

# Misaligned Lawmaking

*Timothy Meyer\**

*Since 1962, when Congress passed the Trade Expansion Act, every new U.S. trade deal has had the same essential bargain at its core. Congress agrees to give the president the power to lower trade barriers, while at the same time providing adjustment assistance for those workers displaced by competition with new imports. This bargain illustrates what I refer to as the Misalignment Thesis: when a legislative bargain is struck over two or more interdependent policies, the policy subject to more frequent or costlier renegotiation and implementation will be disfavored in the long run. In the trade context, the misalignment occurs because trade liberalization commitments are indefinite, enshrined in international agreements, and implemented by the executive branch; the adjustment assistance provisions are temporary, purely domestic, and require renegotiation and reauthorization in Congress.*

*As a consequence, proponents of policies to help displaced workers must constantly renegotiate and defend laws to help their constituents. Moreover, they must do so within an institution, Congress, in which the transaction costs of securing favorable policy outcomes are very high. The result is that policies aimed at helping workers displaced by trade liberalization are chronically undersupplied.*

*Proponents of trade liberalization, on the other hand, never have to renegotiate their gains. Each trade agreement goes into the pocket of trade proponents, and then they move on to securing the next trade agreement. Nor does Congress maintain a meaningful role in the implementation of trade agreements. Once an agreement is in effect, implementation is left to the executive branch, where the transaction costs of enacting a trade-liberalizing agenda are quite low.*

*This Article makes three contributions. First, it introduces the Misalignment Thesis in the context of U.S. trade policy. The Misalignment Thesis is a descriptive claim about how the structure of a legislative bargain*

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\* Professor of Law, Vanderbilt University Law School. I would like to thank Adam Chilton, Evan Criddle, Brian Fitzpatrick, Susan Franck, Morgan Ricks, Chris Serkin, Suzanna Sherry, Ganesh Sitaraman, Joel Trachtman, Ingrid Wuert, and participants at workshops at the European Commission, Directorate General of Trade in Brussels, and the Society of International Economic Law's Biannual Conference in Washington, D.C. I thank Allen Perry, Paulson Varghese, and Stephen Morrison for invaluable research assistance.

*influences the long-term stability and effectiveness of that bargain. Second, the Article introduces the normative corollary to the Misalignment Thesis: if political stability hinges on respecting the legislative bargain, interdependent policies should be subject to renegotiation on the same timeline and implementation on the same terms. In light of this prescription, I offer three concrete proposals for aligning trade liberalization and trade adjustment assistance in order to protect and promote the goals of both policies. Most importantly, I argue—contrary to most commentary—that the Trump Administration’s proposal to limit the duration of trade agreements like NAFTA would better align trade liberalization and trade adjustment assistance. Third, the Article discusses the Misalignment Thesis’s broader application to deregulatory bargains struck in a wide variety of fields, including transportation, telecommunications, and healthcare. The Misalignment Thesis suggests that deregulation often has unintended consequences because the structure of deregulatory bargains undermines their long-term effectiveness.*

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## INTRODUCTION

President Trump has made international trade one of the central policy issues for his Administration.<sup>1</sup> In 2018, the Trump Administration completed tense negotiations with Mexico and Canada over revisions to the North American Free Trade Agreement (“NAFTA”).<sup>2</sup> The resulting agreement has faced uncertain prospects for legislative approval in Canada and the United States,<sup>3</sup> although further negotiations in late 2019 appear to have cleared the path for the revised agreement’s approval in early 2020.<sup>4</sup> In March 2018, the United States completed the renegotiation of the United States–South Korea free trade agreement (“KORUS”).<sup>5</sup> President Trump has also reportedly mulled withdrawing from the World Trade Organization (“WTO”).<sup>6</sup> In response, the European Union (“EU”) has proposed renegotiating certain aspects of the WTO to which the United States has long

1. See, e.g., Andrew Restuccia & Doug Palmer, *White House Preparing for Trade Crackdown*, POLITICO (Jan. 8, 2018), <https://www.politico.com/story/2018/01/07/trump-trade-crackdown-327283> [<https://perma.cc/V8CW-3J3A>] (“President Donald Trump’s administration is preparing to unveil an aggressive trade crackdown in the coming weeks that is likely to include new tariffs aimed at countering China’s and other economic competitors’ alleged unfair trade practices, according to three administration officials.”)

2. Alan Rappeport, *U.S. and Canada Reach Trade Deal to Salvage Nafta*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/us/politics/us-canada-nafta-deal-deadline.html> [<https://perma.cc/7UUA-FV9P>].

3. Mary Beth Sheridan, *Mexico Becomes First Country to Ratify New North American Trade Deal*, WASH. POST (June 19, 2019), [https://www.washingtonpost.com/world/the\\_americas/mexico-becomes-first-country-to-ratify-usmca-north-american-trade-deal/2019/06/19/500dd8c0-92b3-11e9-956a-88c291ab5c38\\_story.html](https://www.washingtonpost.com/world/the_americas/mexico-becomes-first-country-to-ratify-usmca-north-american-trade-deal/2019/06/19/500dd8c0-92b3-11e9-956a-88c291ab5c38_story.html) [<https://perma.cc/V97Z-CGGZ>] (describing the potential difficulties the new treaty faces in the United States and Canada).

4. William Mauldin & Natalie Andrews, *House Passes North American Trade Pact with Bipartisan Support*, WALL ST. J. (Dec. 19, 2019, 5:46 PM), <https://www.wsj.com/articles/usmca-clears-threshold-to-pass-in-the-house-with-bipartisan-support-11576790200> [<https://perma.cc/Y6CJ-N577>].

5. Tori K. Whiting, *Analyzing the Renegotiated U.S.–Korea Free Trade Agreement (KORUS)*, HERITAGE FOUND. 1 (Apr. 13, 2018), [https://www.heritage.org/sites/default/files/2018-04/IB4838\\_0.pdf](https://www.heritage.org/sites/default/files/2018-04/IB4838_0.pdf) [<https://perma.cc/9YYB-TLSS>].

6. Gabriella Muñoz, *Trump Mulls Pulling the U.S. Out of the World Trade Organization: Report*, WASH. TIMES (June 29, 2018), <https://www.washingtontimes.com/news/2018/jun/29/donald-trump-mulls-pulling-the-us-out-of-the-world/> [<https://perma.cc/3QK6-369Y>].

objected,<sup>7</sup> while Canada has convened a group of nations to tackle more comprehensive WTO reform.<sup>8</sup>

Renegotiating these agreements represents an unprecedented opportunity—and a huge risk. WTO rules are the foundation of a global economy that supports millions of jobs worldwide and facilitates trillions of dollars' worth of global trade. Canada and Mexico are the United States' top trading partners after China, while South Korea is the United States' sixth-largest trading partner.<sup>9</sup> These three countries alone accounted for over \$1 trillion in goods traded with the United States in 2016—more than a quarter of the United States' international trade in goods.<sup>10</sup> Revamping these agreements offers the United States the opportunity to consider what international trade policy should look like in the twenty-first century.<sup>11</sup> The foundations of that trading system have remained largely unchanged since the end of the Cold War, when nations created NAFTA (1994), the WTO (1995), and a raft of other free trade agreements around the world.<sup>12</sup>

This Article argues that these renegotiations represent an opportunity to correct a critical misalignment in trade policy. Since 1962, when Congress passed the Trade Expansion Act, every new U.S. trade deal has had the same essential bargain at its core.<sup>13</sup> Congress agrees to give the president the power to lower trade barriers, while at

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7. See Philip Blenkinsop, *EU Set to Push for WTO Reform to Ease Global Trade Tensions*, REUTERS (June 19, 2018, 8:51 AM), <https://www.reuters.com/article/us-trade-wto-eu/eu-set-to-push-for-wto-reform-to-ease-global-trade-tensions-idUSKBN1JF1V0> [<https://perma.cc/K6V5-5VVR>] (“EU leaders will meet . . . to discuss a range of issues, including . . . trade, which has taken on added importance after U.S. President Donald Trump imposed important tariffs on EU steel and aluminum.”).

8. *Canada to Host Meeting on WTO Reform, U.S. and China Left Out for Now*, REUTERS (July 27, 2018, 12:02 PM), <https://www.reuters.com/article/us-usa-trade-wto-canada/canada-to-host-meeting-on-wto-reform-u-s-and-china-left-out-for-now-idUSKBN1KH26V> [<https://perma.cc/MQF2-2XUN>].

9. *Top U.S. Trade Partners*, INT'L TRADE ADMIN., [https://www.trade.gov/mas/ian/build/groups/public/@tg\\_ian/documents/webcontent/tg\\_ian\\_003364.pdf](https://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003364.pdf) (last visited Dec. 26, 2019) [<https://perma.cc/K6F8-BJ7L>]. South Korea's ranking, while listed as seventh by exports, is sixth by combined value of imports and exports. See *id.* These statistics measure trade in goods only, not trade in services or cross-border investments. *Id.*

10. *Id.*

11. Renegotiation of the United Kingdom's trade agreements, necessitated by Brexit, and the negotiation of new EU trade agreements, offers a similar opportunity for countries around the world.

12. Other major trade agreements created in the early 1990s include the Treaty of Asuncion, which created Mercosur, a customs union comprising much of South America, see Treaty Establishing a Common Market art. 1, Mar. 26, 1991, 30 I.L.M. 1041, as well as the Treaty of Maastricht, which deepened European integration through the creation of the European Union and laid the foundation for the adoption of the euro as a common currency, see Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1.

13. See Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252, 76 Stat. 872, 879–80 (repealed 1974).

the same time providing assistance for those workers displaced by competition with new imports. The misalignment occurs because the trade liberalization commitments are indefinite, enshrined in international agreements, and implemented by the executive branch; the assistance provisions are temporary, purely domestic, and require renegotiation and reauthorization in Congress.

As a consequence, proponents of policies to help displaced workers must constantly renegotiate and defend laws to help their constituents. Moreover, they have to do so within an institution, Congress, in which the transaction costs of implementation are very high. The result is that policies aimed at helping workers displaced by trade liberalization are chronically undersupplied.

Proponents of trade liberalization, on the other hand, have not, until recently, ever had to renegotiate their gains. Each trade agreement the United States concludes goes into the pocket of free trade proponents, and then they move on to securing the next trade agreement. Nor does Congress maintain a meaningful role in the implementation of trade agreements. Once an agreement is in effect, implementation is left to the executive branch, where the transaction costs of enacting a trade-liberalizing agenda are quite low.

This Article introduces the Misalignment Thesis, which explains this dynamic. The Misalignment Thesis has both a descriptive and a normative component. The descriptive Misalignment Thesis states that when a legislative bargain is struck over two or more interdependent policies, the policy that is subject to more frequent or costlier renegotiation and implementation will be disfavored in the long run. The normative corollary is that if political stability hinges on respecting the legislative bargain, the policies should be subject to renegotiation on the same timeline and implementation on the same terms.

This misalignment is most evident in situations in which the government moves from using a single policy instrument to implement two policy goals to using two separate policy instruments to achieve the same two goals. I refer to this process as *decoupling*. As long as only a single policy instrument is in use, proponents of both policy goals are ensured a seat at the bargaining table. For example, when the government seeks to use trade barriers to both promote international trade *and* support workers and import-competing industry, proponents of each of these goals have leverage. When each policy goal has its own policy instrument, however, the two policies no longer need to be negotiated together. Consequently, proponents of the more frequently renegotiated policy instrument may not be able to use support for the other policy as leverage in negotiations to achieve their primary goal. They may thus see their policy gains erode over time. This prediction,

grounded in how the law structures the renegotiation and implementation of interdependent policies, flies in the face of a significant body of political and economic thinking that holds that interdependent policies should be negotiated and implemented separately for reasons of efficiency.<sup>14</sup>

I develop the Misalignment Thesis primarily in the context of U.S. trade policy, although as I explain below it has broad application to a number of areas in which the federal government has deregulated the economy. The descriptive Misalignment Thesis, I argue, explains the current crisis in U.S. trade policy.<sup>15</sup> Economists, trade lawyers, and policymakers have for a long time maintained that trade liberalization should be achieved through international agreements, and any redistribution necessary to compensate those harmed by trade liberalization should be worked out as a matter of domestic law.<sup>16</sup> In significant parts of the developed world, including the United States, that domestic redistribution has not occurred on the scale necessary to address the plight of dislocated workers.<sup>17</sup> The election of Donald Trump on a protectionist platform in the United States, British voters'

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14. See, e.g., PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 216 (7th ed. 2005); N. Gregory Mankiw, *Why Economists Are Worried About International Trade*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/business/trump-economists-trade-tariffs.html> [<https://perma.cc/5PZ9-YP2A>] (arguing that dislocations caused by trade liberalization may require domestic programs, such as a robust social safety net, but do not undermine the case for trade liberalization); see also Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1, 3–4 (describing and critiquing the “two-step” model of trade policy).

15. It may also have something to say about the similar crisis in Europe, as well as other deregulatory bargains struck within the United States. See *infra* Part I. In the interest of space, I focus here on the experience in U.S. trade policy, deferring to future research the application of the Misalignment Thesis to other countries and fields.

16. See, e.g., KRUGMAN & OBSTFELD, *supra* note 14, at 216:

It is always preferable to deal with market failures as directly as possible . . . . Any proposed trade policy should always be compared with a purely domestic policy aimed at correcting the same problem. If the domestic policy appears too costly or has undesirable side effects, the trade policy is almost surely even less desirable . . . .

Shaffer, *supra* note 14, at 4 (acknowledging “the trade establishment’s traditional approach of calling for complementary domestic policy in parallel to trade liberalization,” but arguing it is “no longer sufficient”); Simon Lester, *The Globalization Paradox: Democracy and the Future of the World Economy*, 10 WORLD TRADE REV. 409, 414 (2011) (book review) (“[I]s a 20% tariff on foreign goods really the best way to protect domestic labor standards?”); see also Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 993–97 (2017) (discussing conventional thinking on the relationship between trade liberalization and domestic redistribution).

17. See DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* 18 (2012) (“People demand compensation against risk when their economies are more exposed to international economic forces . . . .”); Lawrence Summers, *A Strategy to Promote Healthy Globalization*, FIN. TIMES (May 4, 2008), <https://www.ft.com/content/999160e6-1a03-11dd-ba02-0000779fd2ac> [<https://perma.cc/S77H-VJZM>] (“[W]hat is good for the global economy and its business champions was not necessarily good for [workers] . . . .”).

decision to leave the European Union, and significant electoral support for antiglobalization candidates and right-wing political parties in France, Germany, Italy, Spain, Sweden, Austria, Hungary, and the Netherlands all testify to the inadequacy of government efforts to cope with the domestic effects of globalization.<sup>18</sup> U.S. participation in the Trans-Pacific Partnership (“TPP”)—a free trade agreement between twelve nations that President Obama negotiated to establish the “rules of the road” for twenty-first-century trade—has already been a casualty of this backlash.<sup>19</sup>

The Misalignment Thesis posits that the inadequacy of redistribution is a product of trade law’s domestic architecture in the United States. The Trade Expansion Act of 1962 decoupled international trade policy from government support for workers and import-competing sectors. It did so by creating the Trade Adjustment Assistance (“TAA”) program, the core component of trade-related redistribution since 1962.<sup>20</sup> The program provides financial aid to workers, farmers, and firms hurt by competition from imports.<sup>21</sup> Yet precisely because it involves financial aid, TAA creates spending commitments that Congress must reauthorize from time to time. Not

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18. See *Auxit, Frexit, Next? EU Countries May Hold Referendums Following ‘Brexit’ Vote*, RT NEWS (June 23, 2016, 8:52 PM) <https://www.rt.com/viral/348039-brexit-eu-referendum-domino/> [<https://perma.cc/XYU8-5YWZ>] (“As UK citizens head to the polls for the ‘Brexit’ vote, many are speculating the move could have a domino effect across Europe.”); Jon Stone, *Nearly All EU States ‘Could Follow Britain’s Lead and Leave the Union,’ Senior French MP Warns*, INDEPENDENT (Sept. 27, 2016, 4:45 PM), <https://www.independent.co.uk/news/world/europe/brexit-eu-referendum-britain-france-leave-vote-union-a7331426.html> [<https://perma.cc/7YVA-BXAU>] (quoting a member of the French Parliament as saying that “what happened in the UK at the referendum could have happened [in] almost every other country in the European Union—except in the other countries no Prime Minister would have been as irresponsible as to ask for a referendum”); Jan Eichhorn, Christine Hubner & Daniel Kenealy, *The View from the Continent: What People in Other Member States Think About the UK’s EU Referendum*, APPLIED QUANTITATIVE METHODS NETWORK (2016), [https://www.research.aqmen.ac.uk/wp-content/uploads/sites/27/2017/07/TheViewFromTheContinent\\_REPORT.pdf](https://www.research.aqmen.ac.uk/wp-content/uploads/sites/27/2017/07/TheViewFromTheContinent_REPORT.pdf) [<https://perma.cc/D3PN-5YDH>] (describing the various views of EU citizens in regard to Brexit).

19. See Nicholas Loffredo, *Trump Says Withdrawal From TPP a ‘Great Thing for the American Worker,’* NEWSWEEK (Jan. 23, 2017, 1:15 PM), <https://www.newsweek.com/trump-withdrawal-tpg-great-thing-american-worker-547109> [<https://perma.cc/42RA-5UBZ>] (reporting the Trump Administration’s decision to “act[] on a key campaign promise” by withdrawing from the TPP); Barack Obama, Opinion, *The TPP Would Let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), [https://www.washingtonpost.com/opinions/president-obama-the-tpg-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d\\_story.html](https://www.washingtonpost.com/opinions/president-obama-the-tpg-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html) [<https://perma.cc/423A-UR3Z>] (“As a Pacific power, the United States has pushed to develop a high-standard Trans-Pacific Partnership, a trade deal that puts American workers first and makes sure we write the rules of the road for trade in the 21st century.”).

20. 19 U.S.C. § 2272 (2012).

21. See Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT’L L. 797, 799 (2012) (discussing how trade adjustment assistance works).

surprisingly, TAA's successful reauthorization or extension tends to coincide with the negotiation of new trade agreements, such as NAFTA or TPP.<sup>22</sup>

When new trade negotiations have not been on the table, however, Congress has cut back on TAA. In 1981, Congress significantly cut benefits under TAA.<sup>23</sup> In 1986, it let the program temporarily lapse.<sup>24</sup> The Reagan Administration proposed abolishing it entirely.<sup>25</sup> After a series of short extensions during the Obama Administration, the program is currently set to expire in 2021.<sup>26</sup>

Trade agreements suffer no such headwinds. A U.S. trade agreement remains in force unless and until one state party terminates it.<sup>27</sup> So too does the domestic implementing legislation.<sup>28</sup> Consequently, after Congress has approved a trade agreement, the gains and losses from trade liberalization are locked in, subject only to the executive's willingness to consider using termination or violation as a threat to spur renegotiation.

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22. See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (codified in scattered sections of 19 U.S.C.); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. §§ 3301-3437 (2012)).

23. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2501-2529, 95 Stat. 357, 881-93 (codified in scattered sections of 19 U.S.C.).

24. See J. F. HORNBECK, CONG. RESEARCH SERV., R41922, TRADE ADJUSTMENT ASSISTANCE (TAA) AND ITS ROLE IN U.S. TRADE POLICY 9 (Aug. 5, 2013), <https://fas.org/sgp/crs/misc/R41922.pdf> [<https://perma.cc/64AY-628F>] (describing the circumstances leading up to, and following, the three-month lapse in 1986).

25. *Id.*

26. § 403, 129 Stat. at 374 (codified at 19 U.S.C. § 2318(b)(1) (2012)).

27. See, e.g., Free Trade Agreement Between the United States of America and the Republic of Korea, S. Kor.-U.S., art. 24.5, June 30, 2007, (entered into force Mar. 15, 2012) [hereinafter KORUS], <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [<https://perma.cc/3XLW-ZVHD>]; North American Free Trade Agreement, Can.-Mex.-U.S., art. 2205, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

28. See United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, § 107, 125 Stat. 428, 432 (2011) (sunsetting the domestic legislation in the event the agreement terminates); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 109, 107 Stat. 2057, 2067-68 (1993) (explaining what happens in the event of termination). Implementation acts for all agreements after NAFTA contain provisions, like section 107 of the United States-Korea Free Trade Agreement Implementation Act, that purport to sunset the legislation if the United States withdraws from or terminates an international agreement. However, these provisions are of dubious constitutionality under *Clinton v. City of New York*, 524 U.S. 417 (1998), which held that Congress could not delegate to the president authority to repeal a statute. See Tim Meyer, *Trump's Threat to Withdraw From NAFTA May Hit a Hurdle: The US Constitution*, SALON (Aug. 25, 2017, 1:43 AM), [https://www.salon.com/2017/08/24/trumps-threat-to-withdraw-from-nafta-may-hit-a-hurdle-the-us-constitution\\_partner/](https://www.salon.com/2017/08/24/trumps-threat-to-withdraw-from-nafta-may-hit-a-hurdle-the-us-constitution_partner/) [<https://perma.cc/6B4E-DHN6>] (commenting that “[t]he same logic [from *Clinton*] should apply to trade agreements”); Joel Trachtman, *Trump Can't Withdraw From NAFTA Without a 'Yes' From Congress*, HILL (Aug. 16, 2017, 8:00 AM), <https://thehill.com/blogs/pundits-blog/international-affairs/346744-trump-cant-withdraw-from-nafta-without-a-yes-from> [<https://perma.cc/FYH6-T2MF>] (noting that Congress “has steadfastly avoided delegating power to the president to terminate trade agreements”).



Even more importantly, the largest gains from trade liberalization come from early agreements like NAFTA and the WTO Agreements.<sup>29</sup> According to the U.S. Trade Representative, the average trade-weighted tariff on industrial goods imported into the United States is 2%, and half of such goods enter duty free.<sup>30</sup> For this reason, later agreements, like TPP, have only small effects in terms of overall U.S. GDP.<sup>31</sup> That means trade liberalization's proponents may not be inclined to give up much to get the next trade deal, even though much of the dislocation from trade has already been created and locked in by earlier trade agreements.

This bargaining dynamic is not inevitable. The normative Misalignment Thesis suggests that we can and should reform the system to ensure that all sides have a stake in the success of both trade liberalization and adjustment policies. Doing so requires making credible commitments to renegotiate and implement trade liberalization and adjustment assistance on the same timelines and with the same fervor. This alignment can be accomplished in at least three ways. First, adjustment assistance policies could be embedded in trade agreements themselves, subjecting assistance policies to the same timelines and implementation requirements as trade liberalization commitments. Second, trade agreements could include sunset clauses or periodic reviews that mirror the time limits on TAA's authorization. Third, TAA could take the form of indirect spending commitments that would not require constant reauthorization by Congress.

This Article proceeds in four Parts. Part I explains the history of the relationship between regulating market access for foreign products and supporting the labor market. Historically, the United States used trade barriers to pursue both of these policy goals. I then explain how the creation and implementation of TAA decoupled adjustment assistance for workers and industries hurt by trade liberalization from trade liberalization policies themselves. This Part traces TAA from its beginnings in the 1962 Trade Expansion Act through the most recent legislation extending trade adjustment assistance in 2015, comparing

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29. See RODRIK, *supra* note 17, at 57–58 (explaining that the ratio of redistribution-to-efficiency gains from trade liberalization gets higher with additional trade agreements).

30. *Industrial Tariffs*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/industry-manufacturing/industrial-tariffs> (last visited Dec. 26, 2019) [<https://perma.cc/H523-FGHJ>].

31. See *id.* The U.S. International Trade Commission estimated that over the first fifteen years of its existence, TPP would add only 0.15% of annual GDP growth to the U.S. economy. U.S. INT'L TRADE COMM'N, TRANS-PACIFIC PARTNERSHIP AGREEMENT: LIKELY IMPACT ON THE U.S. ECONOMY AND ON SPECIFIC INDUSTRY SECTORS 69–70 (2016), <https://www.usitc.gov/publications/332/pub4607.pdf> [<https://perma.cc/NQ6C-YVPH>]. Given the size of the U.S. economy, though, this modest growth would still have equaled \$42.7 billion. *Id.* at 69.

how adjustment assistance and trade liberalization policies evolved after their decoupling in 1962. It also situates this decoupling within the economic and policy arguments that justify it on efficiency grounds.

Part II introduces and unpacks the descriptive Misalignment Thesis: when a legislative bargain is struck over two or more interdependent policies, the policy subject to more frequent or costlier renegotiation and implementation will be disfavored in the long run. Misalignment requires that three conditions be satisfied. First, two policies, such as market access and labor market support, must be *interdependent*. Shifts in one policy create costs for proponents of the other policy that in turn create demand for a policy response. Second, the two policies must be *decoupled*, such that each policy has its own policy instrument. Trade agreements and their domestic implementing legislation regulate market access and trade liberalization, while trade adjustment assistance provides labor market support. Decoupling saps political support for using one instrument to accomplish two purposes. Third, the law must not create *credible commitments* to renegotiate the two policies at the same time or implement them in the same manner. The absence of such credible commitments deprives proponents of the policy subject to more frequent or costlier renegotiation or implementation of the political leverage they need to sustain their policy gains. As a result, the long-term stability of the entire legislative bargain is threatened. This instability explains the current crisis in U.S. trade policy. Trade adjustment assistance proponents lost negotiating leverage with the creation of TAA because most of the time Congress can cut funding or decline to extend or amend TAA without negatively impacting trade liberalization. Trade liberalization proponents thus have little reason to support adjustment assistance policies.

Part III takes up the normative Misalignment Thesis by analyzing three techniques by which Congress and the president can align negotiations over trade liberalization and adjustment assistance more effectively. First, the government can enshrine adjustment assistance obligations in international agreements, making them indefinite and subject to implementation on the same terms as trade liberalization commitments. Second, future trade agreements could include sunsets or periodic reviews that are timed to coincide with the review of adjustment assistance policies. Third, Congress could reduce renegotiation of adjustment assistance policies domestically by providing such assistance for longer terms or through mechanisms, such as tax expenditures, that Congress does not need to reauthorize.

Part IV concludes by considering how the Misalignment Thesis can explain the unintended consequences of deregulatory bargains

struck in a wide range of areas, including transportation, telecommunications, and healthcare. In these areas and others, the government has historically taxed or regulated the economy in a manner that provides an implicit subsidy for goods and services that might not otherwise be cost-competitive.<sup>32</sup> Beginning in the mid-twentieth century, however, the government deregulated many of these industries, replacing the implicit subsidy provided by government regulation with direct subsidies in the form of financial payments from the government. In so doing, the government decoupled the goals of promoting efficiency and competition in the regulated sectors from the goal of ensuring the availability of goods and services in unprofitable markets. Policymakers and scholars argued that direct subsidies would be more efficient for the economy as a whole, better at achieving the subsidies' aims, and more politically accountable. But in most of these fields, just as in trade, direct subsidies have failed to achieve their objectives. This failure presents a puzzle the Misalignment Thesis can help explain.

## I. DECOUPLING TRADE REGULATION AND LABOR SUBSIDIZATION

This Part traces the historical relationship between U.S. international trade policy and support for domestic labor markets. This relationship has followed a familiar deregulatory arc. Historically, the government used its power over international trade to pursue multiple policy goals: regulating market access and protecting domestic industries and labor. In the middle of the twentieth century, though, the government began reducing barriers to market access—a gradual deregulation of international trade that hurt these protected domestic interests. The government sought to offset the costs to these domestic interests directly through subsidies designed to support economic adjustment. But those subsidies failed to deliver on their promise.

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32. Throughout this Article, I use the term “subsidy” in the general sense of government-directed financial support. I do not use the term in the narrow, technical sense defined by art. 1 of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). See Agreement on Subsidies and Countervailing Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, [https://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](https://www.wto.org/english/docs_e/legal_e/24-scm.pdf) [<https://perma.cc/BA6L-3C4Q>]. Indeed, the inadequacy of that definition has been one source of the current trade tensions between the United States and China. China provides significant financial support to Chinese industries through a variety of means, but due to the narrow definition of a subsidy in the SCM Agreement, WTO members have little recourse against these practices. See David Lawder, *U.S. Business Groups Say WTO Unable to Curb Many Chinese Trade Practices*, REUTERS (Oct. 4, 2017, 3:27 PM), <https://www.reuters.com/article/us-usa-china-trade/us-business-groups-say-wto-unable-to-curb-many-chinese-trade-practices-idUSKBN1C92UL> [<https://perma.cc/G4J4-XHGT>].

Section I.A introduces the basic theory of international trade law. Higher trade barriers protect domestic industries and their labor forces at the expense of foreign producers and domestic consumers. Lower trade barriers, on the other hand, benefit domestic consumers and foreign producers at the expense of domestic producers. Trade policy, in other words, impacts both market access and support for domestic industries and labor.

Section I.B provides the historical context for this relationship. Although rarely defended as such in modern times prior to the Trump Administration, U.S. trade policy has historically been a vehicle for providing indirect subsidies to certain segments of the American economy. That began to change in the mid-twentieth century with the creation of the General Agreement on Tariffs and Trade (“GATT”), the vehicle through which nations gradually reduced their tariffs. In 1962, the United States decoupled the regulation of international trade from support for labor markets through the creation of the TAA program. As this Section explains, this decoupling is in line with conventional economic thinking that argues that trade regulation should be a separate enterprise from labor market support.

Section I.C traces the subsequent development of TAA and trade liberalization. Congress has repeatedly cut or failed to reauthorize TAA. The program has only gained traction at moments when trade liberalization’s proponents have sought to conclude additional trade agreements. In between, trade adjustment assistance has languished. Section I.D explains the cost of TAA’s neglect. Economic data makes clear that, while trade liberalization has been an enormous boon to the U.S. (and global) economy, it has created concentrated costs for certain workers and communities to which they have not adjusted. The puzzle, to which Part II will turn, is why decoupling trade liberalization and adjustment assistance has failed so spectacularly.

### *A. The Costs and Benefits of Trade Liberalization*

Trade policy is inherently distributional. On the one hand, reducing government restrictions on the consensual exchange of goods and services—what we usually mean by “freeing” or liberalizing trade—creates significant wealth. Free trade enables countries to specialize in producing those goods and services in which they have a comparative advantage and trade for everything else.<sup>33</sup> As a consequence, consumers gain access to cheaper products. In this way, removing government

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33. For a basic presentation of the idea of comparative advantage, see JOOST H.B. PAUWELYN, ANDREW T. GUZMAN & JENNIFER A. HILLMAN, *INTERNATIONAL TRADE LAW* 12–16 (3d ed. 2016).

restrictions on international trade acts like an economy-wide tax cut.<sup>34</sup> Instead of paying \$5 for a gallon of milk, milk drinkers pay only \$3. The same is true for every product or service that can be imported more cheaply than it can be produced in the home country. The overall gains to consumers are vast.

Nor are the gains limited to the end-use consumer. Modern trade agreements are as much about supply chains as about trade in finished products.<sup>35</sup> Companies can often purchase intermediate products, such as component parts of a final product, more cheaply from foreign producers due to trade liberalization than they would otherwise be able to.<sup>36</sup> Some of these savings may go into the companies' pockets, while some savings may be passed on to the end-use consumer. Either way, workers employed by the firm can gain through expanded employment. The U.S. auto industry illustrates the point. NAFTA allowed U.S. automakers to acquire cheaper car parts from Mexico, making U.S. automakers more competitive.<sup>37</sup> Many have argued that the cost savings from NAFTA saved the U.S. auto industry.<sup>38</sup>

Finally, trade liberalization helps exporters. In addition to gaining access to cheaper intermediate goods, exporters also gain access to foreign markets for their final products through the reciprocal

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34. See *Trade, at What Price?*, ECONOMIST (Apr. 2, 2016), <https://www.economist.com/united-states/2016/04/02/trade-at-what-price> [<https://perma.cc/7H34-W89C>] (“Robert Lawrence and Lawrence Edwards, two economists, estimate that trade with China alone put \$250 a year into the pocket of every American . . .”); *Global Trade Liberalization and the Developing Countries*, INT’L MONETARY FUND (Nov. 2001), <https://www.imf.org/external/np/exr/ib/2001/110801.htm#i> [<https://perma.cc/59V6-4HH4>] (“Integration into the world economy has proven a powerful means for countries to promote economic growth . . .”).

35. See Trevor W. Nagel & Elizabeth M. Kelley, *The Impact of Globalization on Structuring, Implementing, and Advising on Sourcing Arrangements*, 38 GEO. J. INT’L L. 619, 619–20 (2007) (including “the expansion of free trade” among the factors that have facilitated manufacturing corporations’ development of global supply chains).

36. See Gary Clyde Hufbauer, Cathleen Cimino & Tyler Moran, *NAFTA at 20: Misleading Charges and Positive Achievements*, PETERSON INST. FOR INT’L ECON. 7 (May 2014) <https://www.piie.com/sites/default/files/publications/pb/pb14-13.pdf> [<https://perma.cc/SZ2G-Z7E8>] (noting that “imports benefit not just US consumers but also US firms that can acquire just the right intermediate components at the right price”).

37. See Elena Holodny, *Trump Wants to Renegotiate NAFTA—Here’s What You Need to Know*, BUS. INSIDER (Feb. 5, 2017, 9:44 AM), <http://www.businessinsider.com/what-is-nafta-is-it-good-for-america-2017-2> [<https://perma.cc/26ZM-DW59>] (noting that “Mexico can build cars more efficiently than the US” because of cheaper labor and parts).

38. See Eduardo Porter, *Nafta May Have Saved Many Autoworkers’ Jobs*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/30/business/economy/nafta-may-have-saved-many-autoworkers-jobs.html> [<https://perma.cc/WR6C-FKLR>] (“[T]here is a good case to be made that without Nafta, there might not be much left of Detroit at all.”); see also Joel Cutcher-Gershenfeld, Dan Brooks & Martin Mulloy, *The Decline and Resurgence of the U.S. Auto Industry*, ECON. POL’Y INST. 18–19 (May 6, 2015), <https://www.epi.org/files/2015/the-decline-and-resurgence-of-the-us-auto-industry.pdf> [<https://perma.cc/78G5-7RG7>] (describing how NAFTA influenced the growth of the auto industry).

exchange of trade commitments among countries. To understand the significance of this market access, one need only look at the value American companies put on access to Chinese markets as trade between the two countries liberalized. For example, Coca-Cola had only just entered China in 1979; by 2014, the country had become Coca-Cola's third-largest market.<sup>39</sup> Two trade-liberalizing events help explain this massive growth: the first United States–China trade agreement in 1979 and Chinese accession to the WTO in 2001.<sup>40</sup>

But while the economy as a whole, and many actors in it, benefit from lower trade barriers, certain sectors of the economy—those that do not compete effectively with cheaper foreign imports—benefit from high trade barriers. To see how, consider tariffs on steel imports, which both Presidents George W. Bush and Donald Trump imposed in an effort to shore up electoral support in midwestern states.<sup>41</sup> Steel tariffs—just taxes on imported steel—make imported steel more expensive relative to domestic steel, which is not subject to any additional tax. By increasing the price of imported steel and aluminum, the tariffs allow U.S. producers to increase their own prices, sell more of their product (because their goods become cheaper relative to imports), or some combination of the two. At the same time, tariffs also increase the price consumers pay. Consequently, domestic consumers of steel, primarily manufacturers, will purchase more steel from American steel manufacturers, and at higher prices than they would pay in the absence of tariffs.

The additional sales at a higher price constitute the American steel producers' indirect regulatory subsidy. Unlike a direct subsidy, which comes from the government, the subsidy here comes from the manufacturers that purchase steel. The premium that the steel companies receive is, however, still effectively a subsidy because it is a result of government regulation.<sup>42</sup> By imposing a tariff (or other trade

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39. Scott Cendrowski, *Opening Happiness: An Oral History of Coca-Cola in China*, FORTUNE (Sept. 11, 2014), <http://fortune.com/2014/09/11/opening-happiness-an-oral-history-of-coca-cola-in-china/> [https://perma.cc/X8RP-X5LN].

40. Agreement on Trade Relations Between the United States of America and the People's Republic of China, China-U.S., July 7, 1979, 31 U.S.T. 4651 (entered into force Feb. 1, 1980). China entered the WTO in 2001. See World Trade Organization, Protocol on the Accession of the People's Republic of China, WTO Doc. WT/L/432 (Nov. 23, 2001) [hereinafter Protocol on China's Accession].

41. See Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018) (announcing President Trump's decision to "adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles . . . imported from all countries except Canada and Mexico"); Proclamation No. 7529, 67 Fed. Reg. 10,551 (Mar. 5, 2002) (announcing President George W. Bush's decision to implement tariff "safeguard measures" with respect to certain types of steel products).

42. To be sure, in many cases this subsidy is inefficient in the sense that it costs those who pay it more than it benefits recipients. Studies bore out this inefficiency in the case of President

barriers, such as a quantitative restriction on imports), the government redirects private dollars to its preferred recipients—a regulatory subsidy.

President Trump’s “national security” tariffs on steel and aluminum, imposed in 2018 and still in effect,<sup>43</sup> illustrate how tariffs effectively use government power to redistribute wealth from one set of private parties to another. One estimate suggested that President Trump’s tariffs would increase the output of the U.S. steel and aluminum sectors by \$9.8 billion and \$0.8 billion, respectively.<sup>44</sup> The same estimate, however, suggested that a variety of other industries, led by the vehicle and heavy manufacturing industries, would lose roughly \$22 billion in output.<sup>45</sup> Overall, the tariffs would therefore reduce output across all U.S. industries by \$11.6 billion.<sup>46</sup> Put differently, President Trump used tariffs to redistribute from downstream manufacturing industries to the steel and aluminum industries, at a net loss to the overall economy.

### *B. Decoupling Market Access from Government Support for Domestic Industries and Labor*

Historically, Congress has used high trade barriers—mostly in the form of tariffs (i.e., taxes) on imported goods—to provide just this kind of indirect subsidy for favored industries and workers.<sup>47</sup> In the first half of the nineteenth century, Henry Clay successfully pushed for tariffs as part of his “American System.”<sup>48</sup> The protection provided by tariffs allowed infant industries in the industrializing northeast of the United States to develop without the threat of foreign competition,<sup>49</sup> while also providing revenue for the federal government to invest in

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Bush’s 2002 steel tariffs. See Gary Clyde Hufbauer & Ben Goodrich, *Time for a Grand Bargain in Steel?*, INST. FOR INT’L ECON. (Jan. 2002), <https://www.piie.com/publications/policy-briefs/time-grand-bargain-steel> [<https://perma.cc/RPV4-K8JJ>] (estimating that every job saved by the Bush steel tariffs would cost \$584,000).

43. See Proclamation No. 9705, 83 Fed. Reg. at 11,625.

44. *The Economic Impact of Steel and Aluminum Tariffs*, FTI CONSULTING 2 (Aug. 2018), <https://www.fticonsulting.com/~media/Files/us-files/insights/articles/economic-impact-steel-aluminum-tariffs.pdf> [<https://perma.cc/AF3M-HANJ>].

45. *Id.*

46. *Id.*

47. See generally Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 593 (2019) (listing “the protection of industry” and “encouragement of infant industry” as “central purposes” for tariffs in the twentieth century).

48. See MAURICE G. BAXTER, HENRY CLAY AND THE AMERICAN SYSTEM 26–28, 32 (1995) (describing the passage of an 1820s tariff bill as being “a definite endorsement of . . . [Henry Clay’s] proclaimed American System”).

49. F. W. TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES 23 (6th ed. 1914) (describing “protection to young industries”).

infrastructure connecting the eastern and western United States.<sup>50</sup> Similarly, in the late nineteenth century, the Republican Party pushed for tariffs as a way to ease the social dislocation caused by the industrial revolution.<sup>51</sup>

In the wake of the Second World War, though, governments created the GATT, the WTO's precursor, to discipline governments' use of trade barriers, thereby limiting their usefulness to provide regulatory subsidies for the labor market.<sup>52</sup> High trade barriers around the globe had fueled the tensions leading to the war, and leaders felt that putting limits on trade barriers—mostly tariffs—would help nations rebuild after the war and limit the chances of a third global conflict.<sup>53</sup> And, as the general theory of trade liberalization predicts, they were right. Declines in tariffs led to a surge in global trade in the latter half of the twentieth century.<sup>54</sup> The growth in international trade, in turn, lifted millions around the world out of poverty.<sup>55</sup>

The GATT provided the basis for a series of multilateral negotiating “rounds” in which countries committed to lowering their tariffs on specific products.<sup>56</sup> The initial GATT negotiations saw significant tariff reductions, led by what amounted to an average 35% tariff reduction by the United States.<sup>57</sup> But GATT members achieved considerably less success over the course of the four rounds of negotiations that carried them through the end of the 1950s.<sup>58</sup>

Consequently, at the beginning of the 1960s, GATT members were looking for an opportunity to greatly reduce global tariffs. The

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50. See DOUGLAS A. IRWIN, *CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY* 157 (2017) (discussing “federal spending on canals, roads, and other transportation improvements as a way of reducing the region’s economic isolation and attracting labor and capital from the East” to the Midwest).

51. James L. Huston, *A Political Response to Industrialism: The Republican Embrace of Protectionist Labor Doctrines*, 70 J. AM. HIST. 35, 36 (1983).

52. General Agreement on Tariffs and Trade art. XXV, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, 272–73 [hereinafter GATT].

53. CHAD P. BOWN, *SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT* 11 (2009).

54. See Gabriel Felbermayr & Wilhelm Kohler, *WTO Membership and the Extensive Margin of World Trade: New Evidence* 2–3 (Institut für Volkswirtschaftslehre, Working Paper No. 304/2009, 2009), <https://projekte.uni-hohenheim.de/RePEc/hoh/papers/304.pdf> [<https://perma.cc/U7JS-CXRE>] (noting that the average annual growth rate of the volume of world exports was 6.2% between 1950 and 2005).

55. Press Release, World Trade Org., *Free Trade Helps Reduce Poverty, Says New WTO Secretariat Study* (June 13, 2000), [https://www.wto.org/english/news\\_e/pres00\\_e/pr181\\_e.htm](https://www.wto.org/english/news_e/pres00_e/pr181_e.htm) [<https://perma.cc/36FU-HQD7>].

56. See David Grieg, *The GATT and Multilateral Trade Negotiations*, 59 AUSTRALIAN Q. 305, 308 (1987) (providing a list of GATT negotiating rounds).

57. Douglas A. Irwin, *The GATT in Historical Perspective*, 85 AM. ECON. REV. 323, 325 (1995).

58. *Id.* (“[T]he GATT achieved remarkably little in the 15 years after the Geneva Round.”).



United States led the way, with President Kennedy seeking extraordinary authority from Congress to cut tariffs if an international agreement could be reached. The Trade Expansion Act of 1962 (“TEA”) provided the president with just that authority. Congress authorized the president to negotiate unprecedented reductions in U.S. tariffs—up to 50% or more in certain circumstances—in exchange for reductions from other countries.<sup>59</sup>

As economist Douglas Irwin put it, “The resulting Kennedy Round of trade negotiations during the 1960’s concluded with the most substantial tariff reductions of the postwar period.”<sup>60</sup> The United States alone cut its nonagricultural tariffs from approximately 14% on average to under 10%.<sup>61</sup> Moreover, the TEA laid the groundwork for the next two major rounds of multilateral GATT negotiations (the Tokyo and Uruguay rounds) that ultimately concluded with the creation of the WTO in 1995. The TEA thus represents a seminal moment in U.S. and global trade policy.

Significantly, Congress authorized the president to make tariff reduction commitments that lasted indefinitely. The TEA required that the United States have the right to terminate any agreements negotiated pursuant to its mandate with due notice, but did not put an automatic expiration date on the tariff reductions.<sup>62</sup> Likewise, as a matter of international law, the GATT makes tariff commitments indefinite in length, although it does allow nations to renegotiate their commitments under certain circumstances.<sup>63</sup> Therefore, the trade liberalization commitments negotiated by the president would never require reauthorization by Congress, nor would the president have to take affirmative steps to extend them.

President Kennedy (and ultimately President Johnson, whose Administration conducted the Kennedy Round negotiations) would have had a difficult time selling these tariff reductions, though, without

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59. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 201(b), 76 Stat. 872 (codified at 19 U.S.C. § 1821 (2012)). The Act actually allowed for even deeper cuts in certain circumstances, pursuant to an agreement with the European Economic Community. § 211, 76 Stat. at 873–74 (repealed 1975).

60. Irwin, *supra* note 57, at 326.

61. Chad P. Bown & Douglas A. Irwin, *The GATT’s Starting Point: Tariff Levels Circa 1947* 24 tbl.6 (Nat’l Bureau Econ. Research, Working Paper No. 21782, 2015), <https://www.nber.org/papers/w21782.pdf> [<https://perma.cc/3W9X-T4ZV>].

62. § 255, 76 Stat. at 880 (codified as amended at 19 U.S.C. § 1885 (2012)).

63. See GATT, *supra* note 52, art. II, 55 U.N.T.S. at 200–04 (committing states to providing tariff treatment no less favorable than that contained in their schedule of concessions); *id.* art. XXVIII, 55 U.N.T.S. at 276–78 (describing procedures for the modification of schedules). The renegotiation process, however, encourages states to offset withdrawn concessions with new concessions. If they do not do so, other states can withdraw concessions in response. Consequently, the renegotiation process itself seeks to make renegotiation unattractive.

some plan to help industries that would lose the protection from competition that came with higher tariffs. For substantial swathes of American production, the TEA and the resulting Kennedy Round tariff cuts amounted to a major reduction in the implicit subsidy trade protection provides.<sup>64</sup> American negotiators understood this effect. Multiple studies conducted after the Kennedy Round suggested that U.S. negotiators agreed to smaller tariff cuts for industries that would have a more difficult time transitioning their labor force into other work.<sup>65</sup>

Anticipating political pushback due to the removal of protection for sensitive industries, President Kennedy proposed that the TEA include the Trade Adjustment Assistance program, which would offer financial assistance to workers and firms who faced competition from a new flood of imports.<sup>66</sup> With TAA, President Kennedy sought to decouple access to U.S. markets from government support for U.S. industries and workers that compete with imports. Prior to 1962, tariff rates had been the primary policy tool that affected both of these policies. High tariff rates provided support for import-competing industries by effectively limiting market access for cheaper imports—that is, by raising the price of imported products that consumers might otherwise purchase. Lower tariffs allowed foreign producers to sell to domestic consumers at the expense of import-competing domestic producers, who might have to lower their prices to remain competitive.

With the creation of TAA, access to U.S. markets—with the greater range of choices such market access offers domestic consumers—would continue to be influenced primarily by tariff rates. Support for import-competing U.S. industries, though, could be managed through TAA. The hope was that labor groups and import-competing industries would support greater market access, since they now had a dedicated policy instrument—direct adjustment assistance from the federal government—to see to their needs. In other words, high tariffs, with their costs for domestic consumers, would therefore no

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64. Alfred E. Eckes, *Trading American Interests*, 71 FOREIGN AFF. 135, 136 (1992):

[B]y January 1972, when the Kennedy Round concessions were fully implemented, tariffs no longer sheltered high-wage American workers from low-paid labor abroad. American producers and workers now found themselves competing in a relatively open international economy at a time when other improvements in transportation and communications and the emergence of many new suppliers intensified competition.

65. See Malcolm D. Bale, *United States Concessions in the Kennedy Round and Short-Run Labour Adjustment Costs: Further Evidence*, 7 J. INT'L ECON. 145 (1977); John H. Cheh, *United States Concessions in the Kennedy Round and Short-Run Labor Adjustment Costs*, 4 J. INT'L ECON. 323 (1974) (hypothesizing that interindustrial variations in tariff reductions reflect a government policy of minimizing labor adjustment problems resulting from tariff cuts).

66. §§ 301–361, 76 Stat. at 883–901 (codified as amended in scattered sections of 19 U.S.C.).

longer be necessary in order to provide government support to import-competing sectors of the economy.

President Kennedy justified TAA explicitly in terms of substituting direct government support for the indirect support provided by tariffs. He argued that “[w]hen considerations of national policy make it desirable to avoid higher tariffs, those injured by that competition should not be required to bear the full brunt of the impact. Rather, the burden of economic adjustment should be borne in part by the Federal Government.”<sup>67</sup> Just as President Kennedy had hoped, labor interests fell in line, supporting the TEA in exchange for the direct support offered by the adjustment assistance program. AFL-CIO President George Meany told the Senate Finance Committee that “there is no question whatever that adjustment assistance is essential to the success of trade expansion. And as we have said many times, it is indispensable to our support of the trade program as a whole.”<sup>68</sup>

In decoupling market access from government support, President Kennedy followed what would become a consensus view within neoliberal trade policy: that indirect regulatory subsidies are an inefficient and politically unaccountable means of supporting the desired economic activity. Proponents of trade liberalization argued that trade policy should instead follow a two-step process.<sup>69</sup> First, governments should negotiate international agreements aimed at reducing trade barriers.<sup>70</sup> By eliminating trade barriers, international trade policy could maximize the total amount of wealth created through trade. To be sure, trade liberalization would result in dislocations within domestic economies. Some workers would lose their jobs; some businesses would close. But the economic growth from trade liberalization would create new jobs for those who lost their jobs and new businesses in those communities that initially saw economic retrenchment.<sup>71</sup> The benefits of trade liberalization would, in other words, trickle down.

In the event that the invisible hand of the market did not help those hurt by trade liberalization, the government could step in and provide assistance as a matter of domestic economic policy—the second

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67. Special Message to the Congress on Foreign Trade Policy, 1 PUB. PAPERS 68, 76 (Jan. 25, 1962).

68. *Trade Expansion Act of 1962: Hearings on H.R. 11970 Before the S. Comm. on Fin.*, 87th Cong. 241 (1962) (statement of George Meany, President, American Federation of Labor and Cong. of Industrial Organizations).

69. See Shaffer, *supra* note 14, at 3 (describing the two-step model of trade policy).

70. *Id.*

71. Timothy Meyer & Ganesh Sitaraman, *A Trade Policy for All*, FOREIGN AFF. (June 26, 2018), <https://www.foreignaffairs.com/articles/2018-06-26/trade-policy-all> [<https://perma.cc/YHN2-PK4C>] (describing and critiquing this view of trade liberalization).

step.<sup>72</sup> This contingent domestic assistance was thought to have several benefits. Most importantly, direct financial assistance would be more efficient than indirect assistance through trade policy. As Nobel Prize-winning economist Paul Krugman and Maurice Obstfeld, the chief economist at the International Monetary Fund, put it:

It is always preferable to deal with market failures as directly as possible . . . . Any proposed trade policy should always be compared with a purely domestic policy aimed at correcting the same problem. If the domestic policy appears too costly or has undesirable side effects, the trade policy is almost surely even less desirable . . . .<sup>73</sup>

Beyond the efficiency gains, scholars have also argued that direct subsidies are more transparent and hence more politically accountable than indirect subsidies.<sup>74</sup> Both tax appropriations and the direct receipt of government funds by a private enterprise are, in theory, visible to the public and therefore subject to greater oversight.<sup>75</sup> By contrast, “[f]iscal or regulatory schemes according privileges to a particular sector can transfer resources in hidden ways,” thereby evading public oversight.<sup>76</sup>

This theory of trickle-down trade liberalization, and its codification in the TEA and TAA, provided the intellectual justification for taking political fights over government support for import-competing interests out of debates about market access. Prior to 1962, negotiations about market access and subsidies for import-competing labor and industry occurred on a single policy dimension—how high should tariffs be? Although further reductions in trade barriers continue to have both of these elements,<sup>77</sup> after 1962 the same two

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72. Shaffer, *supra* note 14, at 3.

73. KRUGMAN & OBSTFELD, *supra* note 14, at 216. Similar arguments have been made in a range of issue areas. See e.g., Harry S. Gerla, *Swimming Against the Deregulatory Tide: Maintaining Fixed Prices in Public Offerings of Securities Through the NASD Antidiscounging Rules*, 36 VAND. L. REV. 9, 28–29 (1983) (“[U]nlike a direct subsidy, a cross-subsidy is insulated from the increased scrutiny and give and take of the political process.”); Alfred E. Kahn, *The Road to More Intelligent Telephone Pricing*, 1 YALE J. ON REG. 139, 157 (1984) (arguing that price controls, a common form of regulatory subsidy, create “an unrealistic, inequitable and inefficient regime in which certain groups of consumers subsidize others in ways unrelated to rational social goals”).

74. Arthur Dunkel & Frieder Roessler, *The Ranking of Trade Policy Instruments Under the GATT Legal System*, in INTERNATIONAL TRADE LAW, *supra* note 33, at 224, 227 (“In the case of a production subsidy in the form of direct budgetary transfers, the costs of protection are more apparent than in the case of import controls.”).

75. *Id.* at 227 (“[I]n order to subsidize, taxes need to be raised, which is an unpopular governmental activity.”).

76. *Id.*

77. Of course, decoupling market access from government support reduced, but did not remove, the pressure to use trade barriers as a form of government support. The United States, for instance, was slow to reduce trade barriers for textiles, out of fear that foreign competition would wipe out U.S. textile manufacturing. Developed countries throughout the world have maintained significant tariff and non-tariff barriers on agricultural products. See M. Ataman

issues occurred on two policy dimensions: (1) how high should tariffs be? and (2) how much funding should be available for adjustment assistance, for how long, and under what conditions? Creating two policy choices where only one had existed previously undermined the negotiating position of import-competing interests. Policymakers and pundits with very different views about government support could agree to pursue trade liberalization because of the overall wealth it created. Political fights about how to distribute that wealth could occur over a different policy instrument. As discussed below, the result was that trade liberalization continued apace, while adjustment assistance stagnated.

### C. Adjustment Assistance's Purgatory

Congress revisited trade's deregulatory bargain in 1974. In so doing, it established a pattern that persists to this day. In each successive negotiation over trade liberalization, Congress has reauthorized TAA only for a limited amount of time and for a limited budget. As a consequence, failure to reauthorize the program would

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Aksoy, *Global Agriculture Trade Policies*, in GLOBAL AGRICULTURAL TRADE AND DEVELOPING COUNTRIES 86, 86–88 (M. Ataman Aksoy & John C. Beghin eds., 2005) (outlining the evolution of agricultural subsidies in developing countries); Bernard Hoekman et al., *Eliminating Excessive Tariffs on Exports of Least Developed Countries*, 16 WORLD BANK ECON. REV. 1, 3–4 (2002) (noting that peak tariffs in developed countries tend to be on agricultural and textile products). These subsidies reflect the judgment of governments that national agricultural practices—and more broadly, national cultures associated with food—are worth supporting, even if doing so results in higher food prices in developed countries. Aksoy, *supra*.

Indeed, the practice of using trade barriers to effectively subsidize favored industries continues today. The Trump Administration has pursued the revival of tariffs in a range of sectors and has done so explicitly on the grounds that it wishes to support those sectors of the American economy. Beyond the steel tariffs referenced above, the Trump Administration has imposed tariffs on solar panels, washing machines, aluminum, a wide range of products from China, and is considering additional tariffs on autos and auto parts. David Lawder & David Shepardson, *White House to Consider Commerce Department Auto Tariff Recommendations: Officials*, REUTERS (Nov. 12, 2018), <https://www.reuters.com/article/us-usa-trade-autos/white-house-to-consider-commerce-department-auto-tariff-recommendations-officials-idUSKCN1NH2JJP> [<https://perma.cc/K7F4-PUY7>]; Ka Zeng, *Trump's Tariffs on Chinese Products Won't Work. Here's Why.*, WASH. POST (Mar. 20, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/20/trumps-tariffs-on-chinese-products-wont-work-heres-why/> [<https://perma.cc/TE5A-N2X2>]. While economists generally agree that these tariffs impose a net cost on the U.S. economy, they also clearly provide a regulatory subsidy to the protected industries. In fact, part of the appeal of creating regulatory subsidies through trade policy is that trade policy is one of the few tools the president has to dole out subsidies unilaterally. Ordinarily, Congress must appropriate funding for subsidies. But because Congress has delegated to the president the power to raise tariffs, he can impose such tariffs as a way to create regulatory subsidies without first needing Congress's permission. See Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 YALE J. INT'L L. ONLINE 16 (2019) (noting that Congress has delegated almost total control over tariff rates to the president, and presidential administrations search for policies that can be implemented without Congressional control).

result in its demise. By contrast, a failure to reach agreement on either the negotiating authority for—or the approval of—a new trade agreement would not result in a rollback of trade liberalization commitments. Rather, it would simply curtail further trade liberalization.

As a consequence, negotiations over trade liberalization and TAA have occurred on different scales since trade liberalization and adjustment assistance were decoupled in the 1960s. Trade liberalization's proponents only need to renegotiate the amount of trade adjustment assistance to secure *marginal* increases in trade liberalization. TAA's proponents, however, need to renegotiate to secure *any* authority for trade adjustment assistance to continue.

### 1. Trade Liberalization After the 1960s

The beginning of a new round of multilateral trade negotiations at the GATT, the Tokyo Round, gave Congress reason to take up trade policy again. In the Trade Act of 1974, Congress authorized the president to enter into further tariff-reducing agreements. The Trade Act was also the first statute to authorize the president to negotiate reductions in nontariff barriers—measures other than tariffs (often regulations) that impede imports and exports.<sup>78</sup> The Trade Act also established “fast-track” procedures, whereby Congress would consider implementing legislation for any resulting agreements in an expedited process.<sup>79</sup> Fast-track procedures, which essentially guarantee trade agreements an up-or-down vote in both houses of Congress without possibility of amendment, replaced the ordinary legislative process, which permits members of Congress to use procedural roadblocks to slow down or block the adoption of legislation.<sup>80</sup>

By establishing fast-track procedures, the 1974 Trade Act paved the way for the modern era of expansive trade liberalization.<sup>81</sup> Prior to the Trade Act, if the president negotiated an agreement reducing nontariff barriers, Congress would have had to approve implementing legislation through the ordinary legislative process.<sup>82</sup> At the end of the Kennedy Round, Congress failed to implement such an agreement

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78. See Trade Act of 1974, Pub. L. No. 93-618, § 102, 88 Stat. 1978, 1982–84 (1975) (codified as amended at 19 U.S.C. § 2112 (2012)).

79. §§ 102, 151, 88 Stat. at 1982–84, 2001–04 (codified as amended at 19 U.S.C. §§ 2112, 2191 (2012)).

80. § 151, 88 Stat. at 2001–04 (codified as amended at 19 U.S.C. § 2191).

81. Meyer & Sitaraman, *supra* note 47.

82. See IAN F. FERGUSSON, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 2–4 (2015) (describing the historical roles of Congress and the president in establishing foreign trade policy).

through this ordinary process.<sup>83</sup> This failure slowed the pace of trade liberalization and ultimately led Congress in 1974 to use fast track to circumscribe its review of trade agreements in order to facilitate greater trade liberalization—a procedure Congress has regularly included in its authorizations for trade negotiations since.<sup>84</sup>

Indeed, since the 1974 Act, the president has negotiated and Congress has approved over a dozen trade agreements covering virtually all of U.S. international trade. In 1979, Congress approved the agreements coming out of the GATT's Tokyo Round negotiations.<sup>85</sup> Even more consequentially, in 1994 Congress approved the Marrakesh Agreement, which created the WTO and greatly expanded the set of multilateral trade obligations, most notably by including services and intellectual property.<sup>86</sup> The United States has also entered into fifteen different free trade agreements with twenty different countries.<sup>87</sup> Even President Trump, no fan of trade liberalization, has gotten in on the game, pursuing new trade agreements with Japan and the European Union.<sup>88</sup>

## 2. Adjustment Assistance After the 1960s

At the same time it made trade liberalization easier, Congress revisited TAA. First, Congress loosened the eligibility criteria and

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83. *Id.* at 4.

84. Meyer & Sitaraman, *supra* note 47.

85. FERGUSSON, *supra* note 82, at 6.

86. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S 154 [hereinafter Marrakesh Agreement].

87. See *Free Trade Agreements*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited Dec. 26, 2019) [<https://perma.cc/7X3F-PSS9>] (listing U.S. trade agreements). The United States currently has only fourteen agreements in force, as the United States–Canada Free Trade Agreement was suspended when NAFTA entered into force. The United States also negotiated a major twelve-nation trade agreement, known as the Trans-Pacific Partnership, under President Obama. President Trump, however, took the United States out of the pact. 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> [<https://perma.cc/P4LF-YBL2>].

88. Bob Bryan, *Trump is Launching Negotiations with Japan to Create a New Trade Agreement*, BUS. INSIDER (Sept. 26, 2018, 4:26 PM), <https://www.businessinsider.com/trump-us-japan-trade-deal-negotiations-2018-9> [<https://perma.cc/57KQ-ESUC>]; David Shepardson, *Trump Administration Says to Open Trade Talks with EU, UK, Japan*, REUTERS (Oct. 16, 2018, 2:16 PM), <https://www.reuters.com/article/us-usa-trade-talks/trump-administration-says-to-open-trade-talks-with-eu-uk-japan-idUSKCN1MQ2P2> [<https://perma.cc/6NFY-5LQ3>]. The Trump Administration has also renegotiated NAFTA and KORUS, although the differences between the new and old versions of these agreements are modest. Josh Zumbun, Bob Davis, & Kwanwoo Jun, *U.S. Wins 'Modest' Trade Concessions from South Korea*, WALL ST. J. (March 26, 2018, 7:35 PM), <https://www.wsj.com/articles/trade-deal-eases-way-for-u-s-south-korea-to-collaborate-on-north-1522058350> [<https://perma.cc/GFV2-37F5>].

expanded benefits.<sup>89</sup> Congress had originally limited funding to job retraining and some income support while retraining was underway.<sup>90</sup> Eligibility under the TEA was also narrow, with applicants having to demonstrate that they had lost their jobs directly because of competition with imports.<sup>91</sup> Indeed, although the program was created in 1962, the first successful application for benefits under TAA was not accepted until 1969.<sup>92</sup> In effect, Congress had created a program that promised support but in practice entailed a limited financial commitment at best.

Second, Congress authorized the program for only eight years.<sup>93</sup> This time-limited reauthorization broke the temporal link between TAA and U.S. trade agreements. The 1962 TEA had authorized TAA indefinitely,<sup>94</sup> just as it had authorized indefinite trade liberalization commitments. Beginning in 1974, however, Congress established a situation in which it need not take any action to extend the United States' trade liberalization commitments, but it must affirmatively act to renew TAA.

Since 1974, a number of statutes have extended and reauthorized TAA, albeit in somewhat different forms and never again for a period longer than six years.<sup>95</sup> Congress extended TAA in 1974, 1981, 1983, 1984, 1985, 1986, 1988, 1993, 1998, 1999, 2002, 2007, 2008, 2009, 2010, 2011, and 2015.<sup>96</sup> By and large, these dates reflect moments

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89. HORNBECK, *supra* note 24, at 8.

90. See C. Michael Aho & Thomas O. Bayard, *Costs and Benefits of Trade Adjustment Assistance*, in *THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY* 153 (Robert E. Baldwin & Anne O. Krueger eds., 1984) (describing that the first generation of TAA provided compensation and adjustment services to trade-displaced workers, and the program was later liberalized and expanded beyond these narrow services).

91. See Ethan Kapstein, *Trade Liberalization and the Politics of Trade Adjustment Assistance*, 137 INT'L LABOUR REV. 501, 508 (1998) ("[T]he criteria used to determine worker eligibility for TAA required evidence that import levels in the worker's industry had increased 'in major part' because of the TEA, and that this increase was the 'major cause' of injury to the workers in the specific firms in the industry.").

92. HORNBECK, *supra* note 24, at 8.

93. *Id.* at 16.

94. *Id.*

95. *Id.* (listing the authorization periods for TAA).

96. For a complete list prior to 2013, see HORNBECK, *supra* note 24, at app. See also Trade Adjustment Assistance Reauthorization Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (to be codified in scattered sections of U.S.C.); Trade Adjustment Assistance Extension Act of 2011, Pub. L. No. 112-40, 125 Stat. 401 (codified as amended in scattered sections of U.S.C.); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of U.S.C.); Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (codified as amended in scattered sections of U.S.C.); Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (codified as amended in scattered sections of U.S.C.); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. §§ 3301-3473 (2012)); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of U.S.C.);



at which the president sought authority to negotiate new trade agreements or sought congressional approval of agreements he had already negotiated.<sup>97</sup> At these moments, politics relinked trade liberalization and adjustment assistance. But in the years after the 1974 Trade Act, the ability to rely only on the weak and episodic political linkage worked to the significant detriment of those favoring adjustment assistance policies.

Indeed, as Table 1 makes clear, the length of time for which Congress authorizes TAA depends significantly on whether trade liberalization—in the form of fast-track authority or approval of new trade agreements—is under consideration. With one exception (a six-year reauthorization in 1986), Congress has never reauthorized TAA for longer than twenty-seven months if TAA has not been paired with a bill authorizing further trade liberalization. By contrast, when TAA and trade liberalization are considered together, Congress has only once reauthorized TAA for less than five years (thirty-four months in 2011).

TABLE 1: REAUTHORIZING TAA WITH AND WITHOUT  
TRADE LIBERALIZATION

| Year                                   | Bill Title  | Length of TAA Extension | Negotiating Authority or Trade Agreement Approved? |
|--|---|-------------------------|--|
| 1962                                   | Trade Expansion Act, P.L. No. 87-794                                    | Indefinite              | Kennedy Round of GATT negotiations                 |
| 1974                                   | Trade Act of 1974, P.L. No. 93-618                                      | 8 years                 | Tokyo Round of GATT negotiations                   |
| 1981                                   | Omnibus Budget Reconciliation Act of 1981, P.L. No. 97-35               | 1 year                  | No   |
| 1983                                   | An Act to Amend the International Coffee Agreement Act, P.L. No. 98-120 | 2 years                 | No   |
| 1984                                   | Deficit Reduction Act of 1984, P.L. No. 98-369                          | 10 weeks                | No   |
| 1985                                   | Emergency Extension Act of 1985, P.L. No. 99-107                        | 5 weeks                 | No   |
| Lapses December 19, 1985 to March 1986 |   |                         |  |

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986) (codified as amended in scattered sections of 19 U.S.C.); Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (codified as amended in scattered sections of U.S.C.); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2101–2487 (2012)); *see* Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872.

97. For instance, in 1993 and 2009, legislation was tied to the approval of NAFTA and several Bush-era trade agreements, respectively. The 1988 legislation laid the groundwork for the Uruguay Round negotiations at the GATT (which culminated in the creation of the WTO), while legislation in 2002 and 2015 set the stage for the Bush-era trade negotiations and the Obama Administration's push to conclude the Trans-Pacific Partnership, respectively. *See* Table 1; *supra* note 96.

|   |   |           |   |
|---|---|-----------|---|
| 1986  | Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. No. 99-272                                 | 6 years   | No  |
| 1988  | Omnibus Trade & Competitiveness Act of 1988, P.L. No. 100-418   | 2 years   | Uruguay Round of GATT negotiations & NAFTA negotiations   |
| 1993  | Omnibus Budget Reconciliation Act of 1993, P.L. No. 103-66  | 5 years   | NAFTA approval  |
| 1998  | District of Columbia Appropriations   | 9 months  | No  |
| 1999  | Consolidated Appropriations Act of 2000, P.L. No. 106-113   | 27 months | No  |
| Lapses September 30, 2001 to August 6, 2002   |   |           |   |
| 2002  | Trade Act of 2002, P.L. No. 107-210   | 5 years   | Negotiating authority for Bush-era trade agreements <sup>98</sup>   |
| 2007  | TAA Extension Act, P.L. No. 110-89  | 3 months  | No  |
| Lapses December 31, 2007 to February 17, 2009 |   |           |   |
| 2008  | Consolidated Appropriations Act of 2008, P.L. No. 110-161   | 1 year    | No  |
| 2009  | Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, P.L. No. 110-329 | 2 months  | No  |
| 2009  | American Recovery & Reinvestment Act of 2009, P.L. No. 111-5  | 2 years   | No <sup>99</sup>  |
| 2010  | Omnibus Trade Act of 2010, P.L. No. 111-344   | 13 months | No  |
| 2011  | TAA Extension Act of 2011, P.L. No. 112-40  | 34 months | Done in connection with legislation implementing FTAs with Colombia, Panama, and South Korea <sup>100</sup> |
| 2015  | TAA Reauthorization Act of 2015, P.L. No. 114-27  | 6 years   | Trans-Pacific Partnership negotiations, NAFTA 2.0 <sup>101</sup>  |

98. The Bush Administration negotiated eleven agreements under this authority, primarily with countries that supported the Administration's war on terror. See *Free Trade Agreements*, *supra* note 87 (listing U.S. trade agreements).

99. The 2009 reauthorization of TAA was done as part of the larger economic stimulus package designed to address the Great Recession. See BENJAMIN COLLINS, CONG. RESEARCH SERV., R44153, TRADE ADJUSTMENT ASSISTANCE FOR WORKERS AND THE TAA REAUTHORIZATION ACT OF 2015, at 12 (2018) (noting that the TAA was reauthorized in 2009 and expanded to spur economic activity during a time of increased unemployment); HORNBECK, *supra* note 24, at 12.

100. COLLINS, *supra* note 99, at 13.

101. At the time, many thought this authority would be used to negotiate a free trade agreement with Europe, known as the Trans-Atlantic Trade and Investment Partnership. Doug Palmer, *US Trade Vote Puts TTIP on Faster Track*, POLITICO (June 30, 2015), <https://www.politico.eu/article/us-trade-vote-ttip-obama/> [<https://perma.cc/FQ5Z-J533>]. Instead, the Trump Administration used it to negotiate its revision to NAFTA, the United States–Mexico–Canada Agreement (“NAFTA 2.0” or “USMCA”). Tori Whiting & Gabriella Beaumont-Smith, *Next Steps for the USMCA: Congress Should Have Its Say to Ensure Free Trade*, HERITAGE FOUND. (June 18, 2019), <https://www.heritage.org/trade/report/next-steps-the-usmca-congress-should-have-its-say-ensure-free-trade> [<https://perma.cc/824N-CJ7T>].

The pressure on adjustment assistance policies became most clear at the end of the Tokyo Round of negotiations in 1979. In implementing the outcome of the negotiations, Congress tried to pass legislation extending and expanding TAA. However, in part because the legislation was separate from the legislation approving the Tokyo Round outcomes, and in part due to concerns about budget priorities, the legislation died in the Senate.<sup>102</sup>

With TAA up for reauthorization in 1982, the Reagan Administration agreed to extend it for only two years in exchange for cuts in benefits and an overall reduction of \$2.6 billion in the program's budget.<sup>103</sup> When the time for reauthorization rolled around in 1983, the Reagan Administration proposed simply eliminating the program.<sup>104</sup> Instead, Congress extended the program until 1985, while cutting benefits and funding once again.<sup>105</sup> In 1985, TAA lapsed completely for a period of three months before being reauthorized through the end of the 1991 fiscal year.<sup>106</sup> This reprieve, too, came with cuts; it eliminated loans, loan guarantees, and other financial benefits for firms suffering from import competition.<sup>107</sup> This reluctance to support TAA came, not surprisingly, during a period of time in which the Reagan Administration had few international trade priorities. With no leverage, TAA proponents were unable to prevent cuts to adjustment assistance.

The tide turned somewhat in TAA's favor when it came time for Congress to once again consider big new trade agreements: NAFTA and the WTO agreements. Legislative efforts to approve these two new trade packages prompted reauthorization and expansion of TAA. In 1993, Congress reauthorized regular TAA and, in legislation passed in December 1993, created a TAA program specifically for those adversely affected by NAFTA.<sup>108</sup> In 1999, Congress extended these programs until 2001.<sup>109</sup>

From September 2001 until August 2002, Congress let TAA lapse again.<sup>110</sup> The program was only reauthorized when President George W. Bush sought trade promotion authority to negotiate new free

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102. HORNBECK, *supra* note 24, at 9.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, §§ 501–507, 107 Stat. 2057, 2149–54 (1993) (codified as amended in scattered sections of 19 U.S.C.).

109. Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, § 702(b), 113 Stat. 1501, 1501A-319 (1999) (repealed 2002).

110. HORNBECK, *supra* note 24, at 16.

trade agreements, such as the Central American free trade agreement (“CAFTA”) and KORUS.<sup>111</sup> The 2002 legislation represented perhaps the first truly major extension of TAA in decades, creating a subsidized health insurance program for dislocated workers, expanded eligibility for downstream workers, and a new program for farm workers.<sup>112</sup>

Since then, however, Congress has chipped away at TAA. A wholesale reauthorization failed to pass in 2007, and the program again lapsed, receiving only temporary funding to continue into 2009.<sup>113</sup> By tying approval of trade agreements with Korea, Panama, and Columbia to TAA’s fate, Congress managed to extend TAA to 2012, and in 2011 extended it until 2013.<sup>114</sup> In 2015, Congress finally extended the program until the end of fiscal year 2021.<sup>115</sup> That six-year extension—linked to the Obama Administration’s efforts to secure approval for the TPP—marked the longest lease on life TAA had been given since 1986.<sup>116</sup> But like much of the TAA legislation during the Obama Administration, it came with cuts to funding that reduced the size and scope of the program.<sup>117</sup>

#### *D. The Costs of Decoupling*

The historical record regarding TAA is thus clear. President Kennedy introduced TAA explicitly to replace indirect subsidies provided by high trade barriers with direct subsidies.<sup>118</sup> The deal should have been a win for everyone. The overall economy would benefit from trade liberalization, while direct subsidies would make workers and import-competing firms whole.

Instead, Congress has repeatedly cut TAA. Consequently, workers and import-competing industries have not gotten what they were promised. The shift from regulatory subsidies to direct subsidies foreshadowed a subsequent decline in the direct subsidies. Moreover, that decline has contributed to the erosion of the manufacturing base

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111. See Trade Act of 2002, Pub. L. No. 107-210, § 111, 116 Stat. 933, 936 (codified as amended in scattered sections of 19 U.S.C.).

112. HORNBECK, *supra* note 24, at 10–11.

113. *Id.* at 11–12.

114. *Id.* at 12–13.

115. Trade Adjustment Assistance Reauthorization Act of 2015, Pub. L. No. 114-27, § 403, 129 Stat. 362, 374.

116. Congress also failed to pass TAA authorization as part of the 2015 Omnibus Trade Accountability and Priorities Act. Instead, Congress separated trade-negotiating authority and TAA authorization into separate bills. However, President Obama successfully insisted on signing them together. See *Obama Signs 2 Trade Bills into Law*, VOA NEWS (June 29, 2015, 6:38 PM), <https://www.voanews.com/usa/obama-signs-2-trade-bills-law> [<https://perma.cc/4K5V-GQ3M>].

117. See § 403, 129 Stat. at 374.

118. See discussion *supra* note 69 and accompanying text.

in many states and communities, the loss of middle-class jobs, and economic insecurity that threatens the stability of an international trading system that has delivered economic growth and development to millions around the world, including within the United States.

More specifically, TAA has failed to stop or significantly smooth out the disruptions from the well-documented decline of U.S. manufacturing, especially in the midwestern United States. That decline has put downward pressure on employment and wages, and it has created fears about long-term economic security.<sup>119</sup> The American steel sector again provides a case in point. Data from the U.S. Bureau of Labor Statistics shows that from 2000 to 2016, U.S. steel jobs declined by 35%, a loss of 48,000 jobs.<sup>120</sup> Similar trends can be found in data from the group Public Citizen, which tracks the number of net manufacturing jobs lost in each state since the United States joined NAFTA and the WTO, as reported by the Bureau of Labor Statistics.<sup>121</sup> For instance, according to Public Citizen, Pennsylvania has lost 308,676 jobs (a 35.4% decline in the sector) and Ohio has lost 276,474 manufacturing jobs (a 28.5% decline in the sector).<sup>122</sup>

While other causes besides trade liberalization, such as automation, have contributed to these job losses, there is no longer any

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119. See David B. Muhlhausen & James Sherk, *Trade Adjustment Assistance: Let the Ineffective and Wasteful "Job-Training" Program Expire*, HERITAGE FOUND. 1, 2–4 (Dec. 4, 2014), <https://www.heritage.org/jobs-and-labor/report/trade-adjustment-assistance-let-the-ineffective-and-wasteful-job-training> [<https://perma.cc/BA6U-7EKM>] (arguing that TAA actually lowers the future earnings of its participants); Mark Muro & Joseph Parilla, *Maladjusted: It's Time to Reimagine Economic 'Adjustment' Programs*, BROOKINGS (Jan. 10, 2017), <https://www.brookings.edu/blog/the-avenue/2017/01/10/maladjusted-its-time-to-reimagine-economic-adjustment-programs/> [<https://perma.cc/2V2H-CVF6>] (discussing the need for changes to U.S. economic adjustment programs, especially in light of today's pervasive labor market disruptions).

120. Joseph S. Pete, *U.S. Steel Industry Has Lost 48,000 Jobs Since 2000*, NORTHWEST IND. TIMES (Aug. 16, 2016), [https://www.nwitimes.com/business/steel/u-s-steel-industry-has-lost-jobs-since/article\\_4ffd704a-1cdc-5eb9-82eb-0b858a369877.html](https://www.nwitimes.com/business/steel/u-s-steel-industry-has-lost-jobs-since/article_4ffd704a-1cdc-5eb9-82eb-0b858a369877.html) [<https://perma.cc/6DS2-GM3P>].

121. *Trade-Related Job Losses by State*, PUB. CITIZEN, <https://www.citizen.org/our-work/globalization-and-trade/trade-related-job-loss-state> (last visited Nov. 1, 2019) [<https://perma.cc/3KK2-CZNM>].

122. *Pennsylvania Job Loss During the NAFTA-WTO Period*, PUB. CITIZEN, <https://www.citizen.org/article/pennsylvania-job-loss-during-the-nafta-wto-period/> (last visited Sept. 29, 2019) [<https://perma.cc/73HC-YAW5>]; *Ohio Job Loss During the NAFTA-WTO Period*, PUB. CITIZEN, <https://www.citizen.org/article/ohio-job-loss-during-the-nafta-wto-period/> (last visited Sept. 29, 2019) [<https://perma.cc/WDG2-XL9N>]. Although these data show a correlation between trade liberalization and the decline of manufacturing jobs, they say nothing about the overall effects of trade, do not indicate that all of the job losses were caused by trade, and do not say anything about the effects of trade on those who previously held the eliminated positions. Many such people will have gained employment in nonmanufacturing jobs, some of which were created by trade.

doubt that trade liberalization itself has played a major role.<sup>123</sup> And while economists argued that labor markets would adjust to absorb unemployed workers into new jobs created by a more efficient economy,<sup>124</sup> recent studies have found that the local effects of job losses from free trade agreements have not been offset by newly created jobs, which are often located far from the communities in which jobs are lost.<sup>125</sup> While accepting the substantial benefits of trade to the nation as a whole, these studies have focused on the negative impact of reducing trade barriers on goods from new U.S. trading partners, especially China, on local labor markets in the United States.<sup>126</sup> Most importantly, David Autor, David Dorn, and Gordon Hanson have shown that communities that lost jobs after China joined the WTO in 2001 had still not recovered a decade later—a blow to the claim that the benefits of trade liberalization trickle down in a way that offsets trade liberalization's costs.<sup>127</sup>

Given the stakes for the stability of the international trading system, the United States' failure to make good on TAA's promise to workers is odd. Why has the federal government maintained its

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123. These job losses may seem like a drop in the bucket of the entire U.S. economy, which loses (or “churns”) about 4 million jobs a year. See Hufbauer, Cimino & Moran, *supra* note 36, at 5. Indeed, one of the great benefits of trade liberalization is that it can create many more new jobs through the more efficient allocation of resources. See, e.g., Miriam Sapiro, *Why Trade Matters*, BROOKINGS (Sept. 1, 2014), [https://www.brookings.edu/wp-content/uploads/2016/06/Trade-Global-Views\\_FINAL.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Trade-Global-Views_FINAL.pdf) [<https://perma.cc/3Y5G-7Y5R>] (discussing the economic rationales for an ambitious trade policy, including the creation of many new jobs). But to those workers who lose their jobs and struggle to find comparable work, the loss of a secure paycheck is devastating. See Farah Stockman, *Becoming a Steelworker Liberated Her. Then Her Job Moved to Mexico.*, N.Y. TIMES (Oct. 14, 2017), <https://www.nytimes.com/2017/10/14/us/union-jobs-mexico-rexnord.html> [<https://perma.cc/P5D5-QV38>] (describing the effects of losing steel jobs on individuals in the midwestern United States).

124. See, e.g., Jagdish Bhagwati, Opinion, *Technology, Not Globalisation, Drives Wages Down*, FIN. TIMES (Jan. 3, 2007), <https://www.ft.com/content/f8738fba-9b53-11db-aa70-0000779e2340> [<https://perma.cc/28GH-UYCD>] (“[E]mpirical studies . . . show that the adverse effect of trade on wages is not substantial.”); Ben S. Bernanke, Chairman, Fed. Reserve, Speech Before the Greater Omaha Chamber of Commerce: The Level and Distribution of Economic Well-Being (Feb. 6, 2007), <https://www.federalreserve.gov/newsevents/speech/bernanke20070206a.htm> [<https://perma.cc/2DDP-N8FL>] (“Because labor markets are adaptable, outsourcing abroad does not ultimately affect aggregate employment, but it may affect the distribution of wages . . .”).

125. David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205, 205 (2016):

Alongside the heralded consumer benefits of expanded trade are substantial adjustment costs and distributional consequences. These impacts are most visible in the local labor markets in which the industries exposed to foreign competition are concentrated. Adjustment in local labor markets is remarkably slow, with wages and labor-force participation rates remaining depressed and unemployment rates remaining elevated . . . .

126. *Id.* at 221–34.

127. *Id.* at 224.

commitment to trade liberalization but not to TAA, the other half of the bargain struck on trade policy?

## II. MISALIGNMENT IN TRADE LAWMAKING

Lawmaking is an iterative process. Lawmakers often revisit prior laws in order to update them in light of new information or to renegotiate the distribution of costs and benefits. Indeed, lawmakers establish *ex ante* the terms under which renegotiation occurs. Lawmakers might, for instance, include a sunset provision in a law. Sunset provisions require lawmakers to reenact—and hence give them an opportunity to renegotiate—a law.<sup>128</sup> Trouble can occur, however, when different parts of a legislative bargain are subject to different methods of renegotiation and implementation. In these situations, beneficiaries of the policy that is more frequently subject to renegotiation or costlier implementation will see their gains erode over time. Worse, these chronic losers may try to bring down both planks of the initial legislative bargain.

In this Part, I set out the descriptive Misalignment Thesis—the theory of misaligned renegotiation and how it ultimately can lead to the collapse of the entire trading system. Section I.A defines misaligned lawmaking and explains how it operates in trade policy. Section II.B discusses the welfare effects of misaligned lawmaking.

### A. *The Theory*

The descriptive Misalignment Thesis holds that when a legislative bargain is struck over two or more interdependent policies, the policy or policies subject to more frequent or costlier renegotiation and implementation will be disfavored in the long run.<sup>129</sup> The intuition is straightforward. When two policies are interrelated, supporters of both policies can strike a legislative bargain in which each gets the policy outcome it desires. Absent such mutual support, the bargain would not pass. Misalignment occurs when one of these policies is

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128. See, e.g., Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401, 401 (1978) (describing sunset legislation).

129. Public law scholars have long been worried about entrenching policies against democratic change. See, e.g., Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335 (2006) (discussing the failure of sunset provisions to dislodge entrenched interest groups); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015) (demonstrating the ways in which political actors entrench their policies through functional means). Misalignment raises a similar, but distinct, concern. Misaligned lawmaking focuses on the relative costs of changing a policy and the impacts of those relative differences, rather than the absolute costs of changing a single policy.

subject to more frequent or costlier renegotiation. Because the policy under renegotiation only passed as part of a package, renegotiating it without the other elements of the package leads to cuts in the policy. Proponents simply do not have the leverage in the subsequent negotiation that they had in the initial negotiation. Differences in the costs of implementation have a similar effect. If implementing one policy is substantially easier, changes to the policy can be made as part of the implementation process, obviating the need for a formal renegotiation.

Misaligned lawmaking occurs when three conditions are satisfied: (1) interdependence, (2) decoupling, and (3) an absence of a credible commitment in the initial legislative bargain to renegotiate the two interdependent policies together. I explain these three conditions below.

### 1. Interdependence

By interdependence, I mean that a policy addressing one problem will have consequences that create demand for a policy response to a separate problem.<sup>130</sup> Trade liberalization and trade adjustment assistance are one example. Trade liberalization, a policy of reducing barriers to imports, exposes some domestic industries to foreign competition, creating job losses. Those job losses, or their prospect, spur demand for a policy response.<sup>131</sup> Prior to 1962, that policy response primarily took the form of higher trade barriers for swaths of the U.S. economy, i.e., it took the form of resisting trade liberalization. After 1962, though, the primary policy response has been trade adjustment assistance.<sup>132</sup>

Other examples of interdependence abound. Deregulation of transportation markets, like airlines and railroads, causes carriers to abandon unprofitable routes.<sup>133</sup> The absence of travel options in remote

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130. This idea is somewhat similar to the idea of a regulatory externality, although it lacks the geographic or cross-border feature often ascribed to that term. *See, e.g.*, Ben Depoorter & Francesco Parisi, *The Modernization of European Antitrust Enforcement: The Economics of Regulatory Competition*, 13 *GEO. MASON L. REV.* 309, 316 (2005) (discussing the positive externalities of antitrust regulation).

131. *See supra* Sections I.A–I.B (discussing the costs and benefits of trade liberalization and noting congressional responses to mitigate those costs).

132. Although political resistance to further trade liberalization has continued, it has largely been unsuccessful, as evidenced by the fact that the United States has a trade-weighted average tariff of only 2% on industrial goods. *See Industrial Tariffs, supra* note 30.

133. *Cf.* Andrew R. Goetz & Timothy M. Vowles, *The Good, the Bad, and the Ugly: 30 Years of U.S. Airline Deregulation*, 17 *J. TRANSP. GEOGRAPHY* 251, 257 (2009) (“In general, service and fares in shorter-distance and less-traveled city-pair markets . . . have not been as good as those in longer-distance and heavily-trafficked markets.”); Phillip Longman & Lina Khan, *Terminal*



parts of the country, in turn, creates pressure for a regulatory response to provide such options.<sup>134</sup> Regulatory approval of a new mine or oil drilling project may create demand for environmental regulation.<sup>135</sup>

This kind of interdependence is different from merely including two policies within the same piece of legislation. Any two policies can be included in the same bill or be subject to vote-trading. During his second term, for instance, President Obama sought negotiation authority (also known as trade promotion authority) to conclude negotiations on the Trans-Pacific Partnership.<sup>136</sup> Such authority would allow him to submit the agreement to an up-or-down vote in Congress, rather than subjecting it to amendment.<sup>137</sup> Legislation granting President Obama trade promotion authority, however, failed in the House of Representatives.<sup>138</sup> To pass the legislation, the House attached trade promotion authority to an unrelated bill on police officers' and firefighters' retirement plans.<sup>139</sup> Democrats opposed to granting President Obama trade promotion authority accused Republicans of linking the two measures because it would look bad for Democrats to vote down a bill supporting police officers and firemen.<sup>140</sup>

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*Sickness: How a Thirty-Year-Old Policy of Deregulation is Slowly Killing America's Airline System*, WASH. MONTHLY (Mar.–Apr. 2012), <https://washingtonmonthly.com/magazine/marchapril-2012/terminal-sickness/> [<https://perma.cc/B3HR-XPMC>] (noting that “over the last five years, service to medium-airports fell by 18 percent”).

134. For example, in response to the Airline Deregulation Act, Congress established the Essential Air Service program to ensure that smaller communities would retain access to the National Air Transportation System. *Essential Air Service*, U.S. DEPT'T TRANSP., <https://www.transportation.gov/policy/aviation-policy/small-community-rural-air-service/essential-air-service> (last updated Nov. 22, 2017) [<https://perma.cc/3FB3-XRFB>] (“The Essential Air Service (EAS) program was put into place to guarantee that small communities that were served by certificated air carriers before airline deregulation maintain a minimal level of scheduled air service.”).

135. See James Conca, *Is Fracking for Gas as Dirty as Coal?*, FORBES (May 5, 2016), <https://www.forbes.com/sites/jamesconca/2016/05/05/is-fracking-for-gas-dirty-enough-for-a-coal-resurgence/#21b2e8664727> [<https://perma.cc/8LFH-M7PN>] (discussing how fracking for natural gas resulted in a growing antifracking movement).

136. See Doug Palmer, *Obama Speaks out on Trade*, POLITICO (Sept. 19, 2013, 2:29 PM), <https://www.politico.com/story/2013/09/obama-trade-promotion-authority-097073> [<https://perma.cc/NE4E-GQMP>] (describing Obama's efforts to pass trade promotion authority).

137. *Id.*

138. *Id.*

139. *Teamsters Denounce Hijacking of Firefighter Retirement Bill to Pass Fast Track in House*, TEAMSTERS (June 18, 2015), <https://teamster.org/news/2015/06/teamsters-denounce-hijacking-firefighter-retirement-bill-pass-fast-track-house> [<https://perma.cc/H7WY-BTSM>] (discussing how the House of Representatives attached trade promotion authority to “the Defending Public Safety Employees' Retirement Act, a widely-supported bill that enables federal firefighters to access their retirement savings once they reach retirement age”).

140. 161 CONG. REC. H4507-02 (daily ed. June 18, 2015) (statement of Rep. Bill Pascrell) (“Today, this bill to provide tax fairness for our law enforcement officers has been twisted and diminished to a convenient vehicle to ram through fast track for a deeply flawed bill.”); see 161 CONG. REC. H4497-03 (daily ed. June 18, 2015) (statement of Rep. Donna Edwards) (saying that

This kind of linkage is happenstance. It occurs only because two issues happen to be before Congress at the same time and therefore provide a basis for bargaining. But because the two issues are otherwise unrelated, they are unlikely to be linked again in the future. Nothing about supporting retirement plans for police officers and firefighters will create a demand for a new trade agreement or for trade adjustment policies.

Interdependent issues, by contrast, will arise together precisely because changing policy on one issue creates costs within another issue space. Those costs create pressure for policies to address both issues simultaneously. Those responses may be linked in legislation or not. The key idea, though, is that the issues are interlocking in a way that creates a demand for negotiation across the two issues.

## 2. Decoupling

By decoupling, I mean the phenomenon of taking a single policy instrument that affects two interdependent policy goals and creating a second policy instrument to deal with one of those goals. President Kennedy, for example, decoupled trade liberalization and market access from labor market support and adjustment assistance by proposing the TAA program.<sup>141</sup> As discussed in Part I, before TAA, trade barriers, most notably tariffs, were a single policy instrument governing two issues. They limited market access, and they also provided labor market support for import-competing sectors of the economy. After TAA, the government could use trade barriers primarily to regulate market access, while TAA would separately address the labor implications of trade policy.

Decoupling occurs in many areas of policy. For instance, the federal government used to require transportation providers (railroads, airlines, and so on) to provide service to unprofitable routes.<sup>142</sup> The government effectively subsidized those routes through price regulation—setting higher than market prices for profitable routes and forbidding new entrants from undercutting those prices. In the late twentieth century, though, Congress decoupled general regulation of transportation networks from the goal of universal service. It loosened or dropped its price controls while replacing the universal service

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attaching trade promotion authority to this unrelated bill is “doing it in the most shameful way . . . hiding behind our first responders”).

141. See discussion *supra* note 69 and accompanying text.

142. See, e.g., THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 20–25 (1983) (discussing how the British and American governments controlled transportation routes from the sixteenth century through the Transportation Act of 1920).

mandate with subsidies for rural transportation networks.<sup>143</sup> Similarly, by creating a separate environmental regulatory structure—such as through the creation of the Environmental Protection Agency—it allowed for separate consideration of the environmental costs of particular kinds of economic activity.<sup>144</sup> Regulation of the economic activity itself no longer had to be a proxy for environmental concerns.

Decoupling is a necessary condition for misalignment. With only a single policy instrument, misalignment cannot occur because both issues must necessarily be renegotiated at the same time. For instance, if trade barriers are both the means of regulating market access and providing support for labor markets, renegotiating trade barriers will necessarily activate constituencies interested in both of those issues. Misalignment can only occur once two interdependent issues can be renegotiated separately. These separate renegotiations introduce the possibility that lawmakers will not take into account the costs of a policy on another interdependent issue area.

Decoupling, of course, does not remove the possibility that two different issue groups will bargain over how a single policy instrument should be used. Import-competing interests, most notably labor, continue to oppose new trade agreements the government proposes.<sup>145</sup> But decoupling saps political support for this kind of linkage. It provides lawmakers with an argument that particular policy issues (e.g., labor market policies) should be dealt with through particular policy instruments (adjustment assistance).

Significantly, decoupling is a necessary regulatory innovation to enable the “two-step” model of trade policy.<sup>146</sup> Under that model, advocates urge that the government pursue trade liberalization without concern for its effects on labor markets or environmental issues and instead address those problems through domestic policy.<sup>147</sup> Decoupling provides the domestic legal and policy tools that allow politicians to endorse this view of how trade should be regulated. More generally,

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143. See *Essential Air Service*, *supra* note 134; *History and Mission*, NAT'L RURAL TRANSIT ASSISTANCE PROGRAM, <https://www.nationalrtap.org/About/History-and-Mission> (last visited Dec. 26, 2019) [<https://perma.cc/C2YX-NL4N>] (providing funding “to establish and maintain transit systems in communities with populations under 50,000”).

144. See RICHARD NIXON, REORGANIZATION PLANS NOS. 3 AND 4 OF 1970, H.R. DOC. NO. 91-366, at 1 (1970) (collecting environmental responsibilities from other agencies and vesting them in a new Environmental Protection Agency); see also National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2012)).

145. Vicki Needham, *Labor, Environmental Groups Call on Congress to Oppose TPP*, HILL (May 23, 2016, 3:19 PM), <https://thehill.com/policy/finance/trade/280938-labor-environmental-groups-call-on-congress-to-oppose-tpp> [<https://perma.cc/9XGU-U34X>] (describing labor unions' opposition to the Trans-Pacific Partnership).

146. See Shaffer, *supra* note 69, at 2–3 (describing the two-step model).

147. See *id.*

decoupling is an overlooked innovation that has aided the political push for deregulation. Deregulating industries becomes politically easier when the competing objectives of deregulation are separated and each are assigned their own policy instrument.

Decoupling, in other words, creates political space for more single-issue bargaining. In traditional economic thinking, this single-issue bargaining is a virtue.<sup>148</sup> As I explain below, though, in the absence of credible commitments to renegotiate interdependent issues together, decoupling turns into a vice.

### 3. Absence of Credible Commitments

Finally, misalignment requires the absence of credible commitments to renegotiate the two policy instruments together.<sup>149</sup> In enacting an initial bargain, Congress can decide that it will revisit certain parts of the bargain but not others. The consequence is that different provisions of the bargain are subject to different default rules on renegotiation. Trade adjustment assistance programs expire if Congress *does not* renegotiate. Trade liberalization provisions in legislation only expire if Congress *does* renegotiate, while trade agreements only terminate if the United States (or another state party) affirmatively withdraws.<sup>150</sup> Of course, getting Congress to take affirmative action is considerably tougher than getting it to take no action. This status quo bias is true of all legislatures, but has been especially true of the U.S. Congress as political polarization has grown in recent years. Congressional output in recent years, in terms of

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148. See discussion *supra* note 14 and accompanying text.

149. A credible commitment is one that binds actors across time and space. See Douglass C. North, *Institutions and Credible Commitment*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 11, 11 (1993).

150. One possible, and modest, limit on this inaction is the common practice of including clauses in trade agreement implementation acts purporting to sunset the legislation if U.S. participation in the agreement ceases. See United States–Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, § 107, 125 Stat. 428, 432 (2011) (“On the date on which the Agreement terminates, this Act . . . and the amendments made by this Act . . . shall cease to have effect.”); Dominican Republic–Central America–United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, § 107(d), 119 Stat. 462, 466 (2005) (“On the date on which the Agreement ceases to be in force with respect to the United States, the provisions of the Act (other than this subsection) and the amendments made by this Act shall cease to have effect.”). However, these clauses are only triggered if either the agreement terminates because other parties withdraw, or if the president withdraws the United States from the agreement. Such withdrawals rarely occur and thus, *ex ante*, are unlikely to force Congress’s hand. Moreover, as noted above, see discussion *supra* note 28, these untested sunset provisions are likely unconstitutional under the Supreme Court’s decision in *Clinton v. City of New York*, 524 U.S. 417, 447 (1998).

statutes passed, has been among the lowest in the United States' 240-year history.<sup>151</sup>

When two interdependent and decoupled policies are renegotiated together, the odds of getting an agreement that furthers both policies is at its maximum. Legislatures are multimember bodies that operate by majority or supermajority rule.<sup>152</sup> Proponents of a particular measure, such as trade liberalization or trade adjustment assistance, must assemble a coalition to enact their proposal. Many measures will not, however, command the necessary support on their own. As a consequence, a measure's supporters will frequently seek to build coalitions by packaging multiple measures together into a single bill or by trading votes across different bills.<sup>153</sup> Renegotiating interdependent issues together allows for these coalitions to form across the two interdependent issues. The ultimate package that emerges will reflect the relative political strength of two groups of issue advocates, but the possibility of a bargain that responds to both issues increases when they are renegotiated together.<sup>154</sup>

By contrast, in the absence of a credible commitment to renegotiate together, advocates of the issue that must be renegotiated more frequently will likely have to do so without the benefit of being able to tie their issue to its most natural companion issue. If the issue does not enjoy majority support on its own, advocates are left looking for other issues around which they can build coalitions. As with the example of tying trade promotion authority to public safety workers' pensions in 2015, such coalitions may form if political circumstances happen to work out.<sup>155</sup> But the natural constituency for a deal—those in favor of a particular policy goal in regard to the interdependent issue—will have no incentive to participate. The absence of a credible

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151. Chris Cillizza, *Yes, President Obama Is Right. The 113th Congress Will Be the Least Productive in History.*, WASH. POST (Apr. 10, 2014, 11:33 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/10/president-obama-said-the-113th-congress-is-the-least-productive-ever-is-he-right/> [https://perma.cc/3CXC-QYPH].

152. See CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., 95-563, *THE LEGISLATIVE PROCESS ON THE HOUSE FLOOR: AN INTRODUCTION 1* (2019) (describing how “a majority of Members should ultimately be able to work their will on the floor”); VALERIE HEITSHUSEN, CONG. RESEARCH SERV., 96-548, *THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION 8* (2019) (describing when simple majority and supermajority votes are required).

153. See ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION 52–53* (2000) (describing and analyzing legislative bargaining and vote trading in economic terms).

154. Of course, if one policy commands sufficient support in a legislature, independent of how the legislature's members feel about the other policy, then this kind of bargaining is irrelevant. In such a situation, the alignment or misalignment of two policies does not affect the policy outcome. However, the prevalence of amendments and pork barrel legislation attests to the fact that such dominance occurs rarely on major legislation.

155. See discussion *supra* note 139 and accompanying text.

commitment to renegotiate the two policies together thus weakens the bargaining position of advocates for the policy that must be renegotiated more frequently.

#### 4. Renegotiating Trade Liberalization and Trade Adjustment Assistance

Within U.S. trade law, the absence of a commitment to simultaneous renegotiation comes from pairing short-term adjustment assistance programs with indefinite trade liberalization commitments. This discrepancy in time horizons results in part from constitutional rules limiting Congress's ability to delegate the authority to spend funds—a limitation that does not apply to tariffs or regulatory authority. As a result, the implementation of trade liberalization occurs within the executive branch, which can use its authority over implementation to update trade liberalization without returning to Congress.

Appropriating funds for specific programs like TAA is a two-step process. First, the appropriations must be authorized. Second, Congress must actually appropriate the funds. As Part I explained, Congress can and does place time limits on both of these aspects of appropriations. For instance, the Trade Act of 1974 authorized appropriations for trade adjustment assistance until September 30, 1982.<sup>156</sup> The amounts, however, were left to the discretion of the appropriations process itself.<sup>157</sup> Similarly, the 2015 Trade Adjustment Assistance Reauthorization Act extended the authorization for appropriations only until June 30, 2021.<sup>158</sup>

Trade adjustment assistance, in other words, has a short lease on life that must constantly be renewed through subsequent legislation. Under current law, unless trade liberalization's proponents happen to be pushing for a new trade agreement in 2021—an uncertain prospect given the major ongoing turmoil in the trading system—TAA's proponents will have to look for other concessions they can make to attract support for an extension. They will, in other words, not have the most natural concession they could make, namely agreeing to the continuation of reduced trade barriers in exchange for the continuation

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156. Trade Act of 1974, Pub. L. No. 93-618, § 284, 88 Stat. 1978, 2041 (“Chapters 2, 3, and 4 of this Title shall become effective on the 90th day following the date of the enactment of this Act and shall terminate on September 30, 1982.”).

157. § 245(b)(1), 88 Stat. at 2027 (codified as amended at 19 U.S.C. § 2317 (2012)) (authorizing the appropriation of such funds “as may be necessary to carry out the provisions of this chapter”).

158. Trade Adjustment Assistance Reauthorization Act of 2015, Pub. L. No. 114-27, § 403(a), 129 Stat. 362, 374.

of reduced assistance. Nor can they expect a rush of congressional support for the extension of TAA. Fiscally conservative members of Congress have for years urged cuts to spending on social programs. Indeed, the 2015 TAA provisions actually *reduced* spending on TAA from the levels established in 2011.<sup>159</sup> The result is that TAA's proponents are likely to face an uphill battle in pushing for further assistance unless new trade agreements are on the congressional agenda.

TAA's limited duration stems in part from limitations, both constitutional and practical, on Congress's ability to delegate the authority to appropriate funding. Current trade adjustment assistance programs, such as unemployment insurance, relocation expenses, and job retraining, involve the expenditure of funds. As a consequence, Congress is constitutionally required to maintain a role in trade adjustment assistance programs. The Appropriations Clause of the Constitution provides that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>160</sup> The Supreme Court has explained that the Appropriations Clause means that "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."<sup>161</sup>

The result is that Congress cannot easily delegate away responsibility for programs, such as TAA, that require financial support. The executive branch cannot, for instance, infer the authority to spend money in support of a program that Congress has authorized unless Congress has separately appropriated funding for the program.<sup>162</sup> As Kate Stith has argued, the role of the Appropriations Clause is to impose on Congress a nondelegable responsibility to approve all expenditures of public funds.<sup>163</sup>

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159. Cathleen Cimino-Isaacs & Gary Clyde Hufbauer, *The Fate of Trade Adjustment Assistance: The Basics*, PETERSON INST. FOR INT'L ECON. (June 11, 2015, 12:15 PM), <https://www.piie.com/blogs/trade-investment-policy-watch/fate-trade-adjustment-assistance-basics> [https://perma.cc/3SYX-Q42B] ("The [proposed 2015] TAA program would cap total spending at \$450 million annually through 2021, subject to certain requirements. For context, this represents a cutback in assistance based on larger caps of \$575 million in 2011 and over \$600 million in 2009.").

160. U.S. CONST. art I, § 9, cl. 7.

161. *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

162. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-6 (2016) ("[T]he Constitution vests in Congress the power and duty to affirmatively *authorize* all expenditures.").

163. Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1349 (1988):

Since legislative appropriations power is rooted in article I, section 8, we may infer that a primary significance of the appropriations clause in section 9 lies in what it takes away from Congress: the option *not* to require legislative appropriations prior to

To be sure, Congress sometimes authorizes the appropriation of funds on a permanent or indefinite basis.<sup>164</sup> However, such authorizations are rare, relative to time-limited appropriations, and usually rely on nontax revenue sources, such as fees or gifts.<sup>165</sup> The much more common approach is for Congress to limit the availability of funds to a finite period of time.<sup>166</sup>

Similarly, the executive branch might repurpose funds that Congress has already authorized and appropriated to offset the costs of its trade policies. The Trump Administration has done just this, providing subsidies to farmers who have been victims of the Trump Administration's trade war with China.<sup>167</sup> Although such reliance on preexisting authority provides some flexibility for the executive branch to both make trade policy and use subsidies to offset harms caused by its policies, the approach will be limited in its effectiveness. Preexisting authorities may not, for instance, authorize funding in sufficient levels to compensate for particular trade programs, especially in the long term.<sup>168</sup> Moreover, repurposing funds or relying on authorities not intended to offset trade policies may be controversial, raising questions about the legitimacy or even legality of the payments.<sup>169</sup>

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expenditure. If the Constitution thus strictly forbids “executive appropriation” of public funds, the exercise by Congress of its power of the purse is a structural imperative.

(footnotes omitted).

164. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 162, at 1-6.

165. *See id.*; Stith, *supra* note 163, at 1378–79 (“[W]henver Congress authorizes an agency to receive and expend gifts, fees, or other payments—in addition to the agency’s specific appropriations—the legislative authorization constitutes what is known as a ‘permanent’ and ‘indefinite’ appropriation.”).

166. *See* Stith, *supra* note 163, at 1354 n.53 (noting that operating funds are usually appropriated on an annual basis); *see also* U.S. CONST. art. I, § 8, cl. 12 (limiting appropriations for the armed forces to two years).

167. The Trump Administration has imposed tariffs on billions of dollars’ worth of Chinese imports, leading China to retaliate with tariffs on U.S. products, including agricultural products. The Trump Administration responded by providing approximately \$12 billion to farmers in 2018 and \$16 billion in 2019. The Administration relied on authority contained in the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714 (2012), that was arguably not intended to cover programs to offset an administration’s trade policies or programs on the scale of the Trump Administration’s subsidy program. *See* RANDY SCHNEPF ET AL., CONG. RESEARCH SERV., R45310, FARM POLICY: USDA’S 2018 TRADE AID PACKAGE 4 (2019) (“The primary authority for the trade aid package is the Secretary of Agriculture’s discretion to use the general powers of the CCC.”).

168. *See* Humeyra Pamuk & Karl Plume, *U.S. to Pay Farmers up to \$16 Billion for Trade War Losses, South to Benefit*, REUTERS (July 25, 2019, 12:59 PM), <https://in.reuters.com/article/usa-trade-china/u-s-to-pay-farmers-up-to-16-billion-for-trade-war-losses-south-to-benefit-idINKCN1UK2NM> [<https://perma.cc/DX4L-J3AJ>] (quoting farm industry representatives as saying that the Trump Administration’s plan “is not a long term solution”).

169. *See* SCHNEPF ET AL., *supra* note 167, at 11 (“Using this authority is not without precedent, but the scope and scale of its use for the trade aid package has increased congressional and public interest.”).



The trade liberalization provisions of international trade agreements and the related domestic implementing legislation lack any similar time limits. U.S. trade agreements themselves continue indefinitely until such time as either a party withdraws or the parties agree to terminate the agreement.<sup>170</sup> These durational provisions (or the lack thereof) are mirrored in the domestic statutes that provide the executive branch the authority to implement trade agreements. For instance, Section 107 of the United States–Korea Free Trade Implementation Act provides only that “[o]n the date on which the Agreement terminates, this Act . . . shall cease to have effect.”<sup>171</sup> Similar provisions have appeared in all U.S. trade agreement implementing legislation since the beginning of the twenty-first century.<sup>172</sup>

This indefinite duration is possible because, unlike appropriations, Congress can delegate control of trade liberalization policy to the executive branch. Consequently, Congress can remove itself from implementing, and hence renegotiating, existing trade liberalization commitments in a way that it cannot with respect to trade adjustment assistance.

Article I, Section 8 of the U.S. Constitution provides that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises.”<sup>173</sup> As a constitutional matter, then, Congress has authority over what has historically been the primary instrument of

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170. *See, e.g.*, Marrakesh Agreement art. XV (“[W]ithdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.”); NAFTA, *supra* note 27, art. 2205 (“A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.”).

171. United States–Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, § 107(c), 125 Stat. 428, 432 (2011).

172. *See, e.g.*, United States–Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, § 107(c), 121 Stat. 1455, 1459 (2007) (“On the date on which the Agreement terminates, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to have effect.”); Dominican Republic–Central America–United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, § 107(d), 119 Stat. 462, 466 (2005) (“On the date on which the Agreement ceases to be in force with respect to the United States, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to have effect.”); United States–Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, § 106(c), 118 Stat. 919, 923 (2004) (“On the date on which the Agreement terminates, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to be effective.”). The North American Free Trade Agreement Implementation Act contains a similar, albeit somewhat less specific provision. *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 109(b), 107 Stat. 2057, 2067–68 (1993) (providing that “[d]uring any period in which a country ceases to be a NAFTA country, sections 101 through 106 shall cease to have effect with respect to such country”).

173. U.S. CONST. art. I, § 8.

trade policy, namely tariffs. But beginning with the Reciprocal Trade Agreement Act of 1934, Congress has delegated to the president the authority to set tariffs.<sup>174</sup> There, Congress granted President Roosevelt the authority to reduce tariffs in accordance with the terms of bilateral trade agreements.<sup>175</sup> Beginning with the Trade Expansion Act of 1962, and later in the statutes implementing trade agreements like the WTO Agreements or NAFTA, Congress granted the president the authority to proclaim tariffs consistent with the United States' international commitments.<sup>176</sup>

Indeed, the core of statutes implementing trade agreements consists of prescribing the rules regarding tariffs. The basic grant of authority in such statutes provides that “[t]he President may proclaim (1) such modifications or continuation of any duty, (2) such continuation of duty-free or excise treatment, or (3) such additional duties, as the President determines to be necessary or appropriate to carry out or apply . . . the Agreement.”<sup>177</sup> Implementing acts typically contain a variety of other technical provisions regarding customs duties, as well as provisions on “trade remedies.”<sup>178</sup> These latter provisions authorize the government to impose additional duties in certain circumstances in which imports cause injuries to American industries.<sup>179</sup>

Depending on the trade agreement in question, implementing legislation may contain a variety of other provisions as well. Because

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174. See Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. (forthcoming 2020) (manuscript at 16), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3439705](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3439705) [<https://perma.cc/NJL5-6B2A>].

175. See Michael J. Hiscox, *The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization*, 53 INT'L ORG., 669, 671 (1999) (discussing Roosevelt's Secretary of State's efforts to obtain the authority).

176. Meyer & Sitaraman, *supra* note 47, at 643 (“Up to and including the 2015 Bipartisan Congressional Trade Priorities and Accountability Act, Congress has granted the President ex ante authority to enter into reciprocal tariff-reducing agreements and to proclaim tariffs on the basis of such agreements.”).

177. United States–Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, § 201(a), 125 Stat. 428, 432–33 (2011); *see also* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 111(a), 108 Stat. 4809, 4819–20 (1994) (codified as amended at 19 U.S.C. § 2902 (2012)) (granting the president similar authority with respect to the World Trade Organization).

178. *See, e.g.*, §§ 201–208, 301, 311–16, 321, 331–38, 341, 125 Stat. at 428, 432–460 (discussing customs provisions and relief from imports in the United States–Korea Free Trade Agreement Implementation Act); §§ 201–10, 301, 311–16, 321–28, 331, 119 Stat. 467–95 (discussing customs provisions and relief from imports in the Dominican Republic–Central America–United States Free Trade Agreement Implementation Act).

179. Under WTO rules, countries are authorized to derogate from their WTO commitments in order to countervail illegal subsidies, bring actions against exporters “dumping” their product (that is, selling it at unfairly low prices), and temporarily limit imports in order to “safeguard” domestic industries. *See Anti-dumping, Subsidies, Safeguards: Contingencies, Etc.*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) (last visited Dec. 26, 2019) [<https://perma.cc/6KEN-A5FJ>] (describing antidumping actions, countervailing duties, and limits on imports).

U.S. tariffs are already so low, modern U.S. trade agreements are more important for their regulatory effects. Consequently, the other provisions in implementing legislation often involve delegations of regulatory authority to the executive branch. These grants of authority can allow significant room for the executive branch to change how trade agreements are implemented without having to return to Congress. Moreover, the existence of an international agreement provides both another means to revise the implementation of trade policy as well as an institutional vehicle to reinforce the executive branch's commitment to trade liberalization. No equivalent mechanism reinforces the government's commitment to adjustment assistance.

Rules for international dispute resolution illustrate the point. Modern trade agreements all contain state-to-state dispute resolution mechanisms.<sup>180</sup> By far the most significant of these mechanisms is the WTO's Dispute Settlement Understanding ("DSU"), which provides for the adjudication of trade disputes by panels and for appeals to the WTO's Appellate Body.<sup>181</sup> Governments can and have used the DSU to challenge regulations adopted by administrative agencies in the United States. For instance, in the famous *Shrimp-Turtle* case, Malaysia, Thailand, India, and Pakistan challenged a ban on the import of shrimp into the United States that had not been caught using technology that kept sea turtles safe.<sup>182</sup> After the United States lost the case, the U.S. State Department changed the governing regulations to comply with the WTO Appellate Body's decision.<sup>183</sup> More recently, in the *United States–Country of Origin Labeling* ("COOL") case, Mexico and Canada challenged U.S. statutes and regulations imposing labeling requirements on beef and pork.<sup>184</sup> Again, after the United States lost

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180. See, e.g., KORUS, *supra* note 27, art. 22; Dominican Republic-Central America-United States Free Trade Agreement art. 20, Aug. 5, 2004, 43 I.L.M. 514. Preferential trade agreements, but not the WTO, also contain investor-state dispute settlement provisions that allow private parties to bring cases directly against governments for violations of the investment provisions of an agreement. See, e.g., NAFTA, *supra* note 27, at ch. 11, § B (providing for procedures governing disputes between a party and "an investor of another party").

181. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement, Annex 2, 1869 U.N.T.S. 401 [hereinafter Understanding on Rules and Procedures] (establishing the Dispute Settlement Body).

182. See Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 1, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

183. See Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 31, WTO Doc. WT/DS58/AB/RW (Oct. 22, 2001) ("The United States contends that it has proceeded to remedy this aspect of unjustifiable discrimination identified by the Appellate Body.").

184. See Appellate Body Report, *United States–Certain Country of Origin Labelling (COOL) Requirements*, ¶ 1, WTO Doc. WT/DS386/AB/R (June 29, 2012).

the initial case, it responded by trying to change administrative regulations to bring itself into compliance.<sup>185</sup>

Like changes to tariffs, these changes to administrative regulations are authorized, within limits, by implementation acts. The Uruguay Round Agreements Implementation Act explicitly contemplates that the executive branch may change regulations in response to adverse decisions from the WTO, provided that it notifies and consults with Congress and engages in public notice and comment.<sup>186</sup> Such new regulations must still conform to ordinary principles of administrative law. But the authority to regulate based on the decisions of an international tribunal is a significant concession from Congress. In a wide range of trade disputes, this authority will permit the executive branch to modify U.S. regulations without obtaining formal consent from Congress. To be sure, the consultation provisions mean that members of Congress can pressure the executive branch to regulate in ways they might prefer. And Congress of course retains the ability to override executive branch regulations through subsequent legislation. But barring such legislation, Congress has acquiesced, on an indefinite basis, to the executive branch's authority to regulate in any area in order to bring the United States into compliance with its trade liberalization obligations.

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We can state the point more generally. Interdependent policy instruments in which one instrument is a tax or regulatory program and the other is a fiscal program are at a high risk of misalignment. Regulatory laws—ones that directly govern the conduct of private actors—can constitutionally be delegated to the executive branch and, as a practical matter, usually are. Their ongoing implementation is therefore negotiated and contested in an environment with relatively low transaction costs. Regulations on market access, environmental regulations, and price controls can all have indefinite durations.<sup>187</sup> But Congress cannot (as a constitutional matter) and does not (as a practical

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185. See Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements: Recourse to Article 21.5 of the DSU by Canada and Mexico*, ¶¶ 1.4–1.6, WTO Doc. WT/DS386/AB/RW (May 18, 2015) (describing the USDA's final rule complying with the DSB's initial recommendations).

186. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g), 108 Stat. 4809, 4830–31 (codified at 19 U.S.C. § 3533 (2012)) (describing the process by which a department or agency can amend regulations deemed inconsistent with the Agreements by a dispute settlement body).

187. Congress can, of course, also make them subject to sunsets or revisit them at any time it wants.

matter) delegate away responsibility for reauthorizing fiscal programs. As a consequence, fiscal programs are almost always of limited duration and can entail tremendous costs in their renewal.<sup>188</sup> The result of this disconnect is misalignment.

### *B. Welfare Implications*

Misaligned lawmaking, which exists when these three factors—interdependence, decoupling, and a lack of credible commitments—are present, explains why eminent commentators like Paul Krugman, Maurice Obstfeld, Gregory Mankiw, and Simon Lester are mistaken when they argue that the costs of trade liberalization can be more effectively dealt with outside of trade policy.<sup>189</sup> Although they do not conceive of it in this way, the “two-step” model for which they advocate is essentially an argument for decoupling interdependent policies like trade liberalization and trade adjustment assistance. Such decoupling, the argument goes, is more efficient because it allows direct responses to each policy problem.<sup>190</sup>

Their argument is right as far as it goes. If adjustment policies kept pace with demands created by trade liberalization, using two different policy instruments might make sense. But the argument for keeping adjustment policy distinct from trade policy fails to take into consideration the law and institutions through which these two decoupled policies must pass. Lawmakers are not disinterested technocrats making policy. They are politicians with varying preferences. Moreover, legislators bargain over policies in an iterative fashion, revisiting and revising legislation over time. The terms of an initial legislative bargain can structure that future bargaining in a way that affects outcomes. Decoupling may in theory enable more direct, efficient policy responses. But completely separating two interdependent issues—which is what occurs when interdependent, decoupled policies are not renegotiated together—removes the

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188. The recent shutdown of the government by the Trump Administration in an effort to obtain funding for a border wall illustrates the point. See Steve Holland & Richard Cowan, *Backing Down, Trump Agrees to End Shutdown Without Border Wall Money*, REUTERS (Jan. 25, 2019, 5:06 AM), <https://www.reuters.com/article/us-usa-shutdown/backing-down-trump-agrees-to-end-shutdown-without-border-wall-money-idUSKCN1PJ126> [<https://perma.cc/L2ZU-RA76>].

189. See KRUGMAN & OBSTFELD, *supra* note 14; Lester, *supra* note 16, at 414 (“But query whether trade restrictions are really the best approach . . . to protect domestic labor standards[.]”); Mankiw, *supra* note 14.

190. See *supra* Section I.B.

incentives for politicians who are bargaining to take into account the costs created by interdependent policies.<sup>191</sup>

In other words, decoupling without making credible commitments to renegotiate interdependent policies together can have significant welfare consequences. The beneficiaries of provisions subject to more frequent renegotiation are likely to enjoy the benefits for which they bargained for a much shorter period of time than the beneficiaries of policies not subject to renegotiation. Moreover, in seeking to extend benefits for a program subject to renegotiation, advocates will frequently have to bargain with less leverage than they had at the time of the initial bargain. After all, the initial measure to which they lent their support is not up for renegotiation.

To see how this bargaining dynamic plays out and its welfare consequences, consider two constituencies bargaining over two policies, trade liberalization and adjustment assistance. Imagine they strike a bargain that lowers tariffs on a range of products in exchange for funding adjustment assistance policies, such as job retraining and relocation subsidies. Further imagine that the bargain is misaligned as described above. Trade liberalization and labor market support in import-competing sectors are interdependent. Increased market access (i.e., lower trade barriers) hurts import-competing domestic industries, creating a demand for labor market adjustment policies. Trade liberalization and labor market support have also been decoupled through the creation of adjustment assistance. Politicians can bargain over a policy on trade liberalization and a policy on adjustment assistance, which saps some of the political rationale for using tariffs as a means of labor market support. Imagine also that legislators authorize an indefinite reduction in tariffs, while authorizing trade adjustment assistance for only five years.

In the first five years, both constituencies benefit from the bargain. Absent legislative action, however, the bargain favors the side whose policy choice is entrenched through an indefinite duration—here, proponents of trade liberalization. Because those benefits are not subject to renegotiation, they continue to accrue in successive years. On the other hand, without renegotiation, proponents of adjustment assistance will lose their benefits. If they (or more accurately their representatives in Congress) do renegotiate, they can expect to see their benefits cut unless they offer additional concessions, such as either a

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191. See, e.g., Sallie James, *Maladjusted: The Misguided Policy of "Trade Adjustment Assistance,"* CATO INST. 1 (Nov. 2007), <https://object.cato.org/sites/cato.org/files/pubs/pdf/tbp-026.pdf> [<https://perma.cc/W253-TVDT>] ("The very existence of trade adjustment assistance perpetuates the myth that freeing trade creates special 'victims' who deserve special programs simply because of the reason for their unemployment.").

reduction in benefits under adjustment assistance or further trade liberalization concessions. Their welfare from the initial deal thus declines in later years.

In principle, these declines in one group's welfare from a legislative bargain might not concern us. Under basic economic theory, rational parties to a bargain assess what they get in terms of its net present value.<sup>192</sup> In striking the deal, one party might receive all of its benefits up front (TAA recipients), while the other party receives its benefits over time (trade liberalization proponents). But both parties should willingly make the agreement as long as, at the time of the bargain, both sides sufficiently value the future stream of benefits. For instance, if labor interests receive sufficient trade adjustment assistance in the early years of a trade agreement to offset all of the costs of trade liberalization going forward, then social welfare may well be maximized through a misaligned bargain.

### 1. Misaligned Renegotiation in the Presence of Uncertainty

Three conditions, however, make it likely that a misaligned bargain will both hurt the beneficiaries of a policy that must be renegotiated as well as cause a drop in their social welfare.

First, the parties will often be uncertain about the exact distribution of costs and benefits over time.<sup>193</sup> That uncertainty can mean that a party receives less, sometimes substantially less, from a bargain than it expected to receive. For instance, a policy instrument may not work as originally envisioned, or an economic shock might cause the distribution of costs and benefits to be different from what the parties initially imagined. The adversely affected party will seek to renegotiate, but if the legislative bargain is misaligned, they will be at a disadvantage in doing so.

More concretely, the actual costs from trade liberalization may be greater in future periods than the parties initially anticipated, or TAA's effectiveness at helping labor transition may be lower. Labor interests might, for instance, initially believe that trade adjustment assistance policies are only necessary for a short period of time. If labor markets adjust within five years, adjustment policies will no longer be

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192. See, e.g., Carlo Alberto Magni, *Investment Decisions, Net Present Value and Bounded Rationality*, 9 QUANTITATIVE FIN. 967, 967 (2009) (explaining that the net present value theory is considered by most scholars a "theoretically sound" model).

193. See Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. 289, 293 (2001) (indicating that distributional uncertainty is pervasive); Timothy Meyer, *Shifting Sands: Power, Uncertainty and the Form of International Legal Cooperation*, 27 EUR. J. INT'L L. 161, 175 (2016) (discussing the effect of uncertainty concerning the distribution of costs and benefits upon state action).

necessary. If labor markets continue to suffer from trade liberalization policies adopted as part of the initial bargain, then TAA proponents will wish to renegotiate to take account of new circumstances or new information. They will, however, have given up their leverage in negotiations if trade liberalization is not also up for renegotiation.

Notice that this uncertainty is a risk only for TAA proponents, not for trade liberalization proponents. To see why, consider that if either side does better than it expects, it has no incentive to renegotiate. If adjustment costs are less than expected, the extra adjustment assistance is a windfall for TAA proponents. Likewise, greater-than-expected trade liberalization benefits are a bonus.

The consequences are not reciprocal, however, if the situation turns out worse for one side. If the costs of trade liberalization turn out to be greater than expected, TAA proponents must renegotiate in the next period from a position of weakness. Since trade liberalization is not under renegotiation, TAA proponents have limited leverage. By contrast, if the benefits of trade liberalization come in lower than expected, trade liberalization proponents can renegotiate when TAA comes up for renegotiation—an event that is never far off. Because TAA proponents have no future stream of benefits at that point, they too should be willing to renegotiate. The policy uncertainty that is common to the real world, then, represents an asymmetric risk when lawmaking has been misaligned.

Empirically, economic data suggests that trade liberalization has, in fact, been considerably more costly to particular communities than anticipated.<sup>194</sup> David Autor and his coauthors have shown that the shock to some communities from China's entrance to the WTO in 2001 was considerably more severe than previously thought and had not abated even a decade later.<sup>195</sup> Indeed, the development of the Chinese economy since 2001 has continued to disrupt new industries years after China joined the WTO. Over a decade after its 2001 accession, for instance, China aggressively entered the market for renewable energy.<sup>196</sup> As a result, U.S. manufacturing workers who had retrained for jobs in this emerging industry lost their jobs again as a result of

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194. See Autor et al., *supra* note 125, at 235 (indicating that labor rates remain depressed in certain localities for a full decade or more after trade shocks).

195. *Id.*

196. See Michael Slezak, *China Cementing Global Dominance of Renewable Energy and Technology*, GUARDIAN (Jan. 6, 2017, 4:00 AM), <https://www.theguardian.com/environment/2017/jan/06/china-cementing-global-dominance-of-renewable-energy-and-technology> [<https://perma.cc/X9PL-SWXZ>].



competition with China.<sup>197</sup> From a trade law perspective, however, this later disruption arose not from a new trade agreement, but from an old one—in this case, the agreement that allowed China to join the WTO.<sup>198</sup>

Significantly, existing WTO members must approve new WTO members, but that process is controlled by the executive branch in the United States.<sup>199</sup> As a result, the executive branch can agree to expand the United States' international trade liberalization commitments by expanding WTO membership without returning to Congress. Not surprisingly, since Chinese accession did not formally require congressional approval, no new TAA measure was passed directly in response. Indeed, TAA was expanded in 1993 when the United States joined NAFTA and again in 2002 when President Bush sought trade promotion authority to negotiate new trade agreements.<sup>200</sup> In the interim, however, TAA received only a brief extension in the late 1990s, followed by a lapse in 2001—the same year China entered the WTO.<sup>201</sup>

## 2. Agency Problems

Second, legislators' incentives in lawmaking frequently diverge from their constituents. Rational models of legislative behavior assume

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197. See Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products), Inv. No. TA-201-75, USITC Pub. 4739, at 33–34 (Nov. 2017) (Final) (finding “significant unemployment and underemployment” in the U.S. solar manufacturing sector due to a dramatic increase in imports). This competition has, in turn, prompted a wave of trade remedies cases against China. See Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491, 506–10 (2018) (discussing international challenges to China's support for renewable energy).

198. Protocol on China's Accession, *supra* note 40.

199. Marrakesh Agreement art. XII (providing that new members of the WTO must be approved by a vote of the existing members); Meyer & Sitaraman, *supra* note 47, at 616. China's admission to the WTO did mean that Congress voted to extend “permanent normal trade relations” to China under U.S. law. See Nicholas R. Lardy, *Permanent Normal Trade Relations for China*, BROOKINGS INST. 1 (May 2000), <https://www.brookings.edu/wp-content/uploads/2016/06/pb58.pdf> [<https://perma.cc/L5LD-7G69>] (anticipating the establishment of such relations). The Jackson-Vanik Amendment to the Trade Act of 1974 had purported to deny certain countries, including China, most-favored-nation status. See Trade Act of 1974 § 402, 19 U.S.C. § 2432 (2012) (restricting normal trade relations with nonmarket economy countries). China's WTO accession would require the United States to grant China most-favored-nation status, so in 2000, Congress voted to grant that status to China permanently. Alan S. Alexandroff, *Concluding China's Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China*, 3 UCLA J. INT'L L. & FOREIGN AFF. 23, 34–39 (1998); see Lardy, *supra* (discussing the Congressional vote). This action by Congress may not have been strictly necessary. China had actually enjoyed most-favored-nation relations with the United States since 1980 pursuant to annual presidential waivers of the Jackson-Vanik Amendment authorized by that statute. Frederick M. Abbott, *China's Accession to the WTO*, 3 ASIL INSIGHTS 1 (Jan. 12, 1998), <https://www.asil.org/insights/volume/3/issue/1/chinas-accession-wto> [<https://perma.cc/L3R8-549Q>].

200. See HORNBECK, *supra* note 24, at 10 (detailing TAA reauthorization events).

201. Protocol on China's Accession, *supra* note 40; HORNBECK, *supra* note 24, at 10.

that legislators pursue policies that advance their electoral prospects.<sup>202</sup> We might expect constituents to lose out over time when legislators receive electoral benefits from reaching a deal that does not serve the long-term interests of their constituents. Misalignment can exacerbate these agency problems by requiring repeated negotiations by legislators plagued by these kinds of agency problems.

In the abstract, agency problems can pose difficulties for either or both sides of a legislative bargain. Constituencies differ, however, in their ability to monitor and sanction their representatives for not adequately representing their interests. In general, collective action problems mean that interests that are widely shared among unorganized individuals will fare worse in the legislative process than interests represented by organizations.<sup>203</sup> Misaligned lawmaking makes this problem worse when the less well-organized constituency is also the one forced to renegotiate more frequently. More frequent renegotiation creates greater monitoring demands. Absent adequate monitoring and sanctioning of legislators, both the initial bargain and each iterative negotiation make the disfavored interest groups worse off than they would be in the absence of agency problems.<sup>204</sup>

The mechanisms through which support for trade liberalization and trade adjustment assistance advance electoral prospects differ in ways that create agency problems for proponents of trade adjustment assistance. The business community provides the primary active constituency in favor of trade liberalization.<sup>205</sup> The business community's support manifests itself in the forms of lobbying and financial contributions to campaigns. This lobbying strategy has been so effective in recent decades that every U.S. presidential administration between the end of World War II and the Trump Administration pursued trade liberalization in one form or another.

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202. DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6 (2d ed. 2004); KRISTINA C. MILLER, CONSTITUENCY REPRESENTATION IN CONGRESS: THE VIEW FROM CAPITOL HILL 8 (2010).

203. See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 48–51 (Schocken Books rev. ed. 1971) (1965) (describing how organizations provide selective benefits to members in order to solve collective action problems).

204. See *infra* Part III.A.

205. Traditional views of the political economy of trade liberalization argue that end-use consumers usually do not support trade liberalization especially vocally, even though collectively they benefit enormously from it. The benefit each such consumer receives is too small to affect their voting behavior or to cause them to organize. Recent polling data bears this out. A July 2016 poll, for instance, found that most respondents do not feel strongly about trade policy one way or another. Among those that do have strong views, however, about three out of four oppose trade liberalization, regardless of party affiliation. Tobias Konitzer, Sam Corbett-Davies & David Rothschild, *Who Cares About Free Trade? Not Many Americans, it Turns Out*, WASH. POST (Jul. 29, 2016, 10:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/29/who-cares-about-free-trade/> [https://perma.cc/7ZPB-M2GU].

The business community is an especially effective monitor in part because of the amount of money it can direct to legislators, but also because it can organize itself more effectively through trade associations like the U.S. Chamber of Commerce or the Pharmaceutical Research and Manufacturers of America.<sup>206</sup> Additionally, because the business cycle often involves medium- to long-term investments, the business community can afford to take a medium- to long-term view of the benefits of trade liberalization. For instance, one of the major criticisms of the Trump Administration's positions during the recent renegotiation of NAFTA centered on a proposed five-year sunset clause.<sup>207</sup> That time period, critics argue, was too short to allow effective business planning, which suggests that businesses view the benefits of trade liberalization as coming over a period of time substantially longer than the proposed five-year window.<sup>208</sup> Ultimately, the agreement reached by the three NAFTA parties included a sixteen-year term subject to renewal.<sup>209</sup>

On the other side of the equation, labor unions are the organizations that most obviously represent constituents that would benefit from trade adjustment assistance. Indeed, in 1962, George Meany, the head of the AFL-CIO, enthusiastically endorsed the Trade Expansion Act that first codified the exchange of support for trade liberalization and trade adjustment assistance.<sup>210</sup> This support collapsed very quickly due to the difficulties with actually extracting the benefits that trade adjustment assistance promised. Between 1962 and 1974, when Congress next considered TAA, the Labor Department

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206. See Megan R. Wilson, *Lobbying's Top 50: Who's Spending Big*, HILL (Feb. 7, 2017, 6:00 AM), <https://thehill.com/business-a-lobbying/business-a-lobbying/318177-lobbyings-top-50-whos-spending-big> [<https://perma.cc/C8PJ-J5EE>] (noting that these organizations were among the top five spenders of lobbying dollars).

207. Andrew Mayeda, *U.S. Wants Five-Year Sunset Provision for NAFTA, Ross Says*, BLOOMBERG (Sept. 14, 2017, 1:43 PM), <https://www.bloomberg.com/news/articles/2017-09-14/ross-says-u-s-wants-five-year-sunset-provision-for-nafta> [<https://perma.cc/B6VS-FXRL>]; see Phil Levy, *Trump May Be About to Blow Up the NAFTA Talks*, FORBES (Oct. 10, 2017, 8:25 PM), <https://www.forbes.com/sites/phillevy/2017/10/10/nafta-round-4-brace-for-impact/> [<https://perma.cc/C33U-MM3V>].

208. Pinar Çebi Wilber, *U.S. NAFTA Stance Makes for Good TV but Bad Policy*, HILL (Oct. 24, 2017, 9:50 AM), <http://thehill.com/opinion/finance/356839-us-nafta-stance-makes-for-good-tv-bad-policy> [<https://perma.cc/E76D-BZ4K>] (“[R]elocations and consolidations [and other ways businesses utilize and take advantage of NAFTA] require a stable economic environment and trust in an agreement that guarantees the rules will not change . . . in the middle of the game. [Businesses'] planning horizon is not five years.”). Ultimately, the renegotiated NAFTA included a sixteen-year duration. See *infra* Part III.

209. Agreement Between the United States of America, the United Mexican States, and Canada art. 34.7, ¶ 1, Nov. 30, 2018, [hereinafter NAFTA 2.0], [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/34\\_Final\\_Provisions.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/34_Final_Provisions.pdf) [<https://perma.cc/K3QT-RQ7C>].

210. See Kapstein, *supra* note 91, at 507.

approved hardly any applications for trade adjustment assistance. Indeed, the first successful application did not occur until November 1969.<sup>211</sup> As a result, during the debate on the Trade Act of 1974, labor interests had come to view TAA in practice as “burial insurance.”<sup>212</sup>

Yet labor unions have failed to generate support for reforming TAA or correcting its misalignment problem. This reflects the well-documented decline in the political influence of labor unions.<sup>213</sup> Union membership has fallen starkly since the 1970s. One source reports that between 1970 and 2003, absolute union membership declined by over 11%, a net loss of about 2.5 million members.<sup>214</sup> During the same period, the U.S. population grew by almost 100 million people.<sup>215</sup> As a result, labor unions lack the political clout they once had. They therefore cannot effectively advocate for changes to TAA or a realignment of adjustment assistance policies with trade liberalization.

Labor unions also no longer command the support of their members on trade politics. The 2016 U.S. presidential election demonstrates labor’s difficulties. Labor unions by and large supported the Democratic candidate, Hillary Clinton. Yet labor households failed to turn out for Clinton.<sup>216</sup> Lack of support among these labor households helped turn a series of midwestern states such as Michigan and Ohio, which had been considered a Democratic firewall, to the victorious Republican candidate, Donald Trump. For instance, in Ohio, Trump won union households by 9%.<sup>217</sup> During the 2012 presidential election, the same households had gone for President Obama over the Republican nominee Mitt Romney by twenty-three points.<sup>218</sup> In Michigan, exit polls showed Clinton winning union households, but only by 13% as against a 33% victory for President Obama four years earlier.<sup>219</sup>

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211. James A. Dorn, *Trade Adjustment Assistance: A Case of Government Failure*, 2 CATO J. 865, 873 (1982).

212. See Kapstein, *supra* note 91, at 509.

213. See ROBERT E. BALDWIN, *THE DECLINE OF US LABOR UNIONS AND THE ROLE OF TRADE* 2–3 (2003); Dan Clawson & Mary Ann Clawson, *What Has Happened to the US Labor Movement? Union Decline and Renewal*, 25 ANN. REV. SOC. 95, 97 (1999).

214. Jelle Visser, *Union Membership Statistics in 24 Countries*, 129 MONTHLY LAB. REV. 38, 45 tbl.3 (2006).

215. See *US Population by Year*, MULTPL, <https://www.multpl.com/united-states-population/table/by-year> (last visited Jan. 6, 2020) [<https://perma.cc/Q9CF-7VDM>].

216. Ted Hesson & Marianne Levine, *Unions Investigate Their Poor Showing for Clinton*, POLITICO (Nov. 10, 2016, 10:48 PM), <https://www.politico.com/story/2016/11/labor-unions-hillary-clinton-mobilization-231223> [<https://perma.cc/M4NA-HD8R>].

217. *Id.*

218. *Id.*

219. *Id.*

In other words, labor households broke with their leadership during the 2016 election. Labor unions face declines in membership for reasons unrelated to trade, but even those households that remain union members increasingly supported the protectionist candidate, Donald Trump. This increase in support for protectionism is understandable if protectionist policies and adjustment assistance are viewed as substitutes. The failure to produce an effective adjustment assistance policy that sustainably coexists with trade liberalization predictably pushes labor union voters towards protectionism.

Beyond these organizational problems, workers in communities that are losing jobs and the social safety net long provided by companies via generous benefit packages may prefer a short-term infusion of cash. Other solutions, such as investment in infrastructure and education, may help workers' communities more in the long run. But such solutions do little to provide them with immediate relief. In economic terms, workers may have a high discount rate. Legislators can thus claim victory by bringing home dollars to their districts today. Misalignment makes this tendency worse because it trades the immediate, but ultimately less helpful, payoff for the possibility of an adjustment assistance policy that continues working for communities over a longer period of time.

As a consequence, legislators have little incentive to push for alignment between trade liberalization and trade adjustment assistance. Trade liberalization's political advocates tend to be business communities that take a longer-term view than do voters that need adjustment assistance. Voters, especially those that benefit most from assistance, will tend to have shorter time horizons and are represented by organizations that have contracted substantially in recent decades. Responding to this incentive, rational legislators will bargain for highly visible cash infusions that they can steer to their districts, rather than hold out for more difficult concessions on long-term adjustment assistance policies.

### 3. Potential Systemic Collapse

Misaligned lawmaking also creates the risk that *both* sides of the misaligned bargain will ultimately be destabilized. Beneficiaries of misalignment may benefit in the short run—getting their preferred policies without having to agree to long-term policies to offset the costs their policies create.<sup>220</sup> But if the losers from misalignment become

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220. See, e.g., James, *supra* note 191, at 4.

convinced that they cannot win in the existing legal and policy framework, they may try to blow the entire system up.

To see how, consider that no statutory program is completely beyond renegotiation. Misaligned lawmaking changes how the government renegotiates interdependent policies, forcing renegotiation to happen more frequently and in a more costly institution for one policy. But Congress, or in some cases the president, remain free to revisit existing policies at any time if they so wish. Thus, even policies insulated from frequent renegotiation can, at any time, become the subject of renegotiation if the political will exists.

In the context of trade agreements, this means that if political support for trade liberalization falls to sufficiently low levels, trade liberalization—including existing trade agreements—may be in jeopardy. The history of trade liberalization in the United States since the end of the Cold War testifies to this fact. Presidents Clinton and Obama both ran on “fair trade” platforms that called for reconsidering and possibly renegotiating the terms of trade liberalization.<sup>221</sup> Although both took steps to improve the labor and environment chapters of trade agreements, neither embraced a more holistic reconsideration of the distributive problems trade liberalization helped create in the United States.<sup>222</sup>

The resulting disenchantment of traditionally Democratic-leaning labor voters partially explains the election of Donald Trump and the current threat in which the modern trade regime finds itself. If labor interests expect to be persistent losers in bargaining over trade liberalization and adjustment policies, labor may decide to reject that bargain in its entirety.<sup>223</sup> They may decide, in effect, that they should not support trade liberalization at all. If the complete lack of support

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221. See Meyer, *supra* note 197, at 501–02; Laura Carlsen, *Obama Reaffirms Promise to Renegotiate NAFTA*, HUFFPOST (Feb. 12, 2009, 5:12 AM), [https://www.huffpost.com/entry/obama-reaffirms-promise-t\\_b\\_157316](https://www.huffpost.com/entry/obama-reaffirms-promise-t_b_157316) [<https://perma.cc/RZ98-52Q9>].

222. Meyer, *supra* note 16, at 1026.

223. There is some debate about whether traditionally Democratic voters who voted for Donald Trump did so out of concern about trade policy specifically, economic insecurity more generally, or due to appeals to identity. Compare Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 PROC. NAT'L ACAD. SCI. U.S. E4330, E4330 (2018) (“Evidence points overwhelmingly to perceived status threat among high-status groups as the key motivation underlying Trump support.”), with Stephen L. Morgan, *Status Threat, Material Interests, and the 2016 Presidential Vote*, 4 SOCIUS 1, 12 (2018) (asserting that economic threats were at least as important as the status threats identified by Mutz in motivating Trump’s support). The key point, though, is that indicating support for protectionist trade policies allows a candidate to signal sympathy with all three of these possible motivations. A platform of rolling back trade liberalization signals disagreement with existing trade policy; sympathy with, and a plan of action to respond to, the economic insecurity voters feel; and can also serve as a proxy for the distrust of foreigners.

leads to the demise of the international trading regime, the total social costs of misalignment could become severe.

Data suggests that members of Congress have historically had some awareness of the threat posed by ineffective adjustment assistance policies. A recent study found that from 1980 to 2004, members of Congress that represented districts with a larger number of exporters—i.e., constituents that would benefit from trade liberalization—were more likely to vote for adjustment assistance.<sup>224</sup> The study found that “[e]xporters and their elected representatives arguably support such expenditures [on adjustment assistance] in an attempt to reduce opposition to free trade and broaden the protrade coalition.”<sup>225</sup> This finding verified what members of Congress themselves have frequently noted: that adjustment assistance is critical to obtain and maintain support for trade liberalization. Senator Max Baucus, for instance, argued that adjustment assistance “can make an important difference in public attitudes. Surveys show that most American[s] feel a lot more comfortable with globalization, off-shoring and trade when they know will get help if their jobs are threatened.”<sup>226</sup> Senator Chuck Grassley similarly worried that losing adjustment assistance for farmers hurt by trade liberalization would make it “very hard for us to win Congressional support for new trade deals.”<sup>227</sup>

Previous empirical study has shown that this strategy is effective. A 2011 study, for instance, found that voters in counties that received trade adjustment assistance funding were less likely to oppose pro-trade liberalization candidates.<sup>228</sup> The corollary is that the absence of trade adjustment assistance tended to increase opposition to pro-trade liberalization policies. Indeed, the same study found that “the electoral impact associated with job losses due to foreign competition was in fact larger than the swing needed to overturn the election’s outcome” in at least one state during the 2004 presidential election.<sup>229</sup> The 2016 election—in which razor thin majorities in states with significant job losses due to foreign competition, such as Michigan, Wisconsin, Ohio, and Pennsylvania, delivered the White House to President Trump—suggests a similar phenomenon.<sup>230</sup>

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224. Stephanie J. Rickard, *Compensating the Losers: An Examination of Congressional Votes on Trade Adjustment Assistance*, 41 INT’L INTERACTIONS 46, 47 (2015).

225. *Id.*

226. *Id.* at 49–50.

227. *See id.* at 50 (quoting 150 CONG. REC. S4737, 4757 (2004) (statement of Sen. Coleman)).

228. *See* Yotam Margalit, *Costly Jobs: Trade-Related Layoffs, Government Compensation, and Voting in U.S. Elections*, 105 AM. POL. SCI. REV. 166, 167 (2011).

229. *Id.*

230. Meyer, *supra* note 77, at 17.

In other words, trade adjustment assistance provides necessary political support for trade liberalization. Without trade adjustment assistance, the great gains that trade liberalization provides are also in jeopardy. Yet neither members of Congress nor scholarly commentators have paid sufficient attention to the way in which the law structures that relationship. Misalignment makes it politically more difficult to provide trade adjustment assistance because it separates the process of approving such assistance from the process of approving the trade agreements that such assistance supports. In so doing, misalignment creates a critical threat to modern trade liberalization.

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Misalignment has severe welfare consequences, as this Part has demonstrated. It means that two sides to a legislative bargain benefit unequally over time. Moreover, the side that gets the short end of the long-term deal will increasingly advocate for the deal's demise. Misalignment thus represents a threat to the sustainability of policies, such as trade liberalization, that require ongoing support among the electorate. How do we rebuild that support and align trade adjustment policies with trade liberalization? I turn to that question in the next Part.

### III. ALIGNING TRADE LIBERALIZATION WITH ADJUSTMENT

Trade liberalization has been one of the major forces for good in the post-World War II era. It has lifted millions of people out of poverty, encouraged innovation and technological advancement, and helped establish peace after a half century of conflict. Yet, as current events testify, liberalized trade is at risk. Rescuing it requires grappling with the structural problems in trade policy that have led us to this juncture. In this Part, I apply the normative Misalignment Thesis to trade. The normative Misalignment Thesis states that when political stability rests upon respecting the terms of a legislative bargain made across two or more issues, those issues should be renegotiated and implemented on the same timelines and in the same institutions. As discussed in Part II, absent such alignment, one plank of the legislative bargain is likely to lose ground over time. In some situations, these losses may not have larger significance. When, however, proponents of the losing policy continue to wield political power, they may use their influence to undermine the winning plank. As a result, neither plank is sustainable in the long term. Aligning the two planks in terms of renegotiation and implementation can ensure the long-term stability of both planks.



I propose three solutions to align trade liberalization with the redistribution that trade liberalization makes necessary. First, commitments to redistribute the gains from trade could be included directly in trade agreements (Section III.A). Second, trade agreements could include sunset provisions, aligning their time limits with the time limits on domestic trade adjustment assistance programs (Section III.B). Third, trade adjustment assistance funds could be distributed through mechanisms that do not require constant renegotiation and reauthorization, such as tax expenditures (Section III.C).

*A. Internationalizing Obligations to Address  
Trade-Related Inequality*

International trade law pressures states to open their economies without similarly pressuring them to provide the adjustment assistance that makes trade liberalization politically sustainable.<sup>231</sup> As a consequence, international law privileges trade liberalization commitments, providing additional legal process and diplomatic avenues to enforce such commitments. To correct this misalignment, governments should enshrine adjustment assistance commitments directly in their trade agreements. This could be done in the form of an “economic development” chapter within trade agreements. An Economic Development Chapter would have three key features.<sup>232</sup>

First, the Economic Development Chapter would create a committee of experts charged with gathering data on communities, regions, and sectors of member states’ economies adversely affected by trade. Indeed, a development chapter in the Comprehensive and Progressive Trans Pacific Partnership (“CPTPP”) (as the TPP was renamed after the United States walked away from it) already creates such a committee.<sup>233</sup> Member states would also report to the committee the measures they have taken to provide assistance to communities adversely affected by trade liberalization. This softer monitoring effort would resemble the reporting and monitoring mechanisms under human rights treaties. While it would not result in sanctions, it would provide information and feedback that could nudge states to take greater action.

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231. *See supra* Section II.A.

232. For a greater exposition as to what an Economic Development Chapter might look like, see Meyer, *supra* note 16, at 1012–23.

233. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 23.7, Mar. 8, 2018, [hereinafter CPTPP], <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/23.aspx> [https://perma.cc/4AXV-S7T8].

Second, the Economic Development Chapter would require states to take affirmative steps to provide adjustment assistance to adversely affected communities and individuals. As Gregory Shaffer and Nicolas Lamp note, developing countries originally sought similar provisions in GATT negotiations in the 1940s.<sup>234</sup> They sought these provisions precisely because they did not think that developed countries' commitments to provide greater market access would be politically stable absent adjustment assistance.<sup>235</sup> The Misalignment Thesis provides the theoretical justification for this intuition.

The Economic Development Chapter should require governments to commit "new money" to adjustment assistance programs in proportion to the degree of adverse effects they report to the Development Committee pursuant to their reporting obligations. The requirement that states commit "new money" ensures that governments do not simply count programs that already exist. Instead, after a finding that a community or region has suffered as a result of trade liberalization, governments would have to adopt new measures that directly respond to their findings. These requirements should be indexed so that they rise and fall with the degree of economic harm suffered as a result of trade liberalization. Amending trade agreements is difficult, so this indexing—which could be done in a number of different ways—ensures that the Economic Development Chapter continues to require financial assistance so long as it is necessary. Equally importantly, if the gains from trade are distributed evenly, the indexing would ensure that the obligation to provide assistance naturally sunsets.

Critically, the Economic Development Chapter should provide significant flexibility to states in terms of the kinds of programs that would qualify. Domestic TAA programs would, for instance, certainly count. But increased spending on a general social safety net should qualify also. So too would additional spending on education and investment in infrastructure, two areas in which public investment can most directly create economic opportunity. Indeed, these latter two priorities are already reflected in the CPTPP's development chapter.<sup>236</sup> The Economic Development chapter I propose here thus builds on an existing blueprint already agreed to by negotiators from twelve

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234. See Shaffer, *supra* note 14, at 25 n.161 ("[D]eveloping countries attempted to include provisions in the GATT regarding developed countries' adjustment policies, hoping that this would reduce the pressure on developed country governments to erect barriers to developing countries' imports. I thank Nicolas Lamp for this point.").

235. See *id.*

236. CPTPP, *supra* note 233, ch. 23.

countries, although it greatly expands it by requiring the imposition of binding commitments.

Third, solving the alignment problem requires that the Economic Development Chapter's obligations be subject to the same state-to-state enforcement procedures as the rest of a trade agreement, including existing chapters on labor and environmental standards. In this way, an Economic Development Chapter would provide an international enforcement mechanism that would help ensure that individual nations honor their commitment to help those harmed by trade liberalization. If a nation failed to honor its development obligations, it could be subject to retaliation by other members and the suspension of concessions equal to the level of benefits the government failed to provide.<sup>237</sup>

One might reasonably ask why Mexico, for instance, would bring a trade case because the United States failed to implement domestic TAA provisions that benefit U.S. workers. To be sure, it seems unlikely that nations would bring many cases in order to assist foreign workers. But it isn't impossible to imagine. As developing countries' efforts to include adjustment assistance obligations in the original GATT attest, developing countries understand that the political stability of market access hinges on effective adjustment assistance.<sup>238</sup> Moreover, countries do sometimes bring cases to help foreign workers. In 2011, for example, the United States brought a case under CAFTA against Guatemala for labor violations that Guatemala committed against its own workers.<sup>239</sup> That case, and the greater enforcement of labor and environmental rights it represented, reflected part of the political bargain known as the "May 10 Consensus," a 2007 deal between the George W. Bush Administration and Congress that led to the approval of a number of twenty-first-century trade agreements.<sup>240</sup> Enforcement of these outward-looking obligations, in other words, is already part of the bargain necessary to approve new trade agreements domestically.

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237. See, e.g., Understanding on Rules and Procedures, *supra* note 181, art. 22.4 ("The level of the suspension of concessions or other obligations authorized by the [Dispute Settlement Body] shall be equivalent to the level of the nullification or impairment.").

238. See Shaffer, *supra* note 14, at 25 n.161.

239. In 2017, the panel ruled against the United States. See *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 ¶ 594 (2017), [https://www.trade.gov/industry/tas/Guatemala%20%20-%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](https://www.trade.gov/industry/tas/Guatemala%20%20-%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf) [<https://perma.cc/DV6K-XLJT>].

240. See *Trade Facts: Bipartisan Trade Deal*, OFF. U.S. TRADE REPRESENTATIVE (2007), [https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf) [<https://perma.cc/84JJ-C5BS>].

Beyond the stability of the trading system, states might believe that bringing development cases is in their own self-interest for a number of other reasons. A Mexican case against the United States might benefit Mexican Americans, while a similar case by the United States against Mexico might improve working conditions in Mexico and thereby stem illegal immigration into the United States. Trade cases are also often brought on a tit-for-tat basis, with a trade case by Country A against Country B prompting a case by Country B against Country A.<sup>241</sup> In this context, a nation might bring a development case purely for leverage in negotiations. Despite this cynical motive, such a case could still lead to higher levels of adjustment assistance.

### *B. Utilizing Sunset Clauses in Trade Agreements*

A second possibility is to include sunset clauses or periodic review mechanisms in trade agreements. A sunset clause is one that causes a legal regime to automatically expire if lawmakers do not take affirmative action to extend the legal rules.<sup>242</sup> By setting up a legal cliff, sunset clauses encourage lawmakers to renegotiate around the extension of a legal regime. If an Economic Development Chapter solves the alignment problem by making both trade liberalization and adjustment policies indefinite and subject to international process, a sunset clause aligns trade liberalization and adjustment assistance commitments by putting them both up for renegotiation, ideally in the same domestic institutions and on the same timelines. Each renegotiation of trade liberalization commitments would therefore involve an opportunity to revisit the necessary degree of trade adjustment assistance.

The idea that trade rules should be the subject of periodic renegotiation is one as old as the Republic. In his farewell address, George Washington counseled his successors to

establish[] with powers so disposed . . . conventional rules of intercourse, the best that present circumstances and mutual opinion will permit, but temporary, and liable to be from time to time abandoned or varied, as experience and circumstances shall dictate.<sup>243</sup>

Using sunset clauses to incentivize renegotiation in both domestic and international regimes is also quite common. Domestic

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241. See, e.g., Thomas J. Prusa & Susan Skeath, *The Economic and Strategic Motives for Antidumping Filings*, 138 REV. WORLD ECON. 389, 411 (2002) (finding evidence of tit-for-tat trade cases in the context of antidumping disputes).

242. See Timothy Meyer, *Power, Renegotiation, and Exit Costs in International Law*, 51 HARV. INT'L L.J. 379, 396 (2010).

243. George Washington, U.S. President, Farewell Address (Sept. 19, 1796), [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp) [<https://perma.cc/63YM-7MHA>].

legislation frequently contains sunset provisions that limit the duration of particular rules. Examples include certain aspects of the USA PATRIOT Act governing surveillance,<sup>244</sup> the assault weapons ban,<sup>245</sup> and tax cuts passed through budget reconciliation, which are limited to ten years.<sup>246</sup> Internationally, sunset clauses appear in agreements as diverse as the nuclear nonproliferation treaty<sup>247</sup> and the Kyoto Protocol on climate change.<sup>248</sup> These clauses are included specifically to promote renegotiation in light of new information gleaned by the parties<sup>249</sup> or changed circumstances.<sup>250</sup> Renegotiation is even quite common in international economic law. India's new model investment treaty, for instance, contains a ten-year sunset clause.<sup>251</sup>

Despite the prevalence of sunset provisions in domestic and international law, sunset clauses have been used only sparsely in trade agreements. Perhaps the first significant use of such a clause is in the new NAFTA 2.0 (the so-called United States–Mexico–Canada Agreement or “USMCA”).<sup>252</sup> That provision limits the NAFTA 2.0 to a sixteen-year term unless all three parties agree to extend the term of the agreement.<sup>253</sup> Unlike other sunset provisions, the new NAFTA provision is designed to ensure that states do not have to make the renewal decision at, or even near, the time the agreement would expire. Instead, NAFTA 2.0 calls for the parties to make the extension decision

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244. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295.

245. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110105, 108 Stat. 1796, 2000.

246. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 115 Stat. 38, 150.

247. Treaty on the Non-Proliferation of Nuclear Weapons art. X.2, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (“Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force . . .”).

248. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3, Dec. 11, 1997, 2302 U.N.T.S. 162 (creating a first commitment period to run from 2008 to 2012, with subsequent commitment periods subject to further negotiation).

249. Koremenos, *supra* note 193, at 293; Meyer, *supra* note 193, at 163.

250. Meyer, *supra* note 242, at 387–88. (arguing that renegotiation provisions are often designed to allow states to renegotiate in the event of power shifts).

251. *Model Text for the Indian Bilateral Investment Treaty*, MYGOV art. 24.1 (2016), [https://www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf) [<https://perma.cc/2VAU-79MX>]. International investment agreements often include other kinds of provisions requiring states to renegotiate their investment obligations over time, to accommodate a desire by countries to liberalize their economies gradually. See Timothy Meyer & Tae Jung Park, *Renegotiating International Investment Law*, 21 J. INT'L ECON. L. 655 (2018). Even the GATT permits states to renegotiate their tariff concessions every three years. GATT, *supra* note 52, art. XXVIII, 55 U.N.T.S. at 276–78.

252. NAFTA 2.0, *supra* note 209, art. 34.7, ¶ 1. As of the time of writing, NAFTA 2.0 remains under consideration in the legislatures of all three member states.

253. *Id.*

six years into the sixteen-year term, reducing the political theater around an extension or sunset decision that would have prompt effect.<sup>254</sup>

This sunset provision has prompted significant pushback. Simon Lester and Inu Manak, for instance, have argued that the “new NAFTA’s sunset clause is one of the most convoluted and unnecessary provisions ever seen in a trade agreement.”<sup>255</sup> Former U.S. Trade Representative Michael Froman argued that the sunset clause deters investment in Mexico by creating legal uncertainty about NAFTA’s future.<sup>256</sup> During negotiations, Canada in particular objected strongly to the inclusion of a sunset provision, although it eventually agreed to it.<sup>257</sup>

Contrary to widespread opinion among commentators and even states like Canada, sunset clauses similar to NAFTA 2.0’s are a good idea, both for trade liberalization commitments in general and for the purpose of aligning trade adjustment assistance provisions with trade liberalization provisions. A sixteen-year duration is long enough to give businesses sufficient certainty that an investment made today in a foreign country will be protected and have value, even if there is some risk of the agreement sunseting in the future.<sup>258</sup> Allowing renewal to occur at any point during the last ten years of the agreement’s term also provides ample time and opportunity for negotiations to take place around revisions to the agreement. Trade negotiators can revisit trade agreements at any point during the agreement’s life cycle and reap the benefits of greater stability that flow from a successful agreement.

At the same time, having to renegotiate will ensure that proponents of adjustment assistance retain ongoing leverage over these negotiations. If they are not satisfied with the package of adjustment policies they are receiving, they can withhold support for extending the

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254. If one party does not agree to extend NAFTA 2.0 at the six-year review, the parties have a chance to renew the agreement each year for the next decade. *Id.* art. 34.7, ¶ 4.

255. Simon Lester & Inu Manak, *New NAFTA’s Sunset Clause Is a Ticking Time Bomb*, HILL (Nov. 7, 2018, 8:00 AM), <https://thehill.com/opinion/finance/415290-new-naftas-sunset-clause-is-a-ticking-time-bomb> [<https://perma.cc/AJC3-KA87>].

256. *NAFTA Sunset Clause ‘Creating Uncertainty,’ Ex-Trade Rep. Says*, BLOOMBERG POL. (July 25, 2018), [https://www.youtube.com/watch?v=egV\\_qJuDMag](https://www.youtube.com/watch?v=egV_qJuDMag) [<https://perma.cc/JT9M-D6SV>].

257. Lester & Manak, *supra* note 255 (discussing the sunset clause in the final, agreed text of NAFTA 2.0); Katie Simpson, *Canada and U.S. Clash over Sunset Clause in ‘Forceful’ NAFTA Talks*, CBC NEWS (Apr. 25, 2018, 3:03 PM), <https://www.cbc.ca/news/politics/canada-us-sunset-clause-1.4635056> [<https://perma.cc/VH6J-7T44>].

258. The Trump Administration’s initial proposal was for a five-year sunset, which would likely have been too short to create sufficient certainty. *See supra* notes 207–208 and accompanying text.

trade agreement.<sup>259</sup> The sunset thus magnifies the bargaining power of adjustment policy supporters by allowing them to link support for existing trade liberalization policies, as well as new trade liberalization proposals, to the extension and modernization of trade adjustment assistance.

As this Article goes to print, Congress appears poised to pass implementing legislation for NAFTA 2.0.<sup>260</sup> Before it does so, and certainly in legislation implementing future trade agreements, Congress should seek two additional changes. First, Congress should demand tighter alignment between adjustment assistance and future extension of NAFTA. In particular, Article 34.7, the sunset and review provision, could be amended to require states to revisit their domestic adjustment policies as part of the extension decision. Even better, Congress could pass adjustment assistance programs in connection with approving NAFTA 2.0 that could be authorized, with money appropriated, for so long as NAFTA 2.0 remains in effect. In this way, a decision to extend NAFTA 2.0 would operate as an automatic extension of TAA.

### *C. Reducing Renegotiation at the Domestic Level*

A third solution would be to reduce the amount of renegotiation over trade adjustment assistance at the domestic level. This would solve, or at least reduce, the alignment problem by making both trade liberalization and adjustment assistance commitments indefinite (or at least of lengthy duration).

Removing the need to renegotiate could be accomplished in several ways. First, Congress could authorize and appropriate money for adjustment policies on a considerably longer time horizon. As mentioned above, Congress does sometimes indefinitely appropriate funds for programs, although these programs tend to have dedicated funding sources such as gifts or fees. Congress could, of course, create such a dedicated fund by earmarking certain fees to fund adjustment assistance or by imposing a tax, the revenue from which would be

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259. During negotiations with Congress, the Trump Administration signaled a willingness to reform and possibly expand TAA in order to obtain approval for NAFTA 2.0. *The US Labor Department Announced Plans on Wednesday To Update And Streamline An Assistance Program Designed To Help Workers Who Lose Their Jobs Due to Competition with Foreign Companies*, INT'L BUS. TIMES (Nov. 6, 2019, 11:21 AM), <https://www.ibtimes.com/us-labor-department-announced-plans-wednesday-update-streamline-assistance-program-2860988> [<https://perma.cc/67D3-A4T5>].

260. Mauldin & Andrews, *supra* note 4.

indefinitely appropriated to fund adjustment assistance programs.<sup>261</sup> Indeed, Congress adopted the former approach to fund a trust for trade adjustment assistance in the 1974 Trade Act.<sup>262</sup> A dedicated tax connected to trade agreements—either in the form of a financial transaction tax or a transaction on the sectors expected to profit from trade liberalization—could fund long-term adjustment assistance appropriations.<sup>263</sup>

In fact, in the wake of the thirty-five-day government shutdown in early 2019, Congress took steps to provide perpetual funding for the government in the event negotiations over government funding break down. Legislators introduced bills that would continue to fund the government at existing levels in the event a new appropriations bill could not pass.<sup>264</sup> Congress, or legislatures in other countries, could pass similar backstops in the event of a failure to renegotiate adjustment assistance obligations. This kind of backstop would ensure that adjustment assistance does not lapse due to a failure of political bargaining, as it did under the Reagan Administration.<sup>265</sup>

Of course, Congress already possesses the ability to appropriate money for longer periods of time but has chosen not to do so. Consequently, tax expenditures may offer a more realistic way to address trade adjustment assistance. A tax expenditure is a “departure[] from the normal tax structure . . . designed to favor a particular industry, activity, or class of persons.”<sup>266</sup> Unlike direct spending, tax expenditures are not subject to constant re-appropriation.

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261. See Frank J. Garcia & Timothy Meyer, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE 78, 96 (2017) (discussing how a financial transaction tax (“FTT”) on specified transactions could be earmarked for, and adequately fund, adjustment assistance).

262. See Trade Act of 1974, Pub. L. No. 93-618, § 245, 88 Stat. 1978, 2026–27 (1975) (codified as amended at 19 U.S.C. § 2317 (2012)) (establishing an “Adjustment Assistance Trust Fund”).

263. See TIMOTHY MEYER & GANESH SITARAMAN, A BLUEPRINT FOR A NEW AMERICAN TRADE POLICY 35–36 (2018), <https://greatdemocracyinitiative.org/wp-content/uploads/2018/12/New-American-Trade-Policy-Final.pdf> [<https://perma.cc/G29P-VF8Y>] (proposing coupling trade agreements with a “winners tax” which would tax sectors predicted to profit from the agreement in order to create a Trade Adjustment Fund, or in the alternative, imposing an FTT throughout the area covered by the trade agreement).

264. Carl Hulse, *With Pain Still Fresh, Lawmakers Make Push to Outlaw Shutdowns*, N.Y. TIMES (Jan. 26, 2019), <https://www.nytimes.com/2019/01/26/us/politics/government-shutdown-legislation.html> [<https://perma.cc/RL5D-HFVX>]. These bills typically reduce the funding gradually over time in order to create pressure to reach an agreement. Such a gradual drawdown might not be appropriate in the case of adjustment assistance. In the case of the shutdown, government funding is typically being held hostage for a largely unrelated priority, such as President Trump’s border wall. Where adjustment assistance is concerned, the level of adjustment assistance itself is the issue over which the parties are bargaining.

265. See *supra* Section I.C.2.

266. Leonard E. Burman, *Is the Tax Expenditure Concept Still Relevant?*, 56 NAT’L TAX J. 613, 613 (2003).



Instead, because they take the form of exemptions from taxes, Congress only needs to write them into the tax code once.

The tax code could, for instance, give workers laid off due to trade liberalization refundable tax credits for relocation and retraining expenses.<sup>267</sup> Alternatively, since laid-off workers will often not have significant income, the credit could be tradeable. Workers would thus be able to exchange the tax credit that they cannot use for cash that someone else can use.<sup>268</sup> Firms could also be given tax credits for hiring workers who have been laid off for trade-related reasons (or, to make administering the program easier, in communities that have been certified as trade-impacted). Such tax credits would make rehiring and retraining workers cheaper than otherwise. From a labor market standpoint, such credits may privilege the least competitive workers. However, they would give businesses an incentive to improve those workers' skill sets and, more importantly, would be an acceptable form of redistribution within the labor market from those who benefit from trade liberalization to those that have been hurt. If a dramatic expansion of the social safety net does not seem feasible, these kinds of second-best options may be more viable strategies.

Again, the use of the tax code to provide adjustment assistance has precedent. In the 2017 Tax Cuts and Jobs Act, Congress created tax credits for investors to invest in designated "Opportunity Zones" within the United States.<sup>269</sup> This legislation provides a ready model for how the tax code could incentivize investment in communities adversely impacted by trade. Expansion of the credit to firms that hire workers certified as adversely impacted by trade liberalization would provide a further incentive for private firms to provide adjustment assistance. Like the Opportunity Zones in the 2017 Act, this use of tax credits also has broader political appeal than direct expenditures. Although both tax expenditures and direct expenditures reduce federal revenue, tax expenditures can be presented as a tax cut, making it easier to build a coalition that will support them in Congress. In addition to solving the

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267. This kind of program would require some definition of who has been laid off due to trade liberalization. However, existing adjustment assistance programs already have definitions and procedures for determining whether workers have been laid off for qualifying reasons. Eligibility criteria and procedures could be borrowed from these programs.

268. In some states, for instance, the tax benefits from creating a conservation easement are transferable in this way. See DEBRA PENTZ, ROMAN GINZBURG & RUTH MCMILLEN, STATE CONSERVATION TAX CREDITS: IMPACT AND ANALYSIS 10–15 (2007), <http://www.taxcreditexchange.com/documents/StateConservationTaxCreditsImpactandAnalysis.pdf> [<https://perma.cc/3DZD-WGVJ>] (analyzing the benefits of making tax credits from conservation easements transferable).

269. Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, 131 Stat. 2184 (to be codified at I.R.C. § 1400Z-2).

alignment problem by reducing renegotiation of an adjustment assistance program, this political attractiveness is a significant point in favor of the use of tax expenditures to provide adjustment assistance.

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The misalignment in U.S. trade policy between trade liberalization and trade adjustment assistance threatens to undo decades of economic progress, hurting American consumers and workers in export-oriented industries without significantly aiding workers and industries hurt by trade liberalization. Realignment is thus necessary to preserve the gains of trade liberalization and vindicate Congress's promise to American workers. As this Part has suggested, a variety of options exist to realign American trade policy. Congress's (nearly concluded) consideration of NAFTA 2.0, as well as any trade negotiations undertaken after the 2020 presidential election, offer the perfect opportunity to test which ones are politically viable.

#### IV. MISALIGNED LAWMAKING: EXTENSIONS

The Misalignment Thesis is generalizable beyond the trade context. One way to understand the Misalignment Thesis is as an explanation for the (perhaps unintended) negative consequences of deregulation that often occur, as well as a normative prescription for how to regulate or deregulate without causing these unintended consequences. Specifically, the Misalignment Thesis predicts that, when the conditions described in Part II are met, deregulation will harm certain constituencies *even when policies are put in place to offset those harms*. Unless those new policies are legally coupled to existing regulatory frameworks so that the two sets of policies continue to be negotiated together, the new policies are likely to receive inadequate government support over time.<sup>270</sup> Normatively, this suggests that legislators should couple interdependent policies—either by forgoing deregulation or by creating credible commitments to negotiate interdependent policies together.<sup>271</sup> In this Part, I briefly discuss this insight from the Misalignment Thesis and its application to debates about deregulation in the domestic regulatory context, setting the stage for future research.

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270. Of course, if the offsetting policies enjoy majority support on their own, decoupling will not lead to this problem.

271. One important countervailing pressure on lawmakers is to reduce the transaction costs of lawmaking. Decoupling can achieve that by allowing lawmakers to address one policy area.

To see how this more general application of the thesis works, consider that when the government wishes to encourage certain kinds of private conduct by the market, it can do so in at least two general ways. First, it can tax or regulate private conduct to encourage the behavior it wants. Second, it can directly subsidize the private conduct it wants to encourage.

The former approach creates what we might call regulatory subsidies. The government does not directly provide cash to a private entity. Instead, it uses its taxing or regulatory power to encourage private parties to do so.<sup>272</sup> High trade barriers provide an example of a regulatory subsidy. As discussed in Part I, high trade barriers encourage domestic consumers to purchase domestically produced goods instead of imported goods. Tariffs, for instance, make imported goods more expensive, causing consumers to spend their money on domestically produced goods that become relatively cheaper. Regulations that constrict the supply of imports likewise turn consumers to domestically produced alternatives.

Regulatory subsidies of this kind are found throughout the U.S. economy, not only in trade. In areas as diverse as postal service,<sup>273</sup> telecommunications,<sup>274</sup> housing,<sup>275</sup> airline regulation,<sup>276</sup> healthcare,<sup>277</sup>

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272. See, e.g., Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 45 (1971).

273. See, e.g., J. Gregory Sidak, *Maximizing the U.S. Postal Service's Profits from Competitive Products*, 11 J. COMPETITION L. & ECON. 617, 644 (2015) (explaining that the Postal Service receives "many privileges and implicit subsidies"); Chris Matthews, *American Taxpayers Give an \$18 Billion Gift to the Post Office Every Year*, FORTUNE (Mar. 27, 2015), <http://fortune.com/2015/03/27/us-postal-service/> [<https://perma.cc/2R48-BEJQ>] (explaining that the Postal Service receives regulatory subsidies through laws barring other services from direct delivery of mail to residential and business mailboxes, tax breaks, and other toll or fee exemptions, and the ability to cheaply borrow from the U.S. Treasury).

274. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 42 U.S.C.) (establishing the Universal Service Fund, a system of subsidies and fees intended to promote universal access to telecommunication services); *Universal Service*, FED. COMM. COMM'N, <https://www.fcc.gov/general/universal-service> (last updated Dec. 20, 2019) [<https://perma.cc/V8S4-P47F>].

275. See Harvey S. Rosen, *Housing Subsidies: Effects on Housing Decisions, Efficiency, and Equity* 28 (Nat'l Bureau of Econ. Research, Working Paper No. 1161, 1983), <https://www.nber.org/papers/w1161> [<https://perma.cc/GZ64-R9EG>] (explaining that tax code provisions which have the effect of lowering the cost of home ownership are commonly known as "implicit subsid[ies]").

276. Christine Chmura, *The Effects of Airline Regulation*, FOUND. FOR ECON. EDUC. (Aug. 1, 1984), <https://fee.org/articles/the-effects-of-airline-regulation/> [<https://perma.cc/K49G-JYVB>]; *Essential Air Service*, *supra* note 134.

277. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of U.S.C.); Svetlana Pashchenko & Ponpoje Porapakarm, *Cross-Subsidization in Employer-Based Health Insurance and the Effects of Tax Subsidy Reform*, 69 NAT'L TAX J. 583, 599 (2016) (noting that the ACA creates sizeable cross-

and even monetary policy,<sup>278</sup> the government has used its authority to provide regulatory subsidies to certain groups.<sup>279</sup> In areas outside of trade, the government often requires businesses to charge some consumers higher prices for goods and services, often substantially above the competitive prices for such products, while mandating that other consumers can purchase the same goods and services below cost. The premium paid by the first group provides an indirect subsidy to the second group.<sup>280</sup>

During the latter half of the twentieth century and the early twenty-first century, Congress deregulated many of these industries. Just as in trade, Congress often accompanied this deregulation with direct subsidies designed to offset the negative consequences of deregulation. In effect, Congress decoupled the general regulation of the market for a particular good or service from an interdependent policy objective. In many domestic contexts, such as transportation, postal service, or healthcare, the decoupled objective is universal access to the good or service. In many of these cases, the direct subsidies have been inadequate to continue to ensure access to the good or service.<sup>281</sup>

Two brief examples—federal regulation of transportation and healthcare—illustrate. Nineteenth-century railroad charters required railroad companies to serve specific routes and forbade them from

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subsidization from people with low expected medical costs (the young and healthy) to people with high expected medical costs (the old and unhealthy).

278. See Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 797–98 (2018) (explaining that commercial banks receive a regulatory subsidy through a favorable administered rate of interest on their accounts with the Federal Reserve, and as a whole, received \$7 billion in interest payments in 2015).

279. Just as in trade, the regulatory subsidy often comes in the form of price regulation. However, domestic regulatory subsidies often involve more direct price controls than trade policy, where tariffs or other trade barriers merely influence the price rather than mandate it. Direct regulation in domestic economic regulation is often paired with regulatory barriers to entry. Absent such barriers, regulating the price of existing providers is ineffective, because new entrants will simply undercut the government-established price. See Richard A. Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 532 (1974) (arguing that firms with monopoly power should be allowed to reduce prices to meet new entry competition, subject to long-run marginal cost and intent to exclude requirements).

280. This phenomenon is often described as cross-subsidization. John Brooks, Brian Galle & Brendan Maher, *Cross-Subsidies: Government's Hidden Pocketbook*, 106 GEO. L.J. 1229, 1235–36 (2018).

281. A number of scholars have defended regulatory subsidies as a relatively efficient means of redistribution. See *id.* at 1249 (arguing that cross-subsidies may be a preferable policy choice because they can be a more efficient form of public finance than traditional tax and transfer); Ricks, *supra* note 278, at 772–73 (proposing that a regulatory subsidy in the form of administrative controls on bank deposit rates would provide an efficient means of addressing efficacy and distribution issues); see also Posner, *supra* note 279, at 535 (stating that federal antitrust laws prohibiting exclusionary practices are inefficient because the laws are overbroad and enforcement is too costly).

canceling service on the grounds that a route was not profitable.<sup>282</sup> In the twentieth century, the Interstate Commerce Commission gained the authority to regulate railroads, including the power to directly regulate rates.<sup>283</sup> It used this power to mandate that railroads provide service on high-cost routes at unprofitable prices.<sup>284</sup> Motor carriers—bus and trucking companies—found themselves subject to similar universal service mandates, with profitable routes subsidizing more remote routes.<sup>285</sup> Finally, in its early years the airline industry had its rates and routes regulated. The federal government awarded airlines a mix of profitable and unprofitable routes, allowing the airlines to subsidize otherwise unprofitable service to rural parts of the United States with the fares charged on more profitable routes.<sup>286</sup> When the federal government backed off these universal service mandates, Congress provided money for direct subsidies to encourage transportation carriers to continue service to rural areas.<sup>287</sup> Not surprisingly, carriers began to drop service on unprofitable routes.<sup>288</sup> Direct subsidies failed to stem the tide of rural retrenchment.<sup>289</sup> The result has been the well-documented isolation of rural communities.<sup>290</sup>

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282. See KEELER, *supra* note 142, at 20–21.

283. See Hepburn Act of 1906, ch. 3591, 34 Stat. 584 (codified as amended in scattered sections of 49 U.S.C.).

284. KEELER, *supra* note 282, at 25.

285. Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543 (codified as amended in scattered sections of 49 U.S.C.); Ricks, *supra* note 278, at 845.

286. See STEPHEN BREYER, REGULATION AND ITS REFORM 213, 332 (1982).

287. See *Essential Air Service*, *supra* note 134 (“The Essential Air Service (EAS) program was put into place to guarantee that small communities that were served by certificated air carriers before airline deregulation maintain a minimal level of scheduled air service.”); *History and Mission*, *supra* note 143 (providing funding to establish and maintain transit systems in communities with populations under fifty thousand).

288. See Goetz & Vowles, *supra* note 133, at 261 (concluding that airline deregulation has negatively impacted fares and service available to smaller cities and unprofitable shorter-haul routes); Longman & Khan, *supra* note 133, at 20–21 (discussing a loss of airline service to several cities and attributing the loss to airline deregulation).

289. See Paul W. Barkley, *The Effects of Deregulation on Rural Communities*, 70 AM. J. AGRIC. ECON. 1091, 1093–95 (1988) (summarizing deregulation of rail transport, telecommunications, financial institutions, and natural gas as well as the negative impact each had on service in rural areas); Paul Stephen Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445, 452–53 (2013) (explaining that legislation and broad discretion exercised by agencies allowed private transportation providers to cancel service to rural areas when it was unprofitable to provide).

290. See, e.g., Ben Kidder, *The Challenges of Rural Transportation*, W. RURAL DEV. CTR. 3–4 (2006), [https://wrdc.usu.edu/files-ou/publications/pub\\_9373753.pdf](https://wrdc.usu.edu/files-ou/publications/pub_9373753.pdf) [<https://perma.cc/8A3M-H6JG>]; Steve Lockwood, *Transportation in Rural America: Challenges and Opportunities*, U. MINN. (2004), <http://www.cts.umn.edu/sites/default/files/files/events/oberstar/2004/2004lockwoodpaper.pdf> [<https://perma.cc/T36D-2C4Y>]; Lilly Shoup & Becca Homa, *Principles for Improving Transportation Options in Rural and Small Town Communities*, TRANSP. FOR AM. (Mar. 2010), <http://t4america.org/wp-content/uploads/2010/03/T4-Whitepaper-Rural-and-Small-Town-Communities.pdf> [<https://perma.cc/97AE-T78D>].

The Patient Protection and Affordable Care Act of 2010 (“ACA”) offers another example. The ACA effectively required insurance companies to provide coverage to expensive healthcare consumers, such as people with preexisting health conditions, at below cost. In turn, the ACA required that most individuals, including healthy individuals not likely to need healthcare services, purchase or otherwise acquire an insurance policy—the so-called “individual mandate.”<sup>291</sup> The individual mandate represented a regulatory subsidy. Insurance companies charged healthy individuals more than the cost of serving them so that those who required expensive healthcare services could be served below cost.<sup>292</sup> In late 2017, however, Congress repealed the individual mandate, leaving the ACA’s direct subsidies to do the work of ensuring universal access to healthcare.<sup>293</sup> The Congressional Budget Office estimated that this decision would cause enrollment in healthcare to drop by four million people by 2019 and lead to a premium hike of about 10% a year over the course of a decade.<sup>294</sup>

A broader test of the Misalignment Thesis in these or other issue areas is beyond the scope of this Article. But the examples are suggestive and such testing is feasible in future research. The rampant use of regulatory subsidies in the U.S. economy, and the deregulation of some but not all industries, provide variation in the degree of alignment—the independent variable in the study. If we observe an erosion of one policy plank following the introduction of misaligned lawmaking—in particular, if the policy subject to more frequent and costlier renegotiation and implementation suffers following the introduction of misalignment—across a number of policy areas, that would be a powerful indicator of the Misalignment Thesis’s explanatory power.

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291. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242–50 (2010) (codified as amended at I.R.C. § 5000A, 42 U.S.C. § 18091 (2012)).

292. The regulation of other insurance markets also involves regulatory subsidies. For instance, regulation of flood insurance rates that kept rates artificially low provided a significant subsidy to homeowners living in flood plains and low-lying coastal areas. See *Implementation of the Biggert-Waters Flood Insurance Reform Act of 2012: Hearing Before the Subcomm. on Hous. & Ins. of the H. Comm. on Fin. Servs.*, 113th Cong. (2013) (statement of Craig Fugate, Administrator of FEMA).

293. Sy Mukherjee, *The GOP Tax Bill Repeals Obamacare’s Individual Mandate. Here’s What that Means for You*, FORTUNE (Dec. 20, 2017), <https://fortune.com/2017/12/20/tax-bill-individual-mandate-obamacare/> [<https://perma.cc/43T5-EW9X>]; see Alex Ghenis, *The Three Pillars of the Affordable Care Act*, NEW MOBILITY (Mar. 1, 2017), <http://www.newmobility.com/2017/03/the-three-pillars-of-the-affordable-care-act/> [<https://perma.cc/M6DM-BKNM>] (describing the ACA’s direct subsidies).

294. CONG. BUDGET OFFICE, REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE 1 (2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf> [<https://perma.cc/XJH4-WBM7>].

## CONCLUSION

Trade liberalization and adjustment policies go hand in hand. The latter represent a commitment by society to help those who suffer from trade liberalization. Equally importantly, they ensure that those who are harmed by trade liberalization have something to gain from it. Yet as our current political moment demonstrates, adjustment policies have not been adequate to preserve political support for trade liberalization and all the benefits it brings.

This mismatch is not purely a creature of politics. It finds its origins in a legal system that enshrines trade liberalization commitments in international agreements and domestic statutes that continue in perpetuity, while adjustment policies must constantly be renegotiated. Rebuilding support for free trade thus requires thinking of new ways to align bargaining over adjustment policies and trade liberalization. Only if those who stand to lose from trade liberalization nevertheless feel invested in the system can we hope to preserve the great gains of an open-world economy.