

# Two Views of International Trade in the Constitutional Order

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## Introduction

In this year of ambitious new trade agreements,<sup>1</sup> public attention has turned once again to the relationship between the U.S. constitutional order and global commerce.<sup>2</sup> Though they may seem strictly contemporary phenomena, neither “globalization” nor the many debates about it are new.<sup>3</sup> Indeed, they were present in a strikingly similar form in the founding era.<sup>4</sup>

One of the many ways in which the Founders’ Constitution differs from current constitutional practice is in the arena of international trade. The changing conception of the constitutional status of international trade tracks the changing place of the American republic in the world of commerce. It also reveals the international dimension of what Fishkin and Forbath describe as “constitutional political economy,” both in the founding era and today.<sup>5</sup>

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1. See, e.g., Roberta Rampton, *Exclusive: Obama Committed to Pacific Trade Deal, Even as Opposition Spreads – Rice*, REUTERS (Mar. 9, 2016, 4:43 PM), <http://www.reuters.com/article/us-usa-trade-exclusive-idUSKCN0WB2R2> [<https://perma.cc/HV6X-AJWA>] (observing President Obama’s commitment to Trans-Pacific Partnership); Jennifer Rankin, *TTIP: EU and US Vow to Speed Up Talks on Trade Deal*, GUARDIAN (Feb. 6, 2016, 1:49 PM), <http://www.theguardian.com/business/2016/feb/26/ttip-eu-and-us-vow-to-speed-up-talks-on-trade-deal> [<https://perma.cc/N278-MLC4>] (reporting that European and U.S. negotiators are “racing to strike a deal” over the Transatlantic Trade and Investment Partnership before President Obama leaves office).

2. See John Brinkley, *Why Is Trade Such a Big Deal in The Election Campaign?*, FORBES (Mar. 3, 2016, 10:19 AM), <http://www.forbes.com/sites/johnbrinkley/2016/03/03/why-is-trade-such-a-big-deal-in-the-election-campaign/#54049d63585a> [<http://perma.cc/6QLJ-5ZLH>] (observing that international trade has become a central issue in the U.S. presidential election).

3. Emma Rothschild, *Globalization and the Return of History*, FOREIGN POL’Y, Summer 1999, at 106, 107 (documenting the long history of globalization over several centuries).

4. See *infra* text accompanying notes 53–76, 116–28.

5. JOSEPH R. FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming 2017) (manuscript at 1) (on file with the *Texas Law Review*); see also Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014)

Nowhere is this change more obvious than in the different procedures by which the United States now commits itself to foreign commercial relations, compared to the process during the Founding Era and for a century or more afterward. As several scholars have noted, the decisive shift occurred during the interwar period and in the immediate aftermath of the Second World War, when international commercial agreements formerly passed as treaties following the specification in Article II were repackaged as normal legislation, now passed under Article I.<sup>6</sup>

The “old” Article II route for the passage of treaties is clearly specified in the Constitution and was solidly established in practice up to the 1930s.<sup>7</sup> The Treaty Clause provides that the President “shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>8</sup> Up through the mid-twentieth century, nearly all international commercial agreements—and most international agreements generally—were passed as treaties using this mechanism.<sup>9</sup> But today, almost no international trade agreements are ratified by a two-thirds supermajority of the Senate—and certainly no significant ones.<sup>10</sup> Instead, they are passed as so-called “congressional–executive” agreements, using the route for normal statutes approved by a majority in both houses of Congress and signed into law by the President, as specified in Article I.<sup>11</sup>

Furthermore, despite being passed under Article I, the congressional–executive agreements governing international trade are not ratified using normal Congressional rules. Instead, they are “fast tracked”: passed by the House and Senate without the possibility of amendment or filibuster and under strict time deadlines. For instance, if the controversial Trans-Pacific Partnership (TPP) is ratified under this presidential administration or the next, it will be done through an “implementing statute,” adopted within

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(introducing the characteristic forms of arguments about constitutional political economy).

6. See, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 845, 853–56 (1995) (analyzing the New Deal Era scholarship and jurisprudence that justified the use of postwar congressional–executive agreements); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1300–06 (2008) (describing the center of gravity of U.S. international lawmaking shifting from treaties to *ex post* congressional–executive agreements).

7. Hathaway, *supra* note 6, at 1274–86.

8. U.S. CONST. art. II § 2, cl. 2.

9. Hathaway, *supra* note 6, at 1292 (“[T]here is little evidence during this period [through the end of the Civil War] of congressional–executive agreements regarding international trade.”). In the later nineteenth century, there were congressional–executive agreements related to embargos and, in the 1890s, a precursor to the later Reciprocal Tariffs Agreement Act of 1934, the McKinley Tariff Act of 1890, that allowed the President to negotiate reciprocal agreements with foreign nations without congressional approval. *Id.* at 1293–94.

10. Exceptions include some extradition and taxation treaties. See *infra* note 26.

11. For a discussion of the evolution of congressional–executive agreements, see generally Hathaway, *supra* note 6.

ninety days of the President's proposal of the text and with serious limits on the usual deliberative functions of Congress.<sup>12</sup> And, unlike the treaties of the Founding Era, which unambiguously concerned foreign relations, the TPP will reshape the domestic regulatory regime in areas including intellectual property, environmental regulation, and consumer protection, in conjunction with similar changes in the domestic regimes of our trading partners.<sup>13</sup>

Much indeed has changed since the Treaty Clause was written. *Ex post* congressional–executive agreements and fast track have become the dominant means of governing trade, and are understood to have ushered in a new global era.<sup>14</sup> The shift from the Article II to the Article I route for international lawmaking via congressional–executive agreements is credited with enabling a dramatic expansion in international commercial agreements, a linchpin (along with U.S. military expansion overseas) of the postwar world.<sup>15</sup> The anxiety that led Jefferson to admonish his countrymen to pursue “peace, commerce, and honest friendship with all nations” but “entangling alliances with none” has all but vanished from the current American republic.<sup>16</sup>

This change in the governance of trade has occasioned debate among constitutional scholars and jurists since it first occurred, and the controversy is renewed with each new episode of accelerated international integration. In the immediate postwar period, the shift from Article II to Article I was widely commented upon—both lauded and criticized by jurists and legal scholars.<sup>17</sup> The controversy reignited in the early 1970s with the passage of fast-track legislation,<sup>18</sup> and erupted again around the time of the emergence

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12. IAN F. FERGUSON, CONG. RES. SERV., TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 10–11 (2015).

13. David Grewal, Opinion, *The President Wants to 'Fast Track' Two Massive Trade Deals. Congress Should Slow Him Down*, L.A. TIMES (Mar. 29, 2015, 9:48 PM), <http://www.latimes.com/opinion/op-ed/la-oe-grewal-congress-should-not-okay-fast-track-20150327-story.html> [https://perma.cc/A8ET-QCN2].

14. Hathaway, *supra* note 6, at 1258–72, 1304–06.

15. See generally Ackerman & Golove, *supra* note 6.

16. Thomas Jefferson, President of the United States, First Inaugural Address (Mar. 4, 1801), [http://avalon.law.yale.edu/19th\\_century/jefinau1.asp](http://avalon.law.yale.edu/19th_century/jefinau1.asp) [https://perma.cc/L5AG-9NZA].

17. For favorable commentary on the rise of congressional–executive agreements, see Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 203–06 (1945). For a contrary view, see generally Edwin M. Borchard, *American Government and Politics: Treaties and Executive Agreements*, 40 AM. POL. SCI. REV. 729 (1946). For a recent discussion of these sources, see Hathaway, *supra* note 6, at 1244–47.

18. Concerns at that time foreshadowed present debates about trade agreements dominating domestic regulation. See, e.g., *The Trade Reform Act of 1973: Hearings on H.R. 6767 Before the H. Comm. on Ways and Means*, 93d Cong. 394 (1975) (statement of William R. Pearce, Ambassador, Deputy Special Representative for Trade Negotiations) (“We can’t ask you for an advance grant of authority to do away with [non-tariff barriers]; in most cases they are linked in very subtle ways to all sorts of domestic legislation.”).

of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) in the mid-1990s.<sup>19</sup> Our return to these debates today is occasioned not only by the fact that the United States is once again at a turning point in its international commercial ambitions—with several massive new trade deals now looming—but also because the procedures by which these trade deals have been promulgated have evolved even since the debates occasioned by NAFTA and the WTO.

In this Essay, we contrast the prevailing views about trade and treaty making with the anxieties about foreign entanglement felt during the Founding Era. We explore these contrasts by examining the evolution of three justifications for the modern trade regime, which we consider to include both Article I lawmaking and “fast-track” procedures (now called “trade promotion authority”). Specifically, the use of these new procedures to establish U.S. foreign commitments has been justified by: (1) the need for U.S. participation and, ultimately, leadership in the international order; (2) the need to maintain executive flexibility and credibility in international negotiation in order to secure such leadership; and (3) the need to harmonize domestic regulatory regimes across national borders in an era of globalization. Each of these justifications may be illuminated by comparison with debates on trade during America’s founding period.

We argue that these justifications largely reflect an underlying motivation comparable to that of the Founders: the desire to protect American political autonomy. But one of the Founders’ major concerns has been left behind, namely that one region’s economic interests and institutions should not be aggressively undercut in promoting the interests of another. The disappearance of this concern coincides with the rise of congressional–executive agreements, fast track, and an international economic policy that initially favored industrial capital over agrarian interests and now privileges the finance and technology sectors on the East and West Coasts above the decaying industrial heartland.<sup>20</sup> These developments also mark the transition from a foreign policy motivated by resistance to European imperialism to one driven by what is usually called “American global leadership.”<sup>21</sup> Recovering what Fishkin and Forbath call

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19. Compare Ackerman & Golove, *supra* note 6, at 802–03 (lauding the shift from Article II to Article I in the context of NAFTA and the WTO), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1227–28 (1995) (criticizing the shift).

20. See discussion *infra* pp. 151–56.

21. Josh Rogin, *Clinton Pledges Another Century of American Global Leadership*, FOREIGN POL’Y (Sept. 8, 2010, 9:21 AM), <http://foreignpolicy.com/2010/09/08/clinton-pledges-another-century-of-american-global-leadership> [<https://perma.cc/892H-R9YH>] (quoting then-Secretary of State Hillary Clinton in 2010: “For the United States, global leadership is both a responsibility and an unparalleled opportunity”).

the “constitution of opportunity”<sup>22</sup> will require examining how these changes, taken together, have affected the capacity for self-government in the American republic.

### I. Interchangeability and America’s Role in the International Order

The most obvious justification for the twentieth-century innovations in trade procedures is that congressional–executive agreements and fast track have allowed the United States to take a leadership position in shaping the international economic order. Taken jointly, these innovations are said to create a more efficient process for international lawmaking, less subject to interest group politics and legislative logrolling.<sup>23</sup> The new procedures have allowed the federal government to advance a unified agenda for international trade with less risk of its being hijacked by particular (i.e., sectional or minority) interests.

As noted in the Introduction, the modern trade regime is based on a shift in international lawmaking from Article II treaties to Article I legislation, passed as congressional–executive agreements.<sup>24</sup> In trade law, the shift began with the Reciprocal Trade Agreements Act of 1934 (RTAA), passed as an “*ex ante* authorization” by which both houses of Congress, using normal procedures, delegated negotiating power to President Roosevelt to pursue tariff reduction within preapproved ranges.<sup>25</sup> The use of an *ex ante* congressional–executive agreement was not unprecedented in the trade regime: Congress had earlier cooperated with President McKinley in the management of foreign trade relations, which the Supreme Court reviewed in *Field v. Clark*.<sup>26</sup> But another form of Article I legislation—which Ackerman and Golove term an “*ex post* approval”<sup>27</sup>—was first used in international economic governance about a decade later, in 1945, when the Truman Administration presented an agreement providing for American participation in the Bretton Woods institutions for ratification

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22. FISHKIN & FORBATH, *supra* note 5 (manuscript at 1).

23. See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 263–66 (2009) (describing the advantages of the fast-track procedure and arguing for its expansion beyond trade); Hathaway, *supra* note 6, at 1307–38 (describing reasons for preferring a congressional–executive agreement even if a treaty might have traditionally been used); Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT’L L. 143, 148 (1992) (describing the four policy ends served by the fast-track procedure).

24. Hathaway, *supra* note 6, at 1286–1301.

25. See Ackerman & Golove, *supra* note 6, at 824, 847–51 (defining “*ex ante* authorizations” as congressional–executive agreements that occur when Congress explicitly authorizes the Executive to make agreements under specified circumstances, using the Reciprocal Trade Agreements Act of 1934 as an example).

26. 43 U.S. 649 (1892); Hathaway, *supra* note 6, at 1292–97.

27. See Ackerman & Golove, *supra* note 6, at 827 (defining *ex post* approvals as congressional–executive agreements in which Congress approves a deal that the Executive has already worked out).

by both houses of Congress.<sup>28</sup> During the interwar era, *ex post* congressional–executive agreements had been used to establish American membership in several international organizations,<sup>29</sup> and the 1945 Bretton Woods legislation set the pattern for postwar economic agreements generally.<sup>30</sup>

The move away from Article II treaty making to congressional–executive agreements was driven by a deepening sense that the Senate’s control over foreign relations had led to disaster: first in its failure to ratify the Versailles Treaty in 1919 and then in the passage of the Smoot–Hawley tariffs of 1930.<sup>31</sup> America’s absence from the League of Nations and its interwar trade protectionism were believed to have contributed to the rise of fascism and, therefore, endangered the project of American constitutionalism itself.<sup>32</sup> Likewise, the RTAA represented the Democratic response to the Smoot–Hawley tariffs of 1930.<sup>33</sup> Those high tariffs were widely believed to be the product of congressional logrolling, influenced especially by the agricultural sector, which had been devastated by falling commodity prices even before the stock market crash of 1929.<sup>34</sup> Seeking to limit the influence of these “special interests,” Congress delegated negotiating power to the President.<sup>35</sup>

In the aftermath of the Second World War, the United States was drawn into a new position of leadership on the global stage, working to rebuild a devastated Europe and solidifying the Western Bloc during the Cold War. It was clear to many American statesmen and jurists that this new role would depend upon a new international lawmaking process, less susceptible to hijacking by interest-group politics and the obstacle of a two-thirds majority approval in the Senate.<sup>36</sup> The new process would be required above all for international *economic* agreements, given their

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28. *Id.* at 891.

29. Hathaway, *supra* note 6, at 1300.

30. See Ackerman & Golove, *supra* note 6, at 891–93 (describing how the Senate’s reaction to Bretton Woods led to a new, expanded precedent of congressional–executive agreements).

31. See I.M. DESTLER, AMERICAN TRADE POLITICS 11–12 (4th ed. 2005) (emphasizing the dramatic drop in imports and exports resulting from the passage of the Smoot–Hawley tariffs); Ackerman & Golove, *supra* note 6, at 874 (describing the need for the United States to create a “more internationalist alternative to the classical procedure that had brought about the tragedy of Versailles”).

32. See Ackerman & Golove, *supra* note 6, at 861–62 (describing how the Constitution and the Senate “set the stage for the rise of Hitler and the resumption of world carnage”).

33. Douglas A. Irwin, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s*, in THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 325, 325 (Michael D. Bordo et al. eds., 1998).

34. *Id.* at 333–35.

35. DESTLER, *supra* note 31, at 14–16.

36. See, e.g., *id.* at 14–17 (describing bargaining between the Executive and Legislative Branches to overcome postwar obstacles to tariff setting).

outsized domestic impact: consider that Roosevelt used the Article II treaty route for American membership in the United Nations, trusting the Senate not to make the same mistake as it had with the League, but the Truman Administration used a congressional–executive agreement to establish American membership in the Bretton Woods institutions.<sup>37</sup>

The shift to congressional–executive agreements for the governance of trade was justified as a triumph over Senate obstructionism enabled by the Treaty Clause. President Roosevelt justified the RTAA using inward-looking arguments: “If the American government is not in a position to make fair offers for fair opportunities, its trade will be superseded.”<sup>38</sup> The globalization of the market meant that American control over its own economic policy required a more efficient international lawmaking process. Faster, less deliberative trade policy was justified by the need to sustain American interests abroad—and ultimately, American autonomy—in a globalized economy. And this greater efficiency was in turn justified by denigrating some interests as “special” and therefore less worthy of proper legislative consideration and the familiar protections available through congressional deliberation. While the much-discussed rise of executive power in the twentieth century has often been characterized as a response to geopolitical and military exigencies, the same arguments were used in the interwar period and afterward to justify an executive-driven management of foreign commercial relations.<sup>39</sup> Indeed, Roosevelt pioneered this approach by somewhat tenuously relying on the Gold Reserve Act of 1934 to enter into currency-stabilization agreements with other nations through an exclusively executive agreement that bypassed Congress altogether.<sup>40</sup>

A more dramatic example of this shift came a decade later with the rise of the *ex post* congressional–executive agreement as the main mechanism for passing international trade deals.<sup>41</sup> The *ex post* congressional–executive agreement is now the standard way to ratify a wide array of international compacts, having generally eclipsed the use of the Treaty Clause except in a

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37. Ackerman & Golove, *supra* note 6, at 891.

38. *Id.* at 847.

39. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 31–41 (2010) (describing the transformation of the Presidency into a “twenty-first-century demagogue, asserting extraconstitutional authority to master the latest crisis threatening the Republic”). See generally ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973) (outlining the growth of presidential power over the history of the United States).

40. GLEN S. KRUTZ & JEFFREY S. PEAKE, *TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS* 39 (2009). These agreements, sometimes called “sole executive agreements,” are used when the President engages with foreign governments pursuant to commitments ostensibly within the sole discretion of the Executive Branch. See generally David H. Moore, *The President’s Unconstitutional Treaty-making*, 59 *UCLA L. REV.* 598 (2011) (describing and critiquing the practice of sole executive agreements).

41. Hathaway, *supra* note 6, at 1298–1301.

few areas.<sup>42</sup> Although the Supreme Court has never taken up the constitutionality of this mechanism,<sup>43</sup> between 1946 and 1972, 88% of international agreements took this form.<sup>44</sup> By comparison, only twenty-seven international compacts in the early founding period were concluded without a treaty,<sup>45</sup> and these took the form of congressional–executive agreements regulating, for instance, the Postmaster General’s ability to receive and deliver letters from foreign postal services.<sup>46</sup> And whereas the early Republic’s most significant international compacts, such as the Jay Treaty and the Louisiana Purchase, were ratified as Article II treaties, the most significant recent ones, such as those creating NAFTA and the WTO, were passed as congressional–executive agreements under Article I.<sup>47</sup>

The rise of the *ex post* congressional–executive agreement was directly tied to concerns about the intransigence of the Senate, which became a topic of public debate during the Presidential campaign of 1943. Roosevelt urged a new process for the ratification of international agreements while Republican candidate Thomas Dewey defended the status quo of the Senate supermajority requirement.<sup>48</sup> With Roosevelt’s reelection, the House Judiciary Committee reported out a potential constitutional amendment, requiring majorities in both Houses for the ratification of a treaty.<sup>49</sup> The amendment was never to be adopted, but when President Truman later submitted the Bretton Woods Agreement establishing the International Monetary Fund and World Bank to Congress, he did so for majority approval by the House and the Senate.<sup>50</sup> As mentioned above, he simultaneously submitted the treaty establishing the United Nations Charter for approval by Senate supermajority, preserving the possibility that the Bretton Woods legislation was an exceptional event justified by the pressing need for American leadership in a new global economic order.<sup>51</sup>

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42. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (AM. LAW INST. 1987). For more in-depth commentary on the rise of the congressional–executive agreement, see also Hathaway, *supra* note 6, at 1252–71 (analyzing foreign policy areas where treaties continue to be used); John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1, 1–11 (2011).

43. Yoo, *supra* note 42, at 3; cf. *Field v. Clark*, 143 U.S. 649, 694 (1892) (addressing the constitutionality of an *ex ante* congressional–executive agreement).

44. John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 766 (2001).

45. CONG. RES. SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 39 tbl.II-1 (2001).

46. *Id.* at 38.

47. Yoo, *supra* note 44, at 766–68.

48. Ackerman & Golove, *supra* note 6, at 883–85.

49. *Id.* at 886.

50. *Id.* at 891.

51. *Id.* Note, however, that American participation in several important international organizations, including the Permanent International Court of Justice and the International Labor Organization were concluded as congressional–executive agreements during the interwar years.



However, following Bretton Woods, no important trade agreement has ever again been submitted solely to the Senate; the General Agreement on Tariffs and Trade (GATT), all of its subsequent amendments, the World Trade Organization, NAFTA, and all the free-trade agreements that followed it, including the proposed TPP, were all presented to Congress as congressional–executive agreements rather than Article II treaties.<sup>52</sup>

The United States' central role in the creation and maintenance of the postwar economic order has been thought to justify this sea change. Legal academics since the interwar period have rationalized this shift by expounding a theory of “interchangeability,” which holds that an ordinary statute can make any legal change that a treaty could, and, conversely, that a treaty can make any change that a statute could.<sup>53</sup> On this view, both the Article I and Article II routes offer equally legitimate mechanisms of international lawmaking, and the choice between them turns on some simple Congressional mathematics: whether a Senate supermajority or a plain majority of Congress at large provides a more feasible route for making any particular international commitments. The constitutionality of interchangeability has been defended under a range of different theories, the most straightforward being that while the Constitution expressly provides for the advice and consent of two-thirds of the Senate, it never *rules out* that a majority in both Houses could simply pass legislation functioning as an international agreement.<sup>54</sup>

Interchangeability has its more sophisticated defenders as well. Bruce Ackerman and David Golove acknowledge that interchangeability represents a departure from the written Constitution, but justify it using Ackerman's theory of constitutional change, which focuses on the transformative power of “constitutional moments” that are not identical to formal Article V amendment processes.<sup>55</sup> On this account, interchangeability has been integrated into the Constitution by repeated political practice tantamount to its popular ratification, in spite of the failure

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Hathaway, *supra* note 6, at 1300.

52. FERGUSON, *supra* note 12, at app. A. *But see* Hathaway, *supra* note 6, at 1257–58 (noting that that several minor trade treaties have been concluded recently using the Article II mechanism).

53. *E.g.*, McDougal & Lans, *supra* note 17, at 206; Yoo, *supra* note 42, at 768–70 (citing McDougal & Lans). For a recent discussion of these sources, see Hathaway, *supra* note 6, at 1244–48.

54. Hathaway, *supra* note 6, at 1243–48; *cf.* U.S. CONST. art. I, § 10 (expressly prohibiting *states* from entering into international compacts).

55. *See* Ackerman & Golove, *supra* note 6, at 874 (explaining how President Roosevelt responded to a strong push by the House of Representatives to pass a constitutional amendment to strip the Senate of its “treaty-making monopoly.” The President, instead of voicing support for a constitutional amendment which would officially give the House treaty-making powers, enacted an unofficial policy of entering into international pacts via congressional–executive agreements rather than treaties, thereby giving Congress as a whole a power that the Constitution reserves solely for the Senate).

of a formal constitutional amendment to replace the Treaty Clause.<sup>56</sup> Former Bush Administration lawyer John Yoo has defended a more limited version of interchangeability: congressional–executive agreements are argued to be constitutional for international agreements involving trade and domestic regulation—which properly fall to Congress under its Article I powers—but not for treaties involving national security and military affairs, which lie outside Congress’s sole power.<sup>57</sup>

Finally, some academics, including Laurence Tribe, reject interchangeability as ungrounded in the constitutional text and historical practice of constitutional law.<sup>58</sup> As early as 1946, legal observers warned of the dangers of consolidating executive power by these means. In the debate over the Bretton Woods legislation, Yale Law School Professor Edwin Borchard cautioned that, unlike congressional–executive agreements, the traditional method for treaty ratification “insures a popular control over treaties and . . . safeguards the small states in a manner which an easier method of approval might escape.”<sup>59</sup>

Whether or not congressional–executive agreements have constitutional legitimacy by dint of any particular textual construction or theory of constitutional change, the inclusion of the Treaty Clause reveals that the Founders differentiated between treaties and statutes, even if either could provide a basis for international lawmaking. Historical practice suggests that international legal commitments were mainly secured through the Article II treaty ratification process, with the purpose of thwarting agreements offering advantages to some regions of the country over others.<sup>60</sup> Indeed, the Senate supermajority requirement for Article II treaty making followed the earlier approach of the Articles of Confederation—which required nine of thirteen states to ratify a treaty—and which was justified as protecting the interests of different states against the binding commitments of foreign treaties.<sup>61</sup>

The distinction between statutes and treaties turns on the foreign interests obviously implicated in the latter. John Jay, writing as Publius in *Federalist No. 64*, argued that treaties could not be undone through normal legislative processes without risking the credibility of the United States

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56. *See id.* at 873 (arguing interchangeability triumphed as a result of “war, popular anxiety about the peace, and escalating constitutional debate”).

57. Yoo, *supra* note 44, at 831.

58. Tribe, *supra* note 19, at 1276.

59. Borchard, *supra* note 17, at 729.

60. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 189, 191 (2005) (discussing how Article II sets forth the requirements for all treaties and noting that prominent Federalists cited the supermajoritarian protections of Article II as safeguarding the country from the dominance of regional interests); *see also* Hathaway, *supra* note 6, at 1281–84 (arguing the supermajority requirement prevented the federal government from making treaties that would disadvantage a particular region).

61. AMAR, *supra* note 60, at 190.

with its foreign allies.<sup>62</sup> While a domestic law is inherently a matter of self-government, a treaty involves a commitment to a foreign power, thus involving both citizens and noncitizens in ongoing obligations given the force of law.<sup>63</sup> Treaties prove quasi-irreversible for this reason, at least as compared to domestic statutes that can be revised by future governmental majorities without upsetting foreign relations.<sup>64</sup> The corrective to this problem, Publius argued, was to trust treaty approval to supermajority consent in the Senate:

States are equally represented in the Senate, and by men the most able and the most willing to promote the interests of their constituents, they will all have an equal degree of influence in that body . . . . [T]he government must be a weak one indeed, if it should forget that the good of the whole can only be promoted by advancing the good of each of the parts or members which compose the whole.<sup>65</sup>

Publius' focus was on advancing the interests of *each* of the parts or members that compose the body of the whole. The statement's significance especially reflected the different Northern, Southern (and perhaps incipient Western) interests at the time—although the Federalists may have believed that regional interests would eventually converge.<sup>66</sup> As Akhil Amar explains, the Federalists made this and other guarantees to “assure[] skeptics that the supermajoritarian safeguards of the Article II treaty process would protect regional minorities, thereby implying that in certain regionally divisive contexts, a simple federal statute . . . would not suffice.”<sup>67</sup>

This guarantee aimed to calm anxieties that had already arisen from a regional conflict under the Articles of Confederation.<sup>68</sup> In the 1780s, Spanish diplomats entered into negotiations with U.S. statesmen—including John Jay—for the American cessation of free navigation of the Mississippi River for twenty-five years in exchange for increased trade with Spain.<sup>69</sup>

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62. THE FEDERALIST NO. 64, at 328–29 (John Jay) (Ian Shapiro ed., 2009).

63. *Id.*

64. *Id.* at 329.

65. *Id.*

66. *See id.* (dispelling the fear of majoritarian oppression of minorities).

67. AMAR, *supra* note 60, at 191; *see also* 3 JONATHAN ELLIOT, ELLIOT'S DEBATES 499–500 (1986) (recording George Nicholas's and James Madison's discussion of whether the treaty provision of Article II would adequately protect the country from dominating regional interests); 2 MAX FARRAND, FARRAND'S RECORDS 541 (1911) (recording Mr. Gerry's argument that peace treaties should require a higher proportion of votes than that required for other treaties).

68. Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 293–94 (1934).

69. AMAR, *supra* note 60, at 191; *see also* Warren, *supra* note 68, at 282–83 (discussing John Jay's role in negotiating the treaty with Spain and the proposed twenty-five year cessation of free navigation).

The treaty would have benefited Northern shipping but harmed states that relied on the Mississippi for transportation and trade.<sup>70</sup> The proposal provoked an intense and divisive debate, with many Southern statesmen indicating a desire to leave the Confederation if the treaty was adopted.<sup>71</sup> Jay abandoned the proposal, and several years later the Mississippi River conflict gave birth to the two-thirds “advice and consent” requirement in the Treaty Clause.<sup>72</sup> Treaties were to be subject to a higher threshold for approval, because they could burden sectional interests for so long, with little or no chance of amendment or repeal.<sup>73</sup>

Alexander Hamilton rearticulated this justification in a later conflict over a commercial treaty with Great Britain, the Jay Treaty, which pitted him against James Madison.<sup>74</sup> Madison maintained that the treaty had to be affirmed by the House as well as the Senate.<sup>75</sup> Hamilton, whose views won the day, maintained that the statutes and treaties belonged to “distinguishable sp[h]eres of [a]ction.”<sup>76</sup> Writing to Rufus King, Hamilton argued that:

- [1.] The object of the *Legislative* Power is to prescribe a rule of Action for our own Nation which includes foreigners coming among us.
- [2.] The object of the Treaty Power is by agreement to settle a rule of Action between two Nations binding on both.
- [3.] These objects are essentially different and in a constitutional sense cannot interfere.
- [4.] The Treaty Power binding the *Will* of the nation must within its constitutional limits be paramount to the Legislative power which is that Will; or at least the last *law* being a Treaty must repeal an antecedent contradictory law.<sup>77</sup>

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70. AMAR, *supra* note 60, at 191.

71. See Warren, *supra* note 68, at 283–84.

72. AMAR, *supra* note 60, at 191–92.

73. *Id.* at 191.

74. See 4 ANNALS OF CONG. 437–38 (1796) (delineating James Madison’s expressed views on the treaty power). Madison lost this debate. See *Jay’s Treaty [6 April, 1796]*, in 16 THE PAPERS OF JAMES MADISON 290, 290–301 (J.C.A. Stagg et al. eds., 1989) (recounting how Madison’s initial proposal was first met with ridicule). But Madison’s views apparently influenced the self-executing nature of the treaty—it eventually required the House to pass appropriations for the treaty to take effect. *Id.*

75. See *Introductory Note: To George Washington* (Mar., 7 1796), in 20 THE PAPERS OF ALEXANDER HAMILTON 64, 64–68 (Harold C. Syrett ed., 1974) (noting that Madison’s treaty-amendment proposal failed).

76. *Letter from Alexander Hamilton to Rufus King* (Mar., 16 1796), in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 75, at 76, 77 (first alteration in original).

77. *Id.*

In this justification, we see Publius' concerns in *Federalist No. 64* reiterated: treaties bind the legislative will and cannot easily be overcome by later legislation, hence the special entrustment to a supermajority in the Senate. Hamilton's opponents shared his view of treaties, if not his trust of the aristocratic Senate: Jefferson denounced the Jay Treaty as a "conspiracy with the enemies of [the] country to chain down the legislature."<sup>78</sup>

An anxiety about what Washington considered entangling "foreign influences" persisted throughout the nineteenth century and meant that most international lawmaking was enacted through the Treaty Clause of Article II.<sup>79</sup> It is important to note, however, that the Founders' concern about foreign entanglements did not rest on skepticism about the legitimacy or efficacy of international law (the "law of nations") but the reverse. It was precisely because the Founders wished to maintain the fledgling nation as one in good international standing—and took the assumption of international legal obligations seriously—that they sought to minimize the foreign influence that would come through commercial interconnection. Only when the United States gained increased confidence vis-à-vis foreign powers in the nineteenth century and later did it shift to using Article I commerce powers to make international agreements. A foreshadowing of this change came with the congressional declaration in 1871 that the United States would no longer treat with the Indian Tribes, considered as sovereign nations, but would manage them instead through Article I legislation.<sup>80</sup>

What happened to the concern to protect regional interests in the enactment of international treaties? In the early twentieth century, distinct regional interests were recast as special interests, which were thought not to deserve protection in the international lawmaking process. This move was justified by new recourse to a conception of a "national interest" that transcended regional divides.<sup>81</sup> In economic terms, this transformation appears to reflect the post-Civil War dominance of one regional interest at the negotiating table: Northern industrial capital, lately transformed into finance capital of the East Coast, was newly thought to be able to speak for the interests of the nation as a whole, at least regarding its external economic affairs.<sup>82</sup>

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78. Letter from Thomas Jefferson to James Madison (Mar. 27, 1796), in 29 THE PAPERS OF THOMAS JEFFERSON 51, 51 (Barbara B. Oberg ed., 2002).

79. For some exceptions involving Texas and Hawaii, see Hathaway, *supra* note 6, at 1355 n.352.

80. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEXAS L. REV. 961, 995 n.160 (2001).

81. *Cf. id.* at 972 (discussing scholars who argue that congressional-executive agreements are superior because they render it "more difficult for narrow regional interests to defeat an agreement otherwise enjoying majority support").

82. See PAUL BAIROCH, *ECONOMICS AND WORLD HISTORY: MYTHS AND PARADOXES* 36–38 (1993) (discussing various tariff modifications between 1861 and 1914 and arguing that protectionism increased during Reconstruction).

## II. Fast Track and the Autonomy of the Executive

The shift away from the protection of regional interests in the Article II treaty-making process has been further consolidated through a set of procedural changes that gave more power to the Executive Branch in regulating foreign economic relations. These procedural changes provide a “fast track” for expediting trade agreements passed as *ex post* congressional–executive agreements. The modern trade regime has been established not just through the use of Article I for international lawmaking, but also, since the 1970s, through these fast-track procedures.

The result has been to increase the autonomy of the Executive Branch in international trade negotiations. On the one hand, the use of congressional–executive agreements has expanded the number of actors involved in giving final approval to international agreements through the inclusion of the House of Representatives in the process. This shift has been widely and rightly praised as a modernizing move that increases the democratic legitimacy of international lawmaking.<sup>83</sup> On the other hand, the number of actors able to shape the substance of trade agreements has been progressively narrowed through the use of fast-track procedures. The Senate once enjoyed the power to consider and amend treaties while convened as a deliberative body, constrained by the distinct economic interests of the several states and guided by its conception of national purpose. Under modern fast-track procedures, a smaller group of policy makers—including members of high-profile House and Senate committees as well as private sector advisors—shape the treaty while it is under negotiation by the Executive Branch.<sup>84</sup> The broadening of the *final approval* process since the mid-twentieth century thus contrasts with a tightening of control over the formation of the trade agenda since the 1970s conceived both in terms of *objective setting* and *textual elaboration*.

This transformation began with the RTAA, which empowered the Executive, albeit modestly.<sup>85</sup> Under that Act, the President was allowed to negotiate tariffs within prespecified ranges to entice reciprocal trade liberalization by foreign allies with the assurance of swift congressional passage afterward.<sup>86</sup> Consequently, Congress merely reviewed the content of the agreements negotiated under the RTAA, once they had been formally

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83. See Hathaway, *supra* note 6, at 1308–37 (discussing how congressional–executive agreements make it easier to conclude Article II treaties, create more dependable international agreements, and have greater democratic legitimacy because they involve the House in the treaty process).

84. See *infra* pp. 130–32.

85. See Reciprocal Trade Agreements Act of 1934, 19 U.S.C. § 1351(a) (1934) (authorizing the President to modify duties and alter import restrictions whenever he determined them unduly burdensome).

86. *Id.*

presented, to check for consistency with its authorization.<sup>87</sup> All the relevant deliberation took place *ex ante*, when Congress set the tariff ranges specified in the RTAA statute.<sup>88</sup> This form of executive delegation does not, in our view, represent an undue narrowing of the scope of congressional deliberation since the matter to be negotiated upon—a reduction in tariff rates—was well defined and thus could be determined with precision *ex ante*.

However, as trade agreements have grown to encompass behind-the-border measures, now conceived as non-tariff barriers or trade distortions, the domain about which Congress does not deliberate has expanded rather than contracted.<sup>89</sup> Permutations of the RTAA had sufficed to lower tariff barriers for the following forty years—contributing to the passage of the GATT and each subsequent round of tariff liberalization.<sup>90</sup> But the Tokyo Round of GATT negotiations, which began in 1973, turned to the regulation of an expanded conception of “non-tariff barriers,” which no longer indicated simply border measures made effective through means other than tariffs (e.g., quantitative restrictions or manipulative customs procedures), but could be expanded to include almost any regulation that created a so-called trade distortion, which has ultimately come to include even environmental, labor, and consumer-safety provisions.<sup>91</sup>

Getting this new round of trade negotiations of such expanded scope through Congress looked as though it would prove challenging. During the prior Kennedy Round, conflict between President Johnson and Congress over conventional non-tariff barriers cast doubt on the willingness of Congress to commit to further trade liberalization, particularly if it threatened significant domestic impact.<sup>92</sup> Specifically, the agreement negotiated by Johnson would have required the United States to eliminate the “American Selling Price” method of pricing goods at the border as well as to change U.S. antidumping practices.<sup>93</sup> Although Congress instructed

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87. *See id.* § 1354 (requiring the President merely to seek information and advice from the United States Tariff Commission and various departments before concluding a foreign trade agreement).

88. *See id.* § 1351 (prohibiting presidential changes in existing tariffs that exceeded a 50% increase or decrease, but giving the President broad discretion within this limit to modify tariffs).

89. *See* ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* 223–40 (2011) (describing the expanding scope of application of GATT/WTO and its impact on domestic regulation).

90. Hal Shapiro & Lael Brainard, *Fast Track Trade Promotion Authority*, BROOKINGS (Dec. 2001), <http://www.brookings.edu/research/papers/2001/12/globaleconomics-brainard> [<https://perma.cc/K8LD-ZAQ6>].

91. LANG, *supra* note 89, at 224–26.

92. Koh, *supra* note 23, at 146.

93. FERGUSSON, *supra* note 12, at 4, 4n.9 (citing I.M. DESTLER, *RENEWING FAST-TRACK LEGISLATION* 6 (1997)).

Johnson not to accept the agreement, he did so anyway.<sup>94</sup> Congress then refused to adopt the changes regulating non-tariff barriers.<sup>95</sup> In response, and in anticipation of the Tokyo Round's conclusion, the Trade Act of 1974 created the first modern fast-track procedure, both restricting and redefining who could influence international trade agreements during the negotiating phase, especially on the question of non-tariff barriers.<sup>96</sup>

The Act expressly provided for commitments on both tariffs and non-tariff barriers to be passed with time-limited debate and no possibility of either amendment or filibuster by simple majorities in both houses of Congress—that is, on the fast track.<sup>97</sup> Permutations of the 1974 Act establishing fast track have been renewed periodically since, with the result that—subject to an initial delegation of authority to the President—Congress restricts itself to an up or down, simple-majority vote on whatever trade deals are negotiated, a favored treatment not otherwise provided for in other areas of lawmaking.<sup>98</sup> In this respect, trade has avoided the general trend of increasing party-political polarization both owing to the use of fast-track procedures and the cross-party consensus that these procedures both issued from and helped to consolidate.

Although fast-track has broadened the numbers involved in the final approval of trade agreements, it has limited who controls objective setting and textual elaboration during the actual negotiations. Specifically, the 1974 Act limited Congress's at-large consideration of any negotiated trade agreement to ninety days after a proposal by the Executive.<sup>99</sup> In its place, it empowered several congressional committees—notably, the Senate Finance Committee and the House Ways and Means Committee—to influence the negotiating process.<sup>100</sup> It also required consultation during the negotiations with a newly created "Industry Trade Advisory Committee" of private sector advisors to ensure representation of a wide range of economic interests (and to mobilize elite pressure useful for later congressional approval).<sup>101</sup> Importantly, although the 1974 Act allowed the fast-tracking of proposals concerning both tariffs and non-tariff barriers, it specifically exempted regulatory commitments in areas of "consumer protection, employee health and safety, labor standards, or environmental standards," which required the passage of special bills authorizing negotiations and providing *ex ante* congressional guidance.<sup>102</sup> The aim of this exemption

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 5.

98. *Id.* at 5–8.

99. Trade Act of 1974, 19 U.S.C. § 2112(e) (2012).

100. *See id.* § 2112(b)(4)(A)(ii).

101. *Id.* § 2155.

102. Trade Act of 1974, Pub. L. No. 93-618, § 102(b)–(c), 88 Stat. 1978 (codified as amended



was to preserve a role for ordinary congressional deliberation concerning regulations within its traditional remit: fast-tracking a customs-house procedure was a different matter than fast-tracking a change to an environmental or labor regulation, even if both were arguably “non-tariff barriers.”

In 1988, the Omnibus Trade and Competitiveness Act took another step toward limiting who could influence trade negotiations before final approval. That Act eliminated the 1974 Act’s distinction between tariff and non-tariff barriers, and with it, some of the special considerations for trade measures impacting consumer protection, employee health and safety, labor standards, and environmental standards.<sup>103</sup> All trade barriers were now procedurally and conceptually in the same boat, including all domestic regulations that could be argued to distort international trade, even if not intended as trade barriers.<sup>104</sup>

These two developments—the invention of fast track and the extension of trade discipline into domestic regulation—have together constituted a radical change, already enabled but not necessitated by the background shift from Article II treaty making to Article I congressional–executive agreements. Congress at large now has limited access to the negotiating positions and draft texts of treaties while they are under development by the Executive Branch.<sup>105</sup> And it then has only a short time to consider complicated agreements that may impact domestic policies once the Executive releases them.<sup>106</sup> The result is that a narrow slice of Congress and elite, private-sector advisors have an outsized influence on a negotiation process that now goes far beyond trade as traditionally understood.

A further development of the past decade has been the use of national security classification to further limit access to the negotiating drafts prior to their formal presentation.<sup>107</sup> Using national security classification allows the United States Trade Representative (USTR) to control the circulation of

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at 19 U.S.C. § 2112 (2012)).

103. Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901 (2012).

104. *See, e.g.*, LANG, *supra* note 89, at 170 (noting that interpretive evaluation must be used to determine what regulations “constitute[] a trade barrier”).

105. *See, e.g.*, Elizabeth Warren, U.S. Senator, Address to the Senate (May 21, 2015), [http://www.realclearpolitics.com/video/2015/05/21/warren\\_trade\\_deal\\_secret\\_because\\_if\\_details\\_were\\_made\\_public\\_now\\_the\\_public\\_would\\_oppose\\_it.html](http://www.realclearpolitics.com/video/2015/05/21/warren_trade_deal_secret_because_if_details_were_made_public_now_the_public_would_oppose_it.html) [https://perma.cc/C7U4-PY46] (discussing the lack of access to information about the Trans-Pacific Partnership provided by the Executive Branch to Congress and the public).

106. *Id.*

107. For a detailed discussion on the implications of the exemption for national security information found in the Freedom of Information Act on the Trans-Pacific Partnership and other international negotiations, see David S. Levine, *Bring in the Nerds: Secrecy, National Security, and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105, 126–40 (2012).

negotiating drafts, further limiting the extent of congressional oversight, in keeping with a general trend toward reduced transparency in international economic lawmaking.<sup>108</sup> More broadly, the effect of national security classification—which, in the case of the TPP (like other recent agreements), extends to the negotiating positions of the USTR for four years after either the passage or *failure* of the legislation—is not only to restrict the number of those in Congress involved in objective setting or textual elaboration for new agreements, but also to reduce popular mobilization against trade agreements during the negotiating process.<sup>109</sup> Interest-group mobilization in favor of the trade agreements can generally be generated through the Industry Trade Advisory Committee (ITAC) members, who can report back to their constituencies and employers in broad terms on the progress of the negotiations.<sup>110</sup> But otherwise-diffuse social movement pressure cannot be brought to bear on the small number of congressional committees that count when the details of trade negotiations are so closely controlled and the actual laws are only made available to the public once they are ready to be fast-tracked. The justification for this new regime of secrecy is that it provides the Executive with room for maneuver in several distinct respects, but this must of course be set against the impact it has on broader traditions of self-government, particularly given that the trade regime now goes far beyond simple tariff policy. It is in this context that the Wikileaks dissemination of draft chapters of the TPP became important in generating alternative mechanisms of public accountability and academic scrutiny, even though the dissemination of these drafts was a direct contravention of the new national security regime for trade law.<sup>111</sup>

Some fast-track defenders claim these developments have enhanced, rather than undermined, executive accountability by giving at least select members of Congress more access to the negotiations.<sup>112</sup> But this argument neglects the question of who gets to influence the content of a treaty during

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108. Oona Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, ASIL INSIGHTS (Aug. 24, 2011), <https://www.asil.org/insights/volume/15/issue/23/going-it-alone-anti-counterfeiting-trade-agreement-sole-executive> [<https://perma.cc/7GHN-UWUT>] (describing the exceptional secrecy shrouding the negotiations for this Agreement, which excluded even Congress).

109. See, e.g., Levine, *supra* note 107, at 128–29 (suggesting that the public “deserves an explanation” for this “level of secrecy”).

110. See generally Margot E. Kaminiski, Opinion, *Don't Keep Trans-Pacific Partnership Talks Secret*, N.Y. TIMES (Apr. 14, 2015), [http://www.nytimes.com/2015/04/14/opinion/dont-keep-trade-talks-secret.html?\\_r=0](http://www.nytimes.com/2015/04/14/opinion/dont-keep-trade-talks-secret.html?_r=0) [<https://perma.cc/7JKC-87A7>]. For examples of exchanges between the USTR and the ITACs, see William New, *Confidential USTR Emails Show Close Industry Involvement in TPP Negotiations*, INTELL. PROP. WATCH (May 6, 2015), <http://www.ip-watch.org/2015/06/05/confidential-ustr-emails-show-close-industry-involvement-in-tpp-negotiations/> [<https://perma.cc/N2GU-6D3U>].

111. Warren, *supra* note 105.

112. Koh, *supra* note 23, at 159–61. Koh acknowledges that fast-track enhances presidential leverage over Congress and suggests several corrective amendments. *Id.* at 169–80.

the negotiation phase. It focuses instead on the increase in the number of congressional representatives involved in the expedited final approval of a treaty, rather than the decrease in the number of those involved in objective setting and textual elaboration.

It also misses the increasing role for private lobbyists representing elite economic interests in the negotiating process. For example, during the negotiation of the TPP, only a few members of Congress could access proposed drafts of the treaty, which were classified as a national security matter by the USTR.<sup>113</sup> By contrast, all members of the ITAC, which included an outsized proportion of pharmaceutical companies and banks, had access to draft text of the treaty while under negotiation by the USTR.<sup>114</sup> This means that the White House could have released the treaty text only in giving an implementing bill to Congress, which would only have 90 ninety days to digest complex draft legislation. In fact, the Obama administration released the treaty text before introducing an implementing bill, apparently to defend and build support for the unpopular proposal.<sup>115</sup> Moreover, given fast-track procedures, Congress can only vote up or down without amendment on a proposal which was years under negotiation—and thus would risk endangering the possibility of any agreement whatsoever through the expression of concern about the final text negotiated by the Executive. By contrast, industry advocates had years to analyze and influence negotiations while they occurred, without incurring public scrutiny in doing so.<sup>116</sup>

The exclusion of Congress at large from the fast-tracked negotiation process contrasts with the role reserved for the Senate in the early Republic under the Treaty Clause. Recall Jay's emphasis on the need for deliberative prowess in his justification of senatorial "advice and consent": issues of foreign "war, peace, and commerce" were especially complex and could "only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to

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113. See, e.g., Warren, *supra* note 105 (discussing how even the members of Congress given access to proposed drafts of the Trans-Pacific Partnership were given limited access and forced to keep it secret from the public).

114. See Christopher Ingraham & Howard Schneider, *Industry Voices Dominate the Trade Advisory System*, WASH. POST (Feb. 27, 2014), <http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/> [https://perma.cc/5FXW-LBBF] (showing the makeup of the Obama Administration's trade advisory system). See generally Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977 (2014) (discussing the effects of a captured USTR on the international intellectual property regime).

115. At the time of this writing, no implementing bill has been introduced. The Obama administration released the TPP text on November 25, 2016.

116. See Kaminski, *supra* note 114, at 981 ("The text of trade negotiating proposals and drafts of free trade agreements are kept secret from most stakeholders, including the public and the press.").

execute.”<sup>117</sup> Because senators were selected by an elite—in those days, by state senators and not popular vote—and had a much longer term than representatives, they were expected to have the capacity and the time to engage in lengthy, careful consideration of foreign affairs.<sup>118</sup> The Senate’s wisdom supplemented the President’s—though, as Oona Hathaway and others have observed, the Advice and Consent Clause was quickly reduced to the “consent” clause given political dynamics in the early republic.<sup>119</sup>

This did not imply that the Senate was understood as another negotiator at the treaty table. In the same essay, Jay admits that negotiations will require “secrecy and immediate despatch [sic]” when treaty partners needed to entrust intelligence to the President.<sup>120</sup> But early practice suggests that secrecy about both the negotiation process and the resultant deals, even when justified, was still limited to the duration of the official negotiations, as illustrated in the debates over the Jay Treaty. Madison, who opposed the treaty, worked with Edward Livingston in the House to call for the release of Jay’s correspondence with President Washington and his other diplomatic papers so that the House could evaluate the constitutionality of the proposed treaty.<sup>121</sup> The papers were released, vindicating both the House’s and Senate’s demand for further information.<sup>122</sup> During that episode and thereafter, the Senate claimed a right to amend any treaty proposed by the President.<sup>123</sup>

The practice during the Founding Era was thus dramatically different from what now prevails. To summarize: the Senate lost its special place in the deliberative process with the shift from Article II to Article I international lawmaking. But given fast-track procedures, Congress as a whole did not then replace the Senate to serve as a comparable deliberative partner for the Executive. Congressional deliberation in the new trade regime is limited to ratification of *ex post* congressional–executive agreements that are shaped mainly by the Executive Branch. The interchangeability of Article II treaty making and Article I legislation, in conjunction with fast-track, has thus functioned to consolidate executive control over trade even as the number of congressional representatives involved in ratifying the results of executive negotiation has expanded. The consequence has been to favor executive preferences in trade deals: as Aaron-Andrew Bruhl has concluded in a positive political theory analysis, a two-thirds voting rule with amendments tends to result in outcomes much

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117. THE FEDERALIST NO. 64, *supra* note 62, at 325–26.

118. *Id.* at 326–27.

119. Hathaway, *supra* note 6, at 1308.

120. THE FEDERALIST NO. 64, *supra* note 62, at 327 (emphasis omitted).

121. *Madison in the Fourth Congress, 7 December 1795–3 March 1797: Editorial Note*, in 16 THE PAPERS OF JAMES MADISON, *supra* note 74, at 141, 141–59.

122. *Id.*

123. *Id.*

nearer the Senate's policy preferences than a one-half voting rule without amendments.<sup>124</sup> Even holding the voting rule constant at one-half, the elimination of amendments, combined with the President's role as the first-mover in the legislation, results in outcomes markedly closer to the President's policy preferences.<sup>125</sup> This is especially true given the Senate's historical practice of proposing amendments to treaties during the ratification process itself.<sup>126</sup> As Bruhl summarizes, "fast track makes the president a proposal-maker who, by setting policy . . . can appropriate to himself all of the benefits from changing the status quo . . . [i]t is a qualitative reversal of roles."<sup>127</sup>

Moreover, the President's preferences over trade have themselves become intertwined with those of the lobbyists included at the negotiating table. The Trade Act of 1974 sought to combine the efficiency of congressional-executive agreements with new input from select congressional committees and private advisors, thereby enhancing the Executive's room for maneuver in international negotiations—but in so doing, it simultaneously empowered industry representatives in the negotiating process.<sup>128</sup> It is unsurprising to note that these private advisors have disproportionately represented economic interests that benefited from the postwar economic order they helped to consolidate and expand, with heavy participation during the TPP negotiations by the finance, pharmaceuticals, and telecommunications sectors.<sup>129</sup> The protection offered by the Treaty Clause to regional and sectional interests in the early republic has been lost, but it is not obvious that a unified national interest has replaced it, given that special economic interests now have a privileged role in the negotiating process.

### III. From Governance of Trade to Governance through Trade

As mentioned briefly above, not only have the procedures by which international commercial agreements are made changed dramatically since the Founding Era, but the content of the agreements has changed as well. International trade commitments increasingly impinge on areas once regulated through normal congressional statutes. That changes are being made to domestic law through international agreements does not, of course,

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124. Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 399–400 (2003).

125. *Id.* at 397–404.

126. *Id.* at 403–04 & n.19 (citing Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT'L & COMP. L. REV. 89, 91 (1996)).

127. *Id.* at 401.

128. See Koh, *supra* note 23, at 165 (recognizing that the President can consult with "private industry groups" as part of the negotiation process).

129. See Ingraham & Schneider, *supra* note 114 (showing the industries represented by the committees of the executive trade advisory system).

flout the Constitution. Under the Constitution, Congress can implement any law whose commitments fall within the scope of its powers, including the power to regulate both interstate and international commerce.<sup>130</sup> The question is not whether Congress has the constitutional authority to approve domestic legal changes through international law, but whether it is wise to allow the Executive to formulate, in collaboration with foreign powers, an agenda for domestic law effectuated through trade agreements and then presented for streamlined congressional approval. In other words, it is the increasing power of the Executive to set objectives and draft textual commitments for international coordination in areas of traditional congressional purview that should give us pause, especially given that international compacts may bind future governments more durably than normal statutes.

Here again, attitudes and practices in the early republic differed from those of today. The early republic's most famous opponent of international commercial entanglements was George Washington, whose Farewell Address of 1796 counseled for merely "temporary" commitments in international commerce.<sup>131</sup> Washington feared any more permanent commitments and denounced the "foreign influence" they introduced into U.S. politics as "one of the most baneful foes of republican government."<sup>132</sup>

In fact, in Washington's own administration, the President could only discretionarily *restrict* trade.<sup>133</sup> Congress authorized Washington to lay an embargo on the ships and vessels of foreign nations whenever he deemed "the public safety shall so require."<sup>134</sup> John Adams and Thomas Jefferson enjoyed similar powers.<sup>135</sup>

Jefferson was perhaps the most ardent supporter of Washington's anti-entanglement position. Indeed, he argued on grounds of self-government that *no* treaty ought to be self-executing.<sup>136</sup> Instead, every treaty should be implemented through a separate congressional statute, which need not adopt the treaty precisely as negotiated by the Executive.<sup>137</sup> Jefferson argued this

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130. Ackerman & Golove, *supra* note 6, at 811.

131. George Washington, President of the United States, Farewell Address (1796), [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp) [<http://perma.cc/8VT3-FXAB>].

132. *Id.*

133. *Field v. Clark*, 143 U.S. 649, 683–85 (1892).

134. *Id.* at 683–84.

135. *Id.* at 684–85.

136. AMAR, *supra* note 60, at 304. Madison held a less extreme version of this view, where laws passed by both houses would always trump treaties ratified by the Senate in case of a conflict. *Id.* at 307 n.44.

137. *Id.* at 304–05.

position during a debate over an 1815 commercial treaty with Britain, which, among other things, committed the United States to equal treatment of British shipping vessels in American ports.<sup>138</sup> Writing in the *Washington Daily National Intelligencer*, Jefferson claimed:

[T]he present enterprise of the Senate [is] to wrest from the H. of Representatives the power, given them by the constitution, of participating with the Senate in the establishment & continuance of laws on specified subjects. [T]heir aim is, by associating an Indian chief, or foreign government in form of a treaty to possess themselves of the power of repealing laws become obnoxious to them, without the assent of the 3d branch, altho' that assent was necessary to make it a law.<sup>139</sup>

For Jefferson, shipping policy fell within the responsibility and powers of the House of Representatives, which ought to have the final say on the matter, negotiated treaty or not. With the exception of Madison, Jefferson did not win over many of his contemporaries to this view.<sup>140</sup> But his attitude epitomizes a general wariness about foreign entanglement that arguably persisted throughout much of the nineteenth century, when the Executive's discretion over trade was mostly limited to resumption of trade relations following military conflict,<sup>141</sup> and even down to the twentieth-century defeat of Wilsonian internationalism.<sup>142</sup>

This wariness no longer holds. Far from regarding treaties as potentially entrapping instruments, they are now considered largely interchangeable with statutes, with an additional priority given to international commercial deals through the use of fast track. The combination of interchangeability plus fast track creates a new incentive structure for getting legal changes made domestically, not just internationally. If desired domestic policies can be made effective as part of an international bargain with foreign allies, they can be fast tracked into an agreement, which may prove harder to reverse than ordinary legislation.

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138. See *A Convention to Regulate the Commerce Between the Territories of the United States and of His Britannick Majesty* art. 1, July 3, 1815, 8 Stat. 228; Letter from Thomas Jefferson to James Madison (Mar. 23, 1815), in 8 *THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES* 371, 373 (Barbara B. Oberg & J. Jefferson Looney eds., 2008) (arguing that the "[c]onvention should be a separate act").

139. Thomas Jefferson, "A" (*Thomas Jefferson*) to the *Washington Daily National Intelligencer*, *WASH. DAILY NAT'L INTELLIGENCER* (Mar. 13, 1816), reprinted in 9 *THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES*, *supra* note 138, at 548, 548.

140. AMAR, *supra* note 60, at 306–07 (demonstrating that the Founding Federalists disagreed about the relationship between congressional statutes and treaties).

141. See *Field v. Clark*, 143 U.S. 649, 684–90 (1892) (recounting delegations to the President of the resumption of trade relations in the nineteenth century following their suspension for military or geopolitical reasons).

142. See Charles A. Kupchan & Peter L. Trubowitz, *Dead Center: The Demise of Liberal Internationalism in the United States*, *INT'L SECURITY*, Fall 2007, at 7, 11 (recounting the Senate's rejection of the League of Nations, which Woodrow Wilson had embraced).

The desire to be seen as a member of the international community in good standing can deter nations from derogating from agreements which have broad acceptance. Furthermore, international regulatory regimes create network effects over time; the more common a standard becomes, the more entrenched, and the greater costs associated with switching from it.<sup>143</sup>

The modern trend of packaging regulatory regimes within trade agreements began with the 1962 Kennedy Round of GATT negotiations.<sup>144</sup> Having reached single-digit tariff rates across most classes of industrial goods during previous negotiating rounds,<sup>145</sup> the GATT parties now sought to eliminate non-tariff barriers—paradigmatic border controls that imposed heightened costs on foreign goods, but later expanded beyond this original conception.<sup>146</sup>

As discussed above, when the Tokyo Round of GATT negotiations concluded in 1979 with an agreement covering government procurement, product standards, customs regulations, and antidumping procedures, Congress had a new fast-track procedure in place to pass these provisions quickly.<sup>147</sup> The 1988 Omnibus Trade and Competitiveness Act, under which both NAFTA and the WTO were established, eliminated the remaining legislative distinction between tariff and non-tariff barriers, reflecting the conclusion of a long conceptual transformation.<sup>148</sup>

Today's trade agreements dig yet deeper into areas of domestic regulatory concern. For example, the TPP contains chapters regulating labor rights, intellectual property, Internet policy, financial regulations, environmental measures, and much else that goes far beyond the traditional concern with market access.<sup>149</sup> Perhaps most controversially, it will further embed the use of investment arbitration, which has in the past targeted environmental impact assessment regimes in Canada,<sup>150</sup> tobacco-labeling

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143. See DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 9, 48 (2008).

144. LANG, *supra* note 89, at 222–40 (describing the Kennedy and Tokyo rounds of GATT negotiations as part of a neoliberal turn in international trade law).

145. *Id.* at 219–40.

146. For the restricted understanding of non-tariff barriers, see General Agreement on Tariffs and Trade art. XI, Apr. 15, 1994, 4 U.N.T.S. 190.

147. See *supra* text accompanying note 91 (discussing the Tokyo round of GATT negotiations).

148. Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901 (2012).

149. See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRANS-PACIFIC PARTNERSHIP (2016), <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/EE5L-VCXV>].

150. See Clayton v. Canada (United States v. Canada), Case No. 2009-04, Award on Jurisdiction and Liability, at 176–79, 200–15 (Perm. Ct. Arb. 2015), <http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf> [<https://perma.cc/33Y2-CXLL>] (imposing an award against the government of Canada, in part, for not properly applying Canadian law in conducting an evaluation of the environmental impact of a project and for the JRP's report in breach of Articles 1102 and 1105 of NAFTA).



laws in Australia,<sup>151</sup> and, recently, even President Barack Obama's decision to veto the Keystone XL pipeline project.<sup>152</sup> As the trade agenda morphs from a concern over tariff rates into these "next generation" issues, the question of how trade deals are concluded becomes even more consequential.

Defenders of the modern trade regime could argue that the use of congressional-executive agreements has remedied Jefferson's complaint about the Treaty Clause favoring the few over the many. By bypassing the Treaty Clause, the modern congressional-executive agreement prevents the Senate from using the treaty power to usurp the power to regulate interstate commerce, which is properly a power of Congress at large.<sup>153</sup> But this line of argument misunderstands the procedures governing the current trade regime—and perhaps also Jefferson's original complaint. As Bruhl argues, by giving the Executive and foreign officials a first-mover advantage in the legislative process, the fast-track process shifts outcomes away from where they would be if Congress as a whole maintained control.<sup>154</sup> When the President presents a negotiated trade agreement, often years in the making, as a take-it-or-leave-it proposition to Congress, the agreement need only satisfy congressional preferences minimally greater than the status quo to pass. On the other hand, when Congress can originate and amend legislation on its own, something closer to the reverse is true: it must only craft legislation that satisfies the Executive's minimum preferences to avoid a veto.

Thus, today's process for passing trade agreements does not answer Jefferson's original concern but may rather deepen it. For the nub of Jefferson's complaint was that the Senate and the Executive were using the treaty process to accomplish *what they could not have done through normal congressional processes*: they misused the "form of a treaty to possess themselves of the power of repealing laws become obnoxious to them, without the assent of the 3d branch, altho' that assent was necessary to make it a law."<sup>155</sup> Arguably, this is what fast track does today, in spite of

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151. See *Tobacco Plain Packaging—Investor-State Arbitration*, AUSTRALIAN GOV.: ATT'Y GEN.'S DEP'T (Dec. 1, 2011), <http://www.ag.gov.au/tobaccoplainpackaging> [<https://perma.cc/4YT6-CEGL>] (discussing arbitration regarding Philip Morris Asia's argument that Australia's tobacco-packaging measure breached the Hong Kong Agreement).

152. Ian Austen, *TransCanada Seeks \$15 Billion in Damages from U.S. Over Keystone XL Pipeline*, N.Y. TIMES (Jan. 7, 2016), <http://www.nytimes.com/2016/01/07/business/international/transcanada-to-sue-us-for-blocking-keystone-xl-pipeline.html> [<https://perma.cc/U2KL-FC9E>]; see also Cory Adkins & David Singh Grewal, *Democracy and Legitimacy in Investor-State Arbitration*, YALE L.J. F. (forthcoming 2016) (comparing two controversial investor-state disputes, the Keystone XL litigation and a recent award against Canada for an environmental assessment).

153. See Bruhl, *supra* note 124, at 397–98 (suggesting this defense).

154. *Id.* at 347–48.

155. Jefferson, *supra* note 139, at 548.

the shift from Article II treaty making to Article I congressional–executive agreements: it empowers the Executive to use an international compact to secure binding legal commitments, including over domestic regulations of great consequence that might not otherwise pass through normal congressional procedures. Indeed, one consequence of fast track is that international commercial agreements may be sought not so much for the opening they provide to foreign markets, but for the reconfiguration of domestic regulatory regimes that could not be accomplished under normal (i.e., non-fast track) procedures in Congress. The result, as one of us has put it, is that international trade agreements are now concerned not so much with governance *of* trade, but with governance *through* trade, both at the national and global level.<sup>156</sup> Jefferson’s alternative—the use of implementing legislation for every treaty—would have given Congress much more latitude in deciding whether and how to turn negotiated international commitments into binding domestic obligations.<sup>157</sup>

#### IV. The Constitutional Political Economy of International Trade Law

Throughout this Essay we have focused on the differences between the current regime for regulating the international commerce of the United States, which involves the use of fast-tracked congressional–executive agreements, and its predecessor, which began in the Founding Era and continued through to the twentieth century, and centered on the Treaty Clause. One puzzling aspect of this dramatic shift is that the discourse about treaties and trade has been, in some respects, continuous. Advocates of the earlier regime emphasized America’s need to preserve its freedom by zealously defending national sovereignty. George Washington established the paradigm in his famous farewell address, where he warned against foreign entanglements:

Against the insidious wiles of foreign influence (I conjure you to believe me, fellow-citizens) the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.<sup>158</sup>

Washington went on to counsel the management of foreign commerce according to rules that were “but temporary, and liable to be from time to time abandoned or varied, as experience and circumstances shall

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156. See Grewal, *supra* note 13.

157. This would have come at the cost, of course, of the Executive’s credibility in international negotiations, but this cost must be weighed against other factors, including the preservation of a republican form of constitution in circumstances of globalization. See *infra* notes 174–76 and accompanying text.

158. Washington, *supra* note 131.

dictate”<sup>159</sup>—in other words, according to rules not permanently entrenched by treaty. Washington feared attachments to European powers that might force, or seduce, the United States to act against its freedom. Like most republican theorists, he put the preservation of collective autonomy ahead of the economic benefits that trade might bring, and, like all revolutionary Americans, he was deeply suspicious of the commercial allure of international empire, having just extricated the United States from British control.<sup>160</sup>

Prompted by these same concerns, American foreign policy in the early nineteenth century—notably through the Louisiana Purchase and military incursions in the Caribbean, and Central and South America—sought to establish a geographic domain in which the United States could control a foreign commerce independent of the European empires. As Jed Rubenfeld has suggested, “the central purpose of the Monroe Doctrine . . . remained the same goal that lay behind Washington’s ‘isolationism’: to preserve U.S. supremacy in its own sphere of action and particularly to preserve U.S. freedom of action vis-à-vis the European powers.”<sup>161</sup> During the same period, the United States maintained high import tariffs on industrial goods to the benefit of its infant industries, in line with policies inaugurated soon after the Revolution.<sup>162</sup>

The substance of U.S. trade relations shifted away from the protectionism of the nineteenth century to international economic liberalism in the twentieth, but may be considered continuous if judged in terms of the purpose of preserving national autonomy. Recall Roosevelt’s admonition as he sought the passage of the Reciprocal Trade Agreement Act of 1934 that “[i]f the American government is not in a position to make fair offers for fair opportunities, its trade will be superseded.”<sup>163</sup> Roosevelt’s point was that failure to liberalize would ultimately put the United States in a vulnerable position: it would lose commerce to other nations and have its influence thereby limited.<sup>164</sup> This shift tracked the transformation of the

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159. *Id.*

160. For a contemporary interpretation of republican political theory in light of modern globalization, see Cécile Laborde & Miriam Ronzoni, *What Is a Free State? Republican Internationalism and Globalisation*, POL. STUD. ONLINEFIRST, Dec. 11, 2015, at 1 (arguing “that the forms of unchecked power that globalisation (if left untamed) sets off create new opportunities for the domination of state—by other states as well as by non-states actors” (emphasis omitted)).

161. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1979 (2004).

162. BAIROCH, *supra* note 82, at 52–55.

163. Franklin D. Roosevelt, President of the United States, Message to Congress Requesting Authority Regarding Foreign Trade (Mar. 2, 1934), in 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 113, 114 (Samuel I. Rosenman ed.).

164. *Id.* at 114. This is a version of a longer running argument that Istvan Hont has called “jealousy of trade.” See generally, ISTVAN HONT, THE JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE (2005).

United States from a former colony wary of entanglement in empire to a position of global leadership in the postwar GATT and Bretton Woods down to the “Washington Consensus”<sup>165</sup> of the 1980s and 1990s.

The justifications for this new approach to world affairs have been little altered since the interwar period. Barack Obama, in seeking passage of the TPP, has employed rhetoric nearly identical in its import to Roosevelt’s:

When more than 95 percent of our potential customers live outside our borders, we can’t let countries like China write the rules of the global economy. We should write those rules, opening new markets to American products while setting high standards for protecting workers and preserving our environment.<sup>166</sup>

Like Roosevelt, Obama claims that unless America pursues liberalization on its own terms, it will lose commerce—and therefore its freedom—to foreign nations.

The goals of U.S. foreign policy have thus remained constant even while their application to world trade has shifted with U.S. commercial interests.<sup>167</sup> The dominant narrative concerning this shift portrays it as not only an adaptation to changing world conditions but also as a form of national consolidation: the modernization of antiquated constitutional and governmental processes in order to transcend sectional conflict.<sup>168</sup> The dimension of constitutional political economy has, however, been largely missing from this analysis.

We suggest that the history of changing trade procedures is part of a larger story concerning the gradual subordination of the post-Civil War agrarian South and Midwest to Northeastern industrial capital and, more recently, of the laggard U.S. manufacturing sector to the financial sector over the last few decades. It is beyond the scope of this Essay to trace the historical origins and import of these conflicts. It suffices to note that different regions of the country have historically had different economic modes of production; hence, a conflict among economic interests will be realized in political terms as a regional conflict. The use of *ex post* congressional–executive agreements to conclude trade deals thus had the

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165. See GREWAL, *supra* note 143 at 236, 250–51 (2008) (stating that “it was the unrivaled power of the United States” that transformed the GATT into the WTO, and describing the “Washington Consensus”).

166. Barack Obama, President of the United States, Statement by the President on the Trans-Pacific Partnership (Oct. 5, 2015), in BRIEFING ROOM: WHITE HOUSE, <https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership> [https://perma.cc/5XCN-6T76].

167. See ROBERT D. BLACKWILL & JENNIFER M. HARRIS, WAR BY OTHER MEANS: GEOECONOMICS AND STATECRAFT 152–78 (2016) (considering the changing history of U.S. trade policy as a function of the changing place of U.S. geoeconomic strategy).

168. Hathaway, *supra* note 6, at 1312–16.

effect of repudiating an earlier principle of regional vetoes on foreign commitments, which had found force in the Senate supermajority requirement. The more recent advent of fast track for passing these trade agreements has further shifted control of economic policy—both over international commerce and, to an increasing extent, domestic economic regulation—to the Executive Branch while empowering representatives from populous coastal states and multinational enterprises that can be competitive on the global stage. Consolidating this general shift has been, even more recently, the use of national security classification to control the circulation of negotiating drafts, further limiting general congressional and popular oversight.<sup>169</sup>

Together, these changes reflect a modernization of trade procedure but not necessarily its democratization, as advocates have tended to claim.<sup>170</sup> It is true that the Senate supermajority requirement empowers a minority of senators to block legislation that might be in the national interest, and we do not suggest a return to Article II treaty making. But we do wish to call attention to the difference among several aspects of the determination of the trade agenda: *objective setting* in negotiations, *textual elaboration* of international commitments, and *final approval* of concluded agreements and to note that while the modern fast-track regime broadens the number of representatives involved in final approval, by contrast with Article II treaty making, it also restricts the number involved in setting broad objectives and elaborating the textual details of the proposed commitments. Furthermore, with trade increasingly considered a national security issue, the number of those involved in giving substance to trade agreements has become smaller still.

The decisive shift came not with the rise of *ex post* congressional–executive agreements but with the use of fast-track procedures to give them special priority over normal Article I legislation. The rise of fast track coincided with the extension of the trade agenda beyond traditional concerns with market access, to address the management of non-tariff barriers and related regulatory issues. It is perhaps unsurprising that the turn to fast track came in the early 1970s at what is now identified as the major inflection point in the evolution of the postwar global economy. The 1970s saw the end of the “economic miracle,” sometimes described as the

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169. See Levine, *supra* note 107, at 107–08 (discussing the practice of classifying information related to trade agreements to prevent oversight).

170. See, e.g., Ackerman & Golove, *supra* note 6, at 804 (defending the constitutionality of NAFTA); Hathaway, *supra* note 6, at 1308–37 (defending congressional–executive procedures); Koh, *supra* note 23, at 144 (defending fast-track). We maintain that the rise of congressional–executive agreements, while itself not antidemocratic, paved the way for fast-tracking trade agreements. While Article I congressional–executive agreements incorporate more representatives and are in that sense more democratic than Article II treaties, the use of fast-track procedures dramatically narrows the range of representatives who can make substantive *ex ante* contributions to international lawmaking.

“thirty glorious years” (1945–1975), characterized by an exceptional period of both high and widely shared economic growth, which had not been seen before and has not been seen since.<sup>171</sup> Against this backdrop, the immediate postwar consensus on trade was faltering in the United States and elsewhere, especially as trade deals began taking in more than tariffs but impacting areas of domestic regulatory purview. While the turn to Article I for international lawmaking may have reflected a new and broadly shared sense that international law was too important to be controlled by Senate supermajority rules, the turn to fast track was driven not by a new consensus on international lawmaking, but by an emerging disagreement over trade liberalization and regulatory harmonization. With the end of the exceptional postwar period, international trade deals increasingly lacked popular legitimacy and could only be passed through special procedures not accorded normal Article I lawmaking, but in line with an elite consensus on the relevant trade priorities for the United States that belied what was otherwise an era of party-political polarization.

This tighter control over the determination of the trade agenda matters all the more because of a gradual shift in the nature of international trade law over the last few decades. In earlier decades, congressional–executive agreements on trade consisted of the *ex ante* specification of acceptable tariff ranges by Congress, which limited the range of possible trade “agendas” that the President could negotiate. But with the shift to “behind the border” measures addressing an expanded (and conceptually underdetermined) set of non-tariff barriers, the power to set the agenda for new trade agreements has grown into a more general power to influence domestic regulations considered as impacting trade. Moreover, this new form of governance is given not increased scrutiny but expedited passage, heralding what might be called “government by fast track” for any issue that can be linked to trade promotion.<sup>172</sup>

What does this new trade regime augur for a constitutional political economy of the kind Fishkin and Forbath wish to recover? They argue that the present United States is moving toward oligarchy and losing the

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171. Thomas Piketty has reinvigorated the discussion about the relation of this period to present times. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 96–99 (Arthur Goldhammer trans., 2013) (stating that “when viewed in historical perspective, the thirty postwar years were the exceptional period,” and comparing postwar growth with that of other eras); see also David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014) (reviewing PIKETTY, *supra*) (analyzing Piketty’s argument and considering its legal implications).

172. While congressional–executive agreements may produce more reliable international commitments because their domestic enforcement is less in doubt than treaty enforcement, they are now being used to produce behind-the-border legal regimes with the full force of domestic law. Hathaway, *supra* note 6, at 1316. These legal rules are not produced through normal legislative processes. They are therefore inconsistent with Jefferson’s stance that international agreements with great effect on the domestic legal order should be confirmed *independently* by Congress operating in its *normal capacity*.

republican character of its earlier eras.<sup>173</sup> As we have suggested above, the shift to “government by fast track” is by no means an obvious gain in democratic self-government, especially given the inclusion of special interest lobbies as an explicit part of the agenda-setting process, now sequestered behind a national security classification. In fact, even the move away from a sectional veto of the kind that the Article II treaty-making process instituted may not be an obvious gain for an inclusive “democracy of opportunity” ideal, although we do not see a return to decision making by Senate supermajority as a panacea. The ideal of a sectional veto has been rather comprehensively discredited since the abolition of slavery, preserved for so long by regional interests.<sup>174</sup> Yet the notion that distinct interests—perhaps based on occupational status or other considerations that may partly track geography—should have a say in trade negotiations may deserve reconsideration. Certainly, any concern with inequality and deprivation today needs to reckon with the entrenched locational determinants of poverty and inequality, which recent research has suggested, unsurprisingly, is intimately tied to the dynamics of international economic competition.<sup>175</sup> Addressing these concerns about the effects of international trade should not require a reversion to Senate supermajority rules for treaty making, but should call into question the use of fast-track procedures to avoid ordinary congressional deliberation, amendment powers, and procedural protections.

Perhaps, most significantly, while the twentieth-century trade regime proved continuous with that of earlier centuries in working to preserve U.S. autonomy (albeit through liberalization rather than protection, given America’s role in the twentieth-century world economy) more recent changes in the substance of proposed trade agreements portend a shift in even this fundamental orientation. The controversial use of investor–state arbitration, as well as the extensive cross-border regulatory harmonization in proposed free trade agreements, may undermine national sovereignty rather than buttress it.<sup>176</sup> If these changes are generalized and deepened, they could portend the most momentous shift yet in the nature of the U.S. trade regime, delivering a form of cross-border harmonization that would work to undermine rather than buttress democratic sovereignty.<sup>177</sup> Such a

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173. FISHKIN & FORBATH, *supra* note 5 (manuscript at 1).

174. As Oona Hathaway summarizes: “it was [previously] seen as a way to keep the federal government from bargaining away regional interests.” Hathaway, *supra* note 6, at 1278.

175. David H. Autor et al., *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade* 1–4 (Nat’l Bureau of Econ. Res., Working Paper No. 21906, 2016).

176. See LANG, *supra* note 89, at 314–53; José E. Alvarez, *Contemporary Foreign Investment Law: An “Empire of Law” or the “Law of Empire”?*, 60 ALA. L. REV. 943, 975 (2009) (discussing a potential danger in the international investment regime).

177. See LANG, *supra* note 89, at 314–53; Alvarez, *supra* note 176, at 975.

regime would have been totally unacceptable to “the jealousy of a free people” as understood in the Founding Era and probably also to those twentieth-century innovators who pioneered the procedures for international lawmaking that could make this new regime possible. Any project for a new constitutional political economy of the kind Fishkin and Forbath propose will have to contend centrally with the changing face of international commerce in the American republic of the twenty-first century.