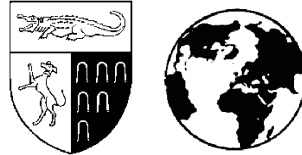


# The Yale Journal of International Law Online



## Trade, Redistribution, and the Imperial Presidency

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### INTRODUCTION

“International trade policy is no longer primarily concerned with tariffs” was a common refrain at international economic law conferences just a few years ago. And for good reason. At the time, it was clear that both trade negotiations and disputes were increasingly focused on non-tariff barriers to trade, such as behind-the-border discrimination, and issues like intellectual property protections and labor and environmental rules. Since the mid-1980s alone, the global average of most-favored nation (MFN) applied tariffs—the standard rate WTO members apply to each other—have fallen from over 25% to less than 10%.<sup>1</sup> Among OECD countries, that number is less than 5%.<sup>2</sup> The decline looks even starker when compared with data from 1947, the year the GATT was created. The World Bank estimated that average global tariffs on manufactured goods in 1947 started at 40%.<sup>3</sup>

Today, of course, the picture is very different. President Trump has made tariffs the central issue in international trade policy. Using a wide range of statutory authority, he has imposed tariffs on \$200 billion worth of Chinese imports, including solar panels and washing machines, as well as on steel and aluminum from virtually every country in the world. He has also threatened additional tariffs on a range of other products, including automobiles and auto parts.

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1. Joost H.B. Pauwelyn, Andrew T. Guzman & Jennifer A. Hillman, *INT’L TRADE LAW* 4 (3d ed. 2016)

2. *Id.*

3. WORLD BANK, *WORLD DEVELOPMENT REPORT 1987*, at 134-35 (1987); *but see* Chad P. Bown & Douglas A. Irwin, *The GATT’s Starting Point: Tariff Levels Circa 1947*, WORLD BANK (Apr. 2016) (estimating average global tariffs in 1947 at twenty-two percent).

In this essay, I argue that one reason for the massive deployment of tariff authority is that the president, like any political officeholder, is beholden to those who put him in office—and who can keep him there. During his successful 2016 campaign, President Trump promised to bring manufacturing jobs back to the United States generally, and especially in states like Michigan, Pennsylvania, Wisconsin, and Ohio that proved decisive in the election.<sup>4</sup> President Trump linked the decline of manufacturing to trade agreements that had reduced trade barriers, allowing cheap imports to supplant goods made in the United States. Since taking office, he has used the powers available to him to try to make good on his promises and reward the constituencies that supported him in the election. In principle, the government has a wide range of policy instruments at its disposal to help those regions. An expansion of the Trade Adjustment Assistance program, which provides financial assistance to workers, farmers, and firms who have suffered due to trade liberalization, would help President Trump's target constituency.<sup>5</sup> Similarly, federal subsidies to help new industries, increased federal investment in primary research and infrastructure, and tax credits for businesses that relocate to economically ravaged regions would all help bring jobs back to the heartland.<sup>6</sup> Such programs, however, require action—either to appropriate funds or to change existing law, like the tax code—by a Congress that is remarkably slow to act these days. Thus, like many presidential administrations before it, the Trump administration has searched for policies that advance its goals and that it can implement without Congress.<sup>7</sup> The tariff power is an obvious candidate: Congress, as it turns out, has delegated almost total control over tariff rates to the president.

The fact that the president has turned to tariffs to effect redistribution should hardly come as a shock. Tariff reductions since the Second World War have created an enormous amount of wealth globally, but they have also had huge distributional impacts that have gone largely unaddressed. During that time, a bipartisan political consensus emerged that trade policy should maximize wealth, while distributional issues should be dealt with domestically.<sup>8</sup> But Congress, a deliberative body facing substantial impediments to action, has

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4. Todd Spangler, *The Rust Belt Gave Trump Victory. Now They Want Jobs in Return*, USA TODAY (Jan. 18, 2017), <http://www.usatoday.com/story/news/politics/2017/01/18/rust-belt-voters-donald-trump/96670922/>.

5. For a description of the Trade Adjustment Assistance program, see Frank J. Garcia & Timothy Meyer, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE 78, 85-90 (2018).

6. In fact, President Trump proposed many of these ideas to Congress in his 2018 State of the Union Address, although most of them have not gone anywhere. See President Donald J. Trump, *State of the Union Address* (Jan. 30, 2018), <http://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>. The tax incentives for investment in "Opportunity Zones," i.e., overlooked rural and urban areas, included in the Tax Cuts and Jobs Act are an exception. See Patrick Sisson, *How Opportunity Zones Could Become a Big Catalyst for Inner-City Development*, CURBED (Apr. 12, 2018), <http://www.curbed.com/2018/4/12/17227124/investment-opportunity-zones-economic-development>.

7. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201 (2018) (describing the increasing tendency of presidents to engage in unilateral policymaking in the realm of international law).

8. For discussion and criticism of this consensus, see, for example, Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985 (2017); Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 UNIV. ILL. L. REV. 1 (forthcoming Jan. 2019) (available at <http://ssrn.com/abstract=3217392>).

declined to take forceful steps to address the distributional issues exacerbated by trade liberalization. The president, on the other hand, has substantially delegated authority over international trade policy and faces few obstacles to decisive action. It was only a matter of time before the country elected a president who would want to redistribute to the losers from trade distribution and who would rely on his international trade authority to do so.

### I. THE CONVENTIONAL WISDOM AND ITS SHORTCOMINGS

For years, the conventional view among policy elites in both the Democratic and Republican parties was that if trade liberalization didn't make everyone better off, it could at least provide the means for doing so. As Gregory Shaffer has described, the policy establishment danced a trade two-step.<sup>9</sup> First, "countries sign *international trade agreements* to combat protectionist pressures and thereby mutually enhance the size of the national economic pie."<sup>10</sup> Second, recognizing that trade liberalization creates both winners and losers, countries use domestic policy to provide assistance to those who lose out from trade liberalization.<sup>11</sup> This approach was thought to promote efficiency by allowing the economic pie to be as large as possible before government turned to the task of distributing it.<sup>12</sup>

This two-step provided the intellectual and policy justification for countries, including the United States, to make trade agreements without worrying too much about those who would lose from those agreements. Thus, elites on both sides of the political spectrum pushed through trade agreements that while deferring contentious fights over distribution. This deferral does not mean, of course, that trade agreements were or are distributionally neutral. They are not. Industries spend a great deal of time and money lobbying their governments to ensure that the wealth created by trade agreements flows to them in the first instance. The intellectual property rules in trade agreements offer the classic example. The recent United States-Mexico-Canada Agreement ("NAFTA 2018"), for instance, requires countries to extend copyright protections by 20 additional years and extends data protection for pharmaceutical companies an extra two years, a key protection against generic drugs.<sup>13</sup>

But, historically, those dancing the trade two-step could only get through the first step before tripping over themselves. Put differently, redistribution on the scale required to address trade-exacerbated inequality never occurred.<sup>14</sup> The Trade Adjustment Assistance (TAA) program, the primary vehicle for addressing trade adjustment concerns in the United States, illustrates why.

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9. Shaffer, *supra* note 8 (manuscript at 2-3).

10. *Id.*

11. *Id.*

12. See, e.g., Paul R. Krugman & Maurice Obstfeld, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 216-17 (7th ed. 2005).

13. United States-Mexico-Canada Agreement, ch. 20, arts. 20.F.13, 20.H.7, Sept. 30, 2018, OFF. U.S. TRADE REPRESENTATIVE, <http://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico> (ratification pending).

14. See Meyer, *supra* note 8, at 1008-11.

President Kennedy proposed TAA in 1962 as part of a plan to dramatically expand trade liberalization. He argued that trade liberalization, while good for the country, would hurt certain sectors and workers, and that the country owed those sectors and workers assistance in adapting to new economic realities.<sup>15</sup> But TAA, which Congress created when it authorized what became known as the Kennedy Round of multilateral trade negotiations, was stillborn. Claimants had such difficulty establishing that they met the eligibility conditions that the first successful claimant did not come along until 1969.<sup>16</sup> Since then, TAA has been a political football, often starved for funding, occasionally lapsing entirely, and generally inadequate to help those communities that actually need it.<sup>17</sup>

This state of affairs has structural roots, which help explain why a president might use tariff increases as a form of redistribution. Consider the misalignment between how the federal government handles trade liberalization and trade adjustment.<sup>18</sup> Trade liberalization commitments are usually enshrined in international agreements, indefinite in length, and negotiated and implemented by the executive branch, which faces considerably lower impediments to action than Congress.<sup>19</sup> Enshrining trade liberalization commitments in international agreements creates a set of international mechanisms—including diplomacy, formal dispute resolution, reputational concerns, and potentially sanctions—that encourage compliance. Moreover, modern trade agreements tend not to have defined limits on their duration, meaning that liberalization commitments never sunset.<sup>20</sup> Finally, trade negotiations and implementation are handled almost entirely by the executive branch. Although Congress approves trade agreements, it has done so primarily on the basis of an up-or-down vote since 1974, essentially allowing the executive to make Congress a take-it-or-leave-it offer.<sup>21</sup> In approving the agreement, Congress delegates to the president the authority to implement it domestically through proclamations and regulations, and supplements the president's authority—based on his constitutional authority over foreign affairs—to implement the agreement internationally through diplomacy.<sup>22</sup>

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15. Special Message to the Congress on Foreign Trade Policy (Jan. 25, 1962), *in* 2 PUB. PAPERS 68, 76 (1963) (“When 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.”).

16. Ethan Kapstein, Trade Liberalization and the Politics of Trade Adjustment Assistance, 137 INT’L LAB. REV. 501, 508 (1998).

17. See Garcia & Meyer, *supra* note 5, at 85-87.

18. See Timothy Meyer, Misaligned Lawmaking (Aug. 8, 2018) (unpublished manuscript) (on file with author).

19. *Id.* at 25-26.

20. NAFTA 2018, if approved by Congress, could mark a departure from this norm. United States-Mexico-Canada Agreement, *supra* note 13, ch. 34, art. 34.7.

21. Trade Act of 1974 § 151, 19 U.S.C. § 2191 (2012) (describing fast track procedures). The U.S.-Jordan Free Trade Agreement, which was not passed under fast-track procedures, is the exception. See Lael Brainard & Hal Shapiro, *Fast Track Trade Promotion Authority*, BROOKINGS INST. 4 (Dec. 2001), <http://www.brookings.edu/wp-content/uploads/2016/06/pb91.pdf>.

22. See, e.g., Dominican Republic-Central America-United States Free Trade Implementation Act §§ 103-6, 201, 19 U.S.C. §§ 4013-4016, 4031 (2012); United States-Korea Free Trade Agreement Implementation Act §§ 103-6, 201, 19 U.S.C. § 3805 note (2012).

Trade adjustment policies are almost completely the opposite. They are entirely a function of domestic law, authorization for such programs sunsets after a few years, and the programs require constant reauthorization by Congress—a body institutionally incapable of decisive action and for the last several decades politically inclined to shrink the size of government.<sup>23</sup> Indeed, Congress may not constitutionally be able to delegate authority over appropriations,<sup>24</sup> meaning it must hold on to trade adjustment policies.

Because Congress is less likely to act, proponents of trade adjustment policies face an uphill battle. Not surprisingly, trade adjustment policies tend to receive significant attention from Congress only when additional trade liberalization commitments are being considered.<sup>25</sup> Since the continuation of trade liberalization commitments is not usually on the bargaining table, there is no reason for trade liberalization proponents in Congress to offer major concessions to proponents of trade adjustment policies. Consequently, trade adjustment policies are chronically undersupplied relative to trade liberalization commitments.<sup>26</sup>

In 2011, for instance, Congress considered approval of new trade agreements with Colombia, Panama, and South Korea. But much more significant trade agreements, like the WTO agreements and NAFTA 1994, would have continued no matter the fate of those new agreements. This fact created a mismatch between trade liberalization’s proponents (who had already secured most of their policy gains in other agreements) and trade adjustment proponents (who fought to extend and fund their program in its entirety). The result was the trade adjustment proponents managed to secure only a partial restoration of funding for TAA, and only for a two-year period.<sup>27</sup>

## II. THE IMPERIAL PRESIDENCY AND REDISTRIBUTION

Congress’s failure to address trade-related distributional concerns created an opening for presidential candidates to run on a platform of doing what Congress did not.<sup>28</sup> In the 2016 election, President Trump ran on a campaign of

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23. Meyer, *supra* note 18, at 26-29. To be sure, the executive branch does the actual implementation of trade adjustment assistance, just as it implements all federal law. The point is merely that implementation of trade adjustment assistance, unlike trade liberalization, requires returning to Congress periodically.

24. 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 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.” (footnote omitted)).

25. See Meyer, *supra* note 18, at 25-29.

26. *Id.*

27. BENJAMIN COLLINS, CONG. RESEARCH SERV., R44153, TRADE ADJUSTMENT ASSISTANCE FOR WORKERS AND THE TAA REAUTHORIZATION ACT OF 2015 13 (2018).

28. While “headline” unemployment remains low in manufacturing-rich Midwestern states by historic standards, that number fails to capture either the number of people who have given up seeking work or the extraordinary wage stagnation suffered by those still employed. See, e.g., Ernie Tedeschi, *Unemployment Looks Like 2000 Again. But Wage Growth Doesn’t*, N.Y. TIMES (Oct. 22, 2018), <http://www.nytimes.com/2018/10/22/upshot/mystery-slow-wage-growth-economy.html>.

bringing jobs back to places like Michigan, Ohio, Pennsylvania, and Wisconsin.<sup>29</sup> Having promised those states relief, President Trump looked for the authority to grant it. But, as noted above, the president does not have the authority to appropriate funds. Instead, the president has authority to redistribute through the creation of trade barriers, most notably tariffs.<sup>30</sup>

The Constitution grants Congress the “Power To lay and collect Taxes, Duties, Imposts and Excises” and “To regulate Commerce with foreign Nations.”<sup>31</sup> The president has no similar grant of substantive authority over economic policy, international or domestic. Consequently, international trade policy differs substantially from other foreign affairs issues, such as war powers, where the president shares constitutional authority with Congress. Where international trade policy is concerned, the president’s authority is almost entirely statutory.<sup>32</sup>

But this statutory authority is extensive. Section 232 of the Trade Expansion Act of 1962 allows the president to take any “action” to “adjust the imports” of any product he deems a threat to national security.<sup>33</sup> Section 232’s definition of “national security” is *sui generis*—so broad, including not only national defense but also any consideration related to the national economy, as to render it virtually limitless.<sup>34</sup> Section 232 is a blank check in the hands of a president looking to raise tariffs. President Trump has used Section 232 to impose 25% tariffs on 157 different kinds of steel products, as well as a 10% tariff on aluminum imports. On August 10, 2018, he announced by tweet that would double the tariffs on Turkey alone, apparently in response to Turkey’s refusal to release an American pastor it was holding.<sup>35</sup> At present, the administration is considering “national security” tariffs on automobiles and auto

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29. Nor was President Trump alone. Senator Bernie Sanders, a candidate for the Democratic nomination, similarly campaigned against the Trans-Pacific Partnership, the then-pending U.S. trade agreement, and more generally against inequality exacerbated by trade liberalization. See Bernie Sanders, *So-Called ‘Free Trade’ Policies Hurt U.S. Workers Every Time We Pass Them*, GUARDIAN (Apr. 29, 2015), <http://www.theguardian.com/commentisfree/2015/apr/29/so-called-free-trade-policies-hurt-us-workers-every-time-we-pass-them>.

30. The president has used his delegated authority to roll back a variety of regulations, such as environmental regulations or rules on workplace safety, which he views as burdening businesses. See Marissa Horn, *26 Environmental Rules Being Rolled Back in the Trump Era*, BNA (July 12, 2018), <http://www.bna.com/26-environmental-rules-n73014477330/>; Ian Kullgren, *Trump Rolls Back Worker Safety Rules*, POLITICO (Sept. 3, 2018), <http://www.politico.com/story/2018/09/03/trumps-worker-safety-regulations-protections-unions-806008>. These regulatory actions can be viewed as redistribution, reallocating wealth from those protected by the repealed regulations to the businesses that no longer must comply. Although using regulation as a form of redistribution has a long history, see Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971) and Morgan Ricks, *Money as Infrastructure*, COLUM. BUS. L. REV. (forthcoming 2018), the distributional impacts of presidential regulation, as opposed to detailed congressional legislation, remains understudied.

31. U.S. CONST. art. I, § 8, cls. 1, 3.

32. As the nation’s chief diplomat, the president has constitutional responsibility for the conduct of diplomacy, including, for instance, negotiating international agreements. U.S. CONST. art. II, § 2, cl. 2.

33. 19 U.S.C. § 1862(c)(1)(A)(ii) (2012).

34. *Id.* § 1862(d).

35. Jim Tankersley, Ana Swanson & Matt Phillips, *Trump Hits Turkey When It’s Down, Doubling Tariffs*, N.Y. TIMES (Aug. 10, 2018), <http://www.nytimes.com/2018/08/10/us/politics/trump-turkey-tariffs-currency.html>.

parts.<sup>36</sup>

Section 301 of the Trade Act of 1974 provides another authority on which President Trump has relied to impose 25% tariffs on \$200 billion worth of Chinese goods. Section 301 allows the president to direct the U.S. Trade Representative to “impose duties or other import restrictions”<sup>37</sup> if the Trade Representative determines that “an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce.”<sup>38</sup> Like Section 232, the tariffs or other trade restrictions imposed under Section 301 may be imposed in whatever amount and for whatever length of the time the Trade Representative chooses, as directed by the president.<sup>39</sup>

Finally, the legislation implementing trade agreements, such as the NAFTA Implementation Act, delegates to the president authority to proclaim tariffs that comply with the terms of trade agreements.<sup>40</sup> But in Section 125 of the Trade Act of 1974, Congress has also given the president the blanket authority to cancel any proclamation made under trade agreements for any reason.<sup>41</sup> As a practical matter, this legislation gives the president the unfettered authority to set tariffs economy-wide. The implementing legislation for trade agreements allow him to reduce tariffs in accordance with the terms of trade agreements, while Section 125 allows him to cancel those reduced tariffs. And since the president’s power to cancel prior tariff reductions applies to basically all U.S. trade agreements, the president effectively has power to raise and lower tariffs at will, for any reason. Such a broad grant of authority to raise and lower tariffs—just taxes—may very well be an unconstitutional delegation of legislative power by Congress.<sup>42</sup> But until a court so holds, the breadth of the president’s authority to raise tariffs, as well as lower them, is almost unbounded. President Trump’s threats to terminate trade agreements like NAFTA rests on this broad grant of authority.

Raising tariffs, as President Trump has done, redistributes wealth from consumers of the newly taxed products, as well as foreign producers of those products, to domestic producers (and by extension their employees) that can now

36. *U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports*, U.S. DEP’T OF COMMERCE (May 23, 2018), <http://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports>.

37. 19 U.S.C. § 2411(c)(1)(B) (2012).

38. § 2411(b)(1).

39. 19 U.S.C. § 1862(c)(1)(A)(ii) (2012); 19 U.S.C. § 2411(b)(2). Other statutory provisions, such as Section 201 of the Trade Act of 1974, grant the president authority to impose tariffs or trade restrictions as well. President Trump has, for instance, used Section 201 to impose so-called “safeguard” tariffs on solar panels and washing machines. Section 201 does, however, cabin the president’s authority somewhat requiring more extensive and specific findings before the president can act, and by limiting tariffs to 4 years in duration. *See* 19 U.S.C. §§ 2251-2253 (2012).

40. *E.g.*, North American Free Trade Agreement Implementation Act § 201(a)(1), 19 U.S.C. § 3331(a)(1) (2012).

41. 19 U.S.C. § 2135(b), 2135(e) (2012). Although this authority applies by its terms only to proclamations made under the Trade Act of 1974, subsequent trade promotion statutes have made this authority applicable to subsequent trade agreements. *See* Omnibus Trade and Competitiveness Act of 1988 § 1105, 19 U.S.C. § 2904 (2012); Trade Act of 2002 § 2110(b), 19 U.S.C. § 3810 (2012).

42. Tim Meyer, *Trump’s Threat to Withdraw from NAFTA May Hit a Hurdle: The U.S. Constitution*, THE CONVERSATION (Aug. 25, 2017), <http://theconversation.com/trumps-threat-to-withdraw-from-nafta-may-hit-a-hurdle-the-us-constitution-81444>.

sell more of their goods at higher prices. These categories do not, of course, precisely fit President Trump's core constituencies.<sup>43</sup> It is easy to find data suggesting that President Trump's tariffs will harm consumers as well as industries that rely on the consumption of intermediate goods to make finished products, such as the auto manufacturing sector.<sup>44</sup> But among Trump supporters, public sentiment appears to support the president's efforts, no matter how the actual costs fall.<sup>45</sup> And there is also data showing that the tariffs do benefit certain industries.<sup>46</sup> For instance, an early estimate suggested that President Trump's steel and aluminum tariffs would create approximately 33,000 jobs in the metal sector.<sup>47</sup> To be sure, the estimate also suggested that the tariffs would result in a loss of about 179,000 jobs in other sectors, for a net loss of approximately 146,000 jobs.<sup>48</sup> Focusing exclusively on this net figure, however, misses the distributive function of trade policy which politicians seeking election can exploit to their advantage.<sup>49</sup>

President Trump has also used the leverage created by his tariffs and the threat thereof to renegotiate two trade agreements, NAFTA and the U.S.-Korea Free Trade Agreement (KORUS). Especially with the renegotiated NAFTA, the Trump administration focused on improving the terms of the deal for specific constituencies, mostly certain auto workers and dairy farmers. The former stand to benefit from new rules in NAFTA 2018 that will require more automobiles and auto parts to be made in North America by workers making a minimum wage of \$16 an hour.<sup>50</sup> The latter will enjoy increased market access to Canada, an

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43. Trade retaliation by other countries also targets core Trump supporters, most notably farmers in rural states that voted for Trump. Jacqueline Thomsen, *Leaked Documents Show China Using Tariffs to Target Trump's Base: Report*, THE HILL (July 3, 2018), <http://thehill.com/policy/finance/international-taxes/395356-leaked-documents-show-china-using-tariffs-to-target-trumps>.

44. See, e.g., Robert Ferris, *Tariffs Cost Ford \$1 Billion in Profit and Hurt Sales in China*, CNBC (Sept. 26, 2018), <http://www.cnbc.com/2018/09/26/tariffs-cost-ford-1-billion-in-profit-and-hurt-sales-in-china.html>; Sherman Robinson et al., *Trump's Proposed Auto Tariffs Would Throw U.S. Automakers and Workers Under the Bus*, PETERSON INST. FOR INT'L ECON. (May 31, 2018), <http://piie.com/blogs/trade-investment-policy-watch/trumps-proposed-auto-tariffs-would-throw-us-automakers-and>; Benn Steil & Benjamin Della Rocca, *Trump Steel Tariffs Could Kill up to 40,000 Auto Jobs, Equal to Nearly One-Third of Steel Workforce*, COUNCIL ON FOREIGN REL. (March 8, 2018), <http://www.cfr.org/blog/trump-steel-tariffs-could-kill-40000-auto-jobs-equal-nearly-one-third-steel-workforce> (finding that a 25% steel tax will result in auto-industry job losses ranging from 18,000 to 40,000 by the end of 2019);

45. See, e.g., Nelson D. Schwartz, *Tariffs Trim a Factory's Profit, but Loyalty to Trump Endures*, N.Y. TIMES (July 23, 2018), <http://www.nytimes.com/2018/07/23/business/economy/trade-factory-trump.html>; Heather Long, *One Important Group Supports Trump's Auto Tariffs*, WASH. POST (July 25, 2018), <http://www.washingtonpost.com/business/2018/07/25/one-important-group-supports-trumps-auto-tariffs>.

46. Thomas J. Gibson, *Tariffs on Foreign Steel Save American Jobs*, USA TODAY (Aug. 29, 2018), <http://www.usatoday.com/story/opinion/2018/08/29/tariffs-foreign-steel-save-american-jobs-editorials-debates/1138960002/> (reporting that U.S. Steel reopened facilities in Granite City, Illinois, creating 800 jobs.).

47. Joseph Francois & Laura M. Baughman, *Does Import Protection Save Jobs? The Estimated Impacts of Proposed Tariffs on Imports of U.S. Steel and Aluminum*, TRADE PARTNERSHIP 2 (March 5, 2018), <http://tradepartnership.com/wp-content/uploads/2018/03/232EmploymentPolicyBrief.pdf>.

48. *Id.*

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

50. Heather Long, *U.S., Canada and Mexico Just Reached a Sweeping New NAFTA Deal. Here's What's in It*, WASH. POST (Oct. 1, 2018), <http://www.washingtonpost.com/business/>



example of trade liberalization achieved through the threat of unilateral protection.<sup>51</sup>

Much of the rhetoric around President Trump's tariffs glosses over this redistributive function. Critics focus instead on the net costs and benefits to society as a whole of trade barriers versus trade liberalization. To be sure, trade liberalization generally creates wealth on a global scale, while trade barriers tend to reduce it. But both actions also redistribute wealth. This redistributive function, I argue, better explains how administrations behave in general, and how President Trump has pursued trade policy in particular. The Trump tariffs and renegotiated trade agreements may well drive little national economic growth; but that, I argue, is not their purpose. They are designed to appeal to certain narrow constituencies that President Trump promised to help.

After years of using trade liberalization to redistribute away from certain working-class and middle-class communities, it should come as little surprise that those communities backed a presidential candidate who promised to redistribute wealth in their favor. And given that the president cannot directly redistribute through fiscal programs, as Congress can, it should be little surprise that he used the trading system, and his power to increase tariffs in particular, to effect redistribution.<sup>52</sup>

### III. A BETTER WAY

There are thus both legal and political economy reasons, as well as a deep irony, behind President Trump's use of tariffs to redistribute to his supporters. Congress has substantially delegated its plenary authority over tariffs, and international trade more generally, to the president. Presidents have used that authority to reduce trade barriers, creating significant wealth but also redistributing wealth in the process. Expressing a desire to help make trade more equitable for those who put him in office, President Trump has now used the same authority to redistribute wealth in the opposite direction. He has done so in part because his authority to control tariff rates is the easiest means at his disposal to redistribute.

The difficulty with redistribution through presidential tariffs is three-fold. First, the tariffs do not seem likely to create the kind of broad economic growth in communities harmed by trade necessary both to sustain political support for trade liberalization and to make whole those communities whose economies have suffered to promote the national welfare through trade liberalization. The net benefits of trade liberalization are real and massive. Achieving a sustainable and equitable distribution of those benefits, though, requires more fine-tuning than can be achieved through the blunt instrument of increased tariffs on select products.<sup>53</sup> Second, as noted above, it is not clear that tariffs alone actually

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2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/.

51. *Id.*

52. I do not mean to suggest, of course, that the availability of legal authority is the only reason President Trump used tariffs. President Trump personally appears to like tariffs for other reasons as well, including an apparent sense that trade barriers are simply too low.

53. The need to renegotiate economic rules with China, which the Trump administration is

deliver net benefits to the groups they intend to help. President Trump's steel tariffs, for instance, redistribute from steel consumers, which include many manufacturers, to steel producers. Some manufacturers (and their workers) win, while others lose.

Third, the ad hoc use of tariffs threatens to undermine the credibility of commitments to a long-term trade policy.<sup>54</sup> The bipartisan consensus in favor of trade liberalization in the post-War years has meant that international trade policy has generally been insulated from the see-saw of presidential administrations, in which one administration undoes the prior administration's actions, that characterizes areas such as environmental protection. But President Trump's use of tariffs could create a situation in which alternating administrations pursue radically different trade policies. In other words, even if President Trump's tariffs are successful in bringing some manufacturing jobs back, his tariffs and the gains they have supported may be undone by the next administration. Even worse, effective trade policy of any kind depends on coordination among countries—and coordination is difficult when one administration refuses to honor its predecessor's commitments.

There is a better way. Distributional issues should be married to trade policy in a way that they currently are not. In an era in which trade agreements set rules governing health and safety regulations, provide minimum intellectual property rules, establish standards for digital trade that impact domestic privacy laws, and establish minimum labor and environmental standards, the argument that trade adjustment should remain domestic and legislative, while trade policy should be international and executive, is no longer tenable. Whatever its value in a world of technocrats, the trade two-step is no longer a viable institutional design when trade policy is already being used for distributional purposes. Instead, we must create institutional incentives to deal with trade liberalization and trade adjustment *together*, in the same institutions and on the same timelines. Doing so is the only sure way to create and sustain trade adjustment policies that support and ensure the long-term viability of trade liberalization policies.

This alignment could be accomplished in a number of ways. Most obviously, Congress has the ability to claw back its authority over tariffs. Indeed, a number of bills are pending in Congress that would accomplish just that.<sup>55</sup> They would do so by stripping the president of his authority to proclaim tariffs under the various statutory provisions described above. Instead, the president's proclamations would become recommendations to Congress, on which Congress

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pushing for through its tariffs on Chinese products, could in principle deliver broad-based benefits. See Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261 (2016). However, that China will agree to overhaul its economic rules in response to President Trump's tariffs is far from certain.

54. I am not arguing against tough negotiating tactics, which, as I have written elsewhere, can be quite effective. Rather, any use of such tactics should be embedded in a long-term strategy. See Timothy Meyer & Ganesh Sitaraman, *A Trade Policy for All*, FOREIGN AFF. (June 26, 2018), <http://www.foreignaffairs.com/articles/2018-06-26/trade-policy-all>.

55. Kathleen Claussen, *Trade War Battles: Congress Reconsiders Its Role*, LAWFARE (Aug. 5, 2018) (describing bills pending in Congress to impose fast-track procedures on different trade statutes, such as Section 232 of the Trade Expansion Act), <http://www.lawfareblog.com/trade-war-battles-congress-reconsiders-its-role>.

would vote pursuant to fast-track rules.<sup>56</sup> For instance, a bill by Senator Bob Corker of Tennessee would require fast-track approval of “national security” trade measures under Section 232.<sup>57</sup> Senator Mike Lee of Utah has introduced a bill that would apply more broadly to any “unilateral”—i.e., presidential—change in trade barriers under a wide range of U.S. trade laws.<sup>58</sup>

Under these bills, the president would still control the agenda, but Congress would make the ultimate decisions about trade barriers, and hence their distributional effects. Putting the ball back in Congress’s court might push it to examine other mechanisms at its—but not the president’s—disposal to address the distributional issues underlying the desire to raise tariffs. Constitutionally, these measures also solve the nondelegation problem presented by statutes that grant wholesale authority over tariffs and foreign commerce to the president. Of course, these bills would likely have to overcome a presidential veto to become law. But litigation challenging the scope of the delegations of authority in trade statutes, such as Section 232, could give the President an incentive work with Congress on how to better allocate responsibility for trade policy.<sup>59</sup>

Sunset and review provisions, of the kind contemplated by NAFTA 2018, provide another vehicle for reengaging Congress.<sup>60</sup> By requiring a periodic review of the United States’ membership in trade agreements through a process that involves Congress, sunset or review provisions give proponents of trade adjustment more opportunities to lobby Congress for aligning trade liberalization and trade adjustment policies.<sup>61</sup>

At the other end of the extreme, delegating to the executive branch explicit authority to deal with the distributional impacts of trade would also align trade liberalization and trade adjustment. Gregory Shaffer, for instance, has argued that Congress can authorize the executive branch to impose trade remedies for “social dumping”—the practice of pricing imports so low, made possible by unfair labor or environmental practices, that they cause serious injury to domestic industries.<sup>62</sup> Perhaps most importantly, the time has come for trade agreements themselves to include obligations on all countries, including developed countries, to address distributional issues directly.<sup>63</sup> As trade agreements have swept in topics further and further afield from traditional trade

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56. The pending bills differ in how many trade statutes would be subject to the new fast track procedures. *Id.*

57. S. 3013, 115th Cong. (2018).

58. S. 177, 115th Cong. (2017).

59. See *Am. Inst. for Int’l Steel, Inc. v. United States*, 1:18-cv-00152-CRK-JCG-GSK (Ct. Int’l Trade filed June 27, 2018) (raising a nondelegation challenge to Section 232 of the Trade Expansion Act); see also William Mauldin, *Lawsuit Challenges Trump’s Authority to Impose Tariffs*, WALL ST. J. (June 27, 2018), <http://www.wsj.com/articles/lawsuit-challenges-trumps-authority-to-impose-tariffs-1530104915> (describing the same).

60. United States-Mexico-Canada Act, *supra* note 13, ch. 34, art. 34.7.

61. The sunset and review provision of NAFTA 2018 does not directly require Congress’s engagement, relying instead (as is usual for international agreements) on the “head of government” to transmit a member’s wishes with respect to renewal. United States-Mexico-Canada Agreement, *supra* note 13, ch. 34, art. 34.7.3. However, in the implementing legislation for NAFTA 2018, Congress has the opportunity to mandate its involvement in this review process.

62. Shaffer, *supra* note 8 (manuscript at 33-42).

63. Meyer, *supra* note 8.

liberalization concerns, there is no longer a case for leaving distributional issues out of trade agreements. A Development Chapter in trade agreements, implemented by the executive branch, would provide both reassurance to those disaffected with our current trade policies and a concrete set of policy tools for the government to help those individuals.

I have made the case for a Development Chapter in trade agreements elsewhere.<sup>64</sup> My point here is that increasing the president's authority to respond to trade adjustment concerns specifically, be it through a Development Chapter, rules on social dumping, or some other mechanism, would channel the political demand for trade adjustment policies away from destructive tariffs that rest on outdated and overly broad statutory authority. If the 2016 election is any indication, the consensus around the trade two-step has collapsed. Going forward, trade liberalization and trade adjustment will have to go hand in hand. The question is whether we will design institutions to help them work together.

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64. *Id.*; Garcia & Meyer, *supra* note 5, at 90-93.