests in a large and extended republic.

When it directly makes trade policy, this diversity of interests has often led Congress to protect American markets. In part, this protectionist bent reflects the deliberately local way that members of Congress interact with their constituents. Businesses of modest size that suffer from foreign competition can effectively influence their congressional representatives’ views on trade policy, even if they cannot reach the more remote executive branch. But Congress’s protectionist tendencies also reflect the fact that Congress often uses trade policy to achieve domestic economic goals, such as redistribution. Of course, it is not necessarily true that protectionism and the use of trade policy to pursue domestic economic policymaking goals need be married to congressional power. We could easily

13 U.S. Const., art. I, sec. 7.
14 Rebecca M. Kysar, On the Constitutionality of Tax Treaties, 38 Yale J. Int’l L. 1 (2013); Yoo, Laws as Treaties, supra note xx.
imagine a protectionist President and a laissez-faire congress. But over two centuries of American history, congressional power and the domestic goals of trade policy have largely been in alignment.

1. The Origins of Federal Authority over International Trade — Take the origins of Congress’s power to collect tariffs and the parallel provision barring the states from establishing tariffs. Under the Articles of Confederation, the U.S. government suffered from a severe lack of revenue. The government needed funds to pay its debt to foreign nations that supported the insurgent country during the Revolutionary War, to cover the costs of running the government, and to pay veterans and fund the army in its battles against Indians on the western frontier. The confederation congress, however, could not establish a nation-wide tariff (or “impost”) without the unanimous consent of the states. Rhode Island (and later New York) balked because it had its own tariff and feared the loss of state revenue.

As a result, the confederation congress was left to issue “requisitions,” or requests to the states to fund the confederation government. The states responded with taxes on their citizens, many of which were regressive. Coming in the midst of a severe post-war economic depression, state-imposed taxes led to widespread revolts across the country. The most famous was Shays’ Rebellion, but protests, conflict, and even armed insurrection were common from Massachusetts to Pennsylvania to Virginia and North Carolina. So important were these economic sources of domestic discontent that Alexander Hamilton captured the origins of the Philadelphia Convention in three words: “Impost begat Convention.”

The tariff clauses of the Constitution were a response to these domestic challenges. The goal of the tariff clause was twofold: revenue and redistribution. On the revenue side, a nation-wide tariff would provide a source of revenue to fund the new government. On the redistribution side, advocates argued that the creation of a tariff would have two effects. First, it would allow the states to reduce or eliminate their regressive taxes. Second, it would redistribute the burdens of

17 Indeed, President Trump and the current Republican-controlled Congress arguably fit this rare configuration.

18 See, e.g., Koh, Congressional Controls, supra note 8, at 1194 (describing the Smoot-Hawley regime and identifying the institutional choice of Congress with protectionist policies).


20 Id. at 12, 26.


22 HOLTON, supra note xx, at 65-66; BROWN, supra note xx, at 36-37.

23 HOLTON, supra note xx, at 145-46. On Shays’ Rebellion, see DAVID P. SATZMARY, SHAYS’ REBELLION (1980).


government (and therefore help farmers, artisans, and other lower-class people) because the tariff would largely fall on luxury and manufactured goods that wealthier people consumed. When the first Congress passed a tariff in 1789 (the tariff was the second act of Congress after a bill establishing the oath of office), states slashed their tax rates considerably, in some cases by more than 90 percent. The tariff’s origins were thus tied to domestic economic questions of revenue and redistribution, as well as to federalism concerns about the whether to tax at the state or national level.

Over the course of the 19th century, trade law and policy was virtually coextensive with the tariff. The justification for tariffs shifted over time, but the central purposes of tariffs were all tied to domestic economics: revenue, internal improvements, protection of industry, encouragement of infant industry, and safeguarding labor. In the early republic, Henry Clay sought to link the revenue generated by tariffs to funding internal improvements, such as canals and roads, that would connect the remote western parts of the United States to the East Coast. At the same time, tariffs would benefit the northeast by protecting infant manufacturing operations from foreign competition.

Clay’s “American System” thus redistributed wealth from the East toward the less-developed West, while still providing a benefit to northeasterners. Southerners opposed Clay’s American System. They sought to decouple internal improvements from the tariff, and they advocated for a “tariff for revenue only” instead of a tariff for the protection of domestic industry. The tariff was largely a tax and transfer regime designed, on their analysis, to redistribute wealth from the South to the North and West. In this way, the tariff operated much in the same way that our current income tax scheme operates, providing the vehicle for redistribution across the nation.

By the second half of the 19th century, the justifications for the tariff shifted toward industrial and labor protection. To mitigate the “social dislocations

26 Id.
27 MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT 211-12 (2003).
28 For a discussion of the broader federalism implications of trade policy, see Part IV, infra.
30 FRANK WILLIAM TAUSIG, THE TARIFF HISTORY OF THE UNITED STATES 1, 23 (6th Ed. 1913) (describing “protection to young industries”); Earlier, during Jefferson’s administration, the embargo and non-intercourse acts had a similar effect, spurring domestic manufacturing. Id. at 16-17. The War of 1812 made clear the military necessity of domestic manufacturing and the role a tariff might play in supporting homegrown industry. Indeed, during this period, even famous skeptics of the tariff, like John C. Calhoun supported high tariffs. Calhoun’s support was because the tariff was “connected with the security of the country.” IRWIN, supra note 29, at 130.
31 For an overview, see MAURICE G. BAXTER, HENRY CLAY AND THE AMERICAN SYSTEM (1995).
32 IRWIN, supra note 29, at 155
33 Id. at 159-60
generated by the industrial revolution," the Republican Party advocated for tariffs as a way to keep wages high for American workers. In the absence of the tariff, they argued, the American market would be flooded by cheap goods made by low-wage workers in foreign countries. So strong was the protectionist justification for tariffs that by the 1870s, advocates pushing to reduce tariffs did not argue that Congress should abolish protectionist tariffs. Instead, they pushed to restrict tariffs to only items with protectionist benefits. They succeeded, and a variety of non-protective duties (that is, revenue-raising duties, such as the tariffs of coffee and tea) were eliminated.

2. Congressional Primacy during the Long 19th Century — Institutionally, tariff policy lay with Congress throughout this period (often referred to as the long 19th century), and Congress passed laws enumerating in great detail every item to which a duty applied. The McKinley Tariff of 1890, for example, had a schedule on “Chemicals, Oils, and Paints” that included acetic or pyroligneous acid, boracic acid, chromic acid, citric acid, sulphuric acid, tannic acid, alcoholic perfumery, alumina, ammonia, blacking of all kinds, blue vitriol, bone-char, borax, camphor, chalk, chloroform, among many other items. Tariff determinations were hard fought by interest groups, with members of Congress deeply involved in the details of tariff rates that supported constituent industries.

More than just being involved in setting tariffs, Congress also attempted to assert its constitutional authority over trade-related issues. In particular, members of the House of Representatives sought to check the use of the Treaty Power to make economic law. The worry was that under the Treaty Power, the Senate and President could come to an agreement with the force of law (under the Supremacy Clause) while excluding the House of Representatives—the only popularly elected branch of the federal government—from the policymaking process.

The House was particularly protective of its central constitutional role in taxation. It passed a resolution in 1880 stating that the use of the Treaty Power to set tariff rates would “be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives.” An 1885 House Report resolved that “the President by advice and consent of the Senate, cannot negotiate treaties with foreign Governments by which the duties levied by Congress can be changed or abrogated, and such treaties to be operative as law must have the sanction of an act of Congress.” Indeed, one classic study of

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35 Id. at 35
36 Id. at 45; TAUSIG, supra note 30, at 65-66.
37 TAUSIG, supra note 30, at 188-189.
38 Id.
39 Id.
41 WRIGHT, supra note xx, at 68.
42 Kysar, supra note 14, at 4.
treaties concluded that in every treaty affecting revenue between 1796 and 1913, the House of Representatives “uniformly insisted upon, but the Senate has acquiesced in, legislation by Congress.”

Congress also asserted itself with respect to the termination of commercial treaties. Congressional legislation terminated treaties of amity and commerce with France in 1798. Years later, Thomas Jefferson wrote that “[t]reaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded. This was accordingly the process adopted in the case of France in 1798.”

More than a century later, in 1911, President Taft sought to terminate a commercial treaty with Russia. The question was whether President Taft needed to gain consent from the Senate alone or from both houses of Congress. At the time, a variety of commentators, Senators, and Representatives argued that the House of Representatives needed to have a say in the process.

3. The Tariff’s Decline — The initial turn away from active use of the tariff was also a function of shifting domestic economic policies and politics in the late nineteenth and early twentieth centuries -- in particular, the weakening of both the protectionist and revenue justifications for the tariff. Critics of the tariff increasingly argued that protectionist tariffs were no longer encouraging infant industry but instead protecting established monopolies. After the Great Merger Movement of 1895-1904, which led to massive consolidation across sectors of the American economy, domestic policy and politics became increasingly focused on the power of trusts and monopolies. This shift had important implications for

43 SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 195 (2d ed. 1916); Kysar, supra note 14, at 43.
44 We do not mean to say, of course, that all three components of the domestic economics paradigm—domestic economic goals, a focus on Article I, and a preeminent role for Congress—were always satisfied in the 19th century. A 1794 statute, for example, authorized the President “whenever, in his opinion the public safety shall so require, to lay an embargo on all ships and vessels…under such regulations as the circumstances of the case may require, and to continue to revoke the same, whenever he shall think proper.” Francis B. Sayre, The Constitutionality of the Trade Agreements Act, 39 COLUM. L. REV. 751, 759-60 (1939) (listing other early 19th century statutes on point). Similar delegations of power, designed to give the President the ability to regulate U.S. involvement in the ongoing conflict between France and Great Britain, continued through the Quasi-War with France and the Jefferson and Madison Administrations. By and large, though, trade policy was defined by domestic economic policy considerations — and by congressional exercise of its Article I authorities.
45 Bradley, Treaty Termination, supra note 9, at 789.
46 Louis Marshall testified “that the power [to terminate] rests in Congress.” Senator Rayner argued that “[a] treaty is the supreme law of the land under the language of the Constitution, and the supreme law of the land ought not to be set aside except by legislative action of both Houses.” Congressmen Legare and Peters agreed. See Bradley, Treaty Termination, supra note 9, at 795 & n. 113, n. 118.
47 TAUSSEIG, supra note 30, at 362-63; IRWIN, supra note 29, at 313.
tariff policy. Critics argued that tariffs were harming competition by effectively protecting domestic monopolies from foreign competitors. The tariff, in the words of some commentators, was “the mother of trusts.”

Efforts to regulate monopolies, they argued, required reducing tariffs.

The revenue justification also became weaker. During the Civil War, Congress established an income tax to raise additional revenue over and above the tariff to cover the costs of warfighting. Two generations later, in 1913, Congress passed and the states ratified the Sixteenth Amendment to the Constitution, authorizing Congress to create an income tax. Over time, taxation supplanted the tariff as the primary source of revenue for the nation. While customs and excise taxes constituted 90 percent of federal revenues in 1880, that number had dropped to 25 percent by 1930. The income tax contributed nothing to the federal fisc in 1880 but made up 59 percent of revenues by 1930. The interchangeability of income taxes and tariffs confirms the domestic economic role the tariff played with respect to revenue and the distribution of economic burdens.

As the revenue justification grew weaker, the tariff became less necessary to the exercise of Congress’s other Article I powers.

Some commentators have argued that the core breaks in American trade policy were the Civil War (after which protectionism became the dominant rationale for American trade policy) and the New Deal (the end of protectionism and the shift to presidential power). There is some truth in these characterizations, especially when viewed in terms of the constitutional and functional home for trade policy. But the shift from the domestic economics paradigm to the foreign affairs paradigm took place over a longer time frame. The transition from the tariff to domestic taxes as a source of revenue, for example, began during the Civil War and jumped forward during the Progressive Era with the Sixteenth Amendment. And while the central shift from congressional power to presidential authority was during the Presidency of Franklin Roosevelt, the origins of congressional efforts to delegate power to the President began prior to the New Deal.

More importantly, these inflection points tend to focus on the outputs of trade policy: high versus low trade barriers, or protectionism versus liberalization. They

50 Id. at 7.
51 Id.
52 Id.
53 Indeed, the Revenue Act of 1916 included both tax and tariff provisions. Irwin, supra note 29, at 340.
55 See, e.g., The McKinley Tariff, supra note xx, Ackerman & Golove, supra note 57, at 821-825.
are divorced from the underlying goals of trade policy: domestic economic objectives or foreign policy objectives. Protectionism is not, however, synonymous with a trade policy driven by domestic economic policy; it can be a tool of foreign policy. Trade liberalization, too, can be enacted in pursuit of domestic economic objectives, as in the case of using foreign competition to regulate domestic monopolies and promote competition. It is the goals of trade policy that more accurately characterize these eras, and the confusion about these goals that characterize our current trade policy.

B. Trade as Foreign Affairs: The Rise and Rise of Presidential Trade Powers

As with the domestic paradigm, the foreign affairs paradigm includes three components: (1) the goals of trade policy are focused on the behavior of or relationships with foreign countries, (2) the constitutional home for trade policy is within Article II, and (3) the functionally desirable locus of trade policy is the executive branch.

The foreign relations aspects of trade are well-understood. A central task of trade policy is making agreements with foreign countries so that the foreign country will lower its tariff rates, thereby opening its markets to U.S. exports. But the foreign relations foundations go beyond setting tariff rates. Trade is also a tool for advancing geopolitical aims, and trade agreements can therefore be used to benefit allies, reward countries who follow American leadership, or sanction those who pursue actions opposed to U.S. foreign policy goals. Finally, trade agreements are a way for the United States to exercise international leadership; they can set the “rules of the road” that the countries around the globe will follow.

The executive branch is traditionally considered functionally superior at making policy judgments on such issues. Unlike a multi-branch and multimember legislature, the executive branch is characterized by a singular president. A single president at the head of a relatively unitary executive branch is better able to negotiate with foreign nations without confusion or clashing voices; the President has greater access to secret intelligence that might be valuable in making geopolitical assessments; and the President is better able to move with alacrity.

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56 On trade as geopolitics, see Jennifer M. Harris & Robert D. Blackwill, War by Other Means: GeoEconomics and Statecraft (2016). On sanctions and international economics as a weapon against those opposed to U.S. interests, see, e.g., Juan Zarate, Treasury’s War: The Unleashing of a New Era of Financial Warfare (2013).

57 See, e.g., Barack Obama, The TPP would Let America, not China, Lead the Way on Global Trade, Wash. Post, May 2, 2016 (“As a Pacific power, the United States has pushed to develop a high-standard Trans-Pacific Partnership, a trade deal that puts American workers first and makes sure we write the rules of the road for trade in the 21st century.”).

58 We say “relatively” because the President sits atop a complex bureaucracy, whose members have considerable power to shape and constrain presidential actions. As commentators have noted, the presidency is a “they” not an “it.” See Cass R. Sunstein, The Office of Information and Regulatory Affairs: Myths and Realities, 126 Harv. L. Rev. 1838 (2013).
when necessary. As a result, it is preferable for the executive branch, not the legislature, to exercise foreign affairs powers. Indeed, Article II gives the President a variety of tools to conduct American foreign affairs. The President is commander-in-chief of the military, has the power to appoint and receive ambassadors, and can recognize foreign governments.\(^\text{59}\) Congress has a variety of foreign affairs powers as well,\(^\text{60}\) but given the strengths of the executive in the realm of foreign policy, Congress has largely acquiesced to the executive’s preeminent role in the field.

Over the course of the 20th century, this foreign affairs paradigm became the dominant approach to trade policy. The transformation was a function of three different factors. First, Congress believed there were policy benefits in delegating trade authority and insulating tariff rate-setting from congressional logrolling. The Supreme Court, for its part, sustained these delegations against constitutional challenge as part of larger transformation of the constitutional law of foreign relations. Second, in the post-World War II era, the country entered an exceptional period of economic growth, in which domestic economic issues were less salient and could be traded-off against Cold War foreign policy imperatives. And finally, Congress failed to reassert itself as the President negotiated increasingly broad trade agreements.

1. **The Rise of Delegation** — Starting in the late 19th century, members of Congress grew concerned that the legislative process was reaching undesirable tariff rates because of legislative horse-trading and interest group influence. Delegations to the executive were seen, at first, as a way to get better information about the effects of tariff rates. In 1866, Congress appointed David Wells Special Commissioner of the Revenue, charging him with issuing reports to Congress on tariff and revenue rates.\(^\text{61}\) In 1882, in response to advocacy from President Chester A. Arthur, Congress created a Tariff Commission (since renamed the International Trade Commission) that would hold hearings and collect testimony on tariff issues.\(^\text{62}\)

The first delegations of authority to set tariff rates took place in 1890 with the McKinley Tariff.\(^\text{63}\) Congress exempted some goods from a tariff, unless the President determined that the foreign country had imposed unfair tariff rates on American products. The McKinley Tariff was challenged before the Supreme Court as an unconstitutional delegation. The Court ultimately sustained the delegation, holding in *Field v. Clark* that the President was simply executing a law passed by Congress.\(^\text{64}\)

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\(^\text{59}\) Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (*Zivotofsky II*).
\(^\text{60}\) U.S. Const., art. I, sec. 8.
\(^\text{62}\) Id. at 233-34
\(^\text{63}\) McKinley Tariff, *supra* note xx; Sayre, *supra* note Error! Bookmark not defined., at 761.
\(^\text{64}\) Field v. Clark, 143 U.S. 649 (1892); Hathaway, *Treaties’ End*, *supra* note xx, at 1294.
Field v. Clark opened the door to more expansive delegations of tariff-setting authority. The Fordney-McCumber Tariff of 1922 included a “flexible tariff” provision, which allowed the President to change tariff rates by as much as 50 percent in order to account for differentials in foreign and domestic production costs. The idea behind the flexible tariff provision was that production cost differentials could be scientifically calculated, thereby insulating tariff rates from the realm of politics. Economists tasked with calculating those rates thought the enterprise was futile because of a variety of technical difficulties related to estimating foreign and domestic production costs and because of inevitable judgment calls in analyzing markets. Yet despite experts’ belief that the executive could not reach a technocratic answer, the Supreme Court upheld the flexible tariff delegation in the 1928 J.W. Hampton case.

Congress’s last experiment with directly setting tariff rates came in 1930, with the infamous Smoot-Hawley Tariff. There, Congress raised the average tariff by approximately 20 percent. Politicians and commentators widely associated the Smoot-Hawley Tariff with a string of economic calamities that followed. Over the next two years, the volume of U.S. imports and exports fell by approximately 40% each. Blaming Smoot-Hawley, a number of foreign countries enacted retaliatory tariffs that furthered dampened international trade.

With two blockbuster Supreme Court precedents upholding delegations to the President and the Smoot-Hawley experience, Congress decided to abandon tariff-making. In 1934, Congress passed the Reciprocal Trade Agreements Act (RTAA). In contrast to congressionally-enacted tariff schedules that ran on for pages, the entirety of the RTAA was only three pages long. It gave the President the power to enter into trade agreements with other nations that reduced tariff rates by up to 50 percent. The President implemented the changes through executive order, and neither the international agreement nor the resulting tariff modifications required


66 JOHN DAY LARKIN, THE PRESIDENT’S CONTROL OF THE TARIFF 115-31(1936) (describing issues with defining the principal market in the United States, the principal competing country, and production areas, and addressing marginal producers, weighted averages, joint costs, similar goods, loss and appreciation, labor expenses, and distribution costs); IRWIN, supra note 29, at 356.

67 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

68 Douglas A. Irwin, The Smoot-Hawley Tariff: A Quantitative Assessment, 80 REV. ECON. & STAT. 326, 327 (1998) (noting that, while it is difficult to come up with an average figure across all tariff lines, one popular estimate of the increase from Smoot-Hawley yields a figure of 17.4%).

69 Id. at 326.

70 League of Nations, WORLD ECON. SURVEY, 1932-33 193 (1933) (“the Hawley-Smoot tariff in the United States was the signal for an outburst of tariff-making activity in other countries, partly at least by way of reprisals.”).
any additional input from Congress.\textsuperscript{71} In addition, the President’s modified rates would remain in place for “three years even if Congress changed the underlying statute.”\textsuperscript{72}

This delegation of power was remarkably unconstrained. In contrast to the Interstate Commerce Commission or Federal Trade Commission, the Tariff Commission (the equivalent executive agency) was not authorized to make rules to guide executive discretion, nor did courts take it upon themselves to do so.\textsuperscript{73} Instead, power was concentrated in the presidency, without procedural or other mechanisms for participation, transparency, or principles for rate-setting.\textsuperscript{74} The only significant constraint was a sunset provision. Some protectionist Republicans at the time said the bill created a “fascist dictatorship in respect to tariffs” that gave Roosevelt “extraordinary, tyrannical, dictatorial power over the life and death of the American economy.”\textsuperscript{75}

2. \textit{Prosperity and Geopolitics} — If congressional delegations and the Supreme Court’s tolerance of those delegations established the legal framework for the foreign policy paradigm in trade, American prosperity in the post-World War II era provided the economic foundation. During that period, trade became increasingly seen as a geopolitical tool to assert American leadership around the world – and in particular to shore up support for the West during the Cold War.\textsuperscript{76}

Economically, the post-World War II era was exceptional in American history. It was a period of relative economic equality, with a growing economy that meant rising middle class wages for families of all races (even as there were significant disparities between races).\textsuperscript{77} With Western Europe and Japan literally in ruins from the war, the United States was the “only major industrial nation with its production capacity not only intact but enlarged as a result of the conflict.”\textsuperscript{78} In 1937, the United States captured 17 percent of global trade in manufactured goods; by 1954, it captured 26 percent.\textsuperscript{79} Massive export capacity meant higher wages and available jobs for workers. As a result, even unions supported trade liberalization in the post-War years.\textsuperscript{80} Skeptics recognized the unique economic circumstances at the time. As Senate Finance Committee Chairman Eugene Millikin observed, “In anything resembling normal times, some of the cuts [to tariffs] would be catastrophic….Copper, livestock, livestock products such as hides and wool,

\begin{itemize}
  \item \textsuperscript{71} IRWIN, supra note 29, at 425.
  \item \textsuperscript{72} Ackerman & Golove, supra note 57, at 848-49.
  \item \textsuperscript{73} Tarullo, supra note xx, at 326-27.
  \item \textsuperscript{74} On the constitutionality of the RTAA, see Sayre, supra note xx.
  \item \textsuperscript{75} IRWIN, supra note 29, at 428.
  \item \textsuperscript{76} IRWIN, supra note 29, at 494-95.
  \item \textsuperscript{77} See, e.g. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2013); SITARAMAN, supra note xx, at 201-202, 206.
  \item \textsuperscript{78} IRWIN, supra note 29, at 492.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Id. at 493.
\end{itemize}
numerous metals, agricultural products—all of these things can be produced cheaper abroad than here.\textsuperscript{81}

With a strong domestic economy and robust demand for American exports, concern for foreign affairs was paramount, particularly in the battle between communism and liberal democracy. In running for reelection in 1948 Truman defended the RTAA—on which he relied to enter into, without congressional approval, the General Agreement on Tariffs and Trade (GATT) in 1947\textsuperscript{82}—as one of the “best assets we can have for peace.”\textsuperscript{83} In 1949, Secretary of Defense James Forrestal told Congress that the Pentagon viewed renewing the RTAA as “a step in the interest of national security.”\textsuperscript{84} In the same debate, Senator Willis Robertson asked rhetorically, “What is the cold war about? It is over trade.”\textsuperscript{85} Presidents Eisenhower and Kennedy also argued for trade agreements on grounds that they would act as a tool for expanding freedom against the ongoing threat from communism.\textsuperscript{86}

The GATT’s odd origins in the post-war settlement provided a turning point both for the foreign policy objectives inherent in, as well as presidential control of, U.S. trade policy. At the Bretton Woods conference in 1944, the United States and its allies conceived of three organizations that would regulate international economic affairs: the World Bank, the International Monetary Fund, and the International Trade Organization (“ITO”).\textsuperscript{87} Leaders intended these institutions to preserve peace and security by “putting a break on beggar-thy-neighbor protectionist policies” believed to have contributed to World War II.\textsuperscript{88} While nations negotiated the Charter of the ITO (known as the Havana Charter), they decided to conclude a provisional agreement that would apply until the ITO came into existence.\textsuperscript{89} To that end, eight nations including the United States signed the GATT in October 1947. Negotiations on the Havana Charter wrapped up the

\begin{thebibliography}{99}
\bibitem{81} Id. at 483.
\bibitem{82} Koh, \textit{Congressional Controls}, supra note 8, at 1195; IRWIN, supra note 29, at 486.
\bibitem{84} Id. at 356.
\bibitem{85} Id.
\bibitem{86} Eisenhower, for example, called on Congress to support creation of an Organization for Trade Cooperation (OTC) to administer GATT in 1955, saying that the failure to do so would “play directly into the hands of the Communists.” His 1955 State of the Union address declared that “We must expand international trade and investment and assist friendly nations whose own best efforts are still insufficient to provide the strength essential to the security of the free world.” Kennedy called trade agreements “an important new weapon to advance the cause of freedom” against the communists. IRWIN, supra note 29, at 516, 519, 527.
\bibitem{88} Id. at 1009.
\end{thebibliography}
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following year. However, objections from both the protectionist and free market camps doomed the Charter’s hopes for consent from Congress. In December 1950, President Truman quietly withdrew the Charter from congressional consideration.

Instead, the Truman administration pressed ahead with the GATT as its framework for an international trade regime. In this way, Truman got his multilateral trade agreement despite being unable to secure congressional approval. Truman’s actions also created the first major post-war test of Congress’s ability to reassert itself in trade policy. Would Congress reassert its primacy over trade policy, or would it continue to let the President lead even when his leadership stretched the bounds of his delegated authority?

3. Congress Experiments with Limits — In the wake of the GATT experience, Congress did indeed begin experimenting with limits on the President’s authority over trade negotiations. For instance, in 1948, in the immediate wake of the signing of the GATT, Congress inserted a provision into the RTAA requiring the President to furnish the Tariff Commission with a list of products he deemed eligible for tariff reductions. The Commission would then determine a “peril point” below which rates could not fall without harming domestic producers. Congress also refused to bless the GATT, stating in each renewal of the RTAA during the 1950s that “[t]he enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the [GATT].” In 1955, the Eisenhower administration submitted a Draft Charter for the Organization for Trade Cooperation (OTC), another attempt to create an international organization that would oversee the GATT. Congress never acted on the Charter and the OTC never came into existence. However, even these modest limitations, which did not alter the fundamental delegation of tariff authority to the President, ultimately proved too restrictive for the executive branch’s foreign policy purposes.

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90 In addition to the tariff reductions, nondiscrimination rules, and limits on nontariff barriers contained in the GATT, the ITO would have included rules on investment, competition, employment, and established a formal international organization. See Stephan W. Schill, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 31-60 (2009) (discussing post-World War II efforts to negotiate a multilateral investment regime).

91 Kenneth W. Dam, Cordell Hull, the Reciprocal Trade Agreements Act, and the WTO: An Essay on the Concept of Rights in International Trade, 1 N.Y.U. J. LAW & BUS. 709, 715 (2005) (discussing Truman’s decision to withdraw the ITO Charter from Senate consideration due to protectionist pressures); Zeiler, supra note xx, at 355 (quoting the business community’s view that the ITO Charter was an “economic Munich.”).

92 Weiler, supra note xx, at 353. After the Democrats took control of Congress in the 1948 elections, they removed the peril point procedure, although it was reintroduced into the RTAA in 1951. Weiler, supra note xx, at 359.


94 Id. at 265-66.
In proposing the Trade Expansion Act of 1962, President Kennedy told Congress that its enactment “could well affect the unity of the West, the course of the Cold War, and the growth of our nation for a generation or more to come.”

The Act substantially expanded the delegation of authority to the President as the United States approached the next round of multilateral trade negotiations (known as the Kennedy Round) by allowing him to reduce tariffs across entire categories of products, rather than on an item by item basis as had been required by the RTAA. This expansion of authority also allowed considerably deeper cuts through tariff negotiations with the European Economic Community (EEC), which maintained a single external tariff but lacked the political capacity to negotiate on a line by line basis due to the fact that the EEC was composed of multiple member states. Although such authority was limited to negotiations with the EEC, the most-favored nation clause meant that any concessions made to the EEC were extended to all other GATT parties.

With this expansion of negotiating authority, Congress once again took some steps to reign in presidential power. Perhaps most significantly, Congress created a Special Trade Representative within the Executive Office of the President and empowered the office-holder to conduct trade negotiations. Congress’s hope in so doing was to reduce the influence of general foreign policy concerns (the State Department’s mandate) on trade policy in favor of economic policy.

Consistent with prior authorizations, Congress also declined to give the President authority to enter into agreements covering nontariff barriers—a catchall term that includes any governmental measure other than tariffs, such as regulations or trade remedies designed to combat specific instances of unfair trade, that impedes trade. As tariffs fell during the successive rounds of GATT negotiations, nontariff barriers became relatively more important impediments to free trade, causing the focus of international negotiations to shift from tariffs to nontariff barriers. Yet reducing nontariff barriers also strikes at the heart of domestic economic concerns. Trade remedies, such as antidumping duties, provide governments a way to protect specific industries injured by international trade. Although not a major issue for negotiators in the 1960s, environmental or health concerns have become increasingly important.

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96 Compare “the President may . . . proclaim such modification or continuance of any existing duty or other import restriction . . . as he determines to be required or appropriate to carry out any such trade agreement,” Trade Expansion Act of 1962, § 201(a)(2), with “the President . . . is authorized . . . to proclaim such modifications of existing duties and other import restrictions . . . of any article covered by foreign trade agreements.” Reciprocal Tariff Agreements Act, 48 Stat. 943.

97 The Act did not permit the President to lower tariff rates to less than 50% of their level in 1962. Trade Expansion Act of 1962, § 201(b)(1). Congress waived this requirement, though, when “the President determines with respect to [articles in any category] that the United States and all countries of the [EEC] together accounted for 80 percent or more of the aggregated world export value.” Trade Expansion Act of 1962, § 211(a).


99 Irwin, supra note 29, at 526.

100 John Rourke, Congress and the Presidency in U.S. Foreign Policymaking 173 (1983).
regulations could restrict trade to the extent product or production standards differed from country to country.

Despite the absence of authority to negotiate on nontariff barriers, President Johnson did so anyway. The Johnson Administration concluded two such agreements, an Antidumping Code and a reform to how the United States calculated customs values. Lacking statutory authority to enter these agreements under the Trade Expansion Act, the President argued he possessed the authority to enter into the Antidumping Code as a sole executive agreement, furthering the claim that the President did not need Congress to make trade policy.\footnote{Koh, supra note 8, at 1199 & n. 23.} In retaliation, Congress refused to implement the reforms to the customs valuation process that the President had negotiated.\footnote{Id. at 1199.} This failure significantly diminished the credibility of the administration in negotiating nontariff barriers—a problem in international trade that would only become more central in the 1970s.\footnote{See Alan F. Holmer & Judith H. Bello, U.S. Trade and Policy Series No. 20, The Fast Track Debate: A Prescription for Pragmatism, 26 INT’L L. AW. 183, 195 (1992) (quoting Sam Gibbons, chair of the House Subcommittee on International Trade, as saying that U.S. negotiators were not trusted after Congress’s failure to implement these agreements.).}

The Kennedy Round negotiations laid bare the schizophrenic nature of U.S. trade policy. For the second time since World War II, the President had aggressively relied on constitutional and ex ante grants of statutory power to enter into multilateral trade agreements that Congress would not approve, justifying these agreements with reference to larger foreign policy concerns. Rather than proactively assert itself, however, Congress tinkered around the margins of the President’s statutory authority while refusing to grant ex post approval for the President’s agreements.

In seeking to resolve this tension, the Trade Act of 1974, passed at the outset of the next round of multilateral trade negotiations (the Tokyo Round), established the framework for contemporary trade policymaking. The 1974 Act included a variety of mechanisms that many have argued represent a reassertion of congressional prerogatives in trade.\footnote{See, e.g., John Linarelli, International Trade Relations and the Separation of Powers under the United States Constitution, 13 DICK. L. REV. 203 (1995); Lawrence M. Reich, Foreign Policy or Foreign Commerce?: WTO Accessions and the U.S. Separation of Powers, 86 GEO. L.J. 751, 756 (1998).} Congress had included a consultation and reporting regime in the Trade Expansion Act of 1962,\footnote{Trade Expansion Act of 1962 §§221-223, 226.} but significantly expanded the regime to include consultations with the private sector and the establishment of associated advisory committees.\footnote{Trade Act of 1974 § 135.} The Act also included a legislative veto provision that authorized Congress via a joint resolution of both houses, or for
some matters a concurrent resolution of either house, to overturn certain executive branch actions.\textsuperscript{107}

At the same time, however, the 1974 Act also significantly expanded presidential power in two ways. First, the Act was the first to give the President authority to negotiate agreements reducing nontariff barriers to trade.\textsuperscript{108} Second, Congress agreed to approve such agreements through “fast track” procedures. Under fast track, the President can negotiate a trade agreement and then introduce that agreement into Congress, where it receives expedited consideration and insulation from the usual amendment process.\textsuperscript{109}

Fast track authority short-circuits congressional review of trade agreements on nontariff barriers relative to the normal legislative process, which had prevailed prior to 1974. As noted above, under the 1962 Trade Expansion Act, the President did not have authority to negotiate nontariff barriers. Consequently, the agreements President Johnson negotiated on nontariff barriers required congressional consent through the ordinary legislative process. Individual members of Congress could thus assert their constituents’ interests through the amendment process. By curtailing that process, fast track effectively removed the primary vehicle through which local interests can inject themselves into the lawmaking process.

In this way, fast-track authority, while ostensibly giving Congress an ex post say over trade agreements, in fact reduced Congress’s role. Prior to 1974, Congress already had an ex post say—it needed to pass legislation to consent to and implement agreements on nontariff barriers. The 1974 Trade Act limited what would otherwise be—and was after the Kennedy Round—plenary review of trade agreements on nontariff barriers.\textsuperscript{110}

\begin{footnotes}
\textsuperscript{107} Id. at § 152.
\textsuperscript{108} Id. at § 102.
\textsuperscript{109} Id. at §§ 102, 151; see also Koh, supra note 8, at 1200; Linarelli, supra note xx, at 217.
\textsuperscript{110} Adkins and Grewal argue that the fast-track procedures in the 1974 Act applied to both the tariff and nontariff commitments. See Adkins & Grewal, supra note 8, at 1510. However, the 1974 Act appears to say that the fast-track procedures are only required for commitments on nontariff barriers. Section 101 of the Trade Act authorized negotiations on tariff commitments, while Section 102 authorized negotiations on nontariff commitments. Section 101 does not mention the fast-track procedure described in Section 151 of the Act, while Section 102 indicates that agreements made pursuant to Section 102 should go through fast-track. Compare Trade Act of 1974 § 101 (making no mention of Section 151) with Trade Act of 1974 § 102(d) (“Whenever the President enters into a trade agreement under this section providing for the harmonization, reduction or elimination of barrier to (or other distortion of) international trade, he shall submit such agreement, together with a draft of an implementation bill (described in Section 151(b))”). See also Trade Act of 1974 §151(c)(1) (“on the day on which a trade agreement is submitted to the House of Representatives and the Senate under Section 102”). By implication, the president retained the authority to enter into tariff reduction commitments without ex post congressional approval. Adkins and Grewal also argue that the 1974 Act “specifically exempted regulatory commitments in areas of ‘consumer protection, employee health and safety, labor standards, or environmental standards,’” from the fast-track procedures of the act, instead requiring “the passage of special bills authorizing negotiations and providing ex ante congressional guidance.” Adkins & Grewal, supra note xx, at 1510. However, as far as we can tell these limitations on presidential authority do not appear in the 1974 Trade Act.
\end{footnotes}
It is worth dwelling for a moment on how thoroughly Congress failed to assert itself effectively into trade policymaking during this era. A variety of congressional actions were largely agnostic on the rise of presidential trade powers or simply ineffectual in checking that rise. Instead of passing legislation to authorize GATT or require the United States to withdraw from it, for example, when Congress renewed trade negotiation authorities in the 1950s, it made an explicit point of noting that it was not acting in either direction on the multilateral trade regime. Similarly, consultation requirements put into place in the 1974 Trade Act were largely toothless. Not only does ex ante and ongoing consultation still leave the President in the driver’s seat on substantive negotiations, but the inclusion of fast-track authority left Congress with no ability to amend the domestic bill implementing the trade agreement: either accept the President’s deal or reject it wholesale.

Some commentators have argued that Congress’s most important attempt to rein in rising presidential power over trade was the legislative veto. As noted above, alongside the significant delegation of power to the President and the creation of fast track authority, the 1974 Trade Act included a legislative veto provision giving Congress a check on some of the President’s authorities under the Act. In INS v. Chadha, the Supreme Court struck down the legislative veto as unconstitutional. In dissent, Justice White recognized at the time that the Court’s decision would eliminate legislative veto provisions in trade, emergency powers, and foreign affairs. The argument is that Congress tried to put in place meaningful checks on the President, but Chadha gutted the most important such tool.

We think this argument does not comport with how trade law intersected with Chadha. The legislative veto in the 1974 Act was not an overarching legislative veto that applied to the President’s general delegated tariff-setting powers. It was far narrower, limited to a few particular powers. Perhaps most importantly, the Act permits American producers to petition the International Trade Commission (ITC) for safeguards—temporary trade barriers imposed to protect American businesses

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111 The provision stated, “The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade” and was included in the 1951, 1953, 1955, and 1958 extensions. Linarelli, supra note xx, at 214; Irwin, supra note 29, at 516.

112 Hathaway, Presidential Power over International Law, supra note xx, at 194 (“In eliminating the legislative veto, the Court eliminated the single most significant control over ex ante congressional-executive agreements that Congress possessed.”).


115 Chadha, 462 U.S. at 945 & 1003 (White, J., dissenting, including appendix).

116 Hathaway, Presidential Power over International Law, supra note xx, at 194.
from import competition. Under the statutory scheme, the Commission makes a recommendation to the President. Under the legislative veto provision, if the President modified the recommendation or declined to adopt it, a resolution of both houses of Congress would implement the Commission’s recommendation over the President’s objection. Because the ITC usually recommends that protection be imposed, the effect of the President’s rejection in most cases would be to keep trade barriers low. The legislative veto allowed Congress to force the President to raise trade barriers to help discrete, identifiable American businesses. The narrowness of this power, though, suggests that Chadha did not have as extraordinary an impact on shifting power from Congress to the President as some have thought. It was Congress’s own abdication of its powers, not the Court’s sweeping decision in Chadha, that caused the shift.

Other commentators have suggested that “Chadha [would] not seriously diminish Congress’ influence over trade policymaking” because Congress reasserted itself vis-à-vis the President in a variety of ways during the 1970s and 1980s. Here too, we disagree. In practice, Congress’s creation of the Trade Representative, delegation of substantive economic policymaking through the Tariff Acts, and authorization to regulate tariffs and trade away non-tariff barriers, meant that expertise and authority were increasingly concentrated in the President – and without the tools of congressional oversight and influence that accompany traditional administrative delegations. The President’s negotiating positions were not, for instance, subject to ordinary notice and comment and judicial review, even though they would be given the force of law once a trade agreement came into effect. Fast track was the culmination of this trend. While Congress would

117 Id. at § 201.
118 Id. at § 203.
119 1974 Trade Act §203(c)
120 Similarly, the legislative veto applied to section 301 of the 1974 Trade Act, which directed the president to “take all appropriate and feasible steps within his power to obtain the elimination of” restrictions “that impair the value of trade commitments made to the United States.” Unlike the GATT dispute process, which contemplated a multilateral determination that a government was violating its trade commitments, Section 301 famously authorized the president to make and act upon such determinations unilaterally and as a matter of federal law. However, the statute did not mandate the president take any particular actions, preferring instead to give the president broad discretion about the appropriate actions. 1974 Trade Act §§ 301(a)-(b) (The president . . . may suspend, withdraw, or prevent . . . and may impose duties or other import restrictions) (emphasis added).
121 Koh, supra note 8, at1192 (“I conclude that, because the legislative veto was only one of a broad array of oversight devices developed by Congress to assert and retain influence in the international trade field, its death in Chadha will not seriously diminish Congress’ influence over trade policymaking. To the contrary, recent U.S. trade actions…strongly suggest … an expansion, rather than a contraction, of congressional involvement in trade matters, particularly in two key areas: negotiating authority and import relief.”).
122 For an overview of Congress’s normal authorities, see Jack M. Beerman, Congressional Administration, 43 San Diego L. Rev. 61 (2006).
123 Beginning with the 1974 Trade Act, however, Congress did subject the president’s application of domestic trade remedies laws—laws designed to provide relief from unfair foreign competition to specific industries or enterprises—to increased judicial review. See Koh, supra note 8, at 1205-06.
have ex ante input into the United States’ negotiating position, economic policy enacted through trade agreements, unlike ordinary domestic economic policy, would receive little more than a yes or no from Congress. In other words, the so-called reforms of the 1970s struck a compromise between active congressional involvement and the President’s ability to efficiently negotiate trade agreements. But the compromise was to reduce congressional involvement relative to what prevailed prior to 1974, not to expand it.

Beyond the formulation of trade law, the President also enjoyed extraordinary freedom from congressional control in the implementation of the international aspects of trade agreements. Recall that, with the failure of the Havana Charter and the rejection of the Organization for Trade Cooperation, the GATT was a treaty without an organization. Over time, though, GATT member countries created an institutional apparatus to support GATT implementation. The GATT Council, consisting of the member states (as represented by their trade ministries), oversaw GATT implementation and served as a forum for negotiations among states. Pursuant to Article XXV of the GATT, GATT members could make “decisions” that had at least the status of soft law and arguably had the status of binding law. Indeed, four agreements coming out of the Tokyo Round in 1979, including rules permitting the granting of trade preferences to developing countries, were adopted in this way. Because they are decisions of an international body—an instrument that has no clear status in U.S. domestic law—the executive branch can agree to these obligations without congressional consent.

The GATT parties also make decisions allowing new members to join. Only 23 nations initially signed the GATT in 1947. By 1975, however, the GATT had 82 parties. As a matter of international law, when a new party joined the GATT it was entitled to receive the benefits of all GATT rules, most notably the tariff rates that the United States charged every other GATT party pursuant to the most-

124 Adkins & Grewal, supra note 8, at 1511 (noting that fast track and NTBs expand executive power).
125 As noted above, Congress did try to constrain the president’s authority over the application of domestic trade remedies laws. See supra note 123 and Koh, supra note 8, at 1205-1206.
127 Jackson, Louis, & Matsushita, supra note 126, at 272.
130 Id.
favored nation obligation. As a result, expanding GATT membership created new international law limits on U.S. tariffs, as well as limits on the extent to which the United States could discriminate more generally against foreign products. Yet, technically, the United States did not itself make new treaty commitments when new countries joined the GATT. Instead, it simply extended existing commitments. While Congress had authorized ex ante this extension of nondiscriminatory treatment, Congress had no formal role in approving new GATT members accepted by the executive branch.

GATT parties also developed the practice of submitting disputes to a panel of experts, who would make a report to the GATT Council. That report had no legal effect unless the GATT parties, acting through the Council, agreed to adopt it. The President, through his agents, represented the United States in the GATT Council and, significantly, chose which GATT disputes to bring and how to defend the United States in GATT cases brought against it. Losing a GATT case creates pressure on the United States (or any party) to change its trade policies. For instance, in 1976 a GATT panel issued a report finding that U.S. tax legislation creating the Domestic International Sales Corporation (DISC), a tax avoidance vehicle for U.S. exporters, violated GATT rules. The United States was prepared to allow (and eventually did allow) the GATT Council to adopt the ruling against the United States, and hence concede that the DISC legislation violated the GATT, even before it knew whether Congress would repeal the legislation.

By the late 20th century, the foreign affairs paradigm was largely dominant. The President exercised expansive trade authorities with little meaningful pushback from Congress. At the same time, however, the foreign policy paradigm became increasingly disconnected from economic realities on the ground. As early as the 1960s, Western Europe and Japan had reentered the export market and by the 1970s the “Asian Tigers” were asserting themselves in international markets. In July 1971, a report of the Commission on International Trade and Investment

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131 GATT art. I.
132 See Trade Expansion Act of 1962 § 251; Trade Act of 1974 § 126. In fact, these provisions mandate extending MFN treatment to all countries (GATT parties or not), except most notably communist countries. See Trade Act of 1974 § 401.
133 GATT Art. XXIII:2; Robert E. Hudec, Reforming GATT Adjudication Procedures: The Lessons of the DISC Case, 72 MINN. L. REV. 1443, 1489 (1988) (“The rulings of GATT panels are not binding legal interpretations; they are merely reports to the GATT Contracting Parties or to its agent, the GATT Council, which alone have the power to make authoritative rulings.”)
134 Id. at 1488.
135 Id. at 1488-92.
Policy (Williams Commission) warned that there is “increasing concern that the foreign economic policy of our government has given insufficient weight to our economic interests and too much weight to our foreign policy relations.” That same year, America ran its first trade deficit since 1935 and saw rising unemployment numbers. Perversely, at the very moment that economic conditions were changing from the unique moment of the post-War era, the paradigm for trade law and policy became even less tethered to domestic economics.

C. The Liberalization Era and the Separation of Powers

Beginning in the 1980s and accelerating with the end of the Cold War, the United States entered a third period marked by domestic economic insecurity and the increasing contestation of the foreign affairs paradigm. In this period, the chief goal of trade liberalization has been utilitarian—freer trade, proponents argue, increases aggregate national wealth. Although sometimes framed as a domestic economic concern and sometimes as a foreign policy concern, this justification makes comparatively little reference to the distributional considerations that are central to the domestic economics paradigm, nor, for the most part, to specific foreign policy or national security objectives which are the hallmark of the foreign affairs paradigm.

Second, the subject matter of trade agreements has also expanded enormously, such that they now regulate a host of nontariff issues over which Congress and the states have primary constitutional authority. Trade policy also diverged into two tracks: a multilateral track that resulted in the creation of the WTO, and a “mini-lateral” track that relied on free trade agreements (FTAs) with individual partners or small groups of nations. Third, despite this expansion, the executive branch has remained the functional home for trade policy. But Congress, responding to domestic economic insecurity, has increasingly balked at new trade agreements. By the Obama administration, foreign policy considerations had largely become a pretext, while domestic economic considerations had become a roadblock to further trade liberalization—but not a force affirmatively shaping trade policy.

1. Institution Building at the End of the Cold War — Initially, both the President and Congress seemed pleased with the 1974 Trade Act framework. In 1979, at the conclusion of the Tokyo Round of GATT negotiations, President Carter submitted a series of agreements on nontariff barriers to Congress, which Congress duly approved in the 1979 Trade Agreements Act, passed pursuant to the fast-track procedures laid out in the 1974 Trade Act.

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137 IRWIN, supra note 29, at 539.
138 Maier, supra note xx, at 45; see also IRWIN, supra note 29, at 539–40.
139 Jackson, Louis, & Matsushita, supra note 126, at 365–373 (describing congressional approval of the Tokyo Round Agreements). Indeed, negotiations had not quite finished when Congress enacted the 1979 Trade Agreements Act, yet Congress granted the president authority to enter into the agreements so long as any subsequent were minor. See Trade Agreements Act of 1979 § 2(b)(1).
By the mid-1980s, however, cracks in the foreign policy paradigm began to show. The trade surpluses that had allowed elected officials to justify using trade policy as a tool of foreign policy were long gone by the 1980s, and Congress had become concerned with the global competitiveness of the American economy.\textsuperscript{140} In a move that would foreshadow current trade politics, Congress wished to push the executive branch to be more aggressive in protecting the American economy and American workers specifically.\textsuperscript{141} In 1985, the House of Representatives began holding hearings and by 1987 both houses of Congress passed bills.\textsuperscript{142} Although largely forgotten today, some of the proposals considered by Congress, such as mandating presidential concern with trade deficits, were so extreme that President Reagan referred to them as the “Sons of Smoot-Hawley.”\textsuperscript{143}

But if the origins of the 1988 Omnibus Foreign Trade and Competitiveness Act can be found in a congressional desire to reassert itself, the final statute fell far short of that aim. Like earlier statutes, the 1988 Act gave the President authority to enter into tariff agreements and negotiate nontariff agreements that would receive an up or down vote pursuant to fast track procedures.\textsuperscript{144} The statute did direct the President to negotiate in light of concerns about American competitiveness, but it did so by authorizing the President to negotiate the \textit{expansion} of the GATT into what became the WTO during the so-called Uruguay Round of negotiations.\textsuperscript{145}

At the same time, congressional efforts to check these presidential powers were limited to a series of nudges. The Act, for instance, required a wide range of new reporting requirements, such as reports on American trade lost to trade barriers identified by the U.S. Trade Representative, compliance with subsidies rules, or reports from the Treasury on exchange rate policies.\textsuperscript{146} Likewise, Congress toyed with the idea of requiring the U.S. Trade Representative to use domestic authorities to retaliate for restrictions on U.S. market access and violations of trade agreements. Instead, Congress ultimately built in a series of discretionary mechanisms that conferred on the executive the decision whether to initiate an

\textsuperscript{140} Trade surpluses and deficits are regularly invoked by politicians in justifying trade policies, despite the fact that economists generally argue that these numbers by themselves are not significant. This may be because politicians use them as a proxy for distributional concerns.


\textsuperscript{142} \textit{Id.} at 653.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} Omnibus Foreign Trade and Competitiveness Act of 1988, §§ 102-03, Pub. L. 100-418.

\textsuperscript{145} Omnibus Foreign Trade and Competitiveness Act of 1988, § 101. During the Uruguay Round the United States 1) aimed to extend reductions in nontariff barriers; 2) introduce comprehensive multilateral rules governing trade in services and intellectual property; 3) reform the GATT disputes process so that countries, most notably European nations, could no longer impede the adoption of decisions.

\textsuperscript{146} Birenbaum, \textit{supra} note 141, at 656.
investigation into restrictions adversely impacting the United States, and gave the executive the ability to waive sanctions for violating trade agreements.\textsuperscript{147}

The 1988 Act ultimately provided the domestic legal basis for negotiating two of the most significant but also controversial trade agreements in American history: the Marrakech Agreement creating the World Trade Organization and, as we describe below, NAFTA. Coming at the end of the Cold War, both agreements represented a pivot from Cold War politics to the international institution building that would characterize the 1990s. Beyond greatly expanding international trade rules and (in the case of NAFTA) providing the basis for supply chains to disaggregate across North America, these two agreements also legalized international trade law to a degree heretofore unknown in any area of international law. The WTO’s Dispute Settlement Understanding (DSU) established a disputes process with an appellate mechanism and automatic adoption of reports.\textsuperscript{148} No longer would reluctant countries or losing parties be able to block the legal effect of adverse rulings. At the same time, the DSU also removed the ability of nations to act unilaterally in response to trade violations. Instead, nations must first seek approval from the WTO’s Dispute Settlement Body (DSB).\textsuperscript{149}

The DSU revitalized the GATT/WTO dispute settlement process, which has emerged as the most successful standing international dispute body ever.\textsuperscript{150} At the same time, however, it further empowered the President at the expense of Congress. The President, after all, represents the United States in disputes before the WTO and therefore controls the United States’ litigating position. The ban on unilateral action also removed the possibility that Congress could directly legislate retaliation against foreign countries without running afoul of WTO rules. Indeed, in a case brought by the EU shortly after the WTO came into force, the United States conceded that it would no longer invoke its unilateral authority to retaliate under Section 301 of the 1974 Act, even though Congress had not amended the Act’s mandate that the President take action in response to the violation of trade commitments made to the United States.\textsuperscript{151}

With relatively little fanfare, Congress passed the Uruguay Round Agreements Act (URAA) in 1994 to implement the WTO agreements. Since then, WTO members have not completed a major package of trade liberalization commitments. The so-called Doha Round, which began in 2001, has yielded little in terms of concrete results and has repeatedly been pronounced dead. Given this failure, it is

\textsuperscript{147} Id. at 657. The Section 301 investigations for restrictions on
\textsuperscript{148} DSU art. 17.
\textsuperscript{149} DSU art. 23.
\textsuperscript{150} The DSB has resolved over 500 disputes since January 1, 1995, with a high degree of compliance from nations. See WTO Dispute Settlement Gateway,\texttt{https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm}. By contrast, during roughly the same period the International Criminal Court, which came into existence in 2001, has managed to complete only a handful of trials.
\textsuperscript{151} United States—Section 301-310 of the Trade Act 1974, WT/DS152/AB.
perhaps surprising that trade liberalization through the WTO continued apace throughout the end of the Clinton administration and into the Bush administration. The accession of new members to the WTO provided new markets for U.S. businesses abroad and entitled those nations to the most-favored nation commitments the United States had already made at the WTO. By far the most important accession in terms of its effects on the U.S. economy was China’s in 2001. Recent economic studies have found that China’s accession—and the related decline in tariffs on Chinese products—has had a considerably more important effect than joining NAFTA on the American economy generally and on the loss of American manufacturing jobs in particular.152

Despite the importance of permitting China to join the WTO, Congress had no formal approval over Chinese accession. Just as had been done under the GATT, new members were approved by a vote of existing members and the United States’ vote was controlled by the executive branch. The URAA required the President to consult with Congress prior to voting at the WTO on the adoption of decisions or the acceptance of new members if the action in question “would substantially affect the rights of obligations of the United States . . . or potentially entail[] a change in Federal or State law.”153 Unlike new trade agreements, though, Congress did not need to vote either on accepting new members or on the package of concessions the executive branch (and other nations) negotiated as the cost of permitting the new member to join.154 Membership in international organizations like the WTO was treated as a foreign policy issue subject to the discretion of the executive branch.155

152 See David H. Autor, David Dorn & Gordon H. Hanson, The China Syndrome: Local Labor Market Effects of Import Competition in the United States, 103 A.M. ECON. REV. 2121, 2125 (2013) (“We find that local labor markets that are exposed to rising low-income-country imports due to China’s rising competitiveness experience increased unemployment, decreased labor-force participation, and increased use of disability and other transfer benefits, as well as lower wages.”); Justin R. Pierce & Peter K. Schott, The Surprisingly Swift Decline of U.S. Manufacturing Employment, 106 A.M. ECON. REV. 1632 (2016) (linking a drop in U.S. manufacturing jobs after 2000 to limitations on increasing tariffs against Chinese goods, with industries more exposed to the policy change suffering greater declines in employment).

153 URAA § 122(h).

154 Congress entertained a number of bills that would have limited the executive branch’s freedom to support Chinese accession to the WTO, although none of these bills were ever enacted. See Alan S. Alexandroff, Concluding China’s Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China, 3 UCLA J. INT’L & FOREIGN AFF. 23, 34-39 (1998).

155 Congress did have to vote on extending MFN status to China. Prior trade statutes had withheld that status from Communist countries and to allow China to join the WTO without MFN status would have put the United States into breach of its WTO obligations to China. See id.; Trade Act of 1974 § 401. Hence, U.S. law created an odd situation in which the president had unchecked authority (as a matter of federal law) to support Chinese accession and determine the conditions thereof, but Congress would then need to act to avoid the United States becoming subject to trade sanctions. See Nicholas R. Lardy, Permanent Normal Trade Relations for China, BROOKINGS INST. (May 10, 2000). In late 2000, Congress did indeed extend MFN status to China without any strings, although it created a series of monitoring mechanisms to oversee Chinese compliance with its WTO commitments. People Republic of China—Trade Relations, P.L. 106-286 (2000).
The result of the 1988 Act and the Uruguay Round was not only to shift power to the Executive Branch but to further unhook trade policy from either the domestic economic or foreign policy paradigms that have long characterized trade’s role within the separation of powers. The WTO accession process is not designed either to maximize (or even seriously consider) the economic interests of diverse U.S. constituencies (as is the legislative process) or to advance specific foreign policy and national security aims (as are the Executive foreign policy powers). Instead, the process enables further liberalization on the grounds that lower trade barriers increases aggregate national wealth, no matter how distributed.156

2. The Turn Toward Free Trade Agreements (FTAs) — Although other countries have continued to join the WTO (most notably Russia in 2012), the WTO in the 21st century has largely become a dispute resolution forum. As such, trade liberalization commitments through the WTO have become almost entirely an executive affair. The executive negotiates and votes on the expansion of the WTO to new members and conducts trade litigation—which can affect the United States’ obligations—on behalf of the United States with relatively little activity required by Congress.157 While WTO expansion can integrate new markets and litigation can develop and clarify existing rules, the stalemate in the Doha Round means the WTO cannot develop new rules.

Instead, FTAs have replaced the multilateral system as primary forum for trade negotiations over new rules. This turn toward FTAs, more than any other development, unmoored trade policy from traditional foreign policy concerns. As we explain below, although some relatively minor FTAs have been used to reward allies, the most significant FTAs have been justified on the grounds that they allow economic integration to proceed faster than the glacial pace truly multilateral negotiations permit.

To accomplish this integration, FTAs are often far more comprehensive than the WTO agreements, including rules on investment and more recently rules on the digital economy and data.158 Beyond coverage, FTAs usually also liberalize trade in goods and services beyond what WTO rules require. An exception in WTO rules to the most-favored nation obligation permits this preferential treatment, provided that nations eliminate “substantially all” barriers to trade between them.159 As a consequence, FTA parties eliminate a considerably wider range of trade barriers than WTO rules require.

156 While there is an argument that further liberalization enhances foreign policy goals or benefits the domestic economy, our point is that these broad justifications are indirect and disconnected from legal processes that one might expect, under our constitutional system, to vindicate those goals.

157 We discuss the impact of this litigation below. See Part III, infra.

158 See, e.g., NAFTA ch. 11 (establishing rules on investment); Trans Pacific Partnership ch. 14 (establishing rules governing electronic commerce).

159 See GATT art. XXIV; GATS art. V.
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Moreover, many chapters of FTAs themselves contain most-favored nation clauses. These clauses usually require that members of the FTA be accorded treatment that is “no less favorable” than that accorded to “any other Party or a non-Party.”\(^{160}\) This means that, as a general matter, the United States must extend any preferential treatment it provides to a subsequent FTA partner to all existing FTA partners. Hence, if South Korea receives preferential treatment in, for example, the services sector via its FTA with the United States that entered into force in 2012, Mexico and Canada would be entitled to the same treatment by virtue of the most-favored nation clause in the services chapter of NAFTA, which entered into force in 1994.

As a result of these clauses, FTAs form a multilateral web of trade liberalization commitments. This web further undermines the foreign policy rationales for FTAs. If an FTA is meant to reward an ally for support on issues such as military and geopolitical support—as opposed to representing an equal trade between parties of market access concessions—that ally does not necessarily need the protection of a clause that gives it the benefits from all future U.S. FTAs. Indeed, granting such allies the benefits of future FTAs risks disrupting the U.S. economy with no offsetting benefit in the form of meaningful market access concessions to the United States.\(^{161}\)

Ironically, given that major FTAs are almost entirely detached from foreign policy concerns, the origins of the U.S. turn to FTAs is found in efforts to pursue one of the United States’ most bipartisan foreign policy objects: a strong relationship with Israel. In 1983, President Reagan and Israeli President Yitzhak Shamir announced their intention to negotiate a free trade agreement.\(^{162}\) That agreement, entered into in 1985, would be the United States’ first comprehensive FTA.\(^{163}\) Given the modest size of the Israeli economy, the economic effects of the agreement on the U.S. economy were negligible. Nevertheless, this foreign policy-oriented trade agreement laid the groundwork for a U.S. program of negotiating FTAs. Today, the United States is party to 14 FTAs currently in force with 20 different countries.\(^{164}\) Additionally, in 2016 the United States signed the 12-nation Trans Pacific Partnership (TPP), a comprehensive FTA that blanketed the Pacific Rim, and has pursued an FTA with the European Union known as the Trans-Atlantic Trade and Investment Partnership (T-TIP).\(^{165}\)

\(^{160}\) See, e.g., TPP art. 10.4 (in the services chapter); NAFTA art. 1203 (same).

\(^{161}\) It is not clear that this approach can be justified on domestic economic grounds either. The only context in which this approach would be justified is if liberalization is always domestically beneficial. This point, however, is contested, particularly on distributional grounds, by many of the domestic economic interests that supposedly benefit.

\(^{162}\) Koh, supra note 8, at 1211.

\(^{163}\) Id. at 1211 & n. 57.


\(^{165}\) Id. in 2017, President Trump announced his intention not to proceed with the TPP. Peter Baker, Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal, N.Y. TIMES (Jan. 23, 2017).
The Israeli-U.S. negotiations presented an odd problem. Although the President continued to have authority to negotiate reductions in nontariff barriers, Congress had declined in the 1979 Trade Agreements Act to extend his authority to negotiate tariff reduction commitments. As a consequence, the President could not negotiate an FTA without Congress revisiting his negotiating authority. To address this problem, Congress passed the 1984 Trade and Tariff Act. Beyond expressly authorizing the FTA negotiations with Israel, the 1984 Act made two other changes to U.S. that would have far-reaching consequences.

First, the Act expanded the definition of “international trade” to include foreign investment. Previously, the 1974 Act had limited the definition to trade in goods and services. This expanded mandate allowed the President to negotiate investment chapters in U.S. FTAs, even though the multilateral GATT did not include rules on investment. As a consequence, FTA negotiations offered the executive branch broader scope to negotiate economic liberalization.

Second, the 1984 Act established a procedure for the President to negotiate FTAs with countries other than Israel that would be eligible for modified fast-track approval. Specifically, the Act provided that if a country other than Israel requested FTA negotiations with the United States, the President must notify the Senate Finance Committee and the House Ways and Means Committee 60 days in advance of notifying the full Congress of his intention to enter into the agreement. If either committee disapproved of the negotiations, any resulting agreement would not be eligible for fast-track procedures. The availability of fast-track procedures for FTAs put bilateral or mini-lateral negotiations on the same footing as multilateral GATT negotiations. At the same time, bilateral negotiations could be completed much more quickly, precisely because of the smaller number of parties.

As a result of these new authorities and the ease of negotiating in smaller groups, FTAs quickly became the preferred tool for negotiating new trade agreements. In 1985, President Reagan notified the Senate Finance and House Ways and Means Committees of his intention to negotiate an FTA with Canada. The U.S.-Canada Free Trade Agreement, in turn, provided the groundwork for

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169 1974 Trade Act § 102(g).
170 Koh, supra note 8, at 1212-13.
172 Because fast-track procedures are merely legislative procedures, this form of legislative veto does not violate the letter of Chadha, which focuses on whether a legislative veto alters legal entitlements. See Koh, supra note 8, at 1217 & n. 77; Chadha, 462 U.S. at 919.
173 Id.
NAFTA negotiations when Mexico requested that the bilateral agreement be expanded to include it as well.

NAFTA’s most important feature was that it allowed duty-free entry of goods into the United States from Mexico, a country with considerably lower wages. As a result, many at the time expected a mass migration of American manufacturing jobs to Mexico, where goods could be manufactured cheaply and then reimported into the United States without having to pay a tariff. Almost as important, though, at least for political purposes, NAFTA’s investment chapter imported a mechanism known as investor-state dispute settlement (ISDS) into a major trade agreement. ISDS allows a private investor to bring an arbitration claim for monetary damages directly against a foreign government. Since NAFTA came into force, the United States has been the respondent in 21 arbitration cases brought by Mexican or Canadian investors, though it has not yet lost a case.

To be sure, NAFTA did not invent ISDS, a mechanism found in bilateral investment treaties. It did, however, establish rules governing investment between the United States and its only two adjacent neighbors, one of which is a developed country. Most U.S. bilateral investment treaties are with small developing countries that have little investment in the United States. These treaties are therefore unlikely to ever be the basis for an ISDS claim against the United States. The United States had concluded only a handful of these agreements prior to NAFTA, with countries such as Panama, making NAFTA the first major U.S. agreement in involve rules on investment.

This shift to including investment in trade agreements is important because rules on how a government treats foreign investment are more invasive than mere trade rules. Especially in the 1980s when the United States negotiated these agreements, trade rules dealt chiefly with barriers at the border. After a product gains entry into the United States, however, the main requirement imposed by trade rules is that it be treated the same as any other product in the stream of commerce. Investment agreements, like NAFTA chapter 11, contain nondiscrimination rules too, but they also have rules that establish substantive standards of treatment (roughly akin to due process in U.S. constitutional law).

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174 NAFTA ch. 11.
175 NAFTA art. 1119 et seq.
176 Canada and Mexico have not been so lucky. Mexico has been subject to 24 claims, while Canada has been subject to 34 claims. Moreover, unlike the United States, both Canada and Mexico have been on the losing end of cases, resulting in judgments worth hundreds of millions of dollars. For comprehensive information on NAFTA disputes, see Todd Weiler, NAFTACLAIMS.COM.
178 Indeed, even many of the Tokyo Round agreement on nontariff barriers actually dealt with border measures such as anti-dumping and countervailing duties. See Jackson, Louis, & Mitsushita, supra note 126 (describing the Tokyo Round agreements). Today, trade regulation of nontariff barriers does involve more regulation of behind-the-border activity.
179 See GATT art. III;
These rules—on “fair and equitable treatment,” the minimum standard of treatment, and expropriation—potentially make a government liable to a private investor if it exercises its regulatory power in a way that either falls below the standard of treatment required by international law or violates the investor’s reasonable expectations in a way that impairs the value of the investment. Combining these rules with a private international remedy created the concern that investment agreements would limit the exercise of state regulatory power to a considerably greater degree than multilateral trade agreements.

The process of approving NAFTA in Congress showed the extraordinary strain on the foreign policy paradigm. The negotiations had largely been completed in 1992, when President George H.W. Bush was running for reelection. But in 1992, the Cold War was over and the United States was emerging from a recession. Consequently, domestic economic policy became a central issue in the campaign. In a precursor of events to come, billionaire Ross Perot ran for president as a third-party anti-trade liberalization candidate. Perot made a point of attacking President Bush’s embrace of NAFTA, famously referring to the “giant sucking sound” that would come as Mexico took American jobs. Then-Arkansas governor Bill Clinton, the Democratic challenger, took a middle road, calling for NAFTA to proceed only after Mexico and Canada had agreed on tougher rules for environmental and labor standards. When Clinton won the election and Democrats generally opposed to the agreements retained control of Congress, it seemed like U.S. trade policy might pivot back towards domestic economic concerns.

Instead, President Clinton did as he promised, negotiating what are known as the NAFTA Side Agreements on Labor and the Environment (or more formally, the North American Agreements on Environmental and Labor Cooperation).
Congress then passed a bill implementing NAFTA, the NAFTA Implementation Act. This established an unfortunate, and unstable, precedent. With the end of the Cold War, domestic economic insecurity had reasserted itself as a political brake on trade liberalization. American presidents, however, chose not to address this problem by designing an international trade policy that responded directly to this insecurity. Instead, their approach reflected two views. First, the overall benefits to the national economy provided the domestic economic justification for the agreements. Unlike earlier eras of U.S. trade policy, distributional issues about who in the American economy gained and lost were not directly part of the administration’s justifications or goals for its international trade policy.

Second, to assuage concerns in Congress about the domestic economic effects of further trade liberalization, in particular the fear that American manufacturing jobs would move wholesale to Mexico, President Clinton negotiated the NAFTA Side Agreements, which require NAFTA parties to enforce their own domestic environmental and labor laws. President Clinton sold these agreements on the premise that they would help alleviate the loss of jobs to Mexico by counteracting the lower labor costs in Mexico that stemmed, at least in some part, from less regulation. In other words, the Clinton administration’s approach to domestic labor market concerns raised by trade agreements was to negotiate international obligations to raise standards in Mexico—an outwardly-focused approach to solving a fundamentally domestic economic problem. These obligations have since become standard in U.S. FTAs. Although the content of these labor and environment obligations have become somewhat stricter in subsequent U.S. trade agreements, the muddled approach of pushing for international obligations on foreign countries to try to address domestic job losses in the United States has not changed. Not surprisingly, these labor and environment provisions have not improved the lot of American workers, creating further cynicism about American trade agreements.

3. Trade in the 21st Century — While President Clinton was ultimately successful in winning congressional support for NAFTA, he did so at the cost of the President’s negotiating authority. After extending fast-track to allow for the

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188 Id. at 992-97.
189 To be sure, the United States carried forward trade adjustment assistance, a domestic program designed to aid workers displaced by competition with imports. However, trade adjustment assistance as implemented in the United States has been largely ineffective. Id. at 1008-1010.
190 NAFTA Environmental Side Agreement, supra note 63, art. 5 (“[E]ach Party shall effectively enforce its environmental laws and regulations through appropriate governmental action . . . .”); NAFTA Labor Side Agreement, supra note 62, art. 3 (“Each Party shall promote compliance with and effectively enforce its labor law . . . .”).
191 Timothy Meyer, Saving the Political Consensus in Favor of Free Trade, 70 Vand. L. Rev. 985, 1002-1004 (2017) [hereinafter “Meyer, Saving Free Trade”].
192 Id. at 990.
193 Id. at 1003-04.
194 Meyer, Saving Free Trade, supra note 191, at 1004-1008.
195 Id. at 1004-08.
passage of the Uruguay Round Agreements Act, Congress let fast-track authority lapse in 1994. Since that time, Congress has only twice renewed the authority (now called “trade promotion authority” or TPA), in 2002 for a five-year period and in 2015 for three years.

The first of these renewals, in 2002, came at the request of President George W. Bush. He used the authority (now formally called trade promotion authority) to negotiate a series of mostly bilateral FTAs, along the Central American Free Trade Agreement (CAFTA). With the exception of the agreement with Korea, (the United States-Korea Free Trade Agreement or “KORUS”), which is the United States’ sixth largest trading partner,196 these agreements had negligible economic impacts on the U.S. economy as a whole. Instead, these agreements—completed with countries like Colombia, Jordan, Bahrain, Morocco, and Oman—shored up American interests around the world by rewarding countries that supported the United States during its wars in Afghanistan and Iraq.197

Demonstrating a continuity across party lines that has characterized executive trade liberalization efforts since President Truman, President Obama began his administration by obtaining congressional approval for several of these Bush-era FTAs. In his second term, President Obama then turned to another Bush initiative, the Trans-Pacific Partnership (TPP). By the end of the Obama administration, TPP was a 12-nation pact, including the three NAFTA parties, Australia, Chile, Japan, Vietnam, Singapore, Malaysia, Brunei, New Zealand, and Peru.

President Obama justified TPP primarily on foreign policy grounds. The agreement, he claimed, would allow the United States “to write the rules” for the 21st century international economy.198 In particular, the TPP would encircle China, which had emerged as the second largest national economy in the world.199 This justification was especially important politically in light of the fact that, like the trade agreements that preceded it, the government itself projected that TPP would have only a modest impact on the overall growth of the U.S. economy—15 percent growth in annual GDP 15 years into the life of the agreement.200

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199 China would be third if one counted the EU as a single country. See World Bank, GDP (current US$), https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?year_high_desc=true.
200 U.S. International Trade Commission, Trans-Pacific Partnership Agreement: Like Impact on the U.S. Economy and on Specific Industry Sectors, https://www.usitc.gov/press_room/news_release/2016/er0518ll597.htm. This modest growth as a percentage still equaled $42.7 billion and was projected to be the highest absolute gain among the TPP parties. Peter A. Petri & Michael G. Plummer, The Economic Effects of the Trans-Pacific
Critics, however, were highly skeptical of these claims. On the one hand, TPP’s text is in most respects similar to prior U.S. trade agreements, suggesting little effort to design an Asia-specific trade agreement. Second, commentators pointed out that China itself seemed fine with TPP provisions. Indeed, so pleased was China with TPP that it incorporated a number of similar provisions into its own mega-regional trade agreement, the Regional Comprehensive Economic Partnership (RCEP).

TPP would face two tests in Congress: granting the President authority to negotiate the agreement, and then its ultimate approval. Ultimately Congress gave President Obama negotiating authority in the Bipartisan Trade Priorities and Accountability Act of 2015. That Act, however, revealed a distrust that had grown between Congress and the President. Although Congress maintained the basic framework for trade promotion authority, it limited its effectiveness to three years with a possible three-year extension if the President so requested and neither house of Congress passed a resolution vetoing the extension. The Act also imposed some of the strictest notification and consultation requirements to date, mandating, for instance, that the Trade Representative meet with any member of Congress “upon request” to discuss the status of negotiations and provide any member of Congress with relevant documents, including classified material. The statute also took modest steps towards beefing up Congress’s oversight role once the agreement entered into force, requiring extensive consultations with Congress on the steps U.S. trading partners take to comply with the agreement, as well as consultations on enforcement action the executive branch intends to take.

Ultimately, these provisions and the congressional skepticism behind them were never put to the test. President Obama signed TPP on February 4, 2016, and the agreement seemed likely to fail in Congress. Before Congress had the chance to vote TPP down, however, electoral politics broke what little remained of the foreign policy paradigm. Trade was a central issue in the 2016 presidential

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Jeremy Malcolm, Meet RCEP, a Trade Agreement in Asia That’s Even Worse than TPP or ACTA, ELECTRONIC FRONTIER FOUNDATION (June 4, 2015), https://www.eff.org/deeplinks/2015/06/just-when-you-thought-no-trade-agreement-could-be-worse-tpp-meet-rcep.


Bipartisan Trade Priorities and Accountability Act §103.

Id. at §104(a)(1).

Id. at §104(a)(3).

Id. at §105(f)(3).

Trans Pacific Partnership Trade Deal Signed in Auckland, BBC NEWS (Feb. 4, 2016), http://www.bbc.com/news/business-35480600 [http://perma.cc/FL22-B3XW]; Adam Behsudi, Obama puts Congress on notice: TPP is coming, POLITICO (Aug. 12, 2016) (“But the deal is going nowhere until the White House addresses a number of concerns lawmakers have raised about the trade agreement”).
campaign. Democratic candidate Bernie Sanders and Republican nominee Donald Trump derided free trade agreements as bad for Americans, leading to an exodus of American manufacturing jobs. This criticism forced the Democratic nominee Hillary Clinton to disavow a trade agreement she had supported as Secretary of State. Polling data during the election also revealed a collapsing political consensus in favor of free trade. Notably, one poll found that 67% of Trump supporters—and 52% of those who vote Republican, the party most likely to favor free trade—had negative views of free trade.

In this environment, an electorate rife with economic insecurity resolved the tension between the President and Congress in favor of slowing trade liberalization. Following Trump’s election in November, President Obama conceded that Congress would not take up TPP during his presidency. Immediately after taking office, President Trump announced he would “unsign” TPP. Ironically, President Trump instead announced he would use the trade promotion authority conferred by Congress in 2015 to renegotiate NAFTA. The Trump administration has pursued that objective through a series of proposals—including making ISDS optional for states, putting a five year sunset provision on NAFTA, and requiring that 50% of auto parts originate in the United States for the finished auto to receive preferential treatment under NAFTA—that would roll back trade liberalization.

As a result of the internationalization of trade policy and the shift toward FTAs, trade has increasingly become unhooked from both the domestic economic and foreign policy justifications that undergird trade’s role in our constitutional system. The results are not surprising. In the context of a shrinking middle class, increased economic anxiety, and rising wealth and income inequality, political support for trade agreements is fragile at best. Without specific foreign policy or national security aims to justify such agreements, the case for liberalization becomes one that relies more on domestic economics. And yet, the distributional effects of these agreements are hotly contested and the process by which the agreements are concluded minimizes the role of domestic politics. By moving

208 Meyer, Saving Free Trade, supra note 191 at 997-98.
210 Alan Yuhas, Congress will abandon Trans-Pacific Partnership, White House concedes, THE GUARDIAN (Nov. 14, 2016).
211 Eric Bradner, Trump to Begin Renegotiating NAFTA with Leaders of Mexico, Canada, CNN (Jan. 22, 2017).
212 Id.
beyond the balance of trade powers outlined in the Constitution, trade policy and politics has created its own crisis.

II. TRADE’S BOUNDARY PROBLEM

Trade is a classic “intermestic” issue, an area that bridges the international and domestic spheres. For example, the tariff that serves to encourage infant industries or raise revenue at home also restricts a foreign country seeking markets for its exports. Viewed from one side, the domestic economics paradigm applies; from the other, the foreign affairs paradigm. Technology, communications, and transportation extend trade’s boundary problem beyond the two-faced view of tariffs. As Professor Jack Goldsmith has observed, “as the world becomes more interconnected, domestic law and activity increasingly have foreign consequences, and vice versa.”214 For example, corporations have increasing established global supply chains for their goods, meaning that a single product might have components sourced from multiple countries, including the final country-of-sale.215 Global production and distribution chains have consequences in a variety of sectors beyond tariffs: regulatory compliance, taxation, national security policy, and data privacy. They even call into question the old saw “What’s good for GM is good for America”: if an American company has most of its operations abroad, wouldn’t directors have an obligation to shareholders to act against American interests if it improves shareholder value?216

Perhaps the best examples of trade’s boundary problem are nontariff barriers (NTBs) to trade. NTBs, recall, are domestic laws or regulations that impede trade, including regulations on issues such as health, safety, and the environment. Such regulations can be challenged through the WTO, resulting in potential liability for WTO members. For instance, in 2009 Congress passed the Family Smoking Prevention and Tobacco Control Act. The statute aimed to reduce youth smoking by eliminating the primary gateway to smoking, flavored cigarettes.217 The statute, however carved out an exception for menthol cigarettes.218 Indonesia successfully challenged the statute at the WTO arguing that the exception for menthol cigarettes, produced mostly in the United States, discriminated against clove cigarettes, produced mostly in Indonesia.219 Similarly, U.S. efforts to implement

216 For a philosophical discussion this problem, see David G. Yosifon, Is Corporate Patriotism a Virtue?, 14 SANTA CLARA L. REV. 265 (2016).
218 Id.
219 Id.
measures, such as a dolphin safe labeling scheme, for tuna imported into the United States have been successfully challenged before the WTO, leading the United States to change its requirements.\textsuperscript{220}

Trade’s boundary problem also gives the President the incentive to frame a wide swath of policies as foreign affairs, rather than domestic economics. When viewed through the foreign affairs paradigm, the process for making law involves presidential leadership, severely restricted interest group involvement, limited public or congressional knowledge or pressure over the terms of the deal, and a fast-tracked ratifying vote by Congress. Compared to the traditional legislative process, the trade agreement approach is far less complex, uncertain, and costly (in terms of time and political capital) for the President. The result is that the dominance of the foreign affairs paradigm should lead not only to expansive presidential power, but to the President increasingly framing domestic policy in foreign affairs terms.\textsuperscript{221}

Trade’s boundary problem, of course, is not insurmountable. Boundary problems are pervasive in law.\textsuperscript{222} The answer is not to slide down the slippery slope and accept that anything framed broadly as “foreign affairs” is exempt from the traditional legislative process.\textsuperscript{223} Below, we argue that despite trade’s boundary problem, Congress—and by extension domestic economic concerns—should play the preeminent role in American trade policy today for three reasons. First, the concerns that animate arguments for foreign affairs exceptionalism in other contexts do not apply to trade policy. Second, the Founders gave control of trade policy to a “parochial” Congress beholden to local constituencies precisely so that those interests could influence trade policy. Third, the 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.

A. Normalizing Trade Law

Within the separation of powers, the foreign affairs paradigm places trade law and policy within the executive branch for a variety of functional reasons, including expertise, speed, and secrecy. As Alexander Hamilton wrote in \textit{Federalist} 70, “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the

\textsuperscript{220} United States—Measures Concerning the Import, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB (adopted June 13, 2012).

\textsuperscript{221} Cf. Sitaraman & Wuerth, \textit{National Security Exceptionalism and the Travel Ban Litigation}, LAWFARE, Oct. 12, 2017 (making the incentive effects argument with respect to national security and immigration).

\textsuperscript{222} For applications in the foreign affairs context, see Derek Jinks & Neal Kumar Katyal, \textit{Disregarding Foreign Relations Law}, 116 YALE L.J. 1230, 1257 (2007); Sitaraman & Wuerth, \textit{Normalization}, supra note 6, at 1942-1944.

proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished." Some scholars have recently argued that foreign affairs should not be treated differently from domestic affairs as a categorical matter, but rather that these functional justifications for expansive executive power should be evaluated on a subfield-by-subfield or even issue-by-issue basis. The reason is that the particular functional justifications for deference might not apply in some fields but do in others. Taking this more careful approach to justifying deference, most of the conventional justifications for expansive deference to the executive are either inapplicable or relatively weak in the trade context.

Start with expertise. It is likely true that the executive branch has more substantive expertise than Congress does with respect to technical information on international economic issues, and certainly true that it has more institutional capacity in terms of personnel and resources. But it is not all clear why this implies that there should be greater executive power over trade matters. As one of us has argued, “it is equally true that [members of the executive branch] know more about food and drug policy, environmental policy, banking regulation, and Medicare reimbursements” than members of Congress. And yet, those “domestic” areas are well understood to be squarely within the purview of the legislative process.

Second, while all foreign affairs issues have some domestic impact and vice-versa, trade is more obviously intertwined with domestic economic policy than many other foreign affairs issues. Whether the issue is tariffs that encourage infant industry, revenue-raising measures, national security imperatives, or “non-tariff” regulatory barriers, the bread and butter of trade agreements are fundamentally different from, for example, peace treaties or military alliances. The latter largely require judgments about the place of the United States and foreign nations in the larger geopolitical context. The former implicates jobs, wages, economic competition domestically, and a variety of other constituent interests. These are precisely the kinds of factors in which Congress is considered have superior institutional competence because of its representative nature. In the Federalist

224 THE FEDERALIST, NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003). See also EDWARD S. CORWIN, THE PRESIDENT 201 (5th rev. ed. 1984) (noting “the unity of the office [of the President], its capacity for secrecy and dispatch, and its superior sources of information; to which should be added the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time”); HAROLD HONGJI Koh, THE NATIONAL SECURITY CONSTITUTION 119 (1990) (noting that the President’s “decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match”).

225 Sitaraman & Wuerth, Normalization, supra note 6, at 1935-49.

226 See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936); Robert Knowles, American Hegemony and the Foreign Affairs Constitution, 41 ARIZ. ST. L.J. 87, 128 (2009). Note that the Executive’s comparative expertise is itself a function of a congressional decision to allocate resources to the Executive Branch such that it has that expertise.

227 Sitaraman & Wuerth, Normalization, supra note 6, at 1936.
Papers, James Madison argued that members of the House of Representatives would not only bring critical knowledge of their constituents’ circumstances to federal policymaking but also that biennial elections would keep members of Congress tethered to the interests of their constituents. He even thought they would be particularly well-suited to address trade policy: “How can foreign trade be properly regulated by uniform laws,” he asked in Federalist 53, “without some acquaintance with the commerce, the ports, the usages, and the regulations of the different states?” The House of Representatives brings that granular knowledge of the diverse circumstances of a large nation to the policymaking process.

Now consider speed, or “dispatch” as Hamilton put it. While a variety of scholars have argued that speed is a “general characteristic of foreign affairs,” it is not at all clear why speed is necessary in the realm of international trade. Trade agreements often take years to conclude, and they move in fits and starts as political and economic conditions change around the world. For example, the Uruguay Round of GATT negotiations began in 1986 and only concluded in 1994 with the signing of the Marrakesh agreement. The fact that a trade agreement can be characterized as “foreign” hardly implies that speed is essential. In contrast, in some cases, such as financial crises and natural disasters, purely domestic emergencies might require quick action. As a result, the foreign/domestic distinction is poorly tailored to the functional need for “dispatch.” A far better distinction would be emergency/non-emergency or crisis/non-crisis.

Finally, secrecy. During the Constitutional Convention, there was a debate on whether the Senate alone or the Senate and the House of Representatives would have a role in advising on treaty negotiations. James Wilson argued that the need for secrecy in treaty negotiations was “outweighed” by the benefits of “obtaining the Legislative sanction.” Roger Sherman responded that the “necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature.” Sherman’s view, relying on the importance of the small number of

228 Federalist No. 53 (Madison), at 301. See also Federalist No. 56.
229 Federalist No. 53 (Madison), at 301.
Senators (twenty-six at the time), carried the day.\textsuperscript{235} John Jay made a similar argument in \textit{Federalist} 64. “[I]n the negotiation of treaties…,” he noted, “perfect secrecy and dispatch are sometimes requisite.”\textsuperscript{236}

The more interesting argument, however, was made by the Federal Farmer, who noted during the ratification debates that “commercial treaties” were different from “treaties of peace and alliance” because the “latter generally require secrecy, [and] it is but very seldom they interfere with the laws and internal police of the country.” In contrast, commercial treaties “do not generally require secrecy, they almost always involve in them legislative powers, interfere with the laws and internal police of the country, and operate immediately on persons and property, especially in the commercial towns…they consist of rules and regulations.” These were, he argued, the province of Congress under its Article I commerce powers.\textsuperscript{237}

While Sherman and Jay took a foreign affairs perspective across the board, the Federal Farmer recognized the distinctive nature of trade agreements.

In contemporary practice, the executive branch has classified draft language from trade agreements up until the entire agreement is finalized. In practice, this means that large sections of the text might be finalized among the parties and yet unavailable to the general public until the entirety of the agreement is concluded. Functionally, this practice makes little sense. First, as Federal Farmer and some modern commentators have argued, trade agreements that make regulatory changes to domestic economic policy issues have no inherent need for secrecy and might in fact benefit from transparency and the attendant public participation and feedback.\textsuperscript{238} Second, the secrecy justification for drafts (rather than the negotiating positions themselves) are extremely weak. By definition the negotiating partners on the other side of the agreement are aware of the draft agreement, so there is no secrecy interest in the draft (and particularly in the completed sections of a draft) with respect to the foreign country.\textsuperscript{239} Third, while it is true that public disclosure of negotiating practices might chill negotiators ability to speak freely in the negotiations, commentators calling for greater transparency in trade agreements have not asked to see negotiators notes or strategies or even to have the negotiations themselves take place in public view. Rather, they argue for giving the public access to drafts that are shared with all the

\textsuperscript{235} Id.

\textsuperscript{236} \textbf{FEDERALIST} NO. 64 (Jay), at 358, 360.


\textsuperscript{238} On the modern side, see John C. Yoo, \textit{Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution}, 99 COLUM. L. REV. 2218, 2241 n. 85 (1999) (“Even if the Senate is better disposed to diplomacy than the House, multilateral treaties that impose domestic rules of conduct do not demand secrecy or speed of action. Only those treaties that have the least domestic effect, and hence need no implementing legislation, such as military or political alliances, demand secrecy.”).

\textsuperscript{239} Elizabeth Warren, Speech in the United States Senate, May 21, 2015.
parties and with industry advisory groups. Indeed, negotiating partners, including the EU, routinely release their side of trade agreements.

In other words, the oft-recited functional arguments for expansive foreign affairs deference to the President—expertise, speed, and secrecy—are all either inapplicable or significantly weaker in the trade context than in other domains within foreign relations. Clumping trade with other foreign relations issues and treating them as exceptional under the separation of powers (and therefore suited to expansive presidential power) thus makes little sense. A far better approach would be to “normalize” trade, and see it as governed by ordinary separation of powers principles, in which Congress has valuable functional contributions to make to policymaking, not to mention significant Article I authorities.

B. The Benefits of a Parochial Congress

A common trope in separation of powers scholarship is that the President represents a national constituency, while the Congress represents local interests. In trade law, commentators and lawmakers invoke this argument to justify the delegation of congressional power to the President. The theory is that by empowering the national President, the parochial Congress ensures that the institution best able to act in the national interest is the institution setting American trade policy. Not coincidentally, on this view the national interest is synonymous with trade liberalization. Reducing barriers to trade increases national wealth in the aggregate, which is—regardless of the distribution of that wealth—deemed in the national interest. Once one defines that national interest in this way, it follows straightforwardly that the executive is best able to act in the “national” interest. The President, after all, has historically favored trade liberalization, while Congress tends to be more protectionist.


242 See, e.g., Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, U.C.L.A. L. REV. (2006) (criticizing the view that the president will pursue policies that advance the aggregate good, while members of Congress will pursue policies that only advance the local good); 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.”).

243 Devereaux, Lawrence, & Watkins, supra note 15, at 188 (“The President, whose constituency is the entire nation, is likely in the best position . . . to represent the overall national interest in open trade.”).
In political economy terms, this argument boils down to a claim that government should pursue efficiency, and not concern itself with distributional considerations, in its choice of trade policy. The goal of the separation of powers, however, is not to produce particular policy outcomes, such as trade liberalization. Nor, as the Supreme Court has repeatedly admonished, is efficiency a value that the Framers of our Constitution prized especially highly when they designed our system of government. As Justice Brandeis put it,

The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Put less starkly, the Constitution gives Congress the primary role in establishing national laws precisely to ensure “a step-by-step, deliberate and deliberative process” that will often be “clumsy, inefficient, even unworkable.”

Local and “parochial” interests are, by constitutional design, at the core of this deliberative process. Members of Congress have a wide range of constituencies. By virtue of local or state election, they are beholden to interests located in their districts or states. By setting elections up this way (and by later providing for direct election of senators), the Framers intended that Congress be the main avenue through which local interests would exert influence over law and policy. Similarly, other interests—such as farmers, labor unions, environmentalists, and small businesses—have an easier time finding a voice in the political process through Congress. Such interests may have difficulty attracting the attention of the President or unelected administrative agencies, but 535 members of Congress

244 Commentators often argue that distributinal issues arising from trade policy should not be ignored, but rather should be resolved through domestic policy. See Dan Ikenson, Crucifying Trade for the Sins of Domestic Policy, FORBES (March 28, 2016). The problem with this claim is that trade’s distributional issues are not, in fact, addressed outside of trade. As a consequence, voters are increasingly demanding that trade policy itself directly address these distributional issues. See Meyer, Saving Free Trade, supra note __.

245 Chadha, 462 U.S. at 959 (“the Framers ranked other values higher than efficiency.”); Youngstown, 343 U.S. at 629 (Douglas, J, concurring) (“All executive power . . . has the outward appearance of efficiency. [But we] cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution.”).


247 Chadha, 462 U.S. at 959.


249 Garcia, 469 U.S. at 550-51 (“the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”).

250 Garcia, 469 U.S. at 565 & n. 9 (Powell, J., dissenting).
provide many more opportunities for interaction. These entry points into the lawmaking process are a feature, not a bug. They ensure that trade policy, or any policy for that matter, reflects the diverse set of interests that exist in our nation. In the economic language that often dominates discussions of trade policy, our Constitutional system mandates that trade policy be made in light of distributional considerations, not efficiency considerations.

Recent legislation introduced by Michigan Senator Gary Peters and North Carolina Senator Richard Burr illustrates the point. The two senators introduced a bill that would create a task force within the Commerce Department charged with initiating trade remedies investigations affecting small and medium-sized businesses.\textsuperscript{251} Under existing law, American producers can petition the government to impose extra duties on goods that are either dumped at unfair prices into the United States or benefit from illegal subsidies. Doing so, however, requires hiring expensive law firms, and although the Commerce Department has authority to self-initiate investigations, it rarely does so.\textsuperscript{252} Unable to access trade remedies through the Commerce Department due to legal costs and the difficulties with getting a remote agency in D.C. to take action, these businesses have turned to Congress for aid. Congress, in other words, provides an avenue of relief for individuals and institutions that cannot influence government policy through other channels.

The chief problem with the foreign affairs paradigm is that it systematically disadvantages the plurality of interests that is core to American democracy and which the Framers intended Congress to represent. The process by which trade agreements are negotiated is far less transparent and participatory than the legislative process because the executive branch is a gatekeeper for determining which interest groups get access to government during negotiations. While the 1974 Act created industry advisory committees that could participate in trade negotiations,\textsuperscript{253} the advisory committee model is not a substitute for the legislative process, even in an era of “unorthodox lawmaking.”\textsuperscript{254} The advisory committees represent a limited number of interests and are heavily stacked in favor of industry. Of the 566 members of the TPP’s 28 advisory committees, 85 percent (480 members) were industry lobbyists or corporate executives.\textsuperscript{255} Some committees were entirely made up of industry representatives. The U.S. Trade Representative

\textsuperscript{251} Vicki Needham, Senators introduce bill to help businesses with trade complaints, THE HILL (FEB. 15, 2018).


\textsuperscript{253} Trade Act of 1974 at § 2155.


\textsuperscript{255} Elizabeth Warren & Rosa DeLauro, Who is Writing the TPP?, BOS. GLOBE, May 11, 2015.
also uses national security classification to restrict the availability of negotiation drafts only to the members of the committee and members of Congress. This restricts congressional involvement and oversight because members of Congress are prohibited from talking about the agreement in public or reading their staffs into the agreement. It also prevents the general public from bringing pressure to bear on the terms of the agreement. Unless an interested party is afforded the privilege of entry into one of the industry advisory committees, it has limited power to shape the agreement’s terms.

Executive-dominated trade lawmaking also effectively allows the President to increase the costs to Congress of passing domestic laws that address the distributional issues raised by, or that run afoul of, trade agreements. This consideration is most prominent in what we might term the “two-step” problem. As noted above, in the post-Cold War era, economists and commentators who support trade liberalization as an economic policy have done so on the grounds that it expands aggregate welfare. Such commentators urge policymakers to use domestic lawmaking to address trade’s distributional problem, rather than trade policy. But separating trade liberalization from distributional issues limits the ability of members of Congress to use trade liberalization as leverage in negotiations to redistribute the gains from trade. The constrained consideration that trade agreements receive in Congress under fast track only further undermines the ability to link these two policies. In effect, members of Congress get an up-or-down vote on trade agreements, which limits their ability to link passage of the agreement to legislation aimed to redistributing the gains from trade. If they try to bring up the distributional issues later, trade liberalization’s advocates have little reason to negotiate, since they have already gotten their trade agreement.

Entrenching regulatory policies through trade agreements can also raise the cost of future legislative change because violating trade agreements has consequences. Countries that violate an agreement can be subject to retaliatory trade restrictions unless they either remove the measure or reach a settlement. Of course, a later-in-time statute trumps an earlier-in-time statute, and a past

256 Adkins & Grewal, supra note 8, at 1511-12.
257 Elizabeth Warren, Speech in the United States Senate, May 21, 2015, https://www.realclearpolitics.com/video/2015/05/21/warren_trade_deal_secret_because_if_details_were_made_public_now_the_public_would_oppose_it.html.
258 See supra Part I.C.
259 See, e.g., Ikenson, supra note 244; Paul R. Krugman & Maurice Obstfeld, International Economics: Theory and Policy 221 (7th ed. 2005) (“Any proposed trade policy should always be compared with a purely domestic policy aimed at correcting the same problem. If the domestic policy appears too costly or has undesirable side effects, the trade policy is almost surely even less desirable”).
260 Timothy Meyer, Misaligned Lawmaking (draft on file with authors).
261 Id.
262 Dispute Settlement Understanding art. 22 (describing the procedures for suspending trade concessions in retaliation for breaching trade commitments).
Congress cannot bind a future Congress. This rule, which applies equally to trade legislation, enables Congress to shift policies in light of changed circumstances, including changes in public preferences. And to be sure, Congress often seems oblivious to trade rules, regularly passing legislation that raises WTO problems. But in principle trade agreements create costs that as a practical matter constrain future Congresses.

Entrenchment is not a problem, per se. Most congressional acts are difficult to change, in part because of the potential economic and political costs of doing so, and are thus entrenched to some degree. Moreover, international law is supposed to work in this fashion. It allows countries to make credible commitments to cooperative policies precisely because it does create future costs to changing those policies.

The problem in the trade context specifically is that Congress does not go through its ordinary legislative process in passing legislation implementing trade agreements, which creates the initial entrenchment. During the initial negotiations over trade obligations, when the United States is unburdened by international obligations, the President dominates lawmaking. Only afterwards, when international commitments create an incentive not to change domestic policy, does Congress have the unfettered ability to propose, debate, and amend legislation. The result is that smaller constituencies and groups that rely on individual members of Congress to advance their interests are disadvantaged. They cannot provide meaningful input into the initial formulation of trade law because they cannot influence the executive branch and Congress only gets an up-or-down vote on the measure. Later when Congress can consider legislation unfettered, it has to also consider the negative consequences of trade agreements—something it would not have had to consider at the initial negotiation stage.

Moreover, Congress does appear responsive to the possibility of trade liability when considering legislation, at least in some circumstances. In 2017, House Speaker Paul Ryan and Ways and Means Committee Chairman Kevin Brady proposed a “border adjustment tax.” The proposal would have addressed a long-running concern that the U.S. tax system disadvantages U.S. companies vis-à-vis

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263 Cf. Whitney v. Robinson, 124 U.S. 190 (1888) (discussing the same relationship between treaties and statutes under the supremacy clause).


266 Even the Art. II treaty making process, which requires a supermajority of the Senate to consent to an international agreement, would involve more deliberation than the fast track procedures used for trade agreements.

most other countries that have a value-added tax (VAT).\textsuperscript{268} VATs are refunded at the border on exports and are, by agreement, permitted under WTO rules. Since the United States does not have a VAT, U.S. companies do not receive a similar refund when they export goods, but they do have to pay VAT in other countries. The Ryan-Brady plan would have moved the United States very close to a VAT system, but because of the kinds of deductions allowed U.S. exporters, raised WTO concerns.\textsuperscript{269} These concerns were high profile and contributed to the decision not to go forward with the border-adjustment tax.

C. The Captured Trade Presidency

Finally, the notion that the President formulates trade policy pursuant in the general national interest defies everything we know about politics. Proponents of the view that the President represents the national interest generally cite the fact that the President is nationally elected.\textsuperscript{270} The President does not, however, need to win the votes of the entire nation—or even a majority of voters—to be elected. As in many elections, presidents must assemble a coalition of 51\% in order to be elected. In the case of presidents, the 51\% applies not to voters, but to electoral college voters, meaning that presidents, such as President George W. Bush and President Trump, can be elected with minorities of the popular vote. Much research in political science suggests that elected officials cater policy to their winning coalitions.\textsuperscript{271} Indeed, they have an incentive not to expand their coalition because attracting support beyond the minimum necessary to win an election is costly.\textsuperscript{272} Given these realities, the mere fact that the President is elected nationally tells us little about whether he will actually pursue a trade policy in the national interest.

Presidential administrations are also subject to capture in the same way that congressional leaders are. Lobbyists work hard to influence administrations’ positions on trade negotiations. Indeed, through the U.S. Trade Representatives Advisory Committees, interest groups, especially industry, are given a seat at the table. What makes lobbying of presidential administrations different from lobbying members of Congress, though, is that there is only one president. The


\textsuperscript{269} Shawn Donnan, Barney Jopson, & Paul McLean, EU and others gear up for WTO challenge to US border tax, FIN. TIMES (Feb. 13, 2017).

\textsuperscript{270} Devereaux, Lawrence, & Watkins, supra note 15, at 188.


\textsuperscript{272} Riker, supra note 271; Barry R. Weingast, A Rational Choice Perspective on Congressional Norms, 23 AM. J. POL. SCI. 245, 245 (1979) (discussing the prediction that “majorities will be of the barest possible size, since [a minimum winning coalition] maximizes the per capita gains for the winners.”). Weingast goes on to note that, as applied to legislative negotiations, the prediction of a minimum winning coalition has limited empirical support, although that may change in the modern era of hyper-polarization.
singular president means that influencing the administration’s position is more difficult and expensive, precisely because many more groups are vying for presidential attention. If a decision is made in Congress, interest groups can seek influence through any of the 535 members.\textsuperscript{273} If decisions are made in the executive branch, the channels for influence are narrower.

This effect is compounded by the allocation of authority over trade policy within the executive branch. The executive branch is, of course, a “they” and not an “it.”\textsuperscript{274} Hence, it is possible to lobby different agencies that work on the same issue. However, the dominance of the U.S. Trade Representative in trade negotiations even limits these other avenues of influence. When the State Department ran trade negotiations, up until the 1960s, foreign policy experts and groups with connections to the Department played a dominant role in formulating trade policy. If the Commerce Department led trade negotiations, the domestic economic considerations that are that Department’s bread-and-butter might play a more outsized role. A separate U.S. Trade Representative, which is housed in the Executive Office of the President, however, cuts down on—although by no means eliminates—these other avenues of influence. Trade policy can be won at the White House.

Recent trade negotiations bear out the prediction that the executive branch is both subject to capture, and that the nature of the groups able to capture the administration’s positions are narrow. Consider the TPP. President Obama touted the TPP as part of a “pivot to Asia.”\textsuperscript{275} Most of the provisions in TPP, however, were cut and paste from earlier U.S. trade agreements.\textsuperscript{276} There was, in other words, nothing distinctly Asian about most of TPP. Labor and environment groups had some success in pushing for stronger provisions.\textsuperscript{277} But although TPP’s labor and environment provisions were the most stringent ever included in a trade agreement, most labor and environmental groups remained cynical that they would have any effect.\textsuperscript{278}

\textsuperscript{273} We do not, of course, mean to suggest that Congress does not have power structures that make some members more powerful than others.

\textsuperscript{274} Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47, 49 (2006) (“[W]e demonstrate that scholars may have underestimated the complexity of White House involvement. Presidential control is a ‘they,’ not an ‘it.’”).

\textsuperscript{275} Mike Green, The Legacy of Obama’s “Pivot” to Asia, FOR. POL. (SEPT. 3, 2016) (listing TPP as among the policy initiatives associated with Obama’s Asia policy).


\textsuperscript{277} Meyer, Saving Free Trade, supra note 191, at 1005 (describing the labor and environment chapters of TPP and the novel “consistency plans” that aimed to raise standards in countries like Vietnam).

\textsuperscript{278} See, e.g., Q&A: The Trans-Pacific Partnership, HUM. RTS. WATCH (Jan. 12, 2016), https://www.hrw.org/news/2016/01/12/qa-trans-pacific-partnership (“Human Rights Watch and others have expressed concerns that the agreement’s labor chapter and associated bilateral agreements will not adequately safeguard labor rights in TPP countries with poor labor rights records, notably Vietnam, Malaysia, and Brunei . . .”).
The Obama administration’s negotiating position was, however, thoroughly captured by industry groups. At the level of process, industry groups were allowed privileged access to negotiating drafts that were otherwise kept secret, including from other interest groups and the public. Hence, representatives from the businesses that would benefit from TPP had a hand in negotiations, while, for instance, labor groups whose constituents stood to be adversely impacted by the negotiations, were held at arms-length.

Not shockingly, this privileged access translated into privileged outcomes. TPP broke new ground by creating rules on digital trade and e-commerce, data protections for pharmaceutical companies. TPP also preserved investor-state dispute settlement, a procedure favored strongly by U.S. companies, over the objection of groups within the United States and other TPP members, such as Australia. To be sure, these companies did not get everything they wanted. Pharmaceutical companies, for instance, wanted a longer data exclusivity period during which generic manufacturers of drugs could not piggy back on existing clinical trials to prove a generic’s safety. But the real innovations in TPP came in the form of the Obama administration’s willingness to carry the water for corporate groups that enjoyed access to negotiations and draft texts that even some members of Congress and their staffs had difficulty accessing.

Given the ability of major economic players to capture the President’s position on trade, the President can hardly be said to represent the national interest. Rather, like all elected officials, the President represents his supporters and those to whom he chooses to listen. Ironically, President Trump’s election has driven this home for commentators who have long championed the “national” president in trade policy as a vehicle for championing aggressive trade liberalization. In response to his supporters, which include blue collar workers in states like Michigan and Ohio

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280 Alex Philippidis, Biopharma Industry Blasts TPP Exclusivity Compromise, GEN (Oct. 6, 2015) (quoting John Castellani, president of the Pharmaceutical Research and Manufacturers of America, as saying “[w]e are disappointed that the Ministers failed to secure 12 years of data protection for biologic medicines . . . This term was not a random number, but the result of a long debate in Congress, which determined that this period of time captured the appropriate balance that stimulated research but gave access to biosimilars in a timely manner.”).

281 George Zornick, Congress is Sick of the Secrecy Around the TPP, THE NATION (Aug. 20, 2015) (noting that “close to 600 corporate executive and lobbyists enjoy wide-ranging access and input to the draft text.”); Letter from Senator Sherrod Brown to President Barack Obama, Oct. 9, 2015 (“Access to the text has been inadequate throughout the TPP negotiations. A copy of the agreement was not readily available for Members of Congress until we demanded it. And even after the text was deposited in the secure reading rooms in the House and Senate, Members had to ask USTR for TPP annexes and other related documents to be made available. In addition, despite repeated requests, congressional staff with the necessary security clearance are still prohibited from seeing the text on their own”), https://www.brown.senate.gov/newsroom/press/release/brown-to-president-obama-access-to-text-of-trans-pacific-partnership-agreement-must-come-before-intent-to-sign
as well as companies struggling to compete with cheap imports, President Trump has acted aggressively to raise trade barriers. He “unsigned” the TPP;\textsuperscript{282} began NAFTA renegotiations that are popular with his political base but unpopular in the business community;\textsuperscript{283} imposed tariffs on solar imports that seem likely to benefit a few companies at the expense of the broader U.S. solar industry;\textsuperscript{284} and is mulling trade restrictions on steel and aluminum imports.\textsuperscript{285}

None of this should be surprising. The President is an elected official, subject to similar pressures to other elected officials. But it should caution against paradigms of trade policymaking that pretend the President is not subject to these pressures. In shifting power to the President, the foreign policy paradigm has ultimately empowered those special interests with access to the President. They can use trade policy to set domestic economic policy that is neither necessarily in the national interest, nor originates in the institution—Congress—responsible for such policy.

III. IMPLICATIONS AND EXTENSIONS

In this Part, we explore the implications of approaching trade from a balanced perspective within the separation of powers. This “normalized” approach to trade law and policy has a variety of consequences for contemporary legal and policy debates. First, we argue that the role of fast track, or trade promotion authority, has been misunderstood in the legal literature, and suggest that the delegation of power to the executive under this authority may be indirectly responsible for the recent backlash to trade agreements. Second, we show that the shift toward the foreign affairs paradigm has had the consequence of giving the President considerable power to declare trade wars, even though such executive actions are tantamount to making national economic policy and have significant economic consequences. This power is of particular interest, given President Trump’s threats to engage in trade wars. Third, we discuss the question of whether the President can withdraw from trade agreements without congressional participation or approval – a question that has gotten increased attention since President Trump’s assertion that he has this power. Fourth, we consider the increasingly common practice of the Executive branch concluding “unorthodox international agreements,” and we argue that Congress’s article I powers suggest that these agreements need to be far more carefully (and narrowly) considered in the trade context. Finally, we identify and discuss the problem of what we call “trade federalism,” the fact that trade agreements increasingly threaten longstanding and core state police powers. Throughout, we compare trade policy to other areas of foreign affairs to illustrate why the case for a greater Congressional participation in trade policy is especially strong in trade.

\textsuperscript{282} Baker, supra note 165.
\textsuperscript{283} Needham, supra note 1.
\textsuperscript{284} Swanson & Plumer, supra note 2.
\textsuperscript{285} Swanson, supra note 3
A. Fast Track and Congressional Oversight

To read the legal commentary, the path from the Smoot-Hawley Tariff to the creation of fast-track authority in 1974 is the path from ridiculousness to rationality. Congress and the President came together to find a way to liberalize trade while maintaining congressional oversight. Fast-track authority, on this view, is a novel innovation that allows the government to achieve both institutional separation of powers goals and make good policy at the same time—a rare combination.

The view outside the legal academy is quite different. Each time fast-track authority (now rebranded as trade promotion authority) comes up for renewal, it is met with vehement opposition. For instance, Public Citizen, a liberal advocacy group, argues that “Fast Track empowers executive branch officials advised by large corporations to skirt Congress and the public” in making trade policies that affect a wide range of trade (i.e. employment) and non-trade (i.e., environment and public health) issues.286 When fast track authority was last renewed in 2015, more than 2000 groups, including dozens of labor unions, environmental groups, and human rights organizations signed a letter urging Congress not to pass fast track. In their words, the then-pending bill “does virtually nothing to increase Congressional oversight over trade policymaking.”287

These very different views stem in part from baseline problems and in part from divergent views about the relative importance of preserving constitutional roles versus achieving particular policy goals. With respect to baselines, many commentators have argued that the creation of fast-track authority in 1974 represented the reassertion of congressional oversight over executive trade policymaking.288 As we explained above, however, this view is based on a misunderstanding of Congress’s role in approving trade agreements before 1974. In granting the President authority to negotiate trade agreements, Congress has always distinguished between tariff and nontariff barriers. Up to and including the 2015 Bipartisan Congressional Trade Priorities and Accountability Act, Congress has granted the President ex ante authority to enter into reciprocal tariff-reducing agreements and to proclaim tariffs on the basis of such agreements.289

Nontariff barriers have an entirely different history. Prior to 1974, and notably in the Trade Expansion Act of 1962, Congress did not grant the President any special authority to negotiate or conclude agreements on nontariff barriers. Such agreements still had to be approved by Congress, however. They simply had to be


288 See, e.g. Koh, supra note 8.

289 See Bipartisan Congressional Trade Priorities and Accountability Act of 2015 § 103(a); Part I supra.
approved through the ordinary legislative process, open to amendment and debate in committee and on the floor. Thus, when President Johnson negotiated agreements on nontariff barriers in the Kennedy Round, he had to submit them to Congress just as he would submit any legislation.\(^{290}\) In other words, congressional oversight of trade agreements on nontariff barriers was at its maximum prior to 1974, and in particular at the end of the Kennedy Round.

Viewed against this backdrop, the fast-track procedures created by the 1974 Trade Act clearly circumscribe congressional oversight. They did so in the name of allowing the United States to more easily enter into trade agreements. Congress would not easily implement trade agreements if members had the opportunity to introduce amendments and delay votes. So Congress gave the President ex ante authority to conclude tariff agreements without ex post congressional approval and circumscribed their own ex post review of agreements on nontariff barriers. In other words, members of Congress lashed themselves to the mast of trade liberalization through delegations to the President. Fast track is the culmination of this trend, not a reversal of it.

Whether this hand-tying by Congress is desirable turns in part on one’s view of trade liberalization. Polls consistently find that those with higher levels of education are also more likely to support trade liberalization.\(^{291}\) It is thus perhaps not surprising that academic commentary has tended to view fast track as benign and even beneficial. Indeed, in other contexts, such as federalism, scholars have suggested that people invoke institutional arguments as pretexts to advance their preferred substantive outcomes.\(^{292}\)

Where fast track is concerned, though, commentators cannot have their cake and eat it too. Fast-track authority enables greater trade liberalization, but at the expense of separation of powers values. Moreover, as discussed above, these separation of powers values here reflect substantive concerns about distributon issues.\(^{293}\) Circumscribing congressional review of trade agreements also circumscribes the number of access points that local economic interests have to the policymaking process. In this sense, we agree that invoking institutional arguments is indeed about substantive policy preferences. It is not, however, solely or even necessarily about trade liberalization versus protectionism. Rather, by circumscribing congressional review of trade agreements, fast track modifies which views have weight in formulating trade policy. The fast track process gives extra weight to the views of pro-liberalization industry advocates who participate

\(^{290}\) See supra Part I.

\(^{291}\) See, e.g., Bradley Jones, Support for free trade agreements rebounds modestly, but wide partisan differences remain, PEW RESEARCH CENTER (April 25, 2017)(documenting that as education levels rise, so too does support for free trade).


\(^{293}\) See Part II.C supra.
in the USTR’s industry advisory committees.\textsuperscript{294} Pushing trade agreements through the ordinary congressional process, in contrast, requires broad democratic support for the agreements. As a result, the compromise struck by fast-track legislation makes more trade agreements possible, but at the cost of reducing the political support for those agreements.

While that compromise may allow more trade agreements in the short-run, in the long run, the lack of political buy-in for trade agreements may leave trade agreements exposed when political fortunes turn. Indeed, that appears to have been exactly what happened when political sentiment turned against trade liberalization in the United States and elsewhere in 2016.\textsuperscript{295} In other words, Congress’s failure to exercise its oversight role in the short-run (in hopes of advancing trade liberalization) may in the long run undermine trade liberalization.

B. The Power to Declare Trade Wars

The institutional home of the power to make war has been one of the most hotly contested constitutional issues in the last century. On the one hand, the President is the commander-in-chief of the armed forces and, from a functional perspective, the most able to respond quickly and decisively to a threat to American national security.\textsuperscript{296} On the other hand, the Constitution commits to Congress the legal power to declare war, as well as the power to appropriate money and make regulations governing the armed forces.\textsuperscript{297} How these powers should work in combination with each other in specific conflicts has bedeviled scholars and policymakers alike.

A similar problem occurs in the case of trade wars. The Constitution gives Congress broad powers over foreign commerce and tariffs.\textsuperscript{298} Yet Congress has largely delegated that power to the President, who is already constitutionally imbued with the power to act as the nation’s chief diplomat.\textsuperscript{299} Moreover, those tools that Congress used to constrain the executive branch’s exercise of authority over trade, such as the legislative veto, have been held unconstitutional or otherwise eroded.\textsuperscript{300} Consequently, the President and the executive branch more generally wield enormous power over the initiation of trade conflicts with other nations. And they do so without a widely accepted normative paradigm—foreign affairs or domestic economic policy—to guide their choices.

\textsuperscript{294} See Part II.C supra.

\textsuperscript{295} See Meyer, Saving Free Trade, supra note xx.

\textsuperscript{296} U.S. Const. art. II § 2.

\textsuperscript{297} U.S. Const. art. I § 8.

\textsuperscript{298} U.S. Const. art. I § 8.


\textsuperscript{300} See Part I, supra.
A trade war can be usefully defined as “when a state threatens to inflict economic harm or actually inflicts it in order to persuade the target state to agree to terms of trade more favorable to the coercing state.” In international economic disputes, trade wars typically involve raising trade barriers against other states in order to induce them to change their policies. The Trump administration, for instance, has used or considered a wide range of trade restrictions against China in order to induce China to further liberalize its economy and, in particular, to pressure it to reduce pervasive government subsidies. In 2017, the Trump administration publicly mulled the possibility of imposing restrictions on imported steel in response to a glut of Chinese overcapacity that depressed global prices and jeopardized the already embattled American steel industry. On January 22, 2018, President Trump imposed so-called “safeguards,” in the form of exceptional tariffs, on solar cells as part of a strategy to combat the influx of Chinese-subsidized solar cells into the U.S. market. On February 15, 2018, the Trump administration declared imports of steel and aluminum from China and other countries a threat to national security, laying the foundation for the imposition of punitive tariffs on those products as well. More generally, nations regularly use trade remedies laws, usually in the form of antidumping or countervailing duties, on a tit-for-tat basis to try to induce each other to grant greater market access.

Like real wars, trade wars are costly for countries that engage in them, even if they prevail. Imposing trade barriers, the primary tool of a trade war, creates real costs for the protected economy. Economists have worried that President Trump’s imposition of 30% tariffs on solar panels, for instance, will increase the cost of solar energy in the United States, hurting American businesses investing in large scale solar farms and American consumers that purchase solar power. Industry groups have estimated that the U.S.-imposed tariffs could cost as many as 23,000 jobs in the United States. This estimate is broadly consistent with the net job loss associated with past efforts to protect the U.S. economy.

302 Thomas Escritt & Maytal Angel, China, U.S., at odds over steel overcapacity at G20 forum, REUTERS (Nov. 30, 2017) (“U.S. President Donald Trump has repeatedly threatened to impose punitive tariffs on steel imports into the United States from China and beyond”).
304 Ana Swanson, Trump Administration Proposes Stiff Penalties on Steel and Aluminum Imports, N.Y. TIMES (Feb. 16, 2018).
305 See Chad P. Bown, Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?, 34 J. LEGAL STUD. 515, 524 (2005) (describing the use of trade remedies as “vigilante justice”).
Given the significant economic costs associated with trade wars, it would make sense for Congress—the constitutional repository for authority over the economy—to wield primary responsibility for initiating trade wars. In fact, however, our current statutory framework allocates that power principally to the executive branch. The executive wields at least two sets of authorities that are largely free of congressional oversight. First, as discussed above, the President controls the United States’ actions at the WTO and within other international trade agreements.\(^{309}\) As a consequence, the President, acting through the U.S. Trade Representative, determines what kinds of trade cases to bring against our trading partners. These cases often form the basis for trade wars. If the United States is successful in a WTO case, for instance, WTO law allows the United States to lawfully raise its trade barriers if the other party does not comply with the WTO’s ruling.\(^{310}\) The President exercises this authority as a matter of domestic law. Indeed, in passing the Uruguay Round Agreements Act, Congress concerned itself primarily with cases in which the United States was a *respondent*.\(^{311}\) In those cases, the President was required to consult with Congress and any affected states. But Congress imposed no limits on the President’s use of offensive authorities in the URAA, leaving the President with considerable authority to initiate trade wars through the WTO mechanism.

Second, the President, and the executive branch more generally, administers and to a large extent controls the nation’s trade remedies and investigations laws. For separation of powers purposes, such laws can be usefully divided into two groups: safeguards,\(^{312}\) national security investigations,\(^{313}\) and Section 301 investigations authorizing retaliatory trade sanctions,\(^{314}\) on the one hand, and antidumping and countervailing duty investigations, on the other. Safeguards are “restrictions on imports imposed in the event of import surges to allow domestic industries of the importing country to make positive adjustments to import competition.”\(^{315}\) Safeguards, national security investigations, and Section 301 investigations are distinct from anti-dumping and countervailing duties because the President has significant discretion when and how he imposes trade barriers. For instance, following a domestic investigation, the ITC must determine that safeguards are warranted, and it then makes a recommendation to the President as to the form those safeguards should take. The President, however, need not follow this recommendation. Likewise, under Section 301, Congress has authorized the President “to suspend, withdraw, or prevent the application of . . . benefits of trade

\(^{309}\) See Part I, supra.

\(^{310}\) DSU art. 22.

\(^{311}\) See URAA §§ 121-130.

\(^{312}\) 1974 Trade Act § 201.

\(^{313}\) 1962 Trade Expansion Act § 232.

\(^{314}\) 1974 Trade Act § 301.

agreements” with any country that the President finds maintains “unjustifiable or unreasonable” trade barriers.\textsuperscript{316} The original purpose of the legislative veto was to limit the President’s discretion to deviate from the ITC’s recommendation in the case of safeguards investigations or to override the President’s decision in Section 301 investigations. However, after \textit{Chadha}, the legislative veto no longer can check the President.\textsuperscript{317}

President Trump’s recent imposition of tariffs on solar panels illustrates the point. After making the requisite findings of injury, the ITC suggested three possible remedies to the President: tariffs, quotas, and import licensing fees.\textsuperscript{318} Industries that benefit from cheap solar imports (included solar installers and their customers) lobbied the White House aggressively in an effort to get the President to reject the ITC’s recommendations.\textsuperscript{319} Instead, the President imposed tariffs on solar panels and, by way of concluding a similar investigation, washing machines.\textsuperscript{320} He did so despite the fact that the governors of a number of states and multiple members of Congress wrote to express opposition to the safeguards investigation.\textsuperscript{321} In a surprise to no one, China—the primary target of the solar tariffs—responded by initiating an investigation into American sorghum, a grain used in food and in the production of syrup.\textsuperscript{322} The investigation targets an agricultural product important to President Trump’s political base that is exported primarily to China.\textsuperscript{323}

Anti-dumping and countervailing duty investigations are somewhat different in that the President lacks discretion as to whether to impose duties. Antidumping duties are tariffs on products that are being sold at below fair market value; countervailing duties are tariffs imposed on goods that a foreign government unlawfully subsidizes.\textsuperscript{324} Once the Commerce Department and the ITC make the necessary findings, the Commerce Department is required by statute to impose the relevant duties.\textsuperscript{325} Like safeguards investigations, anti-dumping and countervailing

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\item \textsuperscript{316} 1974 Trade Act § 301.
\item \textsuperscript{317} See Part I, supra.
\item \textsuperscript{318} Krysti Shallenberger, \textit{ITC proposes 3 solar trade case remedies with tariffs, quotas and capped imports}, \textsc{Utility Dive} (Oct. 31, 2017), \url{https://www.utilitydive.com/news/itc-proposes-3-solar-trade-case-remedies-with-tariffs-quotas-and-capped-im/508596/}.
\item \textsuperscript{319} Lacey Johnson, \textit{Industry Leaders Make Last-Ditch Effort to Steer Trump White House Away From Solar Tariffs}, \textsc{GreenTech Media} (Jan. 12, 2018).
\item \textsuperscript{320} United States Trade Representative Press Release, \textit{supra} note 303.
\item \textsuperscript{321} Lacey Johnson & Julia Pyper, \textit{Solar Tariff Case Advances as ITC Finds 'Injury'}, \textsc{GreenTech Media} (Sept. 22, 2017).
\item \textsuperscript{322} Sui-Lee Wee, \textit{China’s Trade Investigation Takes Aim at Trump’s Base}, \textsc{N.Y.Times} (Feb. 5, 2018) (“It is already a partial trade war.”).
\item \textsuperscript{323} \textit{Id}.
\item \textsuperscript{324} Zhang, \textit{Reforming Trade Remedies}, at 153.
\item \textsuperscript{325} In other countries, anti-dumping and countervailing duty investigations are more under the thumb of the government. See Wee, \textit{supra} note 322 (noting that the Chinese government had “teed up” the sorghum anti-dumping and countervailing duty investigations).
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duty investigations are normally initiated by private parties. The administration does, however, have the statutory authority to “self-initiate” such investigations. Although it rarely uses this authority, doing so is tantamount to declaring a trade war, both because it will likely lead to the imposition of duties and because it does so in a situation in American business itself did not seek the duties. Once again, President Trump made use of this authority, self-initiating investigations into Chinese aluminum. Prior to these actions, the U.S. government had last self-initiated an investigation in in 1985, targeting Japanese semi-conductors during a period of high tension between the two countries over trade issues.

In combination, this control over the kinds of WTO cases to bring, as well as its overwhelming influence over U.S. trade remedies laws, gives the President the ability to launch a trade war without congressional consent. The normative question about whether this state of affairs is desirable parallels in many respects the normative analysis of the war powers question. But there are at least two important differences. First, trade conflicts rarely involve the kinds of immediate risks to national security that may necessitate presidential action in the context of shooting wars. Second, the President’s authority to initiate trade wars is much clearer than his authority to initiate shooting wars due to the statutory delegation of authority. Still, as with the debate about shooting wars, ceding authority to the President has had the effect of reducing the number of veto points involved in starting the conflict. This increases the likelihood of decision-making based on systematic errors of judgment, makes it easier to become involved in conflicts, and reduces the degree of democratic participation in the decision.

Whether this results in better policy outcomes likely depends on how one feels about the trade war in question and on the extent to which any given administration is susceptible to systematic biases in one direction or the other. Our chief point, however, is that Congress’s delegation of power to the executive branch in this context changes the kinds of policy outcomes we would expect when compared to the separation of powers baseline. Congress is subject to a wider variety of


329 Donnan, supra note 327.

pressures than the President, who, once elected, has a freer hand to privilege certain constituencies at the expense of others.331

C. Withdrawing from Trade Agreements

Since President Donald Trump took office in January 2017, the question of whether the President can unilaterally withdraw from trade agreements has garnered considerable attention. The President has repeatedly claimed that he will terminate the North American Free Trade Agreement (NAFTA) and the United States-Korea Free Trade Agreement (KORUS) unless they are renegotiated on more favorable terms for Americans.332 To this list one might add the World Trade Organization (WTO), which the U.S. Trade Representative has criticized as departing from the bargain struck by the WTO contracting parties.333

Foreign relations scholars, however, have come to different conclusions on this question. Some argue that the President cannot terminate agreements unilaterally. They cite the silence of the constitutional text and historical practice in the early republic, in which Congress played a much larger role in treaty termination.334 They also analogize treaties to statutes, which are terminated through the same process by which they are created.335 Others argue that the President can terminate treaties unilaterally. They argue that Article II of the Constitution grants the President broad executive and foreign affairs powers, and that more recent practice supports this authority.336 Still others have suggested a

331 See Part II supra.


335 David Gray Adler, The Constitution and the Termination of Treaties 250 (1986) (arguing that the Goldwater v. Carter Court “should have held that a treaty can be terminated only by the treaty-making power, to wit, the President and the Senate”); Raoul Berger, The President’s Unilateral Termination of the Taiwan Treaty, 75 Nw. U. L. REV. 577 (1980); Michael J. Glennon, The Senate Role in Treaty Ratification, 77 AM. J. INT’L L. 257, 262 n. 36 (1983) (describing this position).

336 See, e.g., John C. Yoo, Review Essay, Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation, 89 CAL. L. REV. 851, 873-74 (2001)”[M]ost commentators, courts, and government entities believe that the President may terminate a treaty
middle way, the most prominent being that termination powers might depend on the subject matter of the treaty at hand.337

In our view, the allocation of the power to terminate the international obligations entered into by the United States depends on the constitutional allocation of authority among the branches, and how that authority has actually been exercised in specific contexts. We therefore do not offer general answers on the power to withdraw from trade agreements. Rather, given Congress’s primary constitutional authority over commerce, we think one must begin by asking what Congress has done with respect to the agreement in question. In particular, as we explain below, Congress could restrict the President’s authority to withdraw from trade agreements, although perhaps not from other kinds of agreements that implicate specific Article II powers.

1. Restricting Presidential Power to Withdraw — Consider first the question of whether Congress can restrict the President’s power to withdraw from trade agreements. One can easily imagine Congress writing into legislation implementing a trade agreement that the President cannot withdraw from the United States’ international obligations barring certain triggering conditions, or that the President cannot withdraw from the agreement under any circumstances.

Given the absence of express constitutional text as to how the United States should withdraw from its international commitments, courts would evaluate claims about the allocation of such authority under Justice Jackson’s famous typology from Youngstown Sheet & Tube v. Sawyer.338 In the trade context, congressionally imposed restrictions on the President’s ability to withdraw would fall into Youngstown category three, in which the President can only triumph over Congress if the President’s power is exclusive or preclusive.339 Such cases are comparatively easy.340 The text of Article I expressly grants Congress the power “to regulate with foreign Nations.” Historical practice from the early republic also indicates that Congress was involved in treaty withdrawal and termination.341 In comparison with the express textual grant and early historical evidence, the case for a preclusive presidential power rooted in either “the executive power” or “foreign
affairs” power seems extremely weak, particularly as these powers are unspecified in the text of Article II.

Functional arguments also suggest Congress should have the power to constrain withdrawal from trade agreements. Traditionally, functionalists have justified expansive presidential power on the uniqueness of foreign affairs with respect to expertise, secrecy, the subject matter, error costs, speed, and flexibility. As we have demonstrated, most of these arguments, however, are comparatively unpersuasive in the trade agreement context. The subject matter of such agreements is economic and regulatory, matters commonly understood as within the purview of Congress and, indeed, constitutionally committed to Congress in Article I. Given the way the government is set up, the executive branch will have greater expertise in virtually all areas of policymaking. Treaty withdrawal generally will not raise any issues that require secrecy.

Speed and flexibility provide relatively stronger grounds for a preclusive presidential power. Conditions might change after the time the agreement is adopted. For example, the outbreak of war between two trading partners might force the United States to choose sides by breaking trading relations with one country. In such a case, speed and flexibility favor presidential decision. But for these functional arguments to override an express statutory provision that Congress deliberated upon and passed (and that the President likely signed, absent a veto override), courts would have to find the speed and flexibility justifications so persuasive as to amount to a preclusive or exclusive executive power to withdraw. Given the subject matter of trade agreements and the textual commitment to Congress in Article I, this seems unlikely.

2. Implicit and Explicit Authorizations to Withdraw — On the other end of the spectrum are cases in which Congress has authorized the President to withdraw from trade agreements. Authorizations come in two forms, explicit and implicit. Explicit authorizations involve Congress affirmatively granting the President the power to withdraw from a trade agreement. Trade acts in the middle of the twentieth century included a provision requiring the President to include a withdrawal or termination clause in trade agreements that reduced tariffs.\(^{342}\) Moreover, these provisions authorized the President to withdraw tariff proclamations made pursuant to such agreements, effectively giving the President the power to withdraw from any tariff-reduction agreement.\(^{343}\)

Implicit authorizations do not expressly grant withdrawal powers. Rather, implicit authorizations flow from ordinary statutory interpretation tools applied to the implementing legislation Congress passes to approve trade agreements. At first glance, such provisions seem unproblematic. Congressional authorization to withdraw from a trade agreement is a Youngstown category one case: the President

\(^{342}\) See, e.g., Trade Expansion Act of 1962 § 255(a).

\(^{343}\) Trade Expansion Act of 1962 § 255(b).
has all the power Congress can delegate (including, in such a case, the Article I foreign commerce power) in addition to any Article II powers the President has.

However, implicit authorizations can create a variety of problems and paradoxes. Consider, for instance, the sunset provisions that Congress has included in all implementing legislation for trade agreements after NAFTA. Congress generally provides that the implementing legislation “shall cease to have effect” when the United States ceases to be a party to the agreement.344

These sunset provisions are best read to grant implicit withdrawal authority to the President. The trade agreements in question each include a provision permitting a party to withdraw after six months written notice.345 Congress is presumed to know the contents of the international agreements it approves. Yet not only does Congress’s implementing legislation make no provision for how the United States’ exit option is to be exercised; it provides that if the United States ceases to be a party, the implementing legislation shall cease to have effect without any further congressional action. If Congress did not think the President would be terminating the international obligations of the United States unilaterally, then it would be unnecessary for the statutory implementation provisions to sunset. Congressional authorization to withdraw would supersede the sunset provision.

Hence, it appears that the President has statutory authority to withdraw from most modern trade agreements. For reasons we note above, this authority further minimizes the role of Congress in formulating trade policy, and therefore in making significant policy choices that affect the domestic economy. If President Trump can terminate NAFTA, for instance, without Congressional consent he can modify the economic rules under which major sectors of the American economy, such as autos and agricultural, operate and upon which they rely.

The problem, though, is that these sunset provisions also raise constitutional concerns. In Clinton v. New York, the Supreme Court held the line item veto unconstitutional under the Presentment Clause because a line item veto gave the President the power to unilaterally repeal or amend portions of a statute.346 These sunset provisions potentially suffer from this problem. If the President can unilaterally withdraw from an international agreement, and the unilateral withdrawal effects a repeal of a domestic statute (the implementing legislation), then Congress may have impossibly delegated to the President the power to repeal a statute. In this sense, the delegation of withdrawal authority runs up against the outer constitutional limits of Congress’s ability to delegate trade lawmaking to the President. As long as Congress continues to pass legislation to

345 See, e.g., CAFTA art. 22.7.
implement trade agreements, the Constitution will not allow Congress to give the President the power to cancel them.

There are, however, at least two potential distinctions between the sunset clauses in these statutes and the Line Item Veto Act. First, courts may treat delegations of authority to the President differently when they implicate foreign affairs. Moreover, as Professor Ed Swaine notes, courts have generally treated assimilative delegations—where a predicate act by an entity other than Congress alters the application of a federal law—as unproblematic. Second, the line item veto involved the repeal of only a portion of the statute, whereas withdrawal tied to a sunset clause repeals the entire statute. One the one hand, this might suggest the legitimacy of the sunset clause because the legislative bargain isn’t broken in a piecemeal fashion. On the other hand, it suffers from the drawback of the President unilaterally repealing a statute altogether, which goes against the formal understanding of bicameralism and presentment that underlies the decision in *Clinton v. New York*.

Perhaps paradoxically, in other words, the very statutory provision that implicitly grants the President authority to withdraw from an international agreement (the trade agreement itself) also unconstitutionally repeals a domestic statute (the implementing legislation). It is not clear what to make of this. The provision could be constitutional as applied to granting the President power to withdraw from the international commitments, because Congress intended the President to have that power, but unconstitutional as applied to the statutory repeal. This would leave the domestic obligations of the United States in place, while the President can terminate the international obligations.

The upshot would be that, absent an affirmative congressional repeal, the President would still be responsible for implementing a trade agreement to which the United States would no longer be party. To be sure, this situation would still alter how the executive could legally behave. Implementing legislation does not simply direct the President to comply with the terms of the agreement or otherwise directly enact the agreement into the U.S. Code. For instance, the NAFTA Implementation Act makes no reference to investor-state dispute settlement. As a consequence, if President Trump withdrew from NAFTA, the United States would

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347 For example, even Justice Sutherland and the four horsemen upheld the international delegation in *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Note however that *Curtiss-Wright* dealt with the application of the nondelegation doctrine to an international delegation, while *Clinton v. New York* found the delegated authority violated the Presentment Clause, rather than the nondelegation doctrine. Looked at this way, trade agreements resemble the Presentment Clause issue in *Clinton v. New York* more than they do the traditional nondelegation issues at issue in *Curtiss-Wright*.


349 Such a situation is, in fact, not so odd. The United States frequently adheres to international instruments that are not legally binding upon it, including through statutes that reference the nonbinding instruments. Examples include SALT II, the Basel Accords on Capital Adequacy, and the Kimberly Process on conflict diamonds.
have no basis on which to continue to participate in investor-state disputes under that agreement. Moreover, the implementing legislation provides that the President “may” proclaim such duties as are required by the agreement.350 Arguably, at least, the legislation does not actually require the President to do so, and therefore leaves the ultimate question of compliance with the agreement to the President.

A second possibility, suggested by Professor Joel Trachtman, is that constitutional avoidance dictates reading the sunset provision to require affirmative congressional consent to withdraw from NAFTA.351 In other words, the sunset provision would not be unconstitutional under *Clinton v. New York* if Congress had to first authorize the President to withdraw from NAFTA. Congress’s authorization would be the effective act repealing the implementation act. This argument has at least two difficulties. First, from a formalist point of view, the President’s withdrawal is still the act that effects the repeal. Second, and more problematically, on this reading the sunset provision actually acts like an affirmative restriction on the President’s ability to withdraw, contrary to the apparent congressional intent to allow the legislation to sunset without further congressional action. The avoidance cannon does not make any interpretation of a provision available, and a reading that appears flatly contradicted by the provision in question seems out of bounds.

3. No Authorization to Withdraw — Yet a third possibility is that the provision is unconstitutional and Congress has therefore not constitutionally spoken on the withdrawal question. Similarly, there are cases in which trade implementing legislation has neither affirmative authorization to withdraw nor to restrict withdrawal. NAFTA is the best example. Unlike subsequent implementation acts, NAFTA’s sunset provision arguably applies only to withdrawal by other parties to the agreement, not the United States.352 In these cases, two questions arise: what power does the President have to withdraw from the agreement, and what power does the President have to terminate the statute implementing such obligations?

The statutory question is easier. Under ordinary principles of constitutional law, supported by *INS v. Chada* and *Clinton v. New York*, the President does not have the power to unilaterally repeal a domestic statute passed by both houses of Congress. Hence, as a practical matter the President cannot remove his domestic

350 NAFTA Implementation Act § 201(a). On the other hand, in the event the president withdrew from NAFTA, parties seeking to require the president to continue to comply with NAFTA would likely argue that “may” in this context means “shall” on the grounds that Congress’s consent to NAFTA’s entry into force indicates a desire that the United States generally comply with the agreement.

351 Joel P. Trachtman, *Terminating Trade Agreements: The Presidential Dormant Commerce Clause Versus a Constitutional Gloss Half Empty* 21 (working paper) (“implementing statutes that provide for termination of the statute upon termination of the agreement are even more difficult to interpret as implicitly authorizing Presidential power to terminate than implementing statutes, like the URAA and NAFTA acts, that do not.”)

352 See supra n. Error! Bookmark not defined.
obligation to implement a trade agreement in accordance with implementing legislation (again, barring a constitutional sunset provision).

The international obligations, however, present a harder case. In the absence of congressional action, the President might well claim a unilateral power to terminate international agreements based on historical practice\(^{353}\) or foreign affairs exceptionalism—the idea that struggles over constitutional power should be resolved in the President’s favor when foreign affairs are implicated.\(^{354}\) Alternatively, one might argue that given the explicit grant of Article I foreign commerce powers to Congress, unilateral executive withdrawal is unconstitutional in the trade context.

Our own view is that presidential powers to terminate the United States’ international obligations from a trade agreement, and the consequences of such termination, should depend on ordinary approaches to constitutional and statutory law and interpretation. Approaches that emphasize the supposedly “exceptional” nature of foreign affairs, or are based on historical practice that assumed as much, are inappropriate in the trade context. The balance of powers between Article I and Article II, Justice Jackson’s *Youngstown* framework, and ordinary principles of interpretation provide a helpful framework for seeing the scope of the President’s powers in this arena.

In litigation, we expect that the confusion about whether trade should be viewed as a foreign affairs issue or a domestic economic issue would take on outsized importance. In *Youngstown* itself, though, the Supreme Court was confronted with a fundamentally domestic economic issue—resolving a labor dispute. The case had foreign relations implications only because President Truman claimed that he needed the steel factories to resume work to support the war effort in Korea.\(^{355}\) A majority of the Court was ultimately unpersuaded that the foreign affairs implications overrode the domestic economic nature of a labor stoppage.\(^{356}\)

In our view, the same is true of trade legislation. While the President might well claim authority to terminate trade agreements absent a congressional prohibition on doing so, his international actions cannot overturn domestic statutes, including ones that implement international agreements. The mere fact that Congress directed the President to regulate based on internationally-agreed

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\(^{354}\) For a discussion of foreign relations exceptionalism, see Sitaraman & Wuerth, *Normalization*, supra note 6; see also Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO WASH. L. REV. 380 (2015).

\(^{355}\) *Youngstown*, 343 U.S. at 583 (“The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense”).

\(^{356}\) *Youngstown*, 343 U.S. at 643-44 (“There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute [the president] also Commander-in-Chief of the country its industries and its inhabitants.”)(Jackson, J., concurring).
standards does not change the fact that Congress’s implementing legislation is passed pursuant to its Article I powers over the economy. Lacking his own constitutional authority over the domestic economy, the President can only regulate pursuant to authority delegated by Congress.

D. Unorthodox International Lawmaking: Soft Law and Executive Agreements+

In recent years, scholars have observed that the process of making international agreements has expanded beyond the conventional “triptych” of treaties, congressional-executive agreements, and sole executive agreements. Instead of these three “isolated stools,” there is now emerging a “whole host of less crystalline, more nuanced forms of international legal engagement and cooperation.” These unorthodox forms of international lawmaking share a common feature, namely that neither Congress nor the Senate expressly consents to their creation. Commentators analyzing these forms of unorthodox international lawmaking, have largely focused on soft law and executive agreements+. For the most part, however, they have shied away from assessing whether the constitutionality of these forms of international norm-creation in trade might diverge from other areas of international cooperation due to trade’s constitutional pedigree under Article I. In our view, assessing the constitutionality of these nontraditional forms of international cooperation requires careful attention to the constitutional allocation of authority over the substantive matters at issue.

Soft law refers to “those [international] nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.” One of the best examples


358 Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Remarks: Twenty-First-Century International Lawmaking, 101 GTO. L.J. 725, 726, 733 (2013); see also Bradley and Goldsmith, Presidential Control, supra note 9; David Kaye, Stealth Multilateralism: U.S. Foreign Policy Without Treaties—or the Senate, FOREIGN AFF., Sept.–Oct. 2013, at 122 (“[N]onbinding arrangements may now be the executive branch’s preferred way of doing business.”).


361 Andrew T. Guzman & Timothy L. Meyer, International Soft Law, 2 J. LEGAL ANALYSIS 171 (2010); see also Galbraith & Zaring, supra note 360, at 739-40 (defining soft law as “agreements between executive branch actors in two or more countries that do not create legal obligations but which nonetheless contain substantive commitments that the parties are expected to take seriously.”). Some authors prefer the term “political commitment” or “pledge” to describe nonbinding commitments by executive branch officials. See Bradley & Goldsmith, Presidential Control, supra note 9, at 13 (“at bottom a political commitment is like diplomatic speech backed by a personal
of soft law is the Basel Accords. The Basel Accords seek to harmonize bank regulations and practices internationally, with the most recent Basel III Accords setting capital and liquidity requirements for banks after the financial crash. These regulations, in effect, seek to set a level playing field (with reciprocal and equivalent standards) in the international trade of financial services. Importantly, however, the Basel Accords are not treaties (in the constitutional sense) or congressional-executive agreements. Rather, the Federal Reserve negotiates the agreements with foreign regulators and then implements the internationally-agreed-upon standards via notice and comment rulemaking. Indeed, the executive branch regularly relies on normal agency authorities that are subject to the Administrative Procedures Act (APA) to give unorthodox international commitments domestic legal effect.

More recently, President Obama entered into the Joint Comprehensive Plan of Action (JCPOA), a nuclear agreement with Iran that was nonbinding internationally and operationalized at the domestic level pursuant to the President’s statutory authority to waive economic sanctions. Note that the imposition or lifting of economic sanctions, while usually framed as a national security issue in the Iran nuclear context, is also a classic case of regulating the terms of foreign trade and commerce.

Executive Agreements+ (EA+) “fall somewhere in between” congressional-executive agreements and sole executive agreements. Unlike sole executive agreements, they are not grounded in the President’s Article II powers alone; unlike congressional-executive agreements, they are not explicitly authorized by legislation. Rather, they are “consistent with, and complement, related congressional activity.” As an example, consider the Anti-Counterfeiting Trade Agreement (ACTA). In the Pro-IP Act, Congress called on the Executive Branch to work with foreign countries to increase the enforcement of intellectual property rights. The Obama Administration argued that while the statutory provision did not authorize the Administration to make an ex ante congressional-executive agreement, it did authorize the Administration to act internationally to accomplish the statute’s charge. Notably the Administration issued this statement in


363 Galbraith & Zaring, supra note 360, at 785.

364 Id. at 887-888.

365 Pro-IP Act, sec. 8113(a).

366 Bodansky & Spiro, supra note xx, at 887.

367 Id. at 893.

368 Id. at 893.

369 Letter from Harold Koh to Senator Ron Wyden (Mar. 6, 2012) (“The ACTA was negotiated in response to express Congressional calls for international cooperation to enhance enforcement of intellectual property rights. Congress has passed legislation explicitly calling for the Executive

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response to congressional charges that the executive had no power to “enter into a
binding international agreement covering issues delegated by the Constitution to
Congress, absent congressional approval.” Ultimately, the U.S. did not join
ACTA, due to domestic political opposition, but it has made a number of other
Executive Agreements.  

While commentators on these forms of unorthodox international lawmaking
have analyzed each in depth, they generally discuss either an entire modality of
unorthodox international lawmaking or particular instances of it. Moreover, in the
case of soft law these analyses are often from the point of view of international
law, rather than U.S. domestic law. Scholars have not assessed the constitutional
authority for these categories from the perspective of a substantive area of law.

We think that is a mistake. The strength of the constitutional underpinnings of
unorthodox international lawmaking shifts based on the substantive area at issue.
For example, in the context of military operations, the President’s Article II
authorities as commander-in-chief would suggest greater constitutional footing for
making unorthodox international agreements. In contrast, the fact that trade falls
at the nexus of foreign affairs and domestic economics suggests a more limited
purview for unorthodox international agreements, given Congress’s express
Article I powers to regulate foreign commerce, set tariffs, raise revenues, and take
necessary and proper actions to implement those powers.

This distinction is critical for evaluating the executive’s authority to conclude
such agreements, the process by which agencies should consider such agreements,
and the reviewability of such agreements in court. Professors Jean Galbraith and
David Zaring, for example, have argued that soft law agreements should be seen
through the prism of foreign relations law. On their view, soft law agreements
should be afforded significant deference in their creation, implementation, and
reviewability because of the deference frequently afforded the President in national
security and foreign affairs. They root this general deference in the “unique
figure of the President, who is Commander in Chief of the armed forces, the
appointer of ambassadors, and vested with the executive power of the United
States—and therefore is the traditional focal point for foreign affairs powers.”

Branch to work with other countries to enhance enforcement of intellectual property rights . . . . The
ACTA helps to answer that legislative call [and] . . . is part of a long line of trade agreements that
were similarly concluded by successive Administrations.”). See Bodansky & Spiro, supra note xx, at 909.

371 Letter from Senator Ron Wyden to President Barack Obama (Oct. 12, 2011). See Bodansky
& Spiro, supra note xx, at 908 n 128.

372 See Bodansky & Spiro, supra note xx, at 910.

373 This international focus occurs primarily in the literature on soft law. See e.g., Guzman &
Meyer, supra note 361 (analyzing why states use soft law agreements rather than binding
international agreements); but see Bradley & Goldsmith, Presidential Control, supra note 9;
Galbraith & Zaring, supra note 360.

374 Galbraith & Zaring, supra note 360, at 742.

375 Id. at 743.
But while the President undoubtedly has some constitutional powers in foreign affairs, Congress has far more powers in the realm of trade – and its powers that are explicitly granted. As a result, we think a better approach would be to evaluate unorthodox international agreements based first on the balance of powers afforded the President or Congress under the Constitution. The degree to which the creation of an agreement or judicial deference might be warranted will depend on the underlying constellation of constitutional powers.

Practically speaking, unorthodox international agreements are often likely to be implemented by (if not concluded by) administrative agencies. One of the important questions, then, is what authority agencies should have to conclude such agreements and what deference they should get for regulations made in conjunction with those agreements. Galbraith and Zaring argue that in concluding such agreements, agencies should be constrained when Congress has spoken to the issue and forbade international cooperation, but that when Congress is silent, “the inherent foreign affairs powers located in the executive branch suggest that agencies still should be presumed to have the right to pursue their objectives through soft law.”

The inquiry seems to us more complicated. In most cases of unorthodox lawmaking, the executive branch can claim some statutory authorization. For instance, in the case of ACTA Congress had indeed directed the executive branch to engage with other countries to boost enforcement of intellectual property laws. But Congress has not expressly authorized, either ex ante or ex post, the conclusion of an international agreement. If Congress has not delegated such authority to the executive branch and the President does not have an independent Article II power, then any agency action is governed by ordinary administrative law procedures under the Administrative Procedures Act (APA). One of the APA’s central purposes is to ensure that administrative action is democratically accountable. Since administrative agencies do not stand for election, the APA achieves this goal by establishing procedures, such as notice and comment rulemaking, that allow interested members of society to participate in the agency’s rulemaking processes.

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376 Bradley & Goldsmith, Presidential Control, supra note 9, at 52 (“courts are more willing to find implicit statutory authorization in areas in which the President has independent constitutional authority”).

377 Galbraith & Zaring, supra note 360, at 764.

378 See Pro-IP Act section 8113(a); Letter from Harold Koh, supra note 370.

379 If Congress has expressly authorized the United States to participate in negotiations or an intergovernmental body, or to conclude an agreement, the president would be acting with the combined powers of both the executive and Congress, and hence his actions would be presumptively constitutional. [Youngstown, Jackson, J., concurring].


381 Id. at 118-56.
When an agency undertakes international negotiations upon which it bases its subsequent rulemaking, however, the agency makes a policy determination prior to a fair consideration of the views of domestic interests. Indeed, it privileges the view of other governments over ordinary American parties. Where Congress has authorized international negotiations or an international agreement, this privileged access presents no constitutional problems. But where Congress has not authorized this access, the agency arguably acts contrary to the APA’s strictures and “in excess of statutory…authority.”

Given the primacy of Congress over foreign commerce and economic concerns generally, courts reviewing regulations based on international standards should carefully scrutinize agency claims of implicit consent or atmospheric acquiescence to the use of unorthodox international agreements as an input into the domestic regulatory process.

Relatedly, administrative agencies should not be given leeway to evade traditional administrative law requirements under the APA. For example, agencies are required to respond to commentators during the notice and comment process, or they risk a court finding their final rule arbitrary and capricious because the agency failed to engage in reasoned decision-making. During the course of the first Basel Accords, the Federal Reserve explained away some commenters’ opinions because they “would be inconsistent with the framework agreed upon by the G-10 countries.” This justification seems problematic to us. If Congress did not authorize international negotiations, then the Fed should not be able to use the international negotiations as a shield in subsequent rulemaking. To do so would only further elevate the importance of foreign governments’ concerns over the concerns that Congress has directed the agency to consider in the APA. In this case, the Fed should have had to follow all of the ordinary administrative law requirements and principles that Congress and the courts have established for rulemaking – including providing a reasoned explanation for its actions that responds meaningfully on the merits to commenters. If an agency cannot offer a justification for internationally agreed-upon standards that is meritorious in relation to the principles by which Congress has directed it to regulate, it should not be able to incorporate those standards into domestic law simply because other governments favor them.

383 It is worth noting that the Supreme Court has not uniformly found in favor of the executive branch on claims of atmospheric acquiescence. While proponents of unorthodox international agreements often cite Dames & Moore v. Regan, 453 U.S. 654 (1981), as an example of judicial acceptance of an Executive Agreement+ that even the Court recognized was not explicitly authorized in legislation, in both Youngstown, 343 U.S. 579 (1952) and FDA v. Brown and Williamson, 529 U.S. 120 (2000), the Supreme Court found that legislative atmosphere did not authorize executive branch action.
385 See Galbraith & Zaring, supra note 360, at 760.
E. Trade Federalism

The President’s control of trade policy also has important implications for the allocation and exercise of economic authority between the federal government and the states. Insofar as it implicates international trade, we refer to this relationship as “trade federalism.” As with other international agreements, trade agreements present a challenge to the U.S. model of vertically separated powers. Under the international law of state responsibility, the United States is strictly liable for violations committed by state and local governments, even if the federal government is constitutionally prohibited from preempts the state action. This liability creates tensions between the President and Congress over how to ensure the compatibility of U.S. law, including state and local law, with international trade agreements.

The challenge of trade federalism goes beyond compliance with international legal obligations, though. Under our constitutional system, trade federalism operates in an uncomfortable limbo. The foreign affairs paradigm suggests that international trade should operate under principles of foreign relations exceptionalism, in which the political branches determine policy and local and state interests give way to national interests. The domestic economics paradigm recognizes the important role that Congress plays in making economic policy for an extended and diverse republic. While Congress makes policy at the national level in part for reasons of uniformity, even in the foreign relations context the Supreme Court has recognized the traditional importance of states and local governments under our constitutional system.

These tensions are particularly important in the current historical moment. Today, states and cities are increasingly regulating matters of international concern. Cities have come together, for instance, to form their own climate change pact, while states like California (which by itself would be one of the ten largest national economies in the world) have begun aggressively regulating greenhouse gases. States and localities have also been active in debates about immigration, pronouncing themselves “sanctuaries” for undocumented immigrants. Other

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387 See Sitaraman & Wuerth, Normalization, supra note xx.


states, such as Massachusetts, have passed laws targeting human rights abuses overseas.\textsuperscript{391} Given the increased prominence of state and local governments in tackling international problems, the potential for the President’s trade agenda to severely impair our trade federalism raises serious concerns.

As discussed in Part I, tariffs were the principle concern of trade negotiations for decades. Setting tariff rates, and controlling foreign commerce more generally, are plenary powers of Congress.\textsuperscript{392} Consequently, trade negotiations that focused on tariffs and import/export procedures raised few federalism issues. Even the GATT, however, imposed rules that applied behind the border. Chief among these rules is the national treatment rule, which prohibits a GATT party from treating foreign products less favorably than it treats like domestic products.\textsuperscript{393} The national treatment rule prohibits a wide variety of discriminatory policies that state and local governments might enact, such as local content requirements.\textsuperscript{394} Despite the formal application of the GATT to subnational policies, however, subnational government action was not a primary focus of the GATT parties.

As the GATT parties shifted their attention from tariffs to nontariff barriers, however, the policies of subnational governments became more and more important. The WTO Agreements create a host of new rules limiting how governments regulate behind the border, including rules governing laws that affect public health, food safety, product safety, and environmental protection. Such laws can be considered nontariff barriers to trade when they have the effect of stymying the cross-border flow of goods, services or capital. Most notably, the Technical Barriers to Trade Agreement applies to regulations governing product standards,\textsuperscript{395} while the Sanitary and Phytosanitary Agreement applies to, \textit{inter alia}, food safety regulations.\textsuperscript{396} The Agreement on Subsidies and Countervailing Measures also imposes limits on the kinds of subsidies governments can offer,\textsuperscript{397} while the


\textsuperscript{392} U.S. Const. art. I § 8.

\textsuperscript{393} GATT art. III.


\textsuperscript{395} Agreement on Technical Barriers to Trade annex 1.1 Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.


\textsuperscript{397} Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Results of the Uruguay Round 231.
General Agreement on Trade in Services imposes limits on government regulation of service providers.\footnote{General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.}

Unlike tariffs and other border measures, these trade rules governing nontariff barriers implicate longstanding, core powers of state and local governments. State and local governments regularly pass product and food safety rules, license service providers, and regulate to protect the environment. Our constitutional system values the power and independence of states and local governments. But the default rule under the international law of state responsibility is that the national government is strictly liable for its own actions, as well as the actions of any subnational governments.\footnote{Draft Articles on State Responsibility, supra note 386, at 84; see also Meyer, Local Liability, supra note 386, at 272 (describing the Draft Articles rule as one of “strict vicarious liability” for subnational government action).} Indeed, the nation remains liable even if, as a political or constitutional matter, the national government cannot control the actions of the subnational government.\footnote{Draft Articles on State Responsibility, supra note 386, at 36.}

The combination of international law’s rules on liable for subnational governments, on the one hand, and trade law’s expansion into nontariff barriers that implicate state police powers, on the other, creates a situation in which state and local governments can open the United States up to retaliation from other countries for breaching trade agreements. Indeed, state rules have figured prominently in a number of WTO disputes. For instance, the EU has successfully challenged subsidies that the states of Washington provided to Boeing under the WTO’s SCM Agreement.\footnote{Appellate Body Report, United States—Measures Affecting Trade in Large Civil Aircraft—(Second Complaint), ¶ 1350, WTO Doc. WT/DS353/AB/R (adopted Mar. 23, 2012) [hereinafter U.S.—Aircraft] (holding that subsidies granted to Boeing by the State of Washington and the City of Wichita, Kansas, violated the WTO’s Agreement on Subsidies and Countervailing Measures).} A WTO panel ruled that the United States unlawfully discriminated against Antigua because U.S. laws ban online gambling with companies based outside the United States, while state laws in virtually every state permit gambling of some kind with businesses located within the state.\footnote{See Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶ 5, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005) (finding that U.S. and local laws prohibiting internet gambling while permitting in-person gambling violate the General Agreement on Trade in Services).} The trend towards applying international trade agreements to state and local action holds outside of the WTO as well. Over 40 percent of the investor-state claims brought under NAFTA—and a quarter of such claims brought against the United States—challenge state and local action.\footnote{Meyer, Local Liability, supra note 386, at 277.}

The potential for liability highlights a tension between the roles that Congress and the Executive play. The President, who must defend the United States in claims...
brought against it and is often thought to prefer to liberalize trade in any event, may wish to preempt the unlawful state or local action to avoid retaliation against the United States. Indeed, Congress has given the President, but not private parties, the power to sue state and local governments to seek a judgment that a subnational measure violates the WTO agreements. However, as far as we are aware the United States has never brought such an action.

This puzzling lack of challenges is perhaps explained by congressional resistance. To be sure, the URRAA requires that the President consult with the states in an attempt to achieve the uniformity of state law with the United States’ trade commitments, and it requires the Trade Representative establish an office to facilitate this consultation process. The Trade Representative must consult with the states whenever a state law is challenged in a WTO case, including by allowing the state an opportunity to help formulate the United States’ position. The Trade Representative is also required to report to Congress both any legal suits the United States takes to preempt WTO-inconsistent state laws, and any WTO cases brought by other members challenging state laws as WTO-inconsistent.

But what Congress has not done is give the executive the authority to preempt WTO-inconsistent state laws through regulation. Federal regulations do, of course, preempt inconsistent state laws. Congress therefore could have given the President the power to harmonize state law with WTO obligations through administrative rulemaking. But Congress instead chose to impose consultation requirements on the President and delegate the authority to make a determination of WTO-inconsistency to the courts. This suggests that Congress might have been concerned with preserving the role of the states. Indeed, even if the United States did initiate a suit to preempt state laws, the URRAA makes clear both that the United States bears the burden of proving the inconsistency and that the courts should accord no deference to the WTO’s own decision regarding the state law. These provisions further suggest that Congress is acting to protect the interests of the states.

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404 Uruguay Round Agreements Act § 102(b)(2) (“No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.”).
405 URRAA § 102(b)(1)(A).
406 Id. at § 102(b)(1)(B).
407 Id. at § 102(b)(1)(C).
408 Id. at § 102(b)(2)(C).
409 Id. at § 124.
410 Id. at § 102(b)(2)(B)(i)-(ii) (“a report of a dispute settlement panel or the Appellate Body convened under the Dispute Settlement Understanding regarding the State law, or the law of any political subdivision thereof, shall not be considered as binding or otherwise accorded deference.”)
The resulting system of trade federalism can be justified neither by the foreign affairs nor the domestic economics paradigm. Unlike other international policies in which state and local governments have been active, state and local governments have limited control over their own borders in the first place and are more likely to behave in a protectionist fashion behind their borders. That Congress would defend the interests of the states in so doing is logical. Members of Congress are, after all, elected at the state or local level. But Congress’s position in the URAA represents an awkward compromise between the state and national interests. Congress has not required that the executive negotiate trade agreements in a way that minimizes the interference with common state law schemes. Nor has Congress itself taken steps to determine which state laws should be preempted. Instead, Congress has left the President a largely free hand to negotiate trade agreements that increasingly implicate core state and local government powers, but has given the President little ability to address the results of such agreements.

As a result, our trade federalism is at best in disarray and at worst at risk of collapsing into trade nationalism. Claims challenging state and local action, including in areas in which those governments are attempting to address other matters of international concern, can be expected to rise. In 2016, for instance, India initiated a case against the United States challenging a number of state and local measures that provide financial support for renewable energy. The dysfunction created by this state of affairs represents a drag both on economic and foreign policy considerations. On the one hand, the executive can do little to make trade law responsive to local concerns. On the other hand, however, the state and local governments lack incentives to reconcile their economic regulation with foreign policy. In sum, Congress’s embrace of the foreign affairs paradigm and its concomitant delegation of powers to the executive to negotiate trade agreements with nontariff barriers poses an ongoing and increasingly significant threat to federalism.

CONCLUSION

Trade and security are the two policies most central to every nation’s well-being and most critical to every government’s functioning. The United States

412 Meyer, Local Discrimination, supra note 394, at 1942 (“[D]iscriminatory conditions are more likely at smaller scales of government.”).

413 Wechsler, supra note xx.

414 In recent free trade agreements, such as the TPP, the United States responded by putting in some limited exemptions for state and local programs. These exemptions—similar to so-called “federalism declarations” attached to other treaties to make clear that the United States does not accept international responsibility for the actions of its state and local governments—apply only to the nondiscrimination rules in the services and investment chapters of the agreements. As such, they are fairly narrow in scope. Moreover, such clauses cannot easily be introduced to the WTO, where existing agreements are difficult to amend and other countries would have little reason to agree to reduce the United States’ incentives to pressure its state to comply with trade rules. See generally, Meyer, Local Liability, supra note 386.

replaced the Articles of Confederation with the Constitution in large part to give the nation control over trade policy. The world’s other great federation, the European Union, used trade integration to rebuild itself after two catastrophic world wars.

To date, the 21st century has been dominated by security considerations. The attacks of September 11 turned the Bush presidency into a wartime presidency. The 2016 presidential election marked a turning point. As both the Republican and Democratic parties pursue policies aimed at addressing voters’ economic insecurity, trade policy is once again taking center stage. At this moment, understanding how our trade constitution came to be is critical to understanding how our trade policy can and will be made going forward. The rightful concern about a host of global challenges—climate change, rogue regimes like North Korea, the rise of China as a global power—make it tempting to revert to a trade policy dominated by foreign policy considerations.

Yet as President Obama’s ill-fated efforts to negotiate the TPP and justify it on foreign policy grounds shows, foreign policy considerations simply cannot carry the weight of a domestic economic policy that so many Americans of both parties feel no longer benefits them. Trade liberalization for its own sake—the utilitarian idea that we should maximize aggregate national welfare through our trade policy without concern for the distribution of the gains from that policy—is an idea whose time is past. Going forward, concerns about economic opportunity, equality, and the distribution of the gains from our trade policies will dominate our politics. How they will shape that policy, though, remains to be seen. Protectionist policies like punitive tariffs and subsidies for manufacturers and displaced labor both redistribute wealth, although they have very different trade implications.

A trade policy dominated by the President has shown itself unable to deal comprehensively with these domestic concerns. A sustainable trade liberalization policy that enjoys broad American support ultimately is one in which Congress participates as a full constitutional partner. We have shown that nothing legally or functionally prevents Congress from assuming that role. Whether Congress will remains to be seen.