Article

Separation of Trade Law Powers

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INTRODUCTION

What are the legal and substantive contours of U.S. trade agreements? Who decides? These questions have long occupied commentators and thinkers in public media and politics. On the eve of a revision of the North American Free

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Trade Agreement (NAFTA)[1]—what I will call the NAFTA 2.0—the U.S. government is poised for a further showdown between legislative and executive authorities on these questions as each branch stakes out territory on what the next U.S. trade agreements should include.

In the last two decades, bilateral and regional trade agreements around the world have come to constitute a new legal economic framework, filling the gap where multilateralism failed or became disobliging. The effect of the new regionalism is a multiplicity of systems, each with its own normative framework and possible jurisprudence. This multiplicity has led to complicated questions of interpretation and regime management that engage States and scholars**.**

For most scholars, however, the story of trade agreements focuses on substantive outputs: regulatory aspects of the agreements, their broadening scope, their intersection with other areas of law, or their potential encroachment on State sovereignty.[2] Some political scientists have also analyzed why States create trade agreements.[3] What these agreements do once they have been created, however, remains under-examined.

While little has been said about how trade agreements are operating in practice, their design and framing are still less well understood. Neither political scientists nor legal scholars have focused critically on why States select particular design features from the rich matrix of available alternatives.[4] The issues to be addressed include foundational questions about State choices, institutional constraints, and whether and how trade agreements respond to uncertainties or changing circumstances that are endemic to the global economy.

Consider the repetition of language across agreements. A close survey of U.S. free trade agreements (FTAs) implemented over the last twenty years reveals significant similarities in the text of many chapters that they share. Although there are changes to some parts of the text, those changes are

1. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

2. Important recent contributions in these categories include Timothy Meyer, *Local Liability in International Economic Law*, 95 N.C. L. REV. 261 (2017); Alexia Brunet Marks, *The Right to Regulate (Cooperatively)*, 38 U. PA. J. INT'L L. 1 (2016); Gregory Shaffer, *Alternatives for Regulatory Governance Under TTIP: Building from the Past*, 22 COLUM. J. EUR. L. 403 (2016); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1 (2015); and Sungjoon Cho, *Defragmenting World Trade*, 27 NW. J. INT'L L. & BUS. 39 (2006).

3. *See, e.g.*, John Whalley, *Why Do Countries Seek Regional Trade Agreements?*, *in* THE REGIONALIZATION OF THE WORLD ECONOMY 63 (Jeffrey A. Frankel ed., 1998).

4. Some political scientists have recently completed important studies that demonstrate the breadth of the boilerplate problem I describe in this Article. While some of the studies' findings are in tension, the bottom line remains the same: there is considerable "copy-paste" in these agreements around the world. *See, e.g.*, Todd Allee, Manfred Elsig & Andrew Lugg, *Is the European Union Trade Deal with Canada New or Recycled? A Text-as-Data Approach*, 8 GLOBAL POL'Y 246 (2017); Todd Allee & Andrew Lugg, *Who Wrote the Rules for the Trans-Pacific Partnership?*, RES. & POL. (July-Sept. 2016), http://journals.sagepub.com/doi/pdf/10.1177/2053168016658919; Wolfgang Alschner, Julia Seiermann & Dmitriy Skougarevskiy, *Text-as-Data Analysis of Preferential Trade Agreements: Mapping the PTA Landscape* (UNCTAD Research Paper No. 5, 2017), http://unctad.org/en/PublicationsLibrary/ser_rp2017d5_en.pdf; Todd Allee & Manfred Elsig, *Are the Contents of International Treaties Copied-and-Pasted? Evidence from Preferential Trade Agreements* (World Trade Inst., Working Paper No. 8, 2016). These studies rely in part on new databases that have collected trade agreement texts for analysis such as the Design of Trade Agreements (DESTA) database (www.designoftradeagreements.org) and the RTA exchange (www.rtaexchange.org).

overshadowed by the passages that look substantially alike—language I elsewhere refer to as "boilerplate," as a result of its copy-pasted character.[5] For example, compare the text of the labor chapter in the Dominican Republic–Central America–United States FTA (CAFTA–DR),[6] signed in 2005, with the text of the labor chapter in the U.S.–South Korea FTA of 2012,[7] or that of the 2016 draft Trans-Pacific Partnership Agreement (TPP).[8] Significant parts of the countries' commitments are unaltered despite vast differences in those trading partners' abilities to meet international standards, the passage of time, and changes in U.S. political leadership.[9]

The repeated use of standardized text in international agreements is not unique to trade. So-called "model" agreements are widely used by States in economic as well as other contexts.[10] A "model" agreement may be desirable for reasons I explore below in greater detail.[11] But are these justifications in fact motivating negotiators to use repeated language in U.S. trade agreements? And, more importantly, is that normatively desirable?

This Article's process-tracing history of U.S. trade agreements seeks to serve an important theoretical purpose—to analyze the under-studied issues of

5. Kathleen Claussen, *Boilerplate Treaties* (unpublished manuscript) (on file with author) (exploring the presence of boilerplate in instruments from other areas of international law apart from trade).

6. Dominican Republic–Central America–United States Free Trade Agreement ch. 16, Aug. 5, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter CAFTA–DR].

7. Free Trade Agreement, S. Kor.-U.S., ch. 19, Feb. 10, 2011, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (entered into force Mar. 15, 2012) [hereinafter KORUS].

8. Trans-Pacific Partnership ch. 19, *opened for signature* Feb. 4, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (not yet in force).

9. *See infra* Section I.A. Scholars and lobbyists have sought changes for those reasons. For example, Alan Swan described the need for the Free Trade Area of the Americas, a negotiated but never completed trade agreement. He urged the parties to "go beyond NAFTA" in light of the special relationship between the United States and Latin America and suggested that the agreement could "be a charter of fundamental domestic economic reform along . . . modern capitalistic lines" under U.S. leadership. Alan C. Swan, *The Dynamics of Economic Integration in the Western Hemisphere: The Challenge to America*, 31 U. MIAMI INTER-AM. L. REV. 1, 5-6 (2000). Ironically, then President-elect Trump's pick for Secretary of the Department of Commerce claimed in the days before the inauguration that the United States *needed* a model trade agreement, claiming that what was done in the past required reexamination and that efficiencies were lost. Jenny Leonard, *Ross Pledges to Design "Model Trade Agreement," Calls for Systematic Re-Examination of Deals*, INSIDE U.S. TRADE (Jan. 18, 2017). The U.S. Trade Representative later made reference to creating a "model" U.S. trade agreement for Africa. Dan Dupont, *Lighthizer: U.S. Will Soon Select an African Country for a "Model" Free Trade Deal*, INSIDE U.S. TRADE (Jan. 31, 2018).

10. Models are used and regularly updated in the U.S. experience with bilateral investment treaties and with income tax conventions. *See Bilateral Investment Treaties and Related Agreements*, U.S. DEP'T OF STATE, https://www.state.gov/e/eb/ifd/bit/ (last visited Mar. 18, 2018); *Treasury Announces Release of 2016 U.S. Model Income Tax Treaty*, U.S. DEP'T OF THE TREASURY (Feb. 17, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0356.aspx (last visited Mar. 18, 2018). In trade, however, there is no such named "model" and no regular attempt to update and reissue any particular template. Rather, there is a perception among some lawmakers that there is considerable variation and opportunities for change in trade agreements when, as this study shows, the data suggest that there is in fact considerable path dependence.

11. The object of this study is not an exhaustive consideration of alternative reasons for using a model, but rather an attempt to provide a particular hypothesis with respect to trade agreements in the context of the inadequate explanatory power of certain prominent schools of thought in international relations.

trade agreement design, innovation, and change. In doing so, the Article considers whether explanations consistent with leading international relations and international law models—such as rational choice theory, behavioral economics, and historical institutionalism—help explain trade agreement consistency.[12] Each theory predicts a particular life cycle for trade agreements and none is entirely exclusive of the others. A comparative review of U.S. trade agreements provides an opportunity to evaluate these competing theoretical frameworks and to consider the role of government actors in promoting normative change. However, the Article concludes that the traditional explanatory models are insufficient to explain the mechanics of U.S. trade agreement design, innovation, and change. The chronicle of trade agreement evolution, or lack thereof, suggests that when shifts in direction do occur, they do not cleanly follow the predictions of any one theoretical paradigm due to the unique congressional-executive shared process for U.S. trade lawmaking.

The bi-branch trade lawmaking architecture is the exceptional result of our constitutional history and trends in the global economy. The process, sewn into a patchwork of time-bound legislation, is known as "fast track" or trade promotion authority (TPA). Today, TPA is the nearly exclusive mechanism for making major U.S. trade agreements.[13] It has not always been this way. Only after Article II trade treaties went out of vogue[14] has the TPA framework become the modus operandi for the conclusion of trade agreements with foreign partners. As this analysis reveals, that framework is more constricted today than it ever was intended to be. Since it was first applied in 1974, subsequent TPA legislation has nearly consistently allocated more power to Congress and less space to the Executive.

This development contrasts sharply with the conventional wisdom on trends in executive authority in other areas of international lawmaking.[15] Unlike other areas of international law, the shift in authority between the branches in trade has tended toward escalated congressional involvement rather than executive dominance.[16] Congress has increased its engagement through changes in the structural and substantive elements of the TPA legislation it has enacted over the last forty years.

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12. As noted above, my purpose is not intended to compare and contrast all schools of thought on this subject. Rather, I select schools that academics and practitioners have readily considered in seeking to explain the consistency of U.S. trade agreements and mention others only in passing. *See, e.g.*, Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT'L L. 309, 344-55 (2013) (discussing literature from several schools); William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227, 229, 234-35 (1997) (also discussing trends in the literature).

13. All but one of the major trade compacts concluded by the United States in the twenty-first century have taken shape through the TPA process.

14. *See infra* note 76 and accompanying text.

15. *See infra* note 152 and accompanying text.

16. This trade trend was previewed by Harold Koh as early as the late 1980s. Koh outlines five "regimes" of congressional-executive interaction on international trade relations, beginning with the earliest stage when Congress maintained full control over trade lawmaking and proceeding through the 1980s to a point where Congress "surrendered" some of its control and conceded the President's need for advance negotiating authority. Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking after* INS v. Chadha, 18 N.Y.U. J. INT'L L. & POL. 1191, 1233 (1986).

Despite the utility in negotiations and democratic significance of a strong ex ante congressional control on executive negotiators, these increased constraints have serious drawbacks when taken to an extreme. Congress's tightened grip on the Executive in the trade context has resulted in Congress effectively displacing the Executive as the lead negotiating branch with foreign trading partners. Unfortunately, negotiating major trade agreements is not Congress's forte. Congress is not adept at accommodating change to existing frameworks,[17] as the content of our trade agreements bears out. Thus, a key takeaway of this study is that the text of U.S. trade agreements is better explained by the separation of powers structure—and the institutional design that has been developed to accommodate that structure—than by other theories.

The evidence from this study further suggests that not only does the constitutional and institutional structure of trade lawmaking in the United States account for the considerable consistency in the resulting agreements, but it also illuminates a potential principal-agent relationship between Congress and the Executive that merits further study. I propose that a more useful account of the trade agreement design process relies upon a blend of traditional theories and an acknowledgement of this structural relationship.

This Article does not seek to analyze every aspect of change in U.S. trade agreements. Rather, I limit my discussion to chapters that best exemplify trends. I analyze how TPA's founders envisioned that trade lawmaking would occur, how the exercise evolved in response to exogenous pressures, and how that is exemplified by the lack of change in agreement text. What emerges is a tapestry of change factors, many of which relate back to the congressional role. Unlike the traditional trade disciplines where consistency is expected, chapters that seek to address non-tariff barriers such as those focused on labor and environment are largely locked into the congressional negotiating guidance.

The trade lawmaking account explored in this Article poses new theoretical challenges for scholars who study how and why domestic institutions have an impact on international law. These challenges include determining the factors that define the strategic spaces for international legal development and specifying the conditions under which Congress and the Executive can re-balance their authorities. Trade agreements are particularly noteworthy in that they are both lawmaking and standard-setting. They create new international norms through the proliferation of standards in bilateral and regional instruments. Thus, a major contribution of this Article is that it identifies opportunities for legal creativity and legal coherence in the international trade lawmaking process.

An examination of the congressional-executive relationship in trade lawmaking is important for three additional reasons. First, as described above, this study fills a gap in that it evaluates trends in U.S. trade agreements by concentrating on the institutional dynamics on the U.S. drafters' side. The

17. *See, e.g.*, Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT'L L. 517, 550 (2013) (describing how Congress faces barriers to monitoring and has a "limited toolkit").

international and domestic law implications are both alarming and encouraging. Trade lawmaking through TPA arguably increases the democratic nature of the process, but it also creates a risk of interest group capture and, as this study emphasizes, stagnation of text.[18] The evidence demonstrates that one result of TPA in its current form is the presence of lowest-common-denominator language in current and past trade agreements that may work to the detriment of U.S. interests.

Second, President Donald Trump's Administration has undertaken a critical re-evaluation of trade agreements. The evolution of trade law has important implications for public policy choices, for the international trade law multilateral system, and for the global economy. This piece seeks to provide scholarly analysis that is of practical use to negotiators and lawmakers.

Third, lessons about the trade lawmaking apparatus provide guidance for governance design in other areas where power is shared between Congress and the Executive. As additional areas of transnational law develop in which the division of authority between the branches is contested, lessons to be learned from the trade lawmaking experience should inform how developments of substance in those areas advance particular processes or structural mechanisms, and how those processes or structures in turn affect substantive developments in the law.

This Article proceeds in four parts. First, I describe the present generation of trade agreements, its evolution, and the emergence of default standard text. The Article selects as a case study the chapters with a high degree of consistency. Second, I analyze the constitutional and historical forces at work in shaping trade agreement text and the existing theories that may explain the standardization trend. Third, the Article argues that none of the dominant international relations theories for managing change accounts well for the effects on trade law practice. In applying each theoretical approach, I conclude that the carefully structured choreography between Congress and the Executive is the strongest determining factor for consistency in U.S. trade agreements. Put differently, the frozen text is an unanticipated byproduct of the institutional architecture. Finally, I propose a rethinking of the congressional-executive entangled tango. Given all that is at stake, review and revision are urgently needed. I set out some preliminary thoughts that seek to take proper account of the international trade regime and that maximize the benefits of both consistency and innovation.

I. THE NAFTA 1.0 & ITS PROGENY

Upon beginning negotiations in August 2017, the Trump Administration announced that negotiations toward the NAFTA 2.0 would be complete by the end of that year. In seeking to make that deadline, the Office of the U.S. Trade

18. Surprisingly, "perhaps the greatest irony of fast track [TPA] is that it has come under attack as being undemocratic and for undermining public accountability when it was actually designed to do just the opposite." *See* Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 GEO. WASH. INT'L L. REV. 1, 4 (2003).

Representative (USTR) issued "negotiating objectives" for the revised agreement in July 2017. Those negotiating objectives largely resembled the objectives that governed the negotiations with Canada, Mexico, and nine other trading partners of the United States in the TPP, leading commentators to question whether the NAFTA 2.0 would be a repeat of the TPP.[19]

In stark contrast to the fast-paced NAFTA 2.0 negotiations, the conclusion of the TPP in October 2015 marked the end of a six-year negotiating exercise in a region that represents nearly forty percent of the global gross domestic product. However, just over one year later, the TPP—once the centerpiece of the Obama Administration's regional trade agenda—was dead, at least for the United States. The Trump Administration declared opposition to the draft text, "unsigning" it within a few days of taking office.[20] Even before the 2016 U.S. presidential election, controversy swirled as to whether congressional approval would be feasible in the seemingly negative trade space of today's politics.[21] That the implementation of a negotiated U.S. trade agreement could be in doubt after so many years and so many resources is a failure of the fragile two-branch trade lawmaking apparatus.

The roots of the TPP stretch to the earliest U.S. free trade agreements.[22] The shared language across agreements has led me to refer to them as a single "generation" of agreements.[23] The language has global influence. Political scientists Manfred Elsig and Todd Allee have used text-as-data analysis to confirm the widespread proliferation of U.S. trade agreement language in trade

19. *See, e.g.*, Simon Lester, *The Trump Administration's NAFTA Negotiating Objectives*, INT'L ECON. L. & POL'Y BLOG (July 17, 2017), http://worldtradelaw.typepad.com/ielpblog/2017/07/the-trump-administrations-nafta-negotiating-objectives.html. USTR updated the negotiating objectives in November 2017, making very few changes. *See USTR Releases Updated NAFTA Negotiating Objectives*, OFF. U.S. TRADE REPRESENTATIVE (Nov. 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/november/ustr-releases-updated-nafta#.

20. Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html. Discussing the congressional-executive relationship at the start of the Trump Administration, one journalist described how "some sources have wondered how the power triangle will play out in the new administration." Leonard, *supra* note 9.

21. Both Hillary Clinton and Donald Trump took positions opposing the TPP. Jacob Pramuk, *Clinton and Trump Can Agree on At Least One Thing*, CNBC (Aug. 11, 2016), https://www.cnbc.com/2016/08/11/trump-and-clinton-now-sound-similar-on-one-key-issue.html. The antagonism toward the agreement was also pervasive in Congress. Speaking of the TPP in the Senate in 2015, Bernie Sanders said: "The truth is that we have seen this movie time and time and time again. Let me tell my colleagues that the ending of this movie is not very good. It is a pretty bad ending." 161 CONG. REC. S2374 (daily ed. Apr. 23, 2015).

22. The precursor to the TPP, the Trans-Pacific Strategic Economic Partnership, was initiated in 2003 by Singapore, New Zealand, and Chile. The United States joined the negotiations in 2008. Meredith Kolsky Lewis, *Expanding the P-4 Trade Agreement into a Broader Trans-Pacific Partnership: Implications, Risks, and Opportunities*, 4 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 401, 404-05 (2009). Kolsky Lewis draws connections with an earlier Asia-Pacific agreement but notes the U.S. position that the TPP would be negotiated on U.S. terms, not building off the Asia-Pacific agreement as a base. Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27, 28-38 (2011) [hereinafter Kolsky Lewis, *The Trans-Pacific Partnership*].

23. I have used this term in recent work. Kathleen Claussen, *Trading Spaces: The Changing Role of the Executive in U.S. Trade Lawmaking*, 24 IND. J. GLOBAL LEGAL STUD. 345 (2017) [hereinafter Claussen, *Trading Spaces*]; Kathleen Claussen, *The Next Generation of U.S.-Africa Trade Instruments*, 111 AJIL UNBOUND 384 (2017).

agreements around the world.[24] All but one of these agreements were negotiated under the auspices of the joint congressional-executive process known as "fast track" or TPA.

The first bilateral trade agreement negotiated under TPA was the U.S.–Israel FTA (1985).[25] Between 1985 and 2000, only two additional agreements would be negotiated: the U.S.–Canada FTA (1988)[26] and the NAFTA (1993).[27] From 2001 through 2007, the United States concluded eight free trade agreements: U.S.–Singapore (2003),[28] U.S.–Chile (2003),[29] U.S.–Australia (2004),[30] U.S.–Morocco (2004),[31] CAFTA–DR (2005),[32] U.S.–Bahrain (2006),[33] U.S.–Oman (2006),[34] and U.S.–Peru (2007).[35] Only the U.S.–Jordan FTA of 2001,[36] negotiated by the Clinton Administration but implemented by

24. For example, these political scientists observe that the United States is not alone in copying and pasting from other agreements. *See* Allee, Elsig & Lugg, *supra* note 4, at 249 (describing how the trade agreement between the European Union and Canada reflects twenty-three percent text previously used by Canada and eighteen percent text previously used by the EU); *see also* Allee & Elsig, *supra* note 4, at 16-20 (tracing similarities across pairs of preferential trade agreements around the world). Furthermore, there are increasingly shared principles and policies found in agreements around the world. *See* Kathleen Claussen, *Stocktaking and Glimpsing at Trade Law's Next Generation*, *in* PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW ANNUAL MEETING 92, 94 (2017) (describing a "normative cascade" among regional trade agreements). Further, others have shown how considerable baseline text for FTAs around the world comes from the WTO Agreements. *See* Todd Allee, Manfred Elsig & Andrew Lugg, *The Ties between the World Trade Organization and Preferential Trade Agreements: A Textual Analysis*, 20 J. INT'L ECON. L. 333 (2017); Henrik Horn, Petros Mavroidis & André Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 2010 WORLD ECON. 1565.

25. Israel–United States: Free Trade Agreement, Isr.-U.S., Apr. 22, 1985, 24 I.L.M 653. I use "FTA" for all agreements to avoid confusion even though some agreements use the title "Trade Promotion Agreement" which would also go by the initials TPA.

26. Canada–United States: Free Trade Agreement, Can.-U.S., Jan. 2, 1988, 27 I.L.M. 281.

27. NAFTA, *supra* note 1.

28. United States–Singapore Free Trade Agreement, Sing.-U.S., May 6, 2003, H. Doc. 108-100, at 5, 2003 U.S.T. LEXIS 254 [hereinafter U.S.–Sing. FTA].

29. United States–Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, H. Doc. 108-101, at 5, 42 I.L.M. 1026 (2003), 2004 U.S.T. LEXIS 242 [hereinafter U.S.–Chile FTA].

30. United States–Australia Free Trade Agreement, Austl.-U.S., May 18, 2004, 43 I.L.M. 1248 (2004) [hereinafter U.S.–Austl. FTA]. The final text is available at OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf (last visited Mar. 18, 2018).

31. United States–Morocco Free Trade Agreement, Morocco-U.S., June 15, 2004, 44 I.L.M. 544 (2005) [hereinafter U.S.–Morocco FTA]. The final text is available at *Final Text*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text (last visited Mar. 18, 2018).

32. CAFTA–DR, *supra* note 6.

33. Agreement between the Government of the United States of America and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Area, Bahr.-U.S., Sep. 14, 2004, 44 I.L.M. 544 (2005) [hereinafter U.S.–Bahr. FTA]. The final text is available at *Final Text*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text (last visited Mar. 18, 2018).

34. Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, Oman-U.S., Jan. 19, 2006, 2006 U.S.T. LEXIS 119 [hereinafter U.S.–Oman FTA]. The final text is also available at *Final Text*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text (last visited Mar. 18, 2018).

35. Trade Promotion Agreement, Peru-U.S., Apr. 12, 2006, 2006 U.S.T. LEXIS 131. The final text is also available at *Final Text*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text (last visited Mar. 18, 2018).

36. Agreement Between the United States of America and the Hashemite Kingdom of Jordan

the George W. Bush Administration, was negotiated and implemented without going through the TPA process. As shown below, the Jordan agreement is exceptional in its level of innovation when compared to the TPA-supported agreements. In 2011, Congress implemented the U.S.–Panama,[37] U.S.–Colombia,[38] and U.S.–South Korea[39] agreements under TPA.[40]

Apart from the growth in the number of topics covered by trade agreements and some new chapters to accommodate those new topics,[41] the text of several of the chapters matches the text of earlier agreements. The language has simply been copied from one agreement to the next like boilerplate.[42]

In my review, I divide the chapters of U.S. agreements into two groups: (1) chapters repeated from one agreement to the next with high consistency of language and very few changes and (2) repeated chapters with a moderate level of consistency along with a slightly greater number of changes. A third group, chapters that are new to trade agreements, makes up a small category, which is in itself telling. Even some of these supposedly new chapters draw from old agreements, however.[43] I concentrate on the first group to understand why those chapters have not changed. Within that group, I select the labor and environment chapters for this study. As this analysis confirms, determining the factors that contribute to innovation and change is not a binary or simple issue. The pathway from innovation to standardization is multilayered.

A. High Consistency and Thin Innovation

Labor and environment commitments did not appear in trade agreements until backlash to the NAFTA prompted the Clinton Administration to negotiate two side agreements related to those topics.[44] The resulting North American

on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63 (2002), 2000 U.S.T. LEXIS 160 (entered into force Dec. 17, 2001) [hereinafter U.S.–Jordan FTA].

37. Trade Promotion Agreement, Pan.-U.S., June 28, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text (entered into force Oct. 31, 2012) [hereinafter U.S.–Pan. FTA].

38. Trade Promotion Agreement, Colom.-U.S., Nov. 22, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text (entered into force May 15, 2012) [hereinafter U.S.–Colom. FTA].

39. KORUS, *supra* note 7.

40. Both houses approved the implementing legislation for the three agreements on October 12, 2011. *See* 157 CONG. REC. 15292-96, 15373-74 (2011). However, the negotiations for these three agreements were begun and signed within the timeframe set out by the 2002 TPA, which expired on July 1, 2007.

41. *See, e.g.*, Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT'L L. & FOREIGN AFF. 209, 211, 221-38. (2011) (providing an overview of the expansion of trade agreements).

42. In other forthcoming work, I describe lessons to be learned from contract for international agreements in respect of boilerplate language not just in international economic law but also in other areas of international law. *See* Claussen, *supra* note 5.

43. The TPP chapter on State-owned enterprises, for example, was not proposed from whole cloth; rather, it built on language from the U.S.–Singapore FTA—the last agreement with a party which, like some of the other TPP parties, has a significant presence of State-owned enterprises. *See* U.S.–Sing. FTA, *supra* note 28, ch. 12. The TPP was an elaboration of that initial text.

44. For a helpful overview of the factors leading to the negotiations of the side agreements, see Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257 (1994).

Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC) included provisions with limited enforceability.[45] For instance, the NAALC includes objectives to improve working conditions and living standards, to encourage cooperation, and to promote compliance and enforcement.[46] Canada, Mexico, and the United States agree in this side text to enforce their respective labor laws and standards; however, the only matter subject to dispute settlement procedures is a "matter where the alleged persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical standards is trade-related; and covered by mutually recognized labor laws."[47] Even then, the enforcement mechanism differs from the commercial enforcement for the NAFTA; it places a cap on any monetary enforcement assessment, for example.[48] Still, the NAALC and the NAAEC side agreements were the first in which labor standards and environmental commitments related to trade were contemplated.

It was the U.S.–Jordan FTA that came closer to realizing the objectives of the labor and environment communities by incorporating the NAALC and NAAEC principles and more into the trade agreement itself. With respect to labor, the Jordan FTA included an article according to which each party is obligated to "not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."[49] This provision grew out of the similar language appearing in the NAALC, but the U.S.–Jordan FTA makes that provision enforceable under the same dispute resolution procedures as the commercial provisions.[50] The enforceability element, and in particular its appearance in the agreement text rather than as a side agreement, was the most important innovation of the U.S.–Jordan FTA, allowing either party to bring concerns about compliance with the labor article to a panel for adjudication. This innovation stands out in the history of the labor and environment trade negotiations. Its exceptionality in innovation correlates with its exceptionality: it was not subject to the TPA framework.

Each of the labor chapters in the trade agreements negotiated between 2002 and 2007[51] uses the same text as appeared in the U.S.–Jordan FTA, both the

45. The side agreements were lumped into the implementing bill for the NAFTA. *See* North American Free Trade Agreement Implementation Act, 107 Stat. 2129, 19 U.S.C. § 3301 *et seq.*

46. North American Agreement on Labor Cooperation arts. 1-6, Sept. 14, 1993, 32 I.L.M. 1499 (1993) [hereinafter NAALC].

47. *Id.* art. 29. The same language covered environmental obligations in the NAAEC. North American Agreement on Environmental Cooperation art. 22, Sept. 14, 1993, 32 I.L.M. 1480 (1993).

48. Charnovitz, *supra* note 4444, at 269.

49. This paragraph appears in Article 6.4(a) of the U.S.–Jordan FTA, *supra* note 36. I will focus on labor for efficiency, but the same patterns occur in the area of environmental obligations.

50. Article 3 of the NAALC provides: "Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action . . . ." NAALC, *supra* note 46, art. 3; *see also* Marc Lacey, *Bush Seeking to Modify Pact on Trade with Jordan*, N.Y. TIMES (Apr. 11, 2011), http://www.nytimes.com/2001/04/11/world/11PREX.html ("It is the first American trade initiative that included labor and environmental standards as part of the main text, putting the rights of workers and the duty of companies not to pollute on the same plane with tariffs.").

51. *See* U.S.–Austl. FTA, *supra* note 30, ch. 18; U.S.–Bahr. FTA, *supra* note 33, ch. 15; U.S.–

paragraph noted above and a subsequent paragraph,[52] and also defines key terms the same way. Each defines "labor laws" as "a Party's statutes or regulations . . . that are directly related to" a list of internationally recognized worker rights. The three subsequent FTAs and the TPP also use the same language for the principal enforceable provisions of the chapter.[53]

Thus, the precise words and phrases used for the major obligations of the labor chapters across the generation after the U.S.–Jordan FTA are consistent. Substantively, the same is also true. Few new articles have been added and few commitments have been changed. The same type of repetition and lack of innovation occurs in the environment chapter with respect to both text and substance.[54] A second exceptional moment occurred in 2007 when the United States began negotiating labor and environmental chapters in which nearly all State commitments were enforceable. Agreements implemented or negotiated after 2007 feature this notable difference. The change in U.S. policy resulted from a major bipartisan deal concluded on May 10, 2007. The deal, referred to colloquially by practitioners as the "May 10 agreement" or the "May 10 language," achieved a shift in U.S. objectives in favor of stronger language in certain chapters: labor, environment, intellectual property, investment, government procurement, and services.[55]

Chile FTA, *supra* note 29, ch. 18; U.S.–Morocco FTA, *supra* note 31, ch. 16; U.S.–Oman FTA, *supra* note 34, ch. 16; U.S.–Sing. FTA, *supra* note 28, ch. 17. These agreements contain some provisions that do not appear in the legislative text and thus were either adopted based on agreements that preceded them or resulted from executive and foreign partner elaboration and innovation. However, most of these provisions relate to cooperation and consultation and none imposes enforceable obligations on the parties.

52. The subsequent paragraph provides the parties with discretion in enforcement: "[E]ach Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources." U.S.–Jordan FTA, *supra* note 36, art. 6.4(b).

53. *See* KORUS, *supra* note 7, art. 19.8; U.S.–Colom. FTA, *supra* note 38, art. 17.8; U.S.–Pan. FTA, *supra* note 37, art. 16.9; Trans-Pacific Partnership, *supra* note 8, art. 19.1.

54. For instance, the language in the environment chapter in the CAFTA–DR signed in 2005 is very similar to the environment chapter in the KORUS implemented in 2012. (The KORUS was largely negotiated several years earlier, but critical changes were made toward the end of the process to enable ratification.) Both chapters require that the parties not "fail to effectively enforce its environmental laws [KORUS adds: "and its laws, regulations, and other measures to fulfill its obligations under the covered agreements [set out in an Annex]"] through a sustained or recurring course of action or inaction, in a manner affecting trade [KORUS adds: or investment] between the Parties, after the date [CAFTA–DR: of entry into force of this Agreement][KORUS: this Agreement enters into force]." KORUS, *supra* note 7, art. 20.3; CAFTA–DR, *supra* note 6, art. 17.2. In another example, "Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings . . . are available . . . [CAFTA–DR: "to sanction or remedy"; KORUS: "to provide sanctions or remedies for"] violations of its environmental laws." KORUS, *supra* note 7, art. 20.4.2; CAFTA–DR, *supra* note 6, art. 17.3. In both examples, the obligations and specific language are nearly identical. Even in those articles where the obligation is substantively altered, the wording is very similar. For example, the parties agree in CAFTA–DR that each party "*shall strive to ensure* that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws," whereas in KORUS, the obligation is strengthened according to the May 10 deal, such that the parties commit that "*neither party shall* waive or otherwise derogate from or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws." KORUS, *supra* note 7, art. 20.3.2 (emphasis added); CAFTA–DR, *supra* note 6, art. 17.2.2 (emphasis added).

55. *See* Charles B. Rangel, *Moving Forward: A New Bipartisan Trade Policy that Reflects American Values*, 45 HARV. J. ON LEGIS. 377 (2008).

Other than including the May 10 agreement changes, no new or altered provisions of considerable note were negotiated in the TPP labor or environment chapters.[56] One small addition to the labor chapter was made covering parties' commitment to adopt and maintain laws on acceptable conditions of work. The practical effect of this provision was relatively limited, however, given that all of the partner countries already had such laws on the books.[57]

This repetition stands in contrast to the positions of labor and environmental advocates. During the TPP negotiations, the labor community sought changes to the language of past agreements, few of which were incorporated into the resulting draft agreement.[58] Those include some that would not have posed major logistical or legal challenges for the United States to adopt: the addition of a provision to set up a labor secretariat; the addition of enforceable provisions related to child labor; the addition of an enforceable provision on forced labor; and changes to the language to reduce "excessive discretion or delay" regarding government consideration of complaints.[59] The lack of change across the agreements in response to these demands fuels the fire of FTA critics and likely contributed to the public rhetoric impeding the TPP's implementation in the United States in 2016.[60]

The labor and environmental advocacy communities were not alone in confronting the repeated language in the labor and environment chapters. In the first case brought under an FTA labor chapter, the United States faced opposition from Guatemala, the other disputing party in the case, in advocating that Guatemala's failure to enforce its labor laws occurred in a "manner affecting trade between the Parties" and was carried out through a "sustained or recurring course of action" as required by the applicable agreement, the CAFTA–DR.[61]

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56. According to one study, "with no less than 136 different environmental norms [in the TPP], only two of these were really new . . . . The other 134 were copied from preexisting trade agreements." Jean Frédéric Morin, Joost Pauwelyn & James Holloway, *The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements*, 20 J. INT'L ECON. L. 365, 383 (2017).

57. A second new provision to "discourage" the importation of products made with forced labor was also added as was a third to facilitate conversation among parties regarding labor issues of interest.

58. According to the AFL-CIO: "While the TPP includes some trivial changes to the Labor Chapter from the 'May 10' standard, none of the changes provide significant new protections for workers, nor do they remedy the completely discretionary nature of labor enforcement." AFL-CIO, REPORT ON THE IMPACTS OF THE TRANS-PACIFIC PARTNERSHIP 16 (Dec. 2, 2015), http://www.aflcio.org/Issues/Trade/Trans-Pacific-Partnership-Free-Trade-Agreement-TPP/Report-on-the-Impacts-of-the-Trans-Pacific-Partnership.

59. *Id.*

60. Such a narrow focus, however, misses that negotiators make advances beyond the surface of the agreement. For example, the dialogues created with governments as to threshold standards that must be met as a condition to entry into force do not always reach the public eye. Nevertheless, the empirical point remains: there is very little difference in chapter text.

61. See generally the written submissions of the United States and Guatemala, available at *In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA–DR*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr (last visited Mar. 18, 2018). The Panel concluded that the United States did not successfully prove that Guatemala's failures to effectively enforce its labor laws occurred "in a manner affecting trade." Final Panel Report, *In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA–DR*, ¶¶ 503-07 (June 14, 2017), https://www.trade.gov/industry/tas/Guatemala%20%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf [hereinafter Final

These same phrases appear in nearly all U.S. agreements. The AFL-CIO had maintained that this language posed "an unnecessary hurdle" for the United States.[62] Ultimately, the United States was unsuccessful in demonstrating that Guatemala had breached the CAFTA–DR on the basis of the Panel's interpretation of that particular language.[63] Despite this outcome, early indications suggest that the Trump Administration seeks to use the same language again in the NAFTA 2.0.[64]

In some respects, the similarities in labor and environment chapters across agreements should not be surprising. Many of the standards they share represent basic standards to which the United States—both the Executive and the legislature—would likely want all trading partners to agree: enforce labor and environmental laws, do not waive or derogate from those laws, and encourage mechanisms to monitor performance. These may be foundational commitments that should be maintained. The question that persists is whether these are the *best* or *only* provisions to fill that space.

B. Moderate Consistency and Moderate Innovation

As compared to the chapters of high consistency such as the labor and environment chapters, other FTA chapters exhibit considerable consistency but permit certain selective innovations. For example, the intellectual property (IP) chapters over time also include a number of similarities that together comprise a basic template. The IP chapter in the TPP was exceedingly similar to past IP chapters, although beyond the standard chapter text it included four country-specific annexes, two annexes related to Internet service providers, and thirteen separate side letters.

Generally, the IP chapters in agreements dating from 2002 onward are all similar with the exception of the changes made to those chapters post-May 10, 2007. The agreements subject to the May 10 changes have less stringent requirements on patent term extensions, patent linkages, and data exclusivity than those that came before that deal was struck.[65] Unlike in labor and environment, where the TPP chapters incorporated the May 10 language, critics of the TPP claim that its IP chapter abandoned the gains of the May 10 deal in those three areas.[66] For example, under the May 10 language, parties may choose whether to provide for patent term extensions in their domestic laws. The TPP, by contrast, would have required countries to provide for patent extensions for regulatory review periods or patent prosecution periods deemed "unreasonable."[67]

Panel Report, *In the Matter of Guatemala*].

62. *See* AFL-CIO, *supra* note 59, at 16.

63. Final Panel Report, *In the Matter of Guatemala*, *supra* note 61.

64. Jenny Leonard & Jack Caporal, *Despite Democrats' Hope, USTR Has Not Indicated It Will Push for NAFTA Labor Standards That Go Beyond TPP*, INSIDE U.S. TRADE (Jan. 29, 2018).

65. SHAYERAH ILIAS & IAN F. FERGUSSON, CONG. RESEARCH SERV., RL34292, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE (2011).

66. *See, e.g.*, *Initial Analyses of Key TPP Chapters*, PUB. CITIZEN (Nov. 2015), http://www.citizen.org/documents/analysis-tpp-text-november-2015.pdf.

67. In another area, biologics, where there was heavy lobbying and debate, critics maintain that

Looking at fourteen different provisions in the TPP IP chapter, twelve of them have substantively equivalent language in at least one prior U.S. FTA.[68] The other two, both provisions on patent scope, introduce two new or newly combined elements. The small changes that were made to the chapter text were said to make the chapter consistent with U.S. IP law.[69]

Like the IP chapter, the TPP dispute settlement chapter largely resembled past dispute settlement chapters, though it accommodated at least one new provision with substantive import that would have provided guidance to arbitrators regarding how to interpret the agreement in light of WTO case law.[70] These chapters may again be lightly updated for the NAFTA 2.0 consistent with the TPP draft.[71] Most notable from the early NAFTA 2.0 negotiations is the common exchange between the executive and legislative branches in the U.S. government regarding the Trump Administration's lack of transparency, according to members of both political parties in Congress.[72]

C. Situating the Variable Landscape

As shown above, there are clear trends of consistency across several trade agreement chapters. Not discussed above are traditional trade chapters such as those that set out obligations of non-discrimination and most-favored-nation treatment and those that refer to the creation of a free trade area. These chapters are likewise consistent but are premised largely on internationally recognized terms of art or legal and economic concepts that do not lend themselves as easily to innovation by their very nature. By contrast, in the "trade-plus" chapters such as those covering labor, environment, and intellectual property, one would expect to see greater variation based on differences in the States participating, changes in political leadership, or the passage of time.

Having shown that large parts of U.S. trade agreements are characterized by moderate to high consistency, the puzzle that remains is how to explain why this phenomenon occurs in U.S. trade agreements. The landscape of variation in

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the Obama Administration did not push back against foreign counterparts. *Id.* at 9. The American University Washington College of Law also analyzed the TPP IP chapter in comparison with the Anti-Counterfeiting Trade Agreement and noted some similarities, but most of those similarities are not at the textual level as is the case among past FTAs. *See* Carrie Ellen Sager, *TPP vs. ACTA: Line by Line*, INFOJUSTICE (Mar. 27, 2012), http://infojustice.org/archives/9256.

68. For an interesting chart illustrating this point, see *TPP Key Provision Comparison with FTAs*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/File:TPP_Key_Provision_Comparison_with_FTAs.pdf (last visited May 16, 2018). *See also* Gina M. Vetere et al., *What's New in the TPP's Intellectual Property Chapter*, GLOBAL POL'Y WATCH (Nov. 24, 2015), http://www.globalpolicywatch.com/2015/11/whats-new-in-the-tpps-intellectual-property-chapter.

69. *See* Vetere et al., *supra* note 68 (describing the changes and how the TPP IP chapter is "broadly consistent" with the IP chapters of prior U.S. trade agreements).

70. Trans-Pacific Partnership, *supra* note 8, art. 28.12.3.

71. *See USTR Releases NAFTA Negotiating Objectives*, OFF. U.S. TRADE REPRESENTATIVE (July 2017), http://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-releases-nafta-negotiating. In late 2017, however, rumors emerged that the Trump Administration sought to propose non-binding dispute settlement, though the final outcome of those conversations is yet unknown. *U.S. Proposes Non-Binding State-to-State Dispute Settlement in NAFTA*, INSIDE U.S. TRADE (Oct. 15, 2017).

72. *See, e.g.*, Dan Dupont, *Ways & Means Democrats Demand Hearings on NAFTA's Renegotiation*, INSIDE U.S. TRADE (Feb. 22, 2018).

the level of consistency of U.S. trade agreements has not been addressed in legal scholarship. Some political scientists have identified the copy-paste effect in the agreements,[73] but few have sought to explain why the use of boilerplate language is so prevalent. If anything, the trend and the cause are misunderstood by practitioners.[74]

I maintain that the landscape of varied consistency is best explained by a structural separation of powers theory as discussed in the remainder of this Article. Other dominant international relations and international law theories do not seize upon the way in which the unique structural and institutional elements surrounding trade agreement negotiations create constraints for lawmakers. To be sure, the construction of trade agreement text is undoubtedly a complex phenomenon, but unlike most treaties or contracts into which the State enters, trade agreements are specially constrained by the separation of powers of the U.S. Constitution with respect to foreign commerce. I first situate the consistency observations in this separation of powers theory before turning to alternative explanations. Each of these alternative theories offers plausible accounts for State behavior in the negotiation of trade agreements, but a separation of powers explanation, or what I call a "structural institutionalist" theory, does a better job than others with which it is in conversation. Thus, in the next Part, I describe the architecture of U.S. trade lawmaking and underscore its alignment with the consistency issues outlined above.

II. THE SEPARATION OF TRADE LAW POWERS

The structure through which Congress and the Executive engage to devise the content of our trade agreements has emerged out of a shift from Article II treaty-making to Article I legislative implementation of "congressional-executive agreements"—extra-constitutional instruments employed in trade and other areas—to accommodate the rise of the twentieth-century multilateral economic regime. Understanding the tension between Congress and the Executive in this space, as well as the current process through which they engage on trade, requires a short recounting of that evolution. I highlight here critical points in the trade story, which begins at the nation's founding.

A. Revisiting Constitutional Blueprints

In the earliest days of U.S. trade lawmaking, Congress regularly issued tariff schedules pursuant to its power under Article I, Section 8 of the U.S. Constitution to lay and collect duties and to "regulate Commerce with foreign Nations."[75] Thereafter, Friendship, Commerce and Navigation (FCN) treaties negotiated by the Executive with the advice and consent of the Senate dominated U.S. foreign commercial engagement.[76] As the FCN treaties came to outlive their

73. *See supra* note 24 and accompanying text.

74. *See, e.g.*, Leonard, *supra* note 9.

75. U.S. CONST. art. I, § 8, cl. 3.

76. John Coyle provides an overview of the literature on and history of FCN treaties. *See* John F. Coyle, *The Treaty of Friendship, Commerce, and Navigation in the Modern Era*, 51 COLUM. J.

utility, a constitutional question arose: if the regulation of foreign commerce is primarily for Congress, and treaties are primarily for the Executive, how would the government organize its position regarding a treaty concerning foreign commerce?[77] This blurry area of shared power assigned in one respect to Congress and in another to the Executive contributed to doubts about whether the treaty or some other device could serve U.S. interests.[78]

The treaty power as described in Article II of the Constitution has always been one of the most important, and most controversial, federal powers.[79] As a general matter, the treaty was never the exclusive domain of the Executive. In *The Federalist Papers*, Alexander Hamilton commented that the treaty power formed "a distinct department" belonging "properly, neither to the legislative nor to the executive."[80] Writing of the congressional-executive realms of authority, Hamilton noted: "The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations . . . ."[81] Likewise, the Treaty Clause does not differentiate among treaty subjects. It does not carve out areas of foreign relations enumerated to other areas of the government, such as foreign

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TRANSNAT'L L. 302 (2013). Practice has influenced the meaning of "advice and consent." Presidential consultation of the Senate for advice prior to submitting a treaty for consent has been an exceedingly rare practice. As Louis Henkin has noted, "'[A]dvice and consent' has effectively been reduced to 'consent.'" LOUIS HENKIN, FOREIGN AFFAIRS & THE UNITED STATES CONSTITUTION 177 (2d ed. 1996).

77. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 235 (2001) (commenting that "the President is not a lawmaker"). As discussed in greater detail below, because today's trade agreements are far from tariff-focused, one reading suggests that the Executive has the authority to conclude them as sole executive agreements.

78. Professor Jefferson Powell observes that "the constitutional text enumerates a variety of powers bearing on [foreign affairs and national security] that it delegates to one or the other political branch without specifying how the enumerated powers are to be related to one another or organized into a coherent framework." H. Jefferson Powell, *The President's Authority Over Foreign Affairs in Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 545 (1999); *see also* David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499, 500 (2012) (discussing the "limited text in the Constitution allocating power over foreign affairs between the branches of government").

79. Per Article II, Section 2 of the Constitution, the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. CONST. art. II, § 2, cl. 2. Although it has been the subject of intense academic and legal debate, the discourse on the treaty power has focused almost exclusively on its scope and on questions of federalism, rather than the separation of powers dilemma that has grown around particular areas of foreign relations. Exceptionally, see Oona Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239 (2013) and Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005). Alexander Hamilton called the Treaty Clause "one of the best digested and most unexceptionable parts of the plan." THE FEDERALIST NO. 75, at 417 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Indeed, it was the federalism question that occupied the Founders. The two-thirds senatorial consent rule, the highest requirement in the Constitution among congressional votes, was the structural check on the Executive, intended to give the states a voice in the treaty-making process and accommodate values of federalism and democracy. *See* Hathaway et al., *supra*, at 242 (commenting that "a key concern about the treaty power was that it would give the federal government the power to cede territory of a state to a foreign nation without the consent of that state").

80. THE FEDERALIST NO. 75, *supra* note 79, at 419.

81. *Id.* at 418.

commerce.[82] Rather, the authors envisioned a broad treaty power.[83] According to David Golove's primary historical research, the Founders envisioned that "the power . . . would extend as far as was customary under international practice."[84]

Notwithstanding the treaty's flexibility in subject matter and the accommodation of both branches, that the United States would enter into contracts with other nations regulating foreign commerce as well as other diverse areas loosely related to the removal of tariff barriers challenged, at a minimum, the efficacy of trade treaty-making in the post-World War II trading environment. The government undertook two institutional changes to address this dilemma.

The first major change was to create a Special Representative for Trade Negotiations (STR), a position first called for by Congress in the Trade Expansion Act of 1962.[85] The STR (now called "the USTR") came to serve as the intermediary between the legislature and the Executive on trade issues and, under the Trade Act of 1974, was directly accountable to both the President and Congress for its trade responsibilities.[86] As I have discussed elsewhere,[87] these moves reflected a congressional interest in enhancing executive authority while also maintaining control on the Executive's work in the trade space.

The second major change was the implementation of a procedural framework then known as "fast track authority." "Fast track" is the colloquial name for TPA and was first contemplated in the Trade Act of 1974.[88] In general terms, in TPA legislation, Congress invites the President to initiate negotiations with trading partners and sets the terms of engagement between itself and the executive branch for the period of negotiations.[89]

In the original 1974 Act, Congress urged the President "to take all appropriate and feasible steps within his power . . . to harmonize, reduce, or eliminate . . . barriers to (and other distortions of) international trade." Congress

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82. Saikrishna Prakash and Michael D. Ramsey observe that "there is no adequate explanation of the source and scope of the foreign affairs powers of the President." *See* Prakash & Ramsey, *supra* note 77, at 233. In one of its more controversial decisions, the Supreme Court has said that, in the "external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . [H]e alone negotiates. Into the field of negotiation the Senate cannot intrude. . . ." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

83. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1134 (2000).

84. *Id*. That practice extends back long before the Founders. Focusing on trade, for one, commercial interactions between and among quasi-sovereigns in the era of the Greeks contributed to the earliest known "international" trade agreements. WILLIAM J. BERNSTEIN, A SPLENDID EXCHANGE: HOW TRADE SHAPED THE WORLD 20-21 (2008). In fourth-century Athens and Thessaly, executives negotiated broad non-military agreements that regulated their trade relations. Those related to the mutual protection of commerce had a specialized Greek word. The Romans likewise entered into executive commercial agreements. COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 60, 114, 375 (1911).

85. Pub. L. No. 87-794, 76 Stat. 872 (1962) (codified at 19 U.S.C. § 1801 *et seq.*).

86. Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified at 19 U.S.C. ch. 12).

87. Claussen, *Trading Spaces*, *supra* note 23, at 350-54.

88. In my earlier work, I have summarized the historical and legal foundations for fast-track, drawing together critical conclusions from other scholars. *Id.* at 351-52 n.18.

89. The language is necessarily imprecise. Constitutionally, the President does not need congressional authorization to enter into negotiations, nor does TPA encourage the President to pursue negotiations in any express terms.

then specifically authorized the President to enter into trade agreements for a short-term period of five years:

> Whenever the President determines that any existing duties or other import restrictions . . . . [or] barriers to (or other distortions of) international trade of any foreign country or the United States unduly burden and restrict the foreign trade of the United States or adversely affect the United States economy, . . . the President, during the 5-year period beginning on the date of the enactment of this Act, may enter into trade agreements with foreign countries . . . providing for the harmonization, reduction, or elimination of such barriers (or other distortions) or providing for the prohibition of or limitations on the imposition of such barriers (or other distortions).[90]

TPA then provides for the President to present to Congress an implementing bill for the resulting trade agreement, which is referred to as a congressional-executive agreement. Congress votes on the agreement without any opportunity for amendment to the agreement itself.

Thus, the special procedure set out in TPA gives the U.S. trade agreement a somewhat unique status in U.S. law.[91] The constitutional (and drafting materials'[92]) silence on how other types of agreements and compacts would be made on behalf of the United States left the door open to creative arrangements.[93] Today, the congressional-executive agreement and the USTR are fixtures in the U.S. trade lawmaking regime.

Edmund Sim calls TPA a "simple answer to a complex problem."[94] Harold Koh's depiction, by contrast, is anything but simple: "an accelerated process that results from self-imposed congressional limits upon ordinary committee deliberation, committee and floor amendment, and filibuster, that effectively bundles disparate substantive provisions together in a take-it-or-leave-it package."[95] The U.S. political apparatus managed to codify, on a time-bound basis, highly structured conversations between the branches through which the shared authority between the legislature and the Executive is activated and played out. Scholars have nevertheless debated the constitutional legitimacy of TPA's structural arrangement.[96] Among those applauding the framework for its

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90. Pub. L. No. 93-618, §§ 101-02, 88 Stat. 1978, 1982-83 (1975).

91. For a summary of the legal and historical debates on congressional-executive agreements, see Claussen, *Trading Spaces*, *supra* note 23, at 353 n.22 and accompanying text.

92. *See* John Linarelli*, International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 DICK. J. INT'L L. REV. 203, 224 (1995) ("Hardly anything can be found in the documentation relating to the drafting of the Constitution so as to glean any intent on the separation of powers in the area of foreign commerce.").

93. *See generally* David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998) (suggesting the indeterminate language of the Treaty Clause legitimizes congressional-executive agreements).

94. Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 521 (1990).

95. Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 163 (1992) (emphasis omitted).

96. On the constitutional questions, see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); Detlev F. Vagts, *The Exclusive Treaty Power Revisited*, 89 AM. J. INT'L L. 40 (1995). As James Varellas notes, Tribe "staked out the position of 'treaty exclusivity' arguing that the Treaty Clause's requirement that two-thirds of the senators present approve treaties proscribed full-stop the use of [congressional-

resolution of the constitutional quandary, Bruce Ackerman and David Golove go as far as to call TPA "one of the great successes of modern American government."[97] TPA created the framework to fill the constitutional gap on foreign commerce. Finding a workable balance in this area of shared power is critical to trade law because, as the next Section begins to illustrate, the balance has a substantial impact on trade law outcomes.

Beyond its navigating the U.S. constitutional issue, TPA's most important perceived contribution has been to front-load conversations between the Executive and Congress, providing foreign trading partners with some expectation of outcome on an expedited timeline.[98] The legislation provides trade agreements a special status, facilitated by a special envoy, the USTR. Through TPA, in some respects, Congress provides "prospective advice and consent," similar to what Jean Galbraith has proposed for other types of treaties.[99] But in so doing, the TPA process also has led to unforeseen consequences for those agreements. To better understand the relationship between TPA and repetitive agreement text, I review in the next Section some of the key features of TPA.

B. Features of TPA

TPA has two sets of features: those that are structural and those that are substantive. The structural features, along the lines of what Aaron-Andrew Bruhl calls "statutized rules," govern how Congress handles the procedure of trade agreement negotiations.[100]

1. Negotiation Procedure

A study of the TPA provisions over the years demonstrates that Congress

executive agreements] . . . [while] Ackerman and Golove . . . defend the prevailing position that 'the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.'" James J. Varellas, *The Constitutional Political Economy of Free Trade: Reexamining NAFTA-Style Congressional-Executive Agreements*, 49 SANTA CLARA L. REV. 717, 721 (2009) (footnotes omitted). Koh comments that the subsequent "overwhelming consensus in the legal academy" rejected Tribe's view in favor of a practice permitting binding agreements to be approved by majorities of both houses of Congress. Harold Hongju Koh, *Address: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. ONLINE 1, 6 (2012). In the earlier days, the Supreme Court addressed the Executive's foreign affairs authority, upholding the delegation to the Executive, causing Assistant Secretary of State Francis B. Sayre to comment that it was "clear beyond the shadow of a doubt that Congress may constitutionally authorize the President to conclude executive agreements which bind the United States without the necessity of subsequent Senate approval and that the President has authority to enter into certain classes of agreements independently of Congressional authorization." Francis B. Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 758 (1939).

97. Ackerman & Golove, *supra* note 96, at 906.

98. David Gantz points out that "most foreign governments are unwilling to complete substantive trade negotiations with the United States in the absence of TPA." David A. Gantz, *The "Bipartisan Trade Deal," Trade Promotion Authority and the Future of U.S. Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 115, 131 (2008). Meredith Kolsky Lewis adds that "as a practical matter TPA is seen as all but necessary to get any trade agreements enacted." Kolsky Lewis, *The Trans-Pacific Partnership*, *supra* note 22, at 46 (footnote omitted). This is borne out by the Obama Administration's fulfilling all of the TPA requirements even before TPA was on the congressional radar for the TPP. *Id.* at 47.

99. Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247 (2012).

100. Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 346 (2003).

uses TPA to maintain close control over the Executive in the trade agreement negotiating context. Beginning with the 1974 Act, the President was obligated to consult with relevant committees during the negotiations and to notify Congress ninety calendar days before signing an agreement.[101] The Act provided for ten "congressional delegates to negotiations" to be "accredited by the President as official advisers to the United States delegations to international conferences, meetings, and negotiation sessions relating to trade agreements."[102]

Following its introduction in the Trade Act of 1974, TPA (still then known as "fast track") was renewed in the Trade Act of 1979 to enable more rounds of negotiation in the creation of various parts of what would become the World Trade Organization. In 1983, following the Supreme Court's ruling in *Immigration and Naturalization Service v. Chadha*,[103] Congress revisited the bi-branch trade lawmaking structure in the Trade and Tariff Act of 1984.[104] There, Congress required the President to notify the House Ways and Means Committee and the Senate Finance Committee of his intention to begin negotiations sixty days prior to the start of negotiations.[105] The Act also provided for denial of the expedited procedures if either committee disapproved of the negotiation within that sixty-day period.[106]

The expedited authority was again renewed in the Omnibus Trade and Competitiveness Act of 1988.[107] That Act provided that Congress could withhold a trade agreement from fast track consideration by passing a resolution of disapproval under certain conditions.[108] Writing in 1992, Harold Koh identified twelve possible leverage points Congress had against the Executive at that stage in the evolution of TPA, each enabled by particular reporting and consulting requirements or similar obligations in the legislation.[109] TPA was briefly extended again in 1993 for the consideration and implementation of the NAFTA.

The Bipartisan Trade Promotion Authority Act of 2002 brought back fast track for the first time in eight years with a stronger congressional role.[110] Even

101. Pub. L. No. 93-618 (1975), § 102(e)(1). The President was also required to provide information to the International Trade Commission, an independent body, for advice, just as he was required to seek information and advice from relevant departments in the executive branch. The role of the International Trade Commission and certain other executive agencies in the trade lawmaking process is not taken up here, but the diversity of contributions to a text even within the executive branch is notable. The Office of the U.S. Trade Representative receives considerable technical, administrative, scientific, and economic guidance in undertaking the negotiation and conclusion of congressional-executive agreements.

102. *Id.* § 161(a).

103. 462 U.S. 919 (1983).

104. Koh maintains that the *Chadha* decision prompted Congress to seize more effective control over trade lawmaking through the use of functional substitutes to Congress's prior legislative vetoes. Koh, *supra* note 16, at 1211, 1216-19; *see also* Bruhl, *supra* note 100, at 347 (describing how fast track rules "can act as a close substitute for the legislative veto").

105. Pub. L. No. 98-573 (1984), § 401(a).

106. *Id*.

107. Notably, the expedited procedures are statutized and not subject to the sunset provision; only the authority to use them is time limited.

108. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

109. Koh, *supra* note 95, at 150-57.

110. *See* Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, 116 Stat. 933

the name of the legislation itself suggests a shorter or tighter leash for the Executive—emphasis on "authority."[111] The 2002 legislation enacted a number of changes to the process, bringing the President closer still to a congressional itinerary. For example, the Act required the President to submit reports when the implementing bill was submitted to Congress for approval, explaining how the FTA makes progress toward TPA objectives. It provided that in the course of negotiations, the USTR must not only consult with the designated congressional committees but also must engage in "regular and detailed briefs" with congressional advisers—a "Congressional Oversight Group"—and future consultation before initiating negotiations.[112]

The 2002 TPA expired in 2007 and was not revived until late 2015, although President Barack Obama requested TPA for purposes of finalizing the TPP as early as July 30, 2013.[113] The 2015 TPA legislation incorporates still more executive discretion-controlling tools including additional congressional consultations during negotiations; additional consultations prior to entry into force; other "enhanced coordination with Congress"; and additional consultation with congressional advisers throughout the process.[114] Further, Congress has reserved the right to change the rules at any time under TPA and occasionally has done so along the way.[115] Each TPA statute remains enshrined in individual chapters of Title 19 of the U.S. Code.[116]

The record is unequivocal in demonstrating an escalation of congressional control mechanisms over the history of the TPA procedure. That statement is true even without taking into account engagement between the branches that is not codified or required. In addition to the procedures defined in the TPA legislation, Congress and the Executive have followed certain unwritten rules of engagement. Through these customs, the Executive seeks to keep the relevant congressional stakeholders apprised and appeased.[117] For example, the House

(codified at 19 U.S.C. §§ 3801-13); *see also* Laura L. Wright, *Trade Promotion Authority: Fast Track for the Twenty-First Century*, 12 WM. & MARY BILL RTS. J. 979, 989 (2004).

111. The term "trade promotion authority" (TPA) was first used in this Act.

112. 19 U.S.C. §§ 3804, 3807. Although the statute does not make specific mention of approval of trade agreements by majority vote of both houses, as a doctrinal matter, it is accepted almost universally. *See, e.g.*, Ackerman & Golove, *supra* note 96, at 803 ("This framework [approval of agreements by majority vote of both houses] has proved remarkably successful—to the point where it is now taken for granted by all foreign-trade professionals.").

113. Rossella Brevetti, *Obama Calls for Trade Promotion Authority Combined with Trade Adjustment Assistance*, INT'L TRADE DAILY (July 31, 2013). According to David Gantz, "the United States' negotiating abilities were severely hampered" by the lack of TPA before June 2015 because "only TPA encourages the United States' negotiating partners to give their final, best positions on contentious issues by assuring them that once a trade agreement is concluded it will not be amended nor indefinitely delayed by the Congress." David A. Gantz, *The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. L. 57, 61 (2015).

114. Pub. L. No. 114-26 (2015), § 104.

115. Congress changed some of the rules in 2008 in the course of its consideration of the U.S.–Colombia FTA. *See* IAN F. FERGUSSON, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY AND THE ROLE OF CONGRESS IN TRADE POLICY 9 n.18 (2015).

116. 1974 is Chapter 12; 1979 is Chapter 13; 1988 is Chapter 17; 2002 is Chapter 24; and 2015 is Chapter 27.

117. Some members of Congress are asking for still more. *See* Jenny Leonard & Dan Dupont, *House Democrats Call for Greater Congressional Authority, More Enforcement in Future Deals*, INSIDE U.S. TRADE (Mar. 28, 2017).

Ways and Means Committee and the Senate Finance Committee sometimes engage in "markup sessions" during which they review the draft implementing bill in conversation with the USTR.

The original "fast track" arrangement was devised at a time when the country was wrestling with suspicions and skepticism toward executive power. By one characterization, the 1974 Act was "wreathed with provisions that manifested Congress' pervasive post-Watergate, post-Vietnam distrust of unchecked executive discretion in foreign affairs: specified negotiating objectives; . . . [and] extensive consultation, certification and reporting requirements."[118] Notwithstanding the passage of time since that low period in the trust of the Executive, the number and forms of congressional requirements for executive engagement have only increased.

2. Substantive Features

Beyond the congressional-executive structural components of TPA are the lesser-studied substantive components. At the heart of these provisions are the "overall" and "principal" negotiating objectives to guide the President in concluding agreements. These objectives guide the Executive in the types of provisions that Congress wishes to see and apply regardless of the trading partner or partners with whom the Executive negotiates.[119]

Over the years, Congress has added lengthy negotiating objectives specific to each chapter.[120] In the 1974 Act, the chapter-specific objectives were short and general in nature. Only four subject areas were covered specifically. The same is true for the objectives that followed in the renewed legislation, until 1988 when there were at least sixteen sectors or topic areas for which Congress articulated objectives. The 1988 legislation was the first to include labor and environment provisions among the principal negotiating objectives:

> The principal negotiating objectives of the United States regarding worker rights are—(A) to promote respect for worker rights; (B) to secure a review of the relationship of worker rights to GATT articles, objectives, and related instruments with a view to ensuring that the benefits of the trading system are available to all workers; and (C) to adopt, as a principle of the GATT, that the denial of worker

118. Koh, *supra* note 95, at 145.

119. In 1974, the overall objectives included: "(1) to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade; (2) to harmonize, reduce, and eliminate barriers to trade . . . ; (3) to establish fairness and equity in international trading relations . . . ; (4) to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition . . . ; (5) to open up market opportunities for United States commerce . . . ; (6) to provide fair and reasonable access to products of less developed countries in the United States market." Pub. L. No. 93-618.

120. Although Congress does not undertake its legislative drafting responsibility in the absence of consultation with the executive branch and the President signs TPA into law, I attribute here the "overall negotiating objectives" primarily to Congress for at least two reasons. First, these objectives often span the lifetimes of more than one presidential administration. Thus, even if the Executive contributed to the policy that shaped some of the language, it is likely that a different chief Executive must execute it. Second, U.S. courts treat legislation largely as the product of Congress, given that the Constitution likewise treats U.S. law that way. Moreover, the USTR often issues its own agreement-specific negotiating objectives that differ from those in TPA.

> rights should not be a means for a country or its industries to gain competitive advantage in international trade.[121]

This Act set the stage for the NAFTA negotiations as well as the negotiation of the NAALC and NAAEC.

The 2002 TPA legislation—the Bipartisan Trade Promotion Authority Act of 2002—continued to substantially expand the objectives to cover still more topics. It included specific, lengthy negotiating objectives for each chapter, including the labor and environment chapters. Among other "principal negotiating objectives for labor," the 2002 Act provides:

> (A) to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries;
> (B) to recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor or environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources, and no retaliation may be authorized based on the exercise of these rights or the right to establish domestic labor standards and levels of environmental protection.[122]

These paragraphs follow the U.S.–Jordan FTA labor chapter language almost exactly. Most important, the 2002 Act also included an objective to treat all principal negotiating objectives equally with respect to dispute settlement, incorporating the milestone of the U.S.–Jordan FTA that had been successfully negotiated by the Clinton Administration.

Thereafter, the FTAs that were negotiated under the 2002 TPA legislation and concluded before 2007 all include the TPA "objectives" language in labor and environment as binding commitments. In other words, the language of those trade agreements is consistent with the TPA legislation authorizing the President to negotiate those agreements in the first place. While correlation is not causation, it is notable that among the many trade agreements negotiated over the last twenty years, the U.S.–Jordan FTA stands out as the only one to be negotiated and implemented outside the TPA framework. Thus, the greatest gains in terms of change to the labor and environment chapters in recent years came from the only agreement not negotiated under TPA. There, the Executive was not obligated to follow any congressionally set blueprint. On that rare occasion, the Executive set the agenda and made a notable advance. The new additions to that agreement were then incorporated into statute in the subsequent TPA legislation.

The 2002 TPA was due to expire at a time when four negotiated agreements had not yet made it through Congress. As a result of the delicate political

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121. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1101(b)(14), 102 Stat. 1107, 1125 (1988).

122. Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, § 2102(b)(11), 116 Stat. 933, 1000 (2002).

situation at the time, a bipartisan deal was required before the agreements that had been negotiated—those with Peru, Colombia, Panama, and South Korea—would enter into force. It was these developments that prompted the May 10 deal noted above. Although that deal and its precise language were not captured by statute, the understanding between the branches was that the terms of May 10 (stronger labor and environment enforcement mechanisms among them) would be incorporated into the Executive's negotiations.[123] These agreements were then re-negotiated to incorporate those agreed-upon changes.

The next iteration of TPA, enacted in 2015, adopted and codified those principles,[124] bringing the full length of congressional objectives for the President to fourteen printed pages of legislation.[125] The TPP labor and environment chapters tracked the 2015 TPA with only small modifications.[126] Thus, across the last twenty years, the text of each FTA's labor and environment chapters has closely resembled the negotiating objective language of its applicable TPA legislation.

The negotiating objectives provided by Congress are ostensibly intended to provide guidelines for the executive branch to consider in negotiating FTAs.[127] In fact, for the high consistency chapters, the language of the agreement has been lifted verbatim from the "objectives" as stated in the TPA legislation. This is not to suggest that the Executive does not engage with Congress as the legislature drafts and enacts these objectives into law. However, it is clear that Congress holds both the pen and the final word through TPA.[128]

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123. In itself, the May 10 agreement—the negotiated soft law between Congress and the Executive—is worth further study. For a primer, see Gantz, *supra* note 98. Query whether the May 10 compromise is now broken following the *In the Matter of Guatemala* CAFTA–DR labor case. *See, e.g.*, Celeste Drake, *U.S. Trade Policy Fails Workers*, AFL-CIO (June 26, 2017), https://aflcio.org/2017/6/26/us-trade-policy-fails-workers (commenting on how the May 10 compromise is no longer sufficient as demonstrated by the Panel's high bar for its interpretation in the case between the United States and Guatemala).

124. For example, the labor chapters in those agreements require the parties to maintain in their law and practice five basic internationally recognized labor principles, and the environment chapters incorporate specific multilateral environmental agreements. Importantly, the May 10 deal also made the labor and environment obligations fully enforceable on par with commercial provisions. *See* Gantz, *supra* note 98, at 150.

125. New provisions were added to address digital trade, State-owned enterprises, regulatory transparency, and currency.

126. For example:

> Article 19.5.1: No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement.
>
> Article 19.5.2: . . . Each Party retains the right to exercise reasonable enforcement discretion and to make *bona fide* decisions with regard to the allocation of enforcement resources between labour enforcement activities among the fundamental labour rights and acceptable conditions of work enumerated in Article 19.3.1 (Labour Rights) and Article 19.3.2, provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter.

Trans-Pacific Partnership, *supra* note 8.

127. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-439, FOUR FREE TRADE AGREEMENTS GAO REVIEWED HAVE RESULTED IN COMMERCIAL BENEFITS, BUT CHALLENGES ON LABOR AND ENVIRONMENT REMAIN 9-10 (2009). President George W. Bush attested in June 2005 that the FTAs advanced TPA's U.S. commercial objectives. *Id.* at 11-12.

128. To be sure, simply following the congressional objectives verbatim is not a guarantee of acceptance and implementation of an agreement. The TPP is one among a few examples of agreements

III. TRADE AGREEMENT DESIGN THEORY

Studying the intersection of substance and structure in TPA helps shed light on the landscape of consistency observed in trade agreements. Koh notes that TPA "creates moral commitments, mutual assurances, credible threats, and settled expectations among the branches in the trade field."[129] In fact, it does much more. This Part sets out how, what I term, "structural institutionalist" theory, which focuses on the separation of powers between Congress and the Executive, provides the best explanation for the consistency in U.S. trade agreement design.[130] I then turn to competing theories and lessons to be learned from those theories' contributions.

A. Structural Institutionalism

Taken together, the review in Part II of the TPA framework features a number of strong indicators that the current congressional-executive structural relationship is contributing to path dependence in our trade agreements. As scholars of path dependence have acknowledged, "When certain actors are in a position to impose rules on others, the employment of power may be self-reinforcing. Actors may use political authority to generate changes in the rules of the game (both informal institutions and various public policies) designed to enhance their power."[131] Congressional activity in the trade lawmaking space has lived up to this prediction. As TPA has evolved and Congress has taken on a greater role, those moral commitments, mutual assurances, and credible threats have become more entrenched and more inflexible.

1. Congressional Monopoly

The high-consistency chapters in U.S. trade agreements are not just consistent with one another but are also locked-in with TPA, whereas the moderate-consistency chapters appear to use the TPA negotiating objectives as exactly that: objectives. In the areas of labor and environment, both of which benefit from strong interest groups and suffer from a bipartisan divide, Congress is itself more constrained and therefore binds the Executive more than in other chapters. In areas such as IP and dispute settlement, where interest group influence is more nuanced and less categorical, Congress is less constrained and can afford the Executive greater flexibility. As these preferences are processed through the legislative machinery, they generate certain defined spaces for the

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that tracked the congressionally mandated language and still was not implemented by the Congress thereafter. But not following congressional objectives may pose an even greater risk of non-acceptance.

129. Koh, *supra* note 95, at 161.

130. Randy Kozel used the term "structural institutionalism" to refer to a "conception of the constitutional order in which various institutions outside the realm of political government 'develop their *own* visions of what the First Amendment means.'" Randy J. Kozel, *Institutional Autonomy and Constitutional Structure*, 112 MICH. L. REV. 957, 958 (2014) (citation omitted). I am using the term to capture an emphasis on structural constraints within an institutionalist analysis.

131. Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 259 (2000) (citation omitted). E.E. Schattschneider asserted: "New policies create a new politics." E.E. SCHATTSCHNEIDER, POLITICS, PRESSURE AND THE TARIFF 288 (1935).

development of policy.[132]

Congress appears to have been less influential on an administration's approach to the IP chapter compared to the labor and environment chapters. Other than in the area of pharmaceuticals, the advocacy community for IP issues is more diffuse and maintains a weaker lobby among members of Congress than in labor and environment.[133] This nuanced lobby could have a differential impact in the course of the many congressional-executive conversations set out by TPA. With respect to the content of the dispute settlement chapter, the probability of congressional capture is similarly low, and USTR as well as foreign negotiating partners may be able to modify the dispute settlement terms in a non-controversial way.

A tentative conclusion, therefore, is that the consistency in trade agreement chapters may be differentiated by levels of congressional capture. To the extent this is correct, it is historically incongruous. Cory Adkins and David Singh Grewal trace how early delegations to the President in the area of foreign commerce were seen as helping to shield trade policymaking from the dangers of interest groups in addition to being more responsive to the exigencies of foreign commercial relations.[134] The interdisciplinary scholarship on interest groups and capture similarly points to a differential in this respect. Adkins and Grewal conclude that TPA procedures allow the federal government "to advance a unified agenda for international trade with less risk of its being hijacked by particular (i.e., sectional or minority) interests."[135] This review suggests that another type of hijacking is going on, one that is made manifest in the paralysis of language in the resulting agreements. Whether congressional capture is the precise explanation for the differentiation across the landscape, the overall trend toward consistency does appear to have to do with greater congressional involvement. In other words, the structure in which Congress seeks to maintain tight control appears to lend itself to capture and, therefore, paralysis.

The appearance of congressionally-prescribed agreement language is not the only indication of the congressional influence on U.S. trade agreements. Negotiators confirm that, through TPA, Congress maintains a heavy role in U.S.

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132. This hypothesis embraces first principles from Philip Frickey and Daniel Farber's iteration of public choice theory, drawing from the republicanism literature to conclude that the government is actively processing preferences in its construction of policy. *See* DANIEL FARBER & PHILIP FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 58 (1991). Moreover, repeat players in the advocacy space quickly adapt to the TPA framework and maximize it to their benefit. For a discussion of how trade interest groups mobilize easily, see Jide Nzelibe, *The Breakdown of International Treaties*, 93 NOTRE DAME L. REV. 1173 (2018).

133. M.J. Durkee recently observed that the effects of business and other advocate participation in treaty-making is under-studied. *See* M.J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264, 267 (2016). Economists have also examined the roles of special interest groups in the trade lawmaking and policymaking spaces. Most notably, Gene Grossman and Elhanan Helpman's work in the mid-1990s provided a foundation for understanding how the branches work together with industry and their lobbies. *See, e.g.*, Gene M. Grossman & Elhanan Helpman, *Protection for Sale,* 84 AM. ECON. REV. 833 (1994).

134. *See* Cory Adkins & David Singh Grewal, *Two Views of International Trade*, 94 TEX. L. REV. 1495, 1499 (2016); *see also* Jide Nzelibe, *The Illusion of the Free Trade Constitution*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 6 (2016) ("The primary justification for supporting delegation of trade authority to the President revolves around the perceived need to suppress the role of special interest groups in trade policy.").

135. *See* Adkins & Grewal, *supra* note 134, at 1499.

negotiating work. Robert Strauss, Special Trade Representative during the Tokyo Round GATT negotiations, commented that he spent as much time with domestic stakeholders and members of Congress as with foreign partners.[136] As one prominent foreign negotiator put it: "[W]hen you negotiate with the United States, you have no choice but to negotiate with the administration, but also with the United States Congress . . . ."[137] The experience of those negotiators is consistent with outcomes predicted by Kristina Daugirdas: "When Congress pays sustained attention to a single issue or instruction over time, the executive branch will feel more pressure to demonstrate responsiveness to Congress's instructions . . . ."[138]

Members of Congress have themselves acknowledged the significant influence Congress plays in U.S. trade agreements and Congress's substantive prerogatives through TPA. In the spring 2002 congressional hearings regarding the possibility of enacting TPA legislation, Senator Chris Dodd referred to "Congress's role in helping to craft the final language of trade agreements over the past 8 years [which] developed new international norms."[139] Such an affirmation is not the type of statement one typically sees from members of Congress in respect of other areas of international law. Senator Dodd went on to discuss the difficulty President George W. Bush would face if certain points did not find their way into the congressional objectives:

> There are 27 pages of negotiating objectives covering every imaginable issue . . . involving insurance, and e-commerce, technology, and the like. . . . Since neither the House bill nor the Senate bill includes the Jordan labor standards or something comparable, the President may not be in a position to prevent our trading partners from violating domestic laws . . . .[140]

The implication of the Senator's remarks is that because Congress did not expressly include language in the TPA legislation, the Executive would be limited in putting that language into a final agreement. In 2018, the Chairman of the House Ways and Means Committee Kevin Brady bluntly told the USTR that Congress was the USTR's "client" and described his expectation that the USTR would negotiate the NAFTA 2.0 to include an investment chapter as Congress had dictated.[141]

The works of political scientists Thomas Schelling and Robert Putnam seek to support a claim that legislative constraint on the Executive can serve as

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136. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 433 (1988).

137. Tommy Koh, *The USSFTA: A Personal Perspective*, *in* THE UNITED STATES SINGAPORE FREE TRADE AGREEMENT: HIGHLIGHTS AND INSIGHTS 3, 10 (Tommy Koh & Chang Li Lin eds., 2004). The AFL-CIO attributes some of the problem to a lack of change in the TPA objectives. *See* AFL-CIO, *supra* note 58.

138. Daugirdas, *supra* note 17, at 554.

139. 148 CONG. REC. 4825 (2002) (Statement of Sen. Dodd).

140. *Id.* At that point, the bill that passed the House and Senate did not include the Jordan language. Senator Dodd also referred to the "evolutionary process" through which the Jordan standards could be incorporated into TPA. *Id.*

141. Dan Dupont, *Lighthizer, Brady Square Off Over ISDS at Ways & Means Trade Hearing*, INSIDE U.S. TRADE (Mar. 22, 2018).

leverage for a party at the negotiating table.[142] Schelling and Putnam maintain that Congress acts as a helpful check on an otherwise unconstrained executive negotiator in securing State priorities.[143] The tighter Congress draws the box, the less the executive branch negotiator can operate outside those lines, which in turn restricts foreign partners' ability to structure an agreement or include language according to their preferences.[144]

U.S. trade negotiations confirm Schelling and Putnam's understanding, but also its drawbacks. The United States maintains significant control in its conversations with foreign partners about trade agreements out of the necessity of securing congressional approval under the TPA framework. This necessity has allowed the United States to secure terms favorable to U.S. stakeholders. My review of U.S. trade agreements over the last twenty years confirms that outcome but adds a further detail of note: it is not simply where Congress is engaged that the Executive is more constrained; rather, there is equally a range of congressional involvement activating different levers in the TPA framework that affects the Executive's constraints.[145] Where stakeholders have a stronger hold on Congress, the Executive is more limited. Put simply, as a result of the current framework for congressional-executive shared power, in certain chapters, the congressional negotiating objectives in TPA and other congressionally sanctioned language in TPA have come to serve as both the floor and the ceiling for U.S. trade agreements.

Thus, the outcomes in U.S. trade agreements appear to be shaped in specific and systemic ways by institutional forces. At least five factors discussed above support this conclusion: first, the verbatim use of TPA legislation as enforceable obligations on States in the agreements; second, the correlation between the congressional involvement in the chapter and the space for innovation; third, negotiator statements confirming the congressional role; fourth, congressional statements affirming Congress's strong role; and, fifth, the fact that the greatest strides in the politicized chapters occurred in the case of the one chapter that did not go through TPA. As compared to other possible explanations, the volume and quality of indicators appear to point to these forces

142. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 28 (1980); Putnam, *supra* note 136.

143. Importantly, scholars have tested this thesis in later years, concluding that the relative influence of domestic politics is far more complex than Schelling and Putnam's model lets on. For example, Keisuke Iida concludes that perceptions of domestic constraints are just as important as the actual constraints themselves. Keisuke Iida, *When and How Do Domestic Constraints Matter?: Two-Level Games with Uncertainty*, 37 J. CONFLICT RESOL. 403 (1993); *see also* Ahmer Tarar, *International Bargaining with Two-Sided Domestic Constraints*, 45 J. CONFLICT RESOL. 320 (2001) (analyzing a model where both negotiators are constrained).

144. Building off the work of Schelling and Putnam, Oona Hathaway articulates that "the presence of constraints on a President [here, a limited model] has the potential to make him stronger, not weaker, at the bargaining table—and better able to strike the best deal for U.S. national interests." Oona Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 236 (2009).

145. Notably, the chapters of greatest U.S. dominance are areas of least consensus at the WTO. In this sense, the United States has been called a "norm entrepreneur." *See, e.g.*, Julien Sylvestre Fleury & Jean-Michel Marcoux, *The U.S. Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership*, 19 J. INT'L ECON. L. 445, 447-48 (2016).

as the most salient cause of the consistency. When one considers the many specific ideas that did not make their way into any agreements and the realm of possibilities for the standards in our trade agreements,[146] as well as the improvements on ambiguous language that have gone uncorrected from one agreement to the next, the generic uniformity is increasingly concerning.

2. Toward a Principal-Agent Relationship?

Today, in light of the constricting steps taken by Congress, the Executive acts in some respects like an agent of Congress in trade lawmaking rather than as a partner. Hamilton foresaw an arrangement like this as problematic and detrimental to U.S. foreign affairs. The President, acting as "the ministerial servant of the Senate[,] could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representatives of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy."[147] Hamilton clearly viewed the Executive as an agent in some respect and the most fit to carry out foreign transactions and negotiations, but the role of executive agent in Hamilton's depiction conceives of Congress as the *approver*, not necessarily as the *drafter*. Thus, the tipped balance in trade law is problematic not because Congress has the lead, but rather because the Executive has such limited normative discretion in a major foreign policy area. This institutional arrangement prevents both strategic optimization and innovation.

Although they have varying interests, Congress grants the Executive some circumscribed discretion and autonomy, and the Executive is intended to act within that space.[148] Here, the situation is further complicated by the fact that Congress is a collective actor; this exacerbates the Congress's ability to be responsive, to fully anticipate contingencies both for itself and the Executive, and likely also to manage their information asymmetry.[149] It is unsurprising that change is difficult under this arrangement, given the high transaction costs that constrain Congress in its foreign commercial governance role. As Daugirdas has illustrated, when it comes to foreign affairs, Congress is "unmotivated[,] . . . ineffective [and] [a]t best, it is relegated to a reactive role."[150]

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146. *See supra* Part II; *see also* Jane Rennie, *Competition Provisions in Free Trade Agreements: Unique Responses to Bilateral Needs or Derivative Developments in International Competition Policy*, 15 INT'L TRADE L. & REG. 57, 71 (2009) (noting the path-dependent nature of bilateral FTAs whereby terms become a reflection of common practice rather than of the particular needs of the parties).

147. THE FEDERALIST NO. 75, *supra* note 79, at 420. Moreover, the United States would "lose a considerable advantage in the management of its external concerns, [and] the people would lose the additional security which would result from the co-operation of the Executive." *Id.*

148. *See* Darren G. Hawkins et. al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, *in* DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 3, 7 (Darren G. Hawkins et al. eds., 2006).

149. Katerina Linos & Jerome Hsiang, *Modeling Domestic Politics in International Law Scholarship*, 15 CHI. J. INT'L L. 1, 10 (2014).

150. Daugirdas, *supra* note 17, at 510, 518 (footnote omitted). Daugirdas points to the need for Congress to have "comprehensive, high-quality, and timely information" for its deliberation. *Id.* at 550. On this, Hamilton further concurred. THE FEDERALIST NO. 75, *supra* note 79, at 420 ("Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous."). Not to mention that, as John Yoo has noted, today,

The use of a principal-agent framework as an analytical tool for understanding congressional-executive relations in foreign affairs is not entirely novel in practice or scholarship.[151] However, the conclusion that Congress plays a remarkably heavy role in our trade negotiations contrasts with the views of those scholars who see executive aggrandizement in foreign relations law, as well as with those who view trade negotiations as having the effect of reducing congressional involvement rather than increasing it.[152] Drawing from the literature on "framework statutes,"[153] some commentators have observed that TPA "establish[es] priorities and give[s] general direction" but nevertheless leaves the President considerable discretion in the implementation of the agreements themselves.[154] Adkins and Grewal characterize the tension this way: "The broadening of the final [trade agreement] approval process since the mid-twentieth century thus contrasts with a tightening of control over the formation of the trade agenda since the 1970s conceived both in terms of objective setting and textual elaboration."[155] In other words, while more members of Congress are involved in the expedited final approval of an agreement, fewer are involved in objective setting and textual elaboration as a result of the concentration of engagement between the President and select committees. This observation has led Adkins and Grewal to conclude that the use of Article I legislation in the trade space "consolidate[s] executive control."[156] Undoubtedly, the Executive exercises important discretion in areas such as the timing of negotiations and on

"the Senate has about fifty percent more members than the first House of Representatives envisioned by the Constitution, suggesting that the Senate no longer has the small numbers that the Framers believed necessary for successful diplomacy." John C. Yoo, *Laws as Treaties: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 845 (2000).

151. Ed Swaine has described that there was a time when "diplomats were regarded as personal agents of a head of state, and could be viewed in terms of a conventional principal-agent relationship, but identifying the principal (conceivably, the head of state, a legislature, or the state itself), the agent . . . , and the nature and consequences of delegated authority became less straightforward." Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2068 (2003). Daniel Abebe has proposed viewing Congress as principal and the President as its agent in foreign affairs generally. In contrast to my study, Abebe seeks to determine "the appropriate level of deference to the President" based on a balancing of internal and external constraints to "ensure that the President is a faithful agent" while also ensuring the President has enough "latitude to achieve congressional goals." Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 STAN. J. INT'L L. 1, 53 (2013).

152. For example, Hathaway concentrates on ex ante congressional-executive agreements, which allow the President to enter into international agreements with remarkably little congressional oversight. *See* Hathaway, *supra* note 144, at 144-45. Trade agreements, however, require congressional approval of the resulting agreement. *Id.* at 263-65. For other examinations of the Executive's dominance in international lawmaking, see Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201 (2018) and Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1003-04 (2013) (emphasizing that reliance on past practice largely explains why the Constitution has been interpreted to grant the Executive broad powers in foreign affairs).

153. *See, e.g.*, Steve Charnovitz, *Using Framework Statutes to Facilitate U.S. Treaty Making*, 98 AM. J. INT'L L. 696 (2004); Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 733-54 (2005) (describing how framework statutes are used in place of substantive legislation for their (1) symbolism; (2) neutral rules; (3) coordination; (4) entrenchment and precommitment; and (5) changing the internal balance of power in Congress).

154. HAL S. SHAPIRO, FAST TRACK: A LEGAL, HISTORICAL, AND POLITICAL ANALYSIS 20 (2006).

155. Adkins & Grewal, *supra* note 134, at 1508 (emphasis omitted).

156. *Id.* at 1514.

which trading partners to focus. Nevertheless, the overall process—and, more importantly, a surprising amount of the substance—is dictated by Congress.

Where the Executive as an agent is granted greater latitude with respect to the text, we tend to see more innovation. Where Congress maintains a tighter leash, we see less innovation. In those areas, we know Congress does not accommodate change well. Other innovative moments may be occasions of "agency slack,"[157] or instances where the agent takes advantage of the principal's trust and engages in self-dealing.[158]

These indications of a principal-agent relationship between Congress and the Executive in trade lawmaking merit further study. At the least, this depiction helps to further elaborate the careful contours of the bi-branch interaction.

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The account offered in this Article, grounded in structural institutionalism, explains several features of the current generation of trade agreements. It is not without its shortcomings, however. For one, I offer a qualitative analysis that focuses on a particular case study. To better understand the consistency across trade agreements, I turn here to three other theories that may provide additional insight on this trend: rational choice (or rational design[159]) theory and behavioral economics—which I will treat together—and historical institutionalism, with which the structural institutionalist theory most closely aligns.

B. Rational Choice and Behavioral Economics Theories

Rational choice theorists vary in their particular approaches to design, but their fundamental assumption is that States are unitary rational actors and this explains and predicts behavior in agreement-making, or helps us theorize the best ways to structure agreements.[160] To rational choice scholars, design choices are

157. Hawkins et al., *supra* note 148, at 8.

158. Joel P. Trachtman, *The Economic Structure of the Law of International Organizations*, 15 CHI. J. INT'L L. 162, 177 (2014).

159. I draw largely from literature that some have characterized as "rational design"—a school of thought that relies upon some of the assumptions traditionally associated with rational choice theory but which focuses in particular on how institutional designers make rational choices. According to rational design theorists (who focus on States as principal actors), States design instruments and institutions to further their own goals, just as rational choice theory would predict. *See* Barbara Koremenos, Charles Lipson & Duncan Snidal, *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG. 1051, 1052-53 (2001); *cf.* Mark S. Copelovitch & Tonya L. Putnam, *Design in Context: Existing International Agreements and New Cooperation*, 68 INT'L ORG. 471, 488 (2014) (noting how rationalist approaches, unlike rational design approaches, often give shorter shrift to context and underlying structures). Thus, insofar as some international relations and political science scholars have made a distinction between these two theories, I apply elements of both approaches and seek to disaggregate the State and examine the role of constituencies that contribute to the design of trade law. The gap between rational choice and rational design has been identified by others. For instance, Jean Galbraith has highlighted how neither rational choice nor rational design addresses negotiation decision-making. *See* Galbraith, *supra* note 12, at 345. For simplicity, I will refer to the schools collectively as "rational choice," as other legal scholars have, though I acknowledge their distinctions. *See, e.g.*, *id.* I am grateful to Manfred Elsig for elaborating these distinctions.

160. Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. LEGAL STUD. 307, 308 (2002) (describing how rational choice theorists characterize States as strategic actors).

the result of rational purposive interactions among States.[161] But rational choice theory cannot explain persuasively the consistency trends noted in Part I. In particular, trade agreement design deviates from what rational choice theory would predict in at least two respects.

First, rational choice theory would predict that instruments would be updated in a way that the parties would view as optimal. Agreements should evolve to reflect new challenges and better language from lessons learned. Fundamentally, no such optimization review has occurred. To the extent there are new chapters or some innovation, negotiators have taken limited steps to update and modernize. For example, the addition of objectives and chapters on digital trade reflects a modernization of agreements, although this modernization is only prospective. No prior administration has revised existing agreements in this way. The Trump Administration's efforts to "modernize" the NAFTA may be a step in that direction, but to date, no re-evaluation in a case-by-case manner has taken place.[162]

A second way in which my results rest uneasily with rational choice theory involves the lack of customization per trading partner. Rational choice theory would predict that the United States would seek to maximize an agreement's utility with respect to a particular trading partner and therefore we should expect to see differences relevant to the country with which the agreement was negotiated. Instead, the TPA framework provides the same general structure and substance regardless of the trading partner. And the resulting agreement, in respect of its substantive norms and standards, reflects this generality. Few areas of existing agreements show signs of customization.[163]

It could be that negotiators believe they have developed a text that has universal appeal and application and that such a baseline or model text *is* optimal. However, this justification—what I will call a "pride" or "gold standard" variation on rational choice theory—is unlikely to be the best explanation for the consistency identified in Part I. Trade agreements are a special breed of contract.[164] The parties involved are States, the volumes and prices involved are large, and there is no meaningful transnational regulatory body to oversee their implementation. Given this context, one would expect to see an active response

161. *See, e.g.*, BARBARA KOREMENOS, RATIONAL DESIGN OF INTERNATIONAL INSTITUTIONS 2 (2001); Galbraith, *supra* note 12; Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 658 (2006).

162. In fact, the negotiating objectives put forward by the Trump Administration did not appear to do much to change what has been done in the past. *See, e.g.*, Brett Fortnam, *NAFTA Draft Notice Includes Language Similar to TPP Text on Investment, IP, SOEs*, INSIDE U.S. TRADE (Mar. 31, 2017). The Administration notably did not use TPA to negotiate changes to KORUS in 2018. Dan Dupont, *U.S., Korea to Discuss KORUS "Amendments and Modifications" on Jan. 5*, INSIDE U.S. TRADE (Dec. 27, 2017).

163. This is obviously not true of the schedules that accompany the agreements, which are specific to the exports and imports from that country. My focus is on standards and norms in the lawmaking core of the agreement.

164. *See* JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 119-49 (2008) (noting the similarities and differences between a treaty and a traditional contract); Lea Brilmayer, *From "Contract" to "Pledge": The Structure of International Human Rights Agreements*, 77 BRIT. Y.B. INT'L L. 163 (2006); Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824 (2007).

to negotiating the contractual terms. Instead, the evidence above shows that the parties often choose only standardized terms without serious consideration of text that may be considered objectively improved. This stands in contrast to the practice in other areas of foreign relations such as bilateral investment treaties and tax conventions. Further, there is not such a limited pool of negotiators across the many agreements that those negotiators likely would believe this to be the case. In light of the requests of constituencies, including potential internal constituencies, the chances that negotiators are uniformly convinced they have an ideal text seem low.

A second theoretical frame derived from behavioral economics may provide an additional alternative explanation for trade agreement consistency. As Galbraith and others have noted, the literature on individual decision-making and behavioral economics is playing an increasingly important role in international law scholarship.[165] Relevant to this analysis, empirical studies rooted in behavioral economics show that individuals tend to be biased in favor of whatever option is framed as the status quo. Here, a status quo bias could provide a plausible explanation for why executive negotiators bring the same language to the negotiating table regardless of political direction or who appears on the other side.[166] The reasons for this bias are debated in the literature. In the preparation of trade agreement language, lawyers and policymakers may be purposefully risk averse about making changes to prior language in case the change could be interpreted by a foreign partner, stakeholder, or arbitral tribunal as a change in meaning that would cast doubt on the meaning of terms in prior agreements.

That lawyers are risk averse is in some respects related to an additional possible justification: that the language has yet to be tested. The latter is a theory of prematurity while the former is rooted in diplomatic concerns. In both, lawyers and negotiators are reluctant to make any changes without seeing an advantage to doing so where the language has yet to be contested or even applied. There is only one U.S. case litigating language from this generation of trade agreements other than the NAFTA,[167] and even in the case of the NAFTA, the United States has been party to only three cases.[168]

The conclusion that negotiators may be reluctant to change language because that language has not been tested or out of fear that they might anger other trading partners is supported by the fact that U.S. trade negotiators often add a phrase such as "for greater certainty" or "for the avoidance of doubt" or drop a footnote rather than change old language.[169] This trend is borne out in the

165. Galbraith, *supra* note 12, at 351-52.

166. *Id*. at 359-60.

167. That single case is *In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA–DR*. *See supra* notes 61-63 and accompanying text.

168. *Status Report of Panel Proceedings*, NAFTA SECRETARIAT, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Status-Report-of-Panel-Proceedings (last visited Mar. 18, 2018).

169. Another common approach is to add an annex or other side agreement, as discussed above in respect of the TPP IP chapters. David Vincent comments that although CAFTA–DR Chapter 10 is nearly identical to NAFTA's Chapter 11, "it includes a significant addition in its Annex. Annex 10-C addresses expropriation by further defining and narrowing an investor's ability to recover due to indirect

TPP draft text in which the phrase "for greater certainty" appears 275 times. Not all of those instances are situations in which language was sticky and could not be changed, but many are. Many represent areas where negotiators found it easier to make a seemingly small adjustment with that *chapeau* than to improve the language. These choices again seem contrary to a rational choice paradigm that would suggest States should be choosing optimal language, not necessarily clarifying what appears to be substandard language.

Similar trends have been noted in contract negotiations. Even if a contract template is selected at random, parties tend to shape their subsequent negotiations around it.[170] This explanation seeks to reconcile the behavioral economics studies with rational choice models. Scholars have termed this behavior "satisficing," as Lauge Poulsen explains, "because bounded rational decision-makers seek solutions that are merely 'good enough,' rather than optimal . . . often lead[ing] to path-dependency over and beyond what would be predicted in rationalist models."[171] The boundedness in trade agreement negotiations is made manifest in multiple ways, most of which will be elaborated in the next Part. While this justification would explain reluctance to change, it would again not fully explain a lack of innovation or willingness to accommodate new non-partisan substantive obligations.

It could be that government actors have other incentives for purposefully maintaining consistent language. For example, they may find it efficient to maintain and manage the same language. Or negotiators may find it politically important to maintain similar expectations internally and externally. That consistency is a goal for any of these reasons seems to be sensible; however, these reasons again do little to explain the lack of new additions in key chapters. If negotiators were striving to maintain expectations or maintain efficiencies, it should be possible to add new language even if change is difficult. Still, little new language has been added over the years.

A further explanation that does not fit squarely in either rational choice or behavior economics is that negotiators may view consistency as an important value of international lawmaking. The consistency could reflect a desire on the part of U.S. trade lawmakers to use consistent language out of a commitment to a singular text that promotes U.S. values. By establishing consistency across diverse trading partners from around the globe, they may contribute to the establishment of international standards where the WTO has failed to achieve consensus.[172] Some analysts have long called for greater use of regional and bilateral agreements as a way of allowing sub-sets of countries to move forward

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expropriation." David Vincent, *The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?*, 23 MINN. J. INT'L L. 1, 21 (2014) (citation omitted).

170. Russell B. Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1587-91 (1998). See also discussions about the "endowment effect" of maintaining the status quo in Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POLIT. ECON. 1325, 1348 (1990).

171. LAUGE N. SKOVGAARD POULSEN, BOUNDED RATIONALITY & ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES 27 (2015).

172. John Whalley describes the "use of regional agreements for tactical purposes by countries seeking to achieve their multilateral negotiating objectives." Whalley, *supra* note 3, at 74.

on an issue where it is clear that there is no consensus among the WTO membership as a whole.[173] While this could be a value to negotiators, policymakers have not made this goal express. Even if some negotiators maintain this view, it does not appear to be among the most prominent bases for the consistency.

Each of these explanations or justifications takes as its premise that the consistency is purposefully chosen by the actors engaged in trade lawmaking. Moreover, while rational choice theory operates under an assumption that the State is a unitary actor, I suggest that the story is more complicated. Understanding the trend requires an examination of the role of internal actors as engines of change and a study of past events. Thus, I turn next to ask whether historical institutionalism, which focuses on historical development to understand change, accommodates the U.S. trade lawmaking story.

C. Historical Institutionalism

In contrast to rational choice theory, historical institutionalism maintains that institutions are largely influenced by historical circumstances. In other words, "history matters."[174] The origin and evolution of institutions are predictors of current functions and constraints (learning from experience); however, historical institutionalism is less successful in predicting specific sources of change.

Historical institutionalists would likely therefore suggest that the origin and evolution of trade agreements and the institutions that precipitate trade agreements are relevant to shaping the functions that the agreements purport to serve.[175] Rather than purposive development, according to this view, trade agreements may be the product of possibly haphazard, inefficient, entrenched institutions. Inferior agreement designs can become embedded through self-reinforcing processes and institutions. Under this theory, the consistency in U.S. trade agreements is not coincidental or even purposeful among individual negotiators. Rather, a central claim of historical institutionalism is that outcomes are shaped by prior outcomes. Thus, historical institutionalists would propose that the current trade agreement design is the product of the choices made in prior negotiations. Opportunities for significant change are brief, intermittent, and critical junctures.[176]

Historical institutionalism's attenuated path dependence is attractive as an explanation for the consistency in trade agreements. Indeed, two notable critical junctures in the development of labor and environment chapters had a major

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173. Bernard Hoekman & Petros Mavroidis, *WTO "à la carte" or "menu du jour"? Assessing the Case for More Plurilateral Agreements*, EJIL: TALK! (Sept. 30, 2015), http://www.ejiltalk.org/wto-a-la-carte-or-menu-du-jour-assessing-the-case-for-more-plurilateral-agreements/.

174. Helfer, *supra* note 161, at 724.

175. *See generally* Elizabeth Sanders, *Historical Institutionalism*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 39 (Binder et al. eds., 2008); Rogers Smith, *Historical Institutionalism and the Study of Law*, *in* THE OXFORD HANDBOOK OF LAW & POLITICS 46 (Keith E. Whittington et al. eds., 2008).

176. *See* Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115, 117 (2010).

impact on their text. The data confirm that, as historical institutionalism would predict, design choices can become default choices not because they are better but because they became entrenched. Inferior agreement designs appear to have become embedded through TPA's self-reinforcing processes, at least to some degree, and the current design is consistent with past design. Historical institutionalists would further conclude that trade agreement language may become hardwired over time through the institutions that develop it. This conclusion is also borne out by the data. Paths designed early in the existence of an institution tend to be followed throughout the institution's development with an impact on the resulting choices made by institutional actors.[177]

A structural institutionalist account adopts many of these same assumptions and conclusions. Like historical institutionalism, structural institutionalism draws from the functionalist literature's approach of seeing a polity as an overall system of interacting parts.[178] According to one description, historical institutionalism likewise sees the institutional organization of the polity as the "principal factor structuring collective behaviour and generating distinctive outcomes," and emphasizes asymmetries of power in contributing to path dependence.[179] What makes the historical institutionalist theory less attractive is that, while TPA developed over time, it was not exogenous historical factors that shaped the consistency in agreements; rather, endogenous structural developments over time created this lock-in effect. Change in trade agreement design is not marked out by increasing returns or positive feedback as historical institutionalism would anticipate. Nor are the operative forces mediated by context inherited from the past. That is, it was not that antecedent conditions imposed constraints on the choices that are available now.[180] The choices remain robust, but the institutional structure that governs the separation of powers between the branches remains the largest constraint.

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Thus, the results of Part I fit poorly with some of the leading theories of treaty design and change in international law, while the structural institutionalist account stands apart. Critical junctures in history, a likely status quo bias, and some learning effects have surely contributed to the level of consistency in U.S. trade agreements, but the TPA process has limited the range of negotiating options more than these other factors, particularly due to Congress's outsized role within that process.

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177. *See, e.g.*, Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 ANN. REV. POL. SCI. 369 (1999).

178. Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three Institutionalisms*, 44 POL. STUD. 936, 941 (1996). Structural institutionalism as I conceive it draws from neofunctionalist principles, particularly historical institutionalism, in the way it disassembles States into their constituent parts to explain institutional dynamics and draws from the same critical assumptions. For more on neofunctionalism, see Helfer, *supra* note 161.

179. Hall & Taylor, *supra* note 178, at 937-41.

180. *See* Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 461, 478 (1998) (describing how, in historical institutionalism, antecedent conditions impose constraints).

IV. LESSONS AND IMPLICATIONS

This study has relevance for both scholarship and practice. First, it guides practitioners to concentrate on seeking to alter the structure of their engagement before the USTR goes to the negotiating table. Second, it provides an agenda for scholars to develop further views on trade agreement design.

TPA is now the singular way trade agreements are negotiated and agreed to by the United States notwithstanding that it is time bound.[181] In effect, TPA remains both ephemeral and institutionalized. As we move toward the NAFTA 2.0, the Trump Administration plans to complete negotiations under the 2015 TPA framework. Given the results of my analysis, we should expect that the NAFTA 2.0 will closely resemble the TPP draft and others that came before the TPP. After the 2015 TPA expires, however, there should be an opportunity for refocusing, and I suggest that government actors seek to do so. In this Part, I examine lessons learned from structural institutionalism and additional implications of the delicate separation of trade law powers on domestic and international trade law.

A. Lessons

Two features of this structural institutionalism in trade agreements take on troubling prominence: first, Congress's inability to make changes to its own negotiating objectives or later acceptance of specific language due to entrenched opposing views between the parties; and, second, Congress's limited ability to customize the details of the agreements according to specific trading partners.[182]

From one perspective, and to the extent the current institutional framework turns Hamilton's vision on its head, the fact that Congress is the lead drafter should be concerning. It makes Congress an international norm-maker where that would otherwise be the function of the Executive. First, Congress drafts norms that form the language of the agreement as a result of the disproportionate role that Congress plays in the agreement-crafting process. Second, the norms take on global prominence as the result of a cascade of bilateral and regional agreements in which other countries have adopted U.S. trade agreement language. Golove concludes: "Only the most wayward Congress . . . would contemplate bypassing the President and appointing its own agent to negotiate . . . an international agreement."[183]

The fact that the TPA process leads to consistency inconsistently is a further unsettling element of this arrangement and contrary to TPA's aims. Given the spectrum of engagement highlighted above, in practice, Congress's

181. Harold Koh refers to TPA as "institutional custom." Koh, *supra* note 95, at 156.

182. These are in fact not just TPA features but congressional features, though they are most salient in the TPA context. As Hamilton wrote of treaties: "The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project." THE FEDERALIST NO. 75, *supra* note 79, at 420-21.

183. Golove, *supra* note 93, at 1891.

delegation is uneven with respect to subject matter and especially so at certain points in the negotiating process. The delegation becomes particularly ineffective during the period of negotiation with the foreign partner, post-TPA, when congressional-executive collaboration should be maximized while negotiations are underway. In those moments, for certain chapters, our trade agreements are beholden to the delicate political battle lines that were previously drawn. On politicized issues such as labor and environment, past, present, and future generations are limited to fragile political compromises formed at critical junctures regardless of the particular situation of the trading partner in question. Interestingly, these topics for which this problem is most salient—the areas of labor and environment—are areas where the President arguably could act without Congress under the Constitution.[184]

In sum, under the TPA framework, without the treaty power, the Executive lost its preeminent agency and agenda-setting authority in the trade negotiating arena.[185] While some important pieces of the trade lawmaking exercise still fall within the discretion of the Executive, and while the Executive also retains significant control over the monitoring, enforcement, and withdrawal from an agreement after it enters into force, the terms of the game (that is, the norms on which I focus) remain primarily a congressional prerogative. Congress sets the rules, the agenda, and largely influences the agreement content. The movement toward a tipped balance began decades ago. The public and congressional perceptions of executive overreach in this process have led to the "steady modification" of the TPA process over time in the direction of Congress.[186] Absent a reconceptualization in the post-NAFTA 2.0 environment, Congress will continue to define the four corners of the negotiating space that it affords the Executive.

B. Restructuring

The above analysis illuminates the trajectory for future trade agreement negotiations. A review of proposals on the NAFTA 2.0 agenda reveals that, despite ambitious goals, change has been uneven and many old patterns persist. While the structural constraints make radical changes unlikely, the coming years may see greater pressure from the Executive toward an additional critical juncture. The costs of consistency may finally become too high.

In beginning to think about what a reconceptualization might entail, the key ought to be bringing the relationship back to balance as intended by the

184. Others have made this argument given that labor and environment could be excepted from ideas of "foreign commerce" and negotiated as sole executive agreements. *See, e.g.*, Koh, *supra* note 95, at 185. The Clinton Administration applied this principle in its conclusion of the side agreements to the NAFTA.

185. For more on the power of the treaty to the Executive, see JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 396 (2005) ("[T]reaty-making may enhance the power of executive branches within governments, at the expense of national parliaments or legislatures, and sometimes permits the executive branch to accomplish legal changes that it alone could not accomplish or, in those states that accord treaties superior status to a national constitution, even to take legal actions otherwise not authorized to any branch of government.").

186. Koh, *supra* note 95, at 171.

Founders. Koh has claimed that, for an "institutional marriage" between the branches of government to function effectively, a "zone of discretion," with broad signposts, is required.[187] Indeed, in 1981, the U.S. Supreme Court concluded that so long as the Executive acts consistently with the "general tenor" of the legislative framework, Congress has license to create permissible space for executive action.[188] Congress and the Executive should seek to develop a pragmatic mechanism to replace fast track. That mechanism should include formalized procedures to govern lawmaking interactions that nevertheless permit innovation.

Under a revised process, congressional objectives could be just that: objectives or guidelines, not the four corners of the negotiating space. Unlike the United States, the EU prepares and receives negotiating directives that are specific to each agreement. Such a process may go a long way to discontinuing the current path dependence in chapters that would benefit from customization.[189]

As a general matter, having the Executive work from guiding principles in consultation with the legislative branch makes good sense for the democratic accountability that engagement provides.[190] A reconceptualization would also help avoid a situation in which the Executive seeks to take on trade agreements as sole executive agreements removing any role for Congress.[191] To be sure, a re-design in the direction of the Executive does not mean a return to the treaty power, nor does it mean a move to putting sensitive subjects of the key chapters in side agreements negotiated under the Executive's prerogative. It was an important development for labor and environment to be incorporated into the agreement, including making those obligations subject to dispute settlement. A side agreement would defeat those important gains and principles. The treaty power with its uncertainties and higher requirement for passage does not appear to provide a reasonable alternative without more.[192]

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187. Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 337, 345 (2017).

188. Dames & Moore v. Regan, 453 U.S. 654, 678-79 (1981).

189. Hal Shapiro and Lael Brainard adroitly put it this way: "A more effective fast track would require meaningful congressional input into negotiations, more selective application of fast track by the president, and closer targeting of fast track provisions to particular agreements." Shapiro & Brainard, *supra* note 1818, at 43. Neither I nor they were the first to make suggested changes to TPA. *See* Koh, *supra* note 95; Sim, *supra* note 94.

190. For one commentary noting the democratic values of fast track, see Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE. L.J. 1236, 1308-12 (2008) (arguing that congressional-executive agreements approved by majorities of both houses have greater democratic legitimacy than treaties approved by two-thirds of the Senate). For a contrasting view, see 140 CONG. REC. S15104 (daily ed. Nov. 30, 1994) (Sen. Byrd lamenting "the rape of the legislative process by the fast-track procedures" as destructive to sovereignty); Robert E. Hudec, *"Circumventing" Democracy: The Political Morality of Trade Negotiations,* 25 N.Y.U. J. INT'L L. & POL. 311 (1993).

191. Representative Sander Levin spoke to this also in his consideration of Congress's role: "There should be something between nitpicking and no role at all for Congress." David S. Cloud, *Lawmakers Offer Plans To Modify Fast Track*, 49 CONG. Q. 1047 (1991).

192. Durkee discusses how others have made this point about treaties in areas outside of trade. *See* Durkee, *supra* note 133, at 267 (summarizing criticism on the limits of the treaty). Innovative mechanisms of treaty design could make the treaty approach more palatable, though such an exploration exceeds the scope of this project.

When it comes to the congressional-executive relationship in trade, a better use of the checks and balances in the structural separation of powers should be applied to transparency and information sharing. Procedural accommodations are needed for the new generation of trade practice. The post-2015 TPA environment is ripe for reevaluation and further consideration of what an improved future process might entail.

CONCLUSION

This Article has analyzed how the similarities among recent and anticipated trade agreements and the lack of innovative space are the result of structural dynamics in the U.S. trade lawmaking apparatus. The additional intermediate scrutiny of larger agreements passed under TPA as it has evolved has led to significant paralysis in certain chapters that may be counter-productive to U.S. interests. Today, TPA exacerbates rather than ameliorates the politicization of trade agreements. The prospects for improvements and creative additions to trade agreements in the future is significantly tempered by this path dependence.

Fundamentally, the question about how much congressional participation or executive delegation is accommodated in our trade lawmaking is a question about ensuring public accountability for negative externalities. It is this sentiment that results in the strongest public reaction to such agreements. Thus, despite President Obama's high approval ratings in his last six months in office, the public response to the TPP was overwhelmingly negative, exacerbated by political rhetoric in the presidential campaigns that used the TPP as a proxy for limited economic growth.

That TPA may create a de facto principal-agent relationship between the branches is an important heuristic. At a time of significant political upheaval, and at a moment of opportunity for reevaluating the separation of trade law powers between the branches, the implications for this unbalanced relationship are wide-reaching and require urgent attention for the benefit of the U.S. and global economies.