

# THE ILLUSION OF THE FREE-TRADE CONSTITUTION

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*In the United States, commentators often contend that our constitutional structure of government can be reformed to promote the general welfare at the expense of special interest groups. Supposedly, one such constitutional innovation—touted widely in the literature—is the longstanding practice in which Congress delegates significant international trade authority to the President. In the now-familiar tale of institutional beneficence, Congress agreed in 1934 to sacrifice some portion of its constitutional authority for the greater good. By doing so, Congress was able to disempower narrow interest groups and enable the President to pursue trade policies that benefit the general welfare. There is one problem with this account: it is not quite true. Neither reciprocity nor the delegation of trade authority to the President were ever efforts to transcend interest group pressure in trade policy; on the contrary, they were very much the products of interest group politics. Moreover, they were not particularly novel. Both delegation and reciprocity had been deployed by politicians to secure protectionist policy goals in the latter part of the nineteenth and early twentieth centuries. In the end, there likely is no set of constitutional structures that will continually guarantee a path to free trade; instead, the relationship between free trade and constitutional institutions is largely contingent and dependent on interest group politics.*

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## INTRODUCTION

In modern constitutional and political economy discourse, there are certain claims so conventional that they come close to becoming articles of faith. One such claim is that by delegating reciprocal trade negotiation authority to the President, Congress will encourage more free trade. This idealistic view of the role of delegation and reciprocity has become so suffused in democratic theory that it has become part of the lore of the modern presidency.

The attractiveness of this argument rests on the favorable effect that many theorists came to expect from the centralization of international trade authority in the presidency. Because of Congress's weakened role, it is often argued, trade policy is liberated from both the politics of incessant gridlock and the risk of capture by narrow protectionist groups.<sup>1</sup> These interest groups, which favor import-competing

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1. See, e.g., KENNETH W. DAM, *THE RULES OF THE GLOBAL GAME: A NEW LOOK AT US INTERNATIONAL ECONOMIC POLICYMAKING* 40–47 (2001) (observing how removing power from Congress made trade liberalization possible); DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 221 (3d ed. 2009) (“[T]he RTAA delegated authority and agenda-setting power to the president, who represented a broad-based constituency and was therefore more likely than Congress to favor lower tariffs.”); see also *infra* notes 16–23 and accompanying text.

policies at the expense of consumer welfare, are assumed to have an outsized influence in legislative politics.<sup>2</sup> By contrast, the President, who is elected from a national constituency, will presumably take a more encompassing view of national economic welfare and hence will be less susceptible to protectionist influence.<sup>3</sup> At first blush, both historical evidence and judicial doctrine appear to support this claim. After all, the Supreme Court has elsewhere endorsed the notion that the President tends to have a broader view of the general welfare than does Congress.<sup>4</sup> And the Reciprocal Trade Agreement Act of 1934 (“RTAA”),<sup>5</sup> which unleashed the modern regime of delegation and reciprocity, has been largely credited with transforming the American constitutional landscape in favor of free trade.<sup>6</sup>

As I shall argue, the logic underpinning this constitutional claim is seductive, but from the perspectives of both history and mechanism design, is ultimately incorrect.

First, the relationship between free trade and the mechanism chosen to promote this value—delegation to the President—remains murky. More precisely, why would we expect Congress to capitulate to special interest groups during times of ordinary legislative politics, but not when it is choosing to delegate trade authority to the President? And why would we think the President would be more immune than Congress from interest group capture, especially if the political spoils to be gained from capture remain high? In sum, any account that suggests that Congress acts benevolently when deciding on issues of constitutional structure, but not so otherwise, portrays an unrealistic picture of American politics.

Second, the historical support for the pro-President view of trade policy is scant. Scholars implicitly assume that prior to 1934 both reciprocity and congressional delegation of trade policy to the President

2. See IRWIN, *supra* note 1, at 221–22.

3. *Id.*

4. See *INS v. Chadha*, 462 U.S. 919, 948 (1983) (“The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . .” (quoting *Myers v. United States*, 272 U.S. 52, 123 (1926)) (internal quotation marks omitted)).

5. In 1934, Congress passed the Reciprocal Trade Agreement Act (RTAA), Pub. L. No. 73-316, § 350(a), 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. § 1351(a) (2014)). The RTAA authorized the President “[t]o enter into foreign trade agreements with foreign governments . . . .” and “[t]o proclaim such modifications of existing duties and other import restrictions . . . to carry out any [such] trade agreement.” § 1351(a)(1)(A)–(B).

6. See DAM, *supra* note 1, at 42–47; IRWIN, *supra* note 1, at 221–22.

were somewhat anomalous or non-existent.<sup>7</sup> They were not. On the contrary, delegation and reciprocity were largely protectionist innovations of import-competing constituencies in the 1890s.<sup>8</sup> These industry constituencies in the nineteenth century sought to delegate to the President in order to raise tariffs and keep imports out, while export-leaning constituencies in the 1930s tried to delegate in order to ensure access to foreign markets.<sup>9</sup> In sum, delegation to the executive branch had long been exploited as a means of pushing trade policies favored by conflicting business coalitions. Moreover, protectionist Presidents in the late nineteenth century deployed reciprocity in a strategic manner to achieve largely mercantilist objectives; the goal was to induce countries in Latin America to open up their markets for surplus American industrial products, but with the caveat that access to protected markets in the United States would be non-negotiable.<sup>10</sup> But there was little reason to assume that Presidents would be institutionally predisposed to favor free trade policies. Republican Presidents in the nineteenth century proved to be largely and stridently protectionist (like their congressional counterparts), while Democratic Presidents and members of Congress favored greater access to foreign markets.<sup>11</sup>

So are there more fruitful ways of promoting trade liberalization through constitutional structure? Maybe there are no obvious institutional solutions. Unfortunately, the prevailing view in the literature is to assume that structures that enable interest group involvement in trade policy are counterproductive and can be corrected through institutional engineering.

The fundamental problem with such views is that they are misleading. At bottom, the role of interest groups in fashioning trade institutions or constitutional structure need not be harmful. On the contrary, interest group conflict in American history has often provided the necessary grist for thwarting old trade policies that privileged protectionism, even when such orders might have been initially justified on high-minded grounds. Indeed, one might argue that the real heroes of tariff reform in the United States in the 1930s were not necessarily pro-reform politicians, but the new interest groups whose preferences suddenly became aligned with opening up foreign markets for exports. For instance, because of the new market opportunities created in Europe as a result of World War II, more Northeast industries

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7. See *infra* notes 16–21 and accompanying text.

8. See discussion *infra* Section I.B.2.

9. See discussion *infra* Section I.B.2.

10. See *infra* notes 75–84 and accompanying text.

11. See *infra* notes 56–63 and accompanying text.

started to become more export-oriented and less resistant to lower tariffs. This shift in preferences helped create new political momentum for tariff reform. But fueled by the export of cotton, there was one constituency that remained invariably constant in its free-trade preferences from the mid-nineteenth century through the modern era: *the southern Democrat*.

The Article proceeds as follows. Parts I and II critically analyze the claim that delegation of trade authority to the President works primarily as a device to overcome the influence of protectionist factions. They advance the contention that on the contrary, both delegation and reciprocity originated in the nineteenth century as an institutional bulwark against free trade.

Part III discusses whether it is even feasible to use constitutional structure as a long-term strategy to weaken special interest groups opposed to trade reform. Part IV suggests an alternative account of the factors that led to the RTAA and the relative decline of the dominance of protectionist groups in the twentieth century. In large part, delegation under the RTAA in 1934 was itself the product of distributive politics, but this time in the service of export groups opposed to protectionism. In the end, this Article argues, the real lesson of the RTAA is that it illustrates the pitfalls behind the belief that one can hardwire the general welfare through constitutional innovation. The history of American trade policy suggests that the preferences of both institutional actors and interest groups are fickle. Industries that champion free trade and market access in one period can become vehement protectionists in another. Realignment between political parties' most powerful constituents can occur and completely overturn longstanding notions about partisan preferences for free trade. For instance, Democrats who championed trade reform and delegation in the 1930s have since switched spots with Republicans as the party of free trade.<sup>12</sup> And Presidents, ever mindful of the needs of their core coalitions, will often pursue policies that make such coalitions happy regardless of whether these policies map neatly onto prevailing theories of economic welfare.<sup>13</sup>

Part V discusses normative implications. The claim here is rather straightforward: we cannot assume that constitutional structure can be harnessed in ways that will promote the general welfare at the expense of unproductive factions. It is rarely clear what the beneficial forces of progress will be *ex ante*, especially in an environment fraught with

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12. See *infra* notes 161–69.

13. See *infra* notes 130–37.

competing policy priorities. This Part concludes that a more productive goal for institutional reform in international trade policy should be to encourage more, and not less, interest group politics.

## I.

### DID DELEGATION REALLY WEAKEN SPECIAL INTERESTS?

The primary justification for supporting delegation of trade authority to the President revolves around the perceived need to suppress the role of special interest groups in trade policy. With the benefit of historical hindsight, this Part suggests that this justification does not add up. The reasons for its failure vary. First, one does not have to rely on the benign motivations of Congress to explain delegation of international trade policy in the 1930s; there are good explanations rooted in special interest conflict that suffice. Second, and more importantly, the original harbinger of delegation and reciprocity in American constitutional history was not the pursuit of free trade, but precisely the opposite: an effort to entrench protectionism in the late nineteenth century.

#### A. *The Benign Account of Delegation's Origins*

Social scientists often concede that while politicians may tend to act as self-interested actors who discount the social welfare, well-designed institutions can serve to constrain such politicians in order to supply the electorate with the policies that they desire.<sup>14</sup>

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14. The seminal account of using institutional design to correct the pathologies of public choice is from economists Geoffrey Brennan and James Buchanan. *See* GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* 2 (1985) (“If rules influence outcomes and if some outcomes are ‘better’ than others, it follows that to the extent that rules can be chosen, the study and analysis of comparative rules and institutions become proper objects of our attention.”); *see also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *TEX. L. REV.* 15, 23 (2010) (proposing institutional reforms that would help avoid capture of agencies by interest groups).

In the context of international trade, Douglas Irwin has succinctly argued that the presidential perspective is key in overcoming special interest politics: “The national electoral base of the president is thought to make the executive more apt to favor policies that benefit the nation as a whole, whereas the narrower geographic representative structure of Congress leads its members to have more parochial interests.” IRWIN, *supra* note 1, at 221. For the most recent analysis of congressional and presidential preferences on international trade, see Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 *VA. L. REV.* 251 (2006). In a recent piece on institutional design for zoning practices, Professors Roderick Hills and David Schleicher invoke the delegation of authority under the RTAA as favorable precedent for using institutions to weaken the power of interest groups:

One reason why the RTAA and the TEA were so successful in reducing tariffs is that they empowered the President, who, with his national con-

For many scholars, congressional delegation was the crucial constitutional innovation that ultimately overcame interest group capture in international trade.<sup>15</sup> For instance, the sentiments expressed by prominent international trade scholar I.M. Destler are typical:

The Constitution grants the President no trade-specific authority whatsoever. Thus, in no sphere of government policy can the primacy of the legislative branch be clearer: Congress reigns supreme on trade, unless and until it decides otherwise.

Beginning in the mid-1930s, Congress did decide otherwise, changing the way it handled trade issues. No longer did it give priority to protecting American industry. Instead, its members would give priority to protecting themselves from the direct, one-sided pressure from producer interests that had led them to make bad trade law. They would channel that pressure elsewhere, pushing product-specific trade decisions out of the committees of Congress and off the House and Senate floors to other governmental institutions.<sup>16</sup>

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stituency, is generally considered more pro-free trade than Congress. Congress is generally more protectionist because its members represent discrete areas that are severely harmed by tariff reduction. And members whose constituents are harmed can horse trade for more general support.

Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget,"* 62 CASE W. RES. L. REV. 81, 115 (2011).

15. See Susanne Lohmann & Sharyn O'Halloran, *Divided Government and U.S. Trade Policy: Theory and Evidence*, 48 INT'L ORG. 595, 596–97 (1994) (summarizing this scholarly point of view and citing its major proponents).

16. I.M. DESTLER, *AMERICAN TRADE POLITICS* 14 (4th ed. 2005). The constitutional flaw to which delegation was supposed to be a solution was Article I, Section 8, Clause 3 of the Constitution of the United States. This provision grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. To be clear, not all commentators have embraced this benevolent account of institutional change under the RTAA. Political economy scholars of the rationalist school have tended to be skeptical. See *infra* note 24 and accompanying text. Sometimes, these benign accounts of delegation might also include the authority delegated to international institutions. However, as some commentators have observed, the extent to which politicians actually delegate substantive authority to international institutions has been exaggerated. See, e.g., Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693 (2008). For other accounts endorsing the delegation-means-more-protection thesis, see, for example, David A. Lake, *The State and American Trade Strategy in the Pre-Hegemonic Era*, 42 INT'L ORG. 33, 38 (1988) ("[W]here the representative element of the state can be best understood as acting in the interests of society, to use Pareto's famous distinction, the executive acts in the interests for society."); Douglas Nelson, *Domestic Political Preconditions of US Trade Policy: Liberal Structure and Protectionist Dynamics*, 9 J. PUB. POL'Y 83, 85–87 (1989) (describing why Congress has a more protectionist vision than does the President); Karen E. Schnietz, *The Institutional Foundation of U.S. Trade Policy: Revisiting Explanations for the 1934 Reciprocal Trade Agreements Act*, 12 J. POL'Y

In the tale that is now the received wisdom, certain reformers like Secretary of State Cordell Hull managed to persuade members of Congress in 1934 to take a series of drastic legislative measures to curtail interest group influence in international trade policy.<sup>17</sup> The resulting legislation, the Reciprocal Trade Agreement Act of 1934 (“RTAA”),<sup>18</sup> is now considered a crucial milestone in American trade policy.<sup>19</sup> Prior to that legislation, American trade policy was purportedly plagued by protectionist forces,<sup>20</sup> which led to a rash of tariff increases in the early twentieth century that culminated in the infamous Smoot-Hawley Tariff Act of 1930.<sup>21</sup>

Reversing this spiral of ever-increasing tariffs at the time seemed daunting because it was thought that Congress was perennially susceptible to capture by protectionist groups.<sup>22</sup> In the end, an act of legislative altruism, which ostensibly shifted the balance of international trade authority from a protectionist Congress to a free-trade President,

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HIST. 417, 429–32 (2000) (observing that Presidents favored low tariffs because the President’s constituency is national while that of a member of Congress is local).

17. See, e.g., NITSAN CHOREV, REMAKING U.S. TRADE POLICY: FROM PROTECTIONISM TO GLOBALIZATION 46–47 (2007) (discussing Hull’s request to Congress “to grant authority to the president to negotiate bilateral concessions raising or lowering tariff rates up to 50 percent of the existing rates . . . providing reciprocal arrangements were made by the other party” and his proposal “to treat the bilateral agreements reached by the president as executive agreements, requiring no ex-post congressional approval”); DESTLER, *supra* note 16, at 14–17 (explaining Hull’s role in formulating the provisions of the RTAA).

Subsequent reforms that made trade agreements more likely, such as the use of congressional-executive agreements in lieu of treaties for ratifying international agreements, have even been compared favorably to constitutional amendments. See generally Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995). But Ackerman and Golove’s account differs from the thesis being offered here in one significant respect. What they were trying to capture was not the foundation of a free-trade Constitution, but the origins of the modern interchangeability doctrine between congressional-executive agreements and treaties. They located that origin in the broader social struggles that ensued in the wake of World War II. However, the constitutional innovation they were describing had to do with United States’ turn toward internationalism more broadly during that era and the need to overcome the barriers the Treaty Clause imposed on the country’s ability to enter into international agreements. *Id.* at 861–96. For an incisive account of the use of treaties and congressional executive agreements in United States history, see Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

18. Pub. L. No. 73-316, § 350(a), 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. § 1351(a) (2014)).

19. Nelson, *supra* note 16, at 85–87 (arguing that the RTAA “fundamentally changed the domestic politics of international trade”).

20. See CHOREV, *supra* note 17, at 56–57.

21. Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended at 19 U.S.C. §§ 1202–1683(g) (2014)).

22. See DESTLER, *supra* note 16, at 14–16.



has been credited with ushering in an era of liberalization, the likes of which had not yet been known in American commercial history.<sup>23</sup>

There is one problem with this account: it does not ring quite true. Yet it continues to be invoked as a justification for our modern constitutional structure of international trade.<sup>24</sup>

### B. *Reasons to Be Skeptical*

Taking a close look at the history of pre-RTAA trade policy, one notices some problems with the conventional narrative. Of course, it will be hard to prove (or disprove) definitively whether members of Congress in the 1930s were motivated largely by noble ideals. But there are nonetheless two reasons to be wary of public-minded explanations. First, there are more plausible self-interested reasons that can explain Congress's delegation decision. Second, and more importantly, neither delegation nor reciprocity was novel in the 1930s. Both had been deployed before in the nineteenth and early twentieth centuries, except that they had been used in the service of protectionism.

#### 1. *Self-Interest Versus Altruism in the RTAA*

A more plausible political explanation for Congress's conversion to free trade in the 1930s might be pressure from both southern cotton and tobacco farmers and the emergence of a new crop of industries, which derived a significant portion of their revenues from exports.<sup>25</sup> The membership of the former group was wide and varied and had a long historical pedigree of pursuing low-tariff policies.<sup>26</sup> For instance, the Southern National Farmers Alliance was considered "the largest citizen organization of nineteenth-century America."<sup>27</sup> While this

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23. DAM, *supra* note 1, at 40–43; DESTLER, *supra* note 16, at 11–14; IRWIN, *supra* note 1, at 221–22.

24. Even when commentators have been otherwise skeptical about Congress's benign motivations in delegating authority, they have usually endorsed the notion that the President is more likely to have stronger free-trade preferences than Congress. For the most recent and thorough criticism of the benign account of the RTAA, see Judith Goldstein & Robert Gullotta, *America and Trade Liberalization: The Limits of Institutional Reform*, 68 INT'L ORG. 263, 263–65 (2014). Nonetheless, even the skeptical accounts take a somewhat benign view of presidential preferences in trade policy. See Michael A. Bailey et al., *The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade*, 49 WORLD POL. 309, 326–27 (1997) (making the same observation); Lake, *supra* note 16, at 38; Schnietz, *supra* note 16, at 429–30.

25. For a discussion of southern cotton farmers' preference for low tariffs and their export orientation, see WILLIAM S. BELKO, *THE TRIUMPH OF THE ANTEBELLUM FREE TRADE MOVEMENT* 43–44 (2012).

26. *See id.*

27. ENCYCLOPEDIA OF THE GREAT PLAINS 710 (David J. Wishart ed., 2004).

farming sector was not necessarily small in number, its geographical concentration was high, and there is evidence that the costs of organizing were low.<sup>28</sup> Indeed, the political prowess of this group and its offshoots was notable, and it was credited with partially spearheading the campaign to pass the Sixteenth Amendment—a measure with largely anti-tariff implications.<sup>29</sup>

But what was this anti-tariff coalition hoping to achieve? It seems unlikely that its members were simply acting out of a high-minded attachment to the ideology of free trade. Indeed, their campaign seemed targeted against Northeast industries whose preferences for tariffs sometimes led to the kinds of trade wars that obstructed the tobacco and cotton coalition's access to foreign markets.<sup>30</sup> Nonetheless, southern farmers had for a long time embraced the rhetoric of *laissez faire* in international political economy,<sup>31</sup> even if during the antebellum era it was juxtaposed uncomfortably with the highly regulated and statist framework of slavery.<sup>32</sup> But the link between cheap slave labor and the export-fueled cotton industry was often viewed as complementary. "Cotton-South opponents of protection," one commentator has argued, "saw freer trade as necessary for slavery's continued profitability, and thus some perceived protection as an indirect effort to undermine slavery."<sup>33</sup>

In any event, southerners viewed the protectionist tariff as a levy disproportionately born by their region to the benefit of the Northeast, and would have liked to eliminate it altogether.<sup>34</sup> But they lacked the

28. See Kevin Narizny, *Rational Idealism: The Political Economy of Internationalism in the United States and Great Britain, 1870–1945*, 12 SECURITY STUD. 1, 9–11 (2003) (discussing the role that southern Democrats played in influencing presidential elections in the early twentieth and late nineteenth centuries).

29. See Kimberly J. Morgan & Monica Prasad, *The Origins of Tax Systems: A French–American Comparison*, 114 AM. J. SOC. 1350, 1359 (2009).

30. AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION 45–54 (2013) (describing the eighteenth-century antagonism between low-tariff Democrats who favored exports and high-tariff Republicans who wanted to protect infant industries).

31. See BRIAN D. SCHOEN, THE FRAGILE FABRIC OF UNION: COTTON, FEDERAL POLITICS, AND THE GLOBAL ORIGINS OF THE CIVIL WAR 100 (2009) ("Though Cotton State planters and politicians were certainly not the first or only to embrace political economy, and particularly *laissez-faire* axioms, few in the western world repeated them as often as they did.").

32. See *id.* at 100–01.

33. *Id.* at 101.

34. John Calhoun, an ardent free-trade proponent, would give voice to the South's concern in this 1828 letter to Micah Sterling:

Our industry tho' at home, by our own hands and our own soil, is engaged in cultivating the great staples of the country for a foreign market, in a market where we can receive no protection, and where we cannot

political numbers to do so.<sup>35</sup> Eventually, as certain industrial sectors in the Northeast and grain farmers in the West became more globally competitive in the early part of the twentieth century, they, too, started to throw their weight behind securing greater access to foreign markets.<sup>36</sup> These latter groups were able to muster enough collective action in favor of tariff reform, in part due to the concrete harms they suffered when foreign states increased their tariffs in retaliation against the United States' import-competing policies.<sup>37</sup>

## 2. *Earlier Views: Delegation and Reciprocity for Protectionism*

Contrary to the conventional wisdom, neither delegation of trade authority nor reciprocity was a novel policy when the RTAA was enacted. Indeed, anti-tariff supporters were simply borrowing a page from their Republican opponents, who had previously perfected delegation as an instrument for pushing protectionist goals.<sup>38</sup>

Take, for instance, the delegation that was the subject of controversy in the famous pre-RTAA case of *Marshall Field & Co. v. Clark*.<sup>39</sup> There, the Court upheld a statutory provision—section three of the McKinley Tariff Act—that gave the President the power to levy predetermined duties or taxes based on his own determinations of whether trade policies between the United States and its trade partners were “‘reciprocally unequal and unreasonable.’”<sup>40</sup> William McKinley, known as the “Napoleon of protection,”<sup>41</sup> was then a formidable chairman of the House Ways and Means Committee,<sup>42</sup> and he

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receive one cent more to indemnify us for the heavy duties we have to pay as consumers. It is thus, that our labour is discouraged.

Letter from John Caldwell Calhoun to Micah Sterling (Sept. 1, 1828), in *THE ESSENTIAL CALHOUN: SELECTIONS FROM WRITINGS, SPEECHES, AND LETTERS* 189, 190 (Clyde N. Wilson ed., 2000).

35. See PETER TRUBOWITZ, *DEFINING THE NATIONAL INTEREST: CONFLICT AND CHANGE IN AMERICAN FOREIGN POLICY* 73 (1998) (“Few southern Democrats were prepared to compromise agriculture in the name of industrial progress, especially when such temporizing could open them to attack from southern populists.”).

36. See *infra* notes 174–77 and accompanying text.

37. See *infra* notes 188–95 and accompanying text.

38. See, e.g., TODD TUCKER & LORI WALLACH, *PUB. CITIZEN, THE RISE AND FALL OF FAST TRACK TRADE AUTHORITY* 15–21 (2008) (describing early pro-tariff groups' efforts to delegate policymaking authority to the executive branch).

39. 143 U.S. 649, 680–94 (1892).

40. *Id.* at 680 (quoting McKinley Tariff Act, ch. 1244, § 3, 26 Stat. 567, 612 (1890)).

41. JOANNE REITANO, *THE TARIFF QUESTION IN THE GILDED AGE: THE GREAT DEBATE OF 1888*, at 129 (1994).

42. *Id.*; see also RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900*, at 477 (2000) (discussing McKinley's appointment as chairman of the House Ways and Means Committee).

spearheaded the campaign under the eponymous statute not only to delegate trade authority but also to raise average tariffs across all imports to close to fifty percent—the highest tariffs of the era.<sup>43</sup> Numerous historians have acknowledged the devastating impact of the McKinley tariff on key trading allies of the United States.<sup>44</sup> For example, Marc-William Palen argues that the tariff caused the collapse of forty or more tobacco factories in Spanish Cuba and helped undermine support for longstanding British free-trade policy by galvanizing protectionist sentiments throughout the empire.<sup>45</sup> Indeed, the Cobden Club, the preeminent British free-trade coalition, condemned the tariff as an “outrage on civilization.”<sup>46</sup>

In addition to the larger delegation controversy, the plaintiffs in *Marshall Field & Co.* also questioned the validity of a bounty clause in the 1890 tariff legislation that allowed the President to provide cash subsidies to the sugar industry.<sup>47</sup> But contrary to today’s prevailing sentiments about the benefits of free trade, at the time of *Marshall Field & Co.*, the government touted protectionism as a policy aligned with the public welfare.<sup>48</sup> The plaintiffs in *Marshall Field & Co.* had insisted that awarding public funds to favored economic groups for the purpose of protecting them from foreign competition did not constitute a valid public purpose under the Constitution.<sup>49</sup> “Nowhere in this enumeration of the legislative purpose of taxation,” the plaintiffs insisted, “is found any hint that a bounty of two cents a pound to the producers of sugar is in any way necessary or conducive to the defense of the Commonwealth . . . or necessary for . . . [the] general welfare of the United States.”<sup>50</sup>

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43. QUENTIN R. SKRABEC, JR., *WILLIAM MCKINLEY, APOSTLE OF PROTECTIONISM* 193 (2008) (noting the unprecedented size of the McKinley tariff).

44. See, e.g., Marc-William Palen, *Protection, Federation, and Union: The Global Impact of the McKinley Tariff upon the British Empire, 1890–94*, 38 *J. IMPERIAL & COMMONWEALTH HIST.* 395, 396 (2010) (observing that the statute imposing the tariff “sent economic and political shockwaves across the globe”); see also BENJAMIN O. FORDHAM, *PROTECTIONIST EMPIRE: TRADE, TARIFFS, AND UNITED STATES FOREIGN POLICY, 1890–1914*, at 15–20 (2011), [http://government.arts.cornell.edu/assets/psac/sp11/Fordham\\_PSAC\\_Mar11.pdf](http://government.arts.cornell.edu/assets/psac/sp11/Fordham_PSAC_Mar11.pdf) (discussing the effects of the McKinley tariff).

45. See Palen, *supra* note 44, at 397.

46. *Id.* at 399 (internal quotation marks omitted) (quoting ANTHONY HOWE, *FREE TRADE AND LIBERAL ENGLAND, 1846–1946*, at 196–97 (1997)).

47. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694–97 (1892).

48. Brief for the United States at 73, *Marshall Field & Co.*, 143 U.S. 649 (Nos. 1049, 1050, 1052).

49. Brief for the Appellants at 83, *Marshall Field & Co.*, 143 U.S. 649 (Nos. 1049, 1050, 1052).

50. *Id.*

Solicitor General Taft's brief in response, which discusses the virtues of the bounty and reciprocity clauses in the Tariff Act of 1890, is worth quoting at some length:

The modern history of every European nation is full of instances where, both by indirect means of the levying of duties and the direct means of bounties, particular industries have been encouraged. . . . We allude to this as showing the necessity for Government interference in the encouragement of the sugar industry in this country. Such national action is required to offset the encouragement of the same industry in other countries, lest thereby we may be made altogether dependent for the supply of a necessity upon countries thus far removed.<sup>51</sup>

Such high-minded rhetoric illustrates the extent to which various groups in American history have deployed the centralization of economic policy to serve their narrow objectives.<sup>52</sup> To be sure, if all are in agreement that protectionism is in the national interest, then it would be a different matter. But at the time the government's brief was drafted, the prevailing economic theories had largely discredited the merits of blocking free trade, even when other nations were ostensibly engaged in protectionist practices.<sup>53</sup> The government itself openly acknowledged that had the bounty been used to promote the private interests of the sugar industry simply for social welfare reasons, it would have been constitutionally suspect.<sup>54</sup> The real difference in this case, the government argued, was that the bounty was enlisted in service of a broader foreign affairs goal of ensuring American economic independence against the rest of the world.<sup>55</sup>

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51. Brief for the United States at 73, *Marshall Field & Co.*, 143 U.S. 649 (Nos. 1049, 1050, 1052).

52. See Wilford J. Eiteman, *The Rise and Decline of Orthodox Tariff Propaganda*, 45 Q.J. ECON. 22, 22 (1930) ("Until within a year or two only the economist and the Democrat dared to raise voices in seemingly unpatriotic and sacrilegious opposition to the protective tariff. Most others worshipped at its shrine.").

53. See JUDITH GOLDSTEIN, *IDEAS, INTERESTS, AND AMERICAN TRADE POLICY* 87–88 (1993); DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 45–46 (1996).

54. Brief for the United States at 72, *Marshall Field & Co.*, 143 U.S. 649 (Nos. 1049, 1050, 1052).

55. The relevant language from the government's brief reads as follows:  
The principle was laid down . . . that a purpose was not a public purpose because, by affecting the private interest of a great many individuals, it would affect the public weal. With respect to municipalities and States, that can have no international relations, this undoubtedly true, but the subject assumed a very different aspect when treated from the standpoint of the collective industries of a nation in relation to the industries of other nations. Questions of foreign commerce and trade have always been the subject of national action.

While the delegation implicated in *Marshall Field & Co.* was justified as a necessary legislative measure that gave the President a freer hand to negotiate tariff reduction agreements,<sup>56</sup> it did not seem that way to free-trade Democrats in Congress and the United States' key foreign trade partners. These groups recognized delegation as a transparently protectionist device that gave the President wide latitude in imposing harsh tariffs on any country that he concluded had unreasonable trade policies.<sup>57</sup> Unsurprisingly, free-trade Democrats in Congress condemned section three of the 1890 statute as unconstitutional.<sup>58</sup>

Belying claims that protectionism exerts one-sided pressure on members of Congress, McKinley and his fellow protectionist Republicans were soundly defeated in the elections later that year.<sup>59</sup> The tariffs had become widely unpopular.<sup>60</sup> Free-trade Democrats promptly removed the offensive section three in the Wilson-Gorman Tariff Act of 1894.<sup>61</sup> But Republicans reinstated it once they took the House in

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*Id.*

56. See 2 EDWARD STANWOOD, *AMERICAN TARIFF CONTROVERSIES IN THE NINETEENTH CENTURY* 281 (1903) (justifying delegation to the President as a means "to secure reciprocal trade with countries"); see also *Marshall Field & Co.*, 143 U.S. at 691 (noting that, in the judgment of the legislative branch, "it is often desirable, if not essential for the protection of the interests of our people, against unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations" (emphasis added)).

57. STANWOOD, *supra* note 56, at 282. Specifically, the Democrats "maintained that the section conferred upon the President in a certain contingency the power to levy duties upon imports, which duties were not imposed by Congress; and that he was further entrusted with the power at his own discretion to abrogate those duties and reimpose them." *Id.*

58. See GOLDSTEIN, *supra* note 53, at 179 ("Democrats argued that the reciprocity amendment gave the president taxing rights that belonged exclusively to Congress."); see also STANWOOD, *supra* note 56, at 282 (making a similar argument about the motives of free-trade Democrats).

59. See GOLDSTEIN, *supra* note 53, at 107 (asserting that the passage of the McKinley tariff did not harm the Democrats since, during the midterm elections, the party "played on public fears of price increases" to gain a majority); see also BENSEL, *supra* note 42, at 478 (arguing that retailers' efforts to tell the public that prices were going to rise after the tariffs went into force was a form of "free political advertising for the free-trading Democrats"); STANWOOD, *supra* note 56, at 294 (stating that "four weeks after the tariff act took effect . . . [h]ardly a Republican representative from the Southern States survived" the election).

60. See STANWOOD, *supra* note 56, at 294.

61. Wilson-Gorman Tariff Act of 1894, ch. 349, § 73, 28 Stat. 570; see also GOLDSTEIN, *supra* note 53, at 112 ("In 1894, the reciprocal provisions of the McKinley act had been repealed.").

1897.<sup>62</sup> For good measure, the 1897 Act also included a section four, which allowed the President to negotiate five-year treaties provided that the goods exported by the other country were not produced in the United States.<sup>63</sup>

But what was so novel about section three of the 1890 Act? It was not that the provision delegated trade policy authority to the President. For some variation of congressional delegation to negotiate had been in place since the early days of the Republic.<sup>64</sup> Additionally, similar provisions that preceded the 1890 Act gave the President the power to restore trade relationships with countries once they met certain conditions.<sup>65</sup> What was remarkable about section three was that it gave the President the unilateral power to retaliate by raising tariffs against the United States' trading partners once he determined that they were engaging in unfair trade practices.<sup>66</sup> Indeed, Marshall Field & Co., the prominent Chicago department store that was the plaintiff in the *Marshall Field & Co. v. Clark* case, challenged delegation on the basis that the President had raised tariffs on goods higher than what was authorized by Congress.<sup>67</sup> At issue in that controversy was

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62. Tariff Act of 1897, ch. 11, § 3, 30 Stat. 151, 204; see also GOLDSTEIN, *supra* note 53, at 111–12.

63. Tariff Act of 1897 § 4.

64. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 682–89 (1892) (listing legislative acts in which Congress delegated to the President the power both to lay embargos upon foreign countries and to restore trade relations with foreign countries following their abolition of discriminatory trade practices).

65. See *id.*

66. McKinley Tariff Act, ch. 1244, § 3, 26 Stat. 567, 612 (1890) (“That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose . . . whenever, and so often as the President shall be satisfied that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other extractions . . . which in view of the free introduction of such [goods the President] may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of [such goods] for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid . . .”). Similarly, as Professor Judith Goldstein has noted, “the Dingley Act [in 1897] authorized the president to negotiate reciprocal trade treaties and to retaliate against countries found to be discriminating against American exports. The later action did not need Senate approval; the former needed the approval of both houses.” GOLDSTEIN, *supra* note 53, at 112.

67. *Marshall Field & Co.*, 143 U.S. at 682. Similarly, the plaintiff in the other famous delegation case of *J.W. Hampton, Jr. & Co. v. United States* was also challenging the authority of the President to raise tariffs beyond that authorized by Congress. 276 U.S. 394, 401 (1928) (upholding the delegation in the Fordney-McCumber Tariff of 1922, which gave the President authority to raise or lower statutory duties by as much as fifty percent for certain imports “upon investigation of the differences in costs of production” between the United States and foreign competitors).

the President's authority to block imports unilaterally, not his authority to pursue trade liberalization.<sup>68</sup>

Furthermore, section three of the 1890 Act embraced a policy of reciprocity in international commercial negotiations.<sup>69</sup> Various scholars have made much of the relationship between reciprocity and trade liberalization, often assuming a close and symbiotic relationship between the two.<sup>70</sup> One commentator succinctly articulated the received wisdom about this supposed relationship as it related to the 1934 RTAA: "Reciprocity clearly can help explain the American liberalization—the United States liberalized because it received something in return—greater access to its exports overseas."<sup>71</sup>

How then does the reciprocity embodied in the Act of 1890 fit into this rather optimistic narrative? There are reasons to think that it did not represent an obvious institutional triumph in the direction of free trade. Most significantly, for much of the late nineteenth and early twentieth centuries, pro-tariff Republicans often championed reciprocity, while free-trade Democrats usually opposed it. Take, for instance, this snippet from the Republican Party's 1896 platform condemning the Wilson-Gorman Tariff Act of 1894, which was passed under Grover Cleveland's administration and repealed the reciprocity provision of the 1890 Act:

We believe the repeal of the reciprocity arrangements negotiated by the last Republican Administration was a National calamity . . . .

*Protection and Reciprocity are twin measures of American policy and go hand in hand. Democratic rule has recklessly struck down both, and both must be re-established. Protection for what we produce; free admission for the necessaries of life which we do not produce; reciprocal agreement of mutual interests, which gain open markets for us in return for our open markets for others. Protection builds up domestic industry and trade and secures our own market for ourselves; reciprocity builds up foreign trade and finds an outlet for our surplus.*<sup>72</sup>

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68. See *Marshall Field & Co.*, 143 U.S. at 680–89.

69. See McKinley Tariff Act § 3 ("That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose . . .").

70. For the benign view of the relationship between reciprocity and free trade, see Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 3–4 (1986).

71. MICHAEL J. GILLIGAN, *EMPOWERING EXPORTERS: RECIPROCITY, DELEGATION, AND COLLECTIVE ACTION IN AMERICAN TRADE POLICY* 7 (1997).

72. *Republican Party Platform of 1896*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29629> (last visited Nov. 16, 2015) (both emphases added).



The language above illuminates some wrinkles in the conventional narrative regarding the relationship between reciprocity and free trade. For while it is true that section three of the 1890 Act helped achieve some notable trade agreements under the Republican administration of Benjamin Harrison,<sup>73</sup> it did so by finessing the relationship between three factors: increased protectionism of import-competing industries, the manipulation of tariff levels on goods that were not produced domestically, and increased access to foreign markets in the American hemisphere for surplus industrial goods.<sup>74</sup>

Ultimately, the 1890 Act's odd combination of high protective tariffs and discriminatory reciprocity provisions for trade agreements coincided with the changing commercial needs of northeastern Republican industries.<sup>75</sup> Protected from European competition since the Civil War, these industrial groups gradually realized that domestic demand could no longer absorb growing industrial output.<sup>76</sup> Republican Secretary of State James Blaine assiduously led the charge to use reciprocity to seek new outlets for demand of these industrial goods in foreign markets.<sup>77</sup> Rather than turning to Europe, however, the Republicans focused more on using the reciprocity provision in the 1890 Act to pry open markets in the developing world, especially in Latin America.<sup>78</sup> But not all of the United States' trading partners in the American hemisphere warmed up to this mercantilist logic. Colombia, Haiti, and Venezuela all rebuffed American overtures for reciprocal trade agreements in the early 1890s, and were punished by high retaliatory tariffs as a result.<sup>79</sup>

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73. David M. Pletcher, *Reciprocity and Latin America in the Early 1890s: A Foretaste of Dollar Diplomacy*, 47 PAC. HIST. REV. 53, 61 (1978) (observing that “[d]uring 1891 and 1892 the United States negotiated eight reciprocity agreements involving Latin America,” of which “[t]he two most important were those with Brazil and Spain for Cuba and Puerto Rico”).

74. *See id.* at 55 (“The reciprocal trade agreements of 1891 and 1892 were the product of a campaign to induce other countries, mostly in the western hemisphere, to lower their tariffs on surplus American manufactures and farm products in return for special treatment of their raw materials in American custom houses.”); *see also* Treb Allen & Stephen Meardon, *Reciprocity in Retrospect: A Historical Inquest of Bilateralism in U.S. Trade Policy*, 2 HIST. ECON. THOUGHT & POL’Y 5, 17 (2002) (“[I]n the last decade of the nineteenth century, free trade became aligned against reciprocity. Free trade, anti-imperialism, and aversion to reciprocity were kindred causes.”).

75. *See* TOM E. TERRILL, *THE TARIFF, POLITICS, AND AMERICAN FOREIGN POLICY 1874–1901*, at 172–74 (1973).

76. *See id.* at 170–71.

77. *See id.* at 168–71.

78. *See* Narizny, *supra* note 28, at 13 (“Faced with high tariffs and intense competition in industrialized countries, businesses had little choice but to search for new markets in Latin America and East Asia.”).

79. *See* PLETCHER, *supra* note 73, at 61–62.

More broadly, the motivations and tactics underlying section three of the 1890 Act should not be confused with a policy favoring free markets. First, for Republicans, the increase of protectionist tariffs on European industrial products was a core part of the Act's overall purpose. Second, the Republican drafters of section three hardly intended reciprocity to be genuinely mutual; they believed that the United States would gain from trade agreements with Latin American countries without giving much in return.<sup>80</sup> After all, agreeing to lower tariffs on goods one hardly produces is not much of a concession at all; on the contrary, these tariffs were deployed tactically as a device to increase bargaining leverage.<sup>81</sup> Understandably, those free-trade Democrats who denounced reciprocity often did so because they viewed it as unfairly coercive and one-sided.<sup>82</sup> Such sentiments were very much at play when congressional Democrats repealed the reciprocity provision of the 1890 Act in 1892.<sup>83</sup> And on the presidential campaign trail in 1896, while condemning the Democratic repeal, McKinley did not mince words in describing what he envisioned were the true objectives of reciprocity:

In my judgment, Congress should immediately restore the reciprocity sections of the old law, with such amendments, if any, as time and experience sanction as wise and proper. The underlying principle of this legislation must, however, be strictly enforced. *It is to afford new markets for our surplus agricultural and manufactured products, without loss to the American laborer of a single day's work that he might otherwise procure.*<sup>84</sup>

Once McKinley won the presidential election in 1896, he rewarded northern business constituencies with a new protectionist

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80. See H.R. REP. NO. 51-1466, at 3 (1890) ("The aim has been to impose duties upon such foreign products as compete with our own . . . and to enlarge the free list wherever this can be done without injury to any American industry, or wherever an existing home industry can be helped and without detriment to another industry which is equally worthy of the protecting care of the Government."); see also Guy Shirk Claire, *Reciprocity as a Trade Policy of the United States*, 141 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 38 (1929) ("These treaties in reality carried into effect the idea of tropical reciprocity and were all alike. They gave the United States an unusual advantage in foreign trade for practically no concessions at all.").

81. See Claire, *supra* note 80, at 38.

82. See *id.*

83. See *id.* ("[T]he Wilson Bill . . . aimed to stop reciprocity because it was being used as a weapon to force Latin America to open its markets to the United States. This law cancelled the treaties made under the McKinley Act. The Democrats believed international bad feeling would result from the operation of such a form of reciprocity.").

84. Letter from William McKinley to Hon. John M. Thurston et al. (Aug. 26, 1896), in ALL THE REPUBLICAN NATIONAL CONVENTIONS FROM PHILADELPHIA, JUNE 17, 1896, at 146, 151 (Henry H. Smith ed., 1896).

tariff, the Dingley Tariff of 1897,<sup>85</sup> which also restored the key reciprocity provisions of the 1890 Act.<sup>86</sup> Again, free-trade Democrats not only condemned the protectionist aspects of the Dingley tariff, but also questioned the logic underpinning reciprocity. In the hearing on the proposed tariff, Congressman Cochran of Missouri, a free-trade Democrat, accurately pointed out the redistributive implications of reciprocity from the 1890 Act:

[Y]ou propose to give us reciprocity. Reciprocity with whom? The McKinley law gave us reciprocity, not with the great states of Europe, that consume the surplus agricultural products of this country, but with some of the Spanish-American countries and with some of the small islands adjacent to our coast. . . . Who was benefited by these reciprocity treaties? The same trusts and combines that were benefited by other features of the McKinley bill of 1891 and will be further benefited by the passage of the bill now under consideration.<sup>87</sup>

These musings by Congressman Cochran further illustrate the complicated relationship between delegation, reciprocity, and factional rent-seeking in nineteenth-century trade policy. In this rendition, delegation and reciprocity were presumably deployed to further both the protectionist and export access goals of one specific faction at the expense of the export access goals of another. Ultimately, Republicans pushed for more delegation in the Act of 1922, which not only gave the President the authority to alter tariff rates by up to nearly fifty percent, but also gave him the unprecedented power to engage in tariff reclassifications.<sup>88</sup> The Act also created the so-called scientific tariff, which sought to equalize the costs of production among countries so that no country could undercut the prices charged by American companies.<sup>89</sup>

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So much for the notion that delegation and reciprocity serve primarily as vehicles for promoting free trade. To be sure, throughout the

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85. Tariff Act of 1897, ch. 11, 30 Stat. 151.

86. *Id.* § 3, 30 Stat. at 204.

87. 30 CONG. REC. 199 (1897) (statement of Sen. Cochran).

88. Tariff Act of 1922, ch. 356, §§ 315–316, 42 Stat. 858, 941–44 (1922) (permitting the President to “determine and proclaim the changes in classifications or increases or decreases in any rate of duty”); *see also* GOLDSTEIN, *supra* note 53, at 123–24 (underscoring the fact that the President’s discretion to “raise or lower duties for the purpose of equalizing [production] costs” was “limited only by a 50 percent cap”).

89. Tariff Act of 1922 §§ 315–316; *see also* GOLDSTEIN, *supra* note 53, at 124 (discussing the scientific tariff provision in the Tariff Act of 1922).

nineteenth and early twentieth centuries, these structural innovations were nonetheless justified in high-minded or general welfare terms.<sup>90</sup> However, at the time, the more dominant view was that the welfare of powerful protectionist groups approximated the public interest of the United States.<sup>91</sup> Of course, such a perspective was not shared by free-trade Democrats, but they were largely out of power in the executive branch for the greater part of the relevant period.

The flipside of such general welfare rhetoric was that the protectionists of the nineteenth century tended to depict free-trade supporters as narrow-minded “selfish” groups.<sup>92</sup> Indeed, in certain quarters, antagonism toward free trade enjoyed a certain degree of intellectual respectability. The famous German economist Friedrich List went so far as to argue that the principal objective of the Philadelphia Convention of 1787 was to forge a new protectionist order.<sup>93</sup> After tariffs eventually were lowered by the Tariff Act of 1816, List laid the blame on “powerful private interests which were opposed to those of the manufacturers.”<sup>94</sup> He then claimed that the lower tariffs had caused the United States to “suffer[ ], for a second time, greater evils though peace than the most devastating war could have brought upon it.”<sup>95</sup>

### 3. *Secretary Hull’s Conversion to Delegation*

The aversion of free-trade Democrats to constitutional innovation on tariff policy proved to be temporary. One of the vocal critics of presidential delegation in the bill version of the disastrous 1930 Smoot-Hawley tariffs was a certain Cordell Hull, a southern Democrat who was on his way to becoming one of the most pronounced anti-tariff voices on Capitol Hill.<sup>96</sup>

90. See, e.g., TERRILL, *supra* note 75, at 172–73 (describing widespread praise for the reciprocity provisions of the McKinley Act).

91. See Eiteman, *supra* note 52, at 22–24.

92. See *id.* at 31–32 (observing that American protectionists described British free trade as “the real mother of trusts” and claimed that “[p]rotection was the ‘savior of our industries, the herald of advancing wages and the progenitor of good prices’” (quoting *What Are the Compensations?: Things that Have Come to Pass Under the Dingley Law*, AM. ECON., July 21, 1899, at 27)); see also FRIEDRICH LIST, NATIONAL SYSTEM OF POLITICAL ECONOMY 120–21 (Cosimo Classics 2011) (1841) (describing Congress as being influenced by free-trade groups who were opposed to the interests of manufacturers in the early nineteenth century).

93. LIST, *supra* note 92, at 120–21.

94. *Id.* at 121.

95. *Id.*

96. See *The Tariff Commission and the Flexible Tariff*, in 2 EDITORIAL RESEARCH REPORTS 1929, at 399 (1929), <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1929052900#.Ujy4aZzCa3o> (“The opponents of the plan contend that the flexible system can never be made to work as a ‘scientific’ method of tariff revi-

In 1934, however, then-Secretary of State Hull seemed to have a change of heart. Having shed his prior qualms about unconstitutional delegation when he was a congressman, Hull, then a key member of Roosevelt's cabinet, helped set in motion his own scheme of delegation.<sup>97</sup> That scheme involved the combination of an unconditional Most Favored Nations ("MFN") clause in trade agreements with the presidential flexibility to reduce tariffs unilaterally in negotiations with foreign countries.<sup>98</sup> And more importantly, reductions in tariffs would no longer be made through omnibus legislation by way of Congress, but through bilateral agreements with other countries.<sup>99</sup> Congress would simply vote on a bicameral basis whether to approve trade negotiation authority, rather than approve specific trade agreements with other countries that would then be subject to ratification under the Treaty Clause.<sup>100</sup> Subsequently, the General Agreement on Tariffs and Trade ("GATT") multilateral framework of 1947 also had the added dimension of ensconcing trade reduction authority into a broader institutional framework, where efforts to raise a tariff would no longer be a simple matter of a dispute between two states, but a violation of a rule governing a broader range of states.<sup>101</sup>

This episode would not prove to be the only time that Hull would have a change of heart regarding the allocation of international trade authority. For instance, he strongly opposed the establishment of a

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sion, and that the delegation to the President of broad power to alter tariff duties is an undesirable innovation in the plan of government established under the Constitution of 1789. This position was taken during the House debates by Rep. Cordell Hull, D., Tenn., member of the Ways and Means Committee . . .").

97. See CHOREV, *supra* note 17, at 47 (discussing Hull's request that Congress "grant authority to the president to negotiate bilateral concessions raising or lowering tariff rates up to 50 percent of the existing rates on agricultural and industrial products"); Kenneth W. Dam, *Cordell Hull, The Reciprocal Trade Agreements Act, and the WTO*, 1 N.Y.U. J.L. & BUS. 709, 712 (2005) (describing Hull's role as Secretary of State in securing both delegation and reciprocity under the RTAA); see also GOLDSTEIN, *supra* note 53, at 140, 143 (discussing "most favored nations" provisions and executive delegation).

98. See GOLDSTEIN, *supra* note 53, at 140, 143 (discussing MFN and executive delegation).

99. See *id.*

100. CHOREV, *supra* note 17, at 47-49. Specifically, Hull "asked Congress to treat the bilateral agreements reached by the president as executive agreements, requiring no ex-post congressional approval," which was a "radical departure from previous practices" that required congressional ratification of trade treaties negotiated by the President. *Id.* at 47. Though Congress granted the President trade negotiation authority, it limited such authority to three years. Consequently, the President had "to periodically return to Congress for new authority, which promised a continued negotiation between Congress and the executive." *Id.* at 48-49.

101. See General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (spelling out MFN obligations).

tariff board under the Taft administration, which would have removed the setting of tariff rates from congressional control.<sup>102</sup> But then he reversed course and endorsed the establishment of a similar board under the administration of Woodrow Wilson, a free-trade Democrat.<sup>103</sup>

Once the shoe was on the other foot, it was the Republicans' turn to denounce delegation of trade authority as unconstitutional and wrongheaded.<sup>104</sup> The Republican Party platform of 1936 not only vowed to repeal the RTAA,<sup>105</sup> but also "condemn[ed] the secret negotiations of reciprocal trade treaties without public hearing or legislative approval."<sup>106</sup> In the years prior to the 1940 election, the Republican leaders in the Congress and Senate overwhelmingly voted for repeal of the RTAA every time it came up for renewal.<sup>107</sup> By the late 1940s, however, when some of the Republican business constituencies that initially supported repeal had become net exporters, a split emerged within Republican legislators, and many decamped from their long-held protectionist positions to embrace free trade.<sup>108</sup> This intra-coalitional split within the Republican Party ultimately made it more likely that the constitutional innovations that made the RTAA possible would remain durable.<sup>109</sup>

Against this background, the delegation accorded the President in the 1934 Act was neither particularly original nor power-enhancing from the President's perspective. Indeed, it is better understood in part

102. William R. Allen, *The International Trade Philosophy of Cordell Hull, 1907–1933*, 43 AM. ECON. REV. 101, 115–16 (1953).

103. *See id.* at 116; *see also* THE CONCISE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 543 (Michael Kazin et al. eds., 2011) (discussing Cordell Hull's position on trade policies during the era).

104. *See Republican Party Platform of 1936*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29639#ixzz1RR7G6ga4> ("We will repeal the present Reciprocal Trade Agreement Law. It is futile and dangerous. Its effect on agriculture and industry has been destructive. Its continuation would work to the detriment of the wage earner and the farmer."); *see also* Schnietz, *supra* note 16, at 427 ("Republicans' primary argument against the RTAA was that legislative authority it embodied was unconstitutional . . .").

105. *See Republican Party Platform of 1936*, *supra* note 104.

106. *See id.*

107. *See* Douglas A. Irwin & Randall S. Kroszner, *Interests, Institutions, and Ideology in Securing Policy Change: The Republican Conversion to Trade Liberalization After Smoot-Hawley*, 42 J.L. & ECON. 643, 644–45 (1999).

108. *See id.* at 645 ("As the 1940s progressed, however, Republicans began to cross the aisle and vote with Democrats in favor of RTAA renewals."). Irwin and Randall explain the shift thusly: "Senate Republicans voting in 1934 were responsive only to import-competing interests, whereas those voting in 1945 were responsive to both import-competing and export-oriented interests." *Id.* at 647.

109. *See id.* at 647.

as a ploy by anti-tariff Democrats to undo the damage inflicted by Republican coalitions' previous delegations of tariff-raising authority to the President. But by the time of the 1934 Act, Democrats had given up on piecemeal efforts to simply repeal protectionist legislation. They instead sought to entrench a legislative scheme that would make it more difficult for future Republican Presidents to ever have the power to unilaterally raise tariffs or make other adjustments for import-competing industries.<sup>110</sup> They also were miffed at how prior Republican Presidents had converted the Tariff Commission set up by Wilson into a protectionist scheme. The 1928 and 1932 Democratic Party platforms reveal the Democrats' views on the delegation practiced by their Republican predecessors. The 1932 platform announced that the Democrats would embrace "a fact-finding tariff commission free from executive interference,"<sup>111</sup> while the party vowed in the 1928 platform to end "the executive domination which has destroyed the usefulness of the present commission."<sup>112</sup>

In the post-RTAA era, delegation of free-trade authority to the President has more or less followed a predictable pattern. The free-trade party—the Republicans, in the modern era—has generally preferred to delegate to the executive branch regardless of which party occupies the White House.<sup>113</sup> By contrast, Democrats usually have been reluctant to delegate even during periods of united government.<sup>114</sup> But given the pre-RTAA history, it is unlikely that this pattern has much to do with the trade preferences of the President, and more to do with the fact that modern multilateral trade negotiations constrain the ability of Presidents to negotiate for protectionist provisions.<sup>115</sup> The trade constituencies in both political parties understand well the constraints of these multilateral regimes, and their preferences on delegation reflect that understanding. There is a slight wrinkle to this story, however. With the proliferation of bilateral and regional trade agreements, Presidents now have more flexibility to insert pro-

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110. See Schnietz, *supra* note 16, at 429 ("The RTAA was primarily designed to protect against a return to high tariffs under the next period of Republican unified political control of the federal government.").

111. *Democratic Party Platform of 1932*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29595> (last visited Nov. 16, 2015).

112. *Democratic Party Platform of 1928*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29594> (last visited Nov. 16, 2015).

113. See Yevgeniy Kirpichevsky & Phillip Y. Lipsy, *Congressional Preferences and the Structure of Delegation: Reassessing the Effect of Divided Government on U.S. Trade Policy 25–28* (Dec. 29, 2008) (unpublished manuscript), <http://stanford.edu/~plipsy/paperdelegationtrade.pdf>.

114. See *id.* (manuscript at 28–34).

115. See *id.* (manuscript at 17–18).

tectionist or mercantilist commitments into international trade agreements.<sup>116</sup>

## II.

### DID THE MARKETPLACE OF IDEAS EXPOSE SPECIAL INTERESTS?

In democracies, the assumption is often that the marketplace of ideas will serve to screen out institutions and policies that are unfounded or dubious, or that cater to the needs of narrow interest groups. The underlying logic is that such policies will likely be discredited when they are exposed to the light of public debate. To this end, one common argument made in support of the RTAA is that the Depression helped clarify the horrors of legislative supremacy in international trade.<sup>117</sup>

There is one significant problem with this marketplace of ideas narrative as applied to the RTAA: it cannot quite explain post-RTAA trade policy. First, and most importantly, the marketplace of ideas thesis does not reflect the intense partisan conflict that surrounded both the enactment and the subsequent history of the RTAA.<sup>118</sup> Rather than understanding that the Smoot-Hawley tariffs were a likely source of the global economic crisis and viewing the RTAA as a solution, Republican legislators in both houses instead condemned the RTAA as a blatant partisan measure on behalf of interest groups associated with the Democratic Party.<sup>119</sup> Indeed, as some commentators have observed, almost every member of Congress who voted for the Smoot-

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116. See Jagdish Bhagwati, *Dawn of a New System*, 50 FIN. & DEV. 9, 12–13 (2013) (arguing that regional trade agreements can hurt the promotion of free-trade goals); Jagdish Bhagwati & Arvind Panagariya, *The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends*, 86 AM. ECON. REV. 82, 86 (1996) (“In conclusion, among the as-yet-unformalized arguments that drive the simultaneous use of PTA’s by the United States alongside multilateralism, is that . . . [that] posits a ‘selfish hegemon’ that, while wedded to multilateral outcomes, uses the PTA approach as a *sequential bargaining strategy* to divide the nonhegemonic governments and improve the final multilateral outcome in favor of its own demands.” (quoting Jagdish Bhagwati, *The World Trading System*, 48 J. INT’L AFF. 279, 284 (1994))).

117. GOLDSTEIN, *supra* note 53, at 132–33 (elaborating upon this view). Leading proponents of the marketplace of ideas, or lessons learned thesis, include: DAM, *supra* note 1, at 40–42; DESTLER, *supra* note 16, at 15–16; DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 223 (1999).

118. See Bailey et al., *supra* note 24, at 314 (providing empirical references that cut against the marketplace of ideas thesis); Schnietz, *supra* note 16, at 418–20 (“[T]he [congressional] voting record clearly undermines the lesson hypothesis.”).

119. See Bailey et al., *supra* note 24, at 314.



Hawley tariffs also voted against the RTAA.<sup>120</sup> And as discussed *supra*, in the years after the passage of the RTAA and up until World War II, the Republican Party did not vary in its protectionist stance.<sup>121</sup> Ironically, the economic opportunities provided by the war helped transform some of the northern industries that supported Republicans from import-competing groups to net exporters.<sup>122</sup> Had the northern business interests from which the Republicans drew their support in 1932 persisted in their import-competing preferences through the 1950s, it is very likely that the constitutional regime underpinning the RTAA would have unraveled.<sup>123</sup> And while other commentators have criticized the notion that Congress would willingly relinquish authority because of lessons learned,<sup>124</sup> they nonetheless seem to accept the premise that a President will likely have more liberal trade preferences than will Congress.<sup>125</sup>

Second, the marketplace of ideas thesis does not adequately capture the ideational landscape of American trade policy prior to the 1930s, nor does it pay sufficient attention to the political economy factors that shaped trade policy at the time. As Professor Judith Goldstein points out in her in-depth analysis of U.S. trade policy, by the advent of World War I the dominant academic discourse in the American academy already favored free trade.<sup>126</sup> Even though a protectionist element was visible in some American economics departments by the

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120. See Michael J. Hiscox, *The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization*, 53 INT'L ORG. 669, 674 (1999).

121. See *supra* notes 104–109 and accompanying text.

122. See Irwin & Kroszner, *supra* note 107, at 647 (describing change in Republican preferences from strictly protectionist to more export-oriented after World War II); see also Hiscox, *supra* note 120, at 685–86 (observing that traditional protectionist industries that supported the Republican Party had turned into export groups in the wake of World War II).

123. As Irwin and Kroszner observe: “Senate Republicans voting in 1934 were responsive only to import-competing interests, whereas those voting in 1945 were responsive to both import-competing and export-oriented interests.” See Irwin & Kroszner, *supra* note 107, at 647.

124. See GILLIGAN, *supra* note 71, at 5; Bailey et al., *supra* note 24, at 313–14; Schnietz, *supra* note 16, at 418–19.

125. See, e.g., GILLIGAN, *supra* note 71, at 5 (“Common to all [who argue that delegation has facilitated liberalization of American trade policy] . . . is the idea that the president has more liberal preferences on trade policy than members of Congress do because his constituency is national rather than parochial.”); Bailey et al., *supra* note 24, at 326–28 (observing that Presidents favored low tariffs because first, the President’s constituency is national while that of a member of Congress is local; and second, the President’s international role involves using trade liberalization as a means to achieve “geopolitical goals”); Schnietz, *supra* note 16, at 429–32 (also attributing the President’s preference in favor of lower tariffs to the office’s national constituency).

126. See GOLDSTEIN, *supra* note 53, at 87–88.

latter part of the nineteenth century, it had all but vanished by the end of the century.<sup>127</sup>

But despite the almost universal one-sidedness of the ideational discourse in favor of trade liberalization, academics and policy experts had had almost no discernible effect upon the trajectory of American trade policy by the early twentieth century. Up until the 1940s, tariff policy had an almost predictable pattern. When Republicans were in power, they championed high tariffs (backed by their manufacturing base); when Democrats were in power, they (and their agricultural constituents) pushed for tariff reform.<sup>128</sup> If and when policy experts and academics testified about the effects of high tariffs before Congress, they usually were ignored by those opposed to tariff reform and bandied around opportunistically by those groups who stood to benefit materially from such reforms.<sup>129</sup> There does not seem to be much evidence that the policy discourse influenced any politician who was not otherwise responding to constituent pressure to take a different stance on the merits of tariff policy.<sup>130</sup>

By the time the Smoot-Hawley tariff was passed in 1930 (raising average ad-valorem rates to 52.8%), it was uniformly condemned by academic economists as an imprudent economic measure.<sup>131</sup> These academic voices, however, seemed to have no effect on either the subsequent legislative debates or the eventual political outcome.<sup>132</sup> Moreover, even after Smoot-Hawley instigated a tariff war that led twenty-six major trading partners to implement quantitative restrictions and economic controls, and that provoked the United Kingdom to abandon whatever remained of its free-trade regime in 1932, there is little evidence that major Republican politicians experienced a change of heart or mind.<sup>133</sup> Even when the Great Depression set in between 1929 and 1933 and the American economy had collapsed, Republican legislators remained convinced that Smoot-Hawley had very little to do with the ensuing economic crisis, and that the RTAA

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127. *See id.* at 88–91.

128. *See* Bailey et al., *supra* note 24, at 325.

129. In her book, Goldstein highlights the little influence academic economists played in shaping trade policy during the nineteenth and early twentieth centuries, even though they largely favored free trade. *See* GOLDSTEIN, *supra* note 53, at 90.

130. *See, e.g., id.* at 125 (discussing how Smoot-Hawley passed despite strong opposition by economists).

131. *See id.*

132. *See id.* at 125–26.

133. *See* Schnietz, *supra* note 16, at 419–21; *see also* Hiscox, *supra* note 120, at 674–75.

was the political travesty that threatened the American constitutional and economic order.<sup>134</sup>

But why was political discourse on tariff policy in the early twentieth century so far removed from the conventional academic wisdom? Some commentators have blamed the ineffectual and socially disengaged norms of professional economists who often presented their findings in a manner that made it difficult for politicians or the public to understand.<sup>135</sup> But beyond the esoteric academic behavior of professional economists, a more likely reason might be that these academic ideas did not resonate with the material interests of the key interest groups aligned with the Republican Party. The disjuncture between ideas and material interests meant that the conventional academic wisdom that free trade would be welfare-enhancing could not find support within political circles.<sup>136</sup>

Finally, a failing of the marketplace of ideas explanation is that it overlooks how much of the political will in favor of free trade during the early twentieth century might have been the result of vested interests, rather than the exchange of ideas. While Cordell Hull (as both legislator and Secretary of State) undeniably had an evangelical bend to his crusade for trade liberalization,<sup>137</sup> it is something of a reach to extrapolate that the RTAA and the post-war international order were born of moral conviction, rather than more mundane commercial considerations.

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134. See *Republican Party Platform of 1936*, *supra* note 104 (“We will repeal the present Reciprocal Trade Agreement Law. It is futile and dangerous. Its effect on agriculture and industry has been destructive. Its continuation would work to the detriment of the wage earner and the farmer.”).

135. See GOLDSTEIN, *supra* note 53, at 134 (“American economists, disinterested in political affairs, were busy . . . creating a discipline whose beauty was its abstraction and often its irrelevance for particular policy questions.”).

136. There is a literature that points to the primacy of material interests over high-minded ideas in shaping the contours of trade institutions. See, e.g., Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255, 255 (1991) (“[I]t is tempting to view the [GATT] Agreement as a high-minded, trade-liberalizing undertaking, devoted to the pursuit of free trade and to the defeat of protectionist forces. But scholars have long argued that such a view of GATT is naive, and that it must instead be understood as an expedient bargain among the self-interested political leaders of GATT signatories.”); see also Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization’s Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 250–53 (2005) (using interest group politics to explain the design of the WTO’s dispute resolution mechanism).

137. See generally Douglas A. Irwin, *Trade Liberalization: Cordell Hull and the Case for Optimism* (July 31, 2008) (unpublished manuscript), <http://www.cfr.org/trade/trade-liberalization-cordell-hull-case-optimism/p16873>; see also *supra* notes 96–103 and accompanying text.

There are many reasons to view any ideational explanation with some suspicion. First, as discussed earlier, there were strong and well-organized business constituencies that lobbied for greater market access under the RTAA.<sup>138</sup> Second, there were also regional differences for the preference for free trade and international institutions that belie ideational accounts. Conventional accounts of the controversies underlying the ratification of the postwar U.N. institutions and the prewar trade regime sometimes explain the disputes as pitting internationalists who supported the United Nations and the prewar trade regime against conservative isolationists.<sup>139</sup> But as some commentators have observed, it was southern politicians in the early part of the twentieth century who were most supportive of the use of international law and multilateral institutions as a means of resolving economic policy issues, and the South was then (as now) hardly considered a bastion of progressive idealism or particularly susceptible to norms of global cosmopolitanism.<sup>140</sup> For southern politicians (a group to which Cordell Hull belonged),<sup>141</sup> the prevailing preference for internationalist institutions from the 1930s through World War II was dictated by a simple logic: the economy of the South was tied strongly to agriculture, and southern farmers were a largely export-oriented lot whose interests were most visibly threatened by Hitler's autarchic economic policies.<sup>142</sup> As Peter Trubowitz put it, "[I]n the final analysis, there can be little question that the South's interests were determined by its position in the international economy . . . . The South was more vulnerable to the loss of overseas markets than other sections of the country."<sup>143</sup>

By the early 1950s, however, southern Democrats were aligning with Republican constituencies in strident opposition to the proliferation of certain international institutions.<sup>144</sup> What happened? The answer is that President Truman had decided to break with President Roosevelt's more delicate and nuanced approach on civil-rights issues and had gambled on courting the black vote, whose demands included using international human-rights agreements to overcome domestic

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138. See *supra* notes 24–33 and accompanying text.

139. See, e.g., Ackerman & Golove, *supra* note 17, at 803.

140. See TRUBOWITZ, *supra* note 35, at 126–27.

141. The claim here is not that Hull's ideological posture was a mask for regional southern commercial interests, but that his free-trade positions both as Secretary of State and as a senator and congressman from Tennessee resonated with southern interests and politicians. See *id.* at 128–29.

142. See *id.* at 130–34.

143. *Id.* at 134.

144. See Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 Nw. U. L. REV. 635, 666–67 (2011).

obstacles to integration.<sup>145</sup> According to the now-famous Rowe Report, Truman was advised that his 1948 electoral victory hinged on the support of African American voters in the North who “h[eld] the balance of power in Presidential elections for the simple arithmetical reason that the Negroes not only vote in a bloc but are geographically concentrated in the pivotal, large and closely contested electoral states such as New York, Illinois, Pennsylvania, Ohio and Michigan.”<sup>146</sup> In hindsight, the Rowe Report gambled wrongly that southern whites would not abandon the New Deal coalition and align with Republican business interests because of Truman’s stance on civil-rights issues.<sup>147</sup>

Truman’s willingness to embrace key planks of the civil-rights movement upset the key coalition that enabled Roosevelt to pursue multilateralism during the 1930s and early 1940s.<sup>148</sup> For example, James Byrnes—Truman’s second Secretary of State, who negotiated the peace treaties with key European allies at the end of the war and started the process for the creation of West Germany—was a southern Democrat who eventually turned against Truman on the question of U.N. treaties and civil rights.<sup>149</sup> Indeed, in order to satisfy human-rights treaty skeptics within his own Republican Party, Eisenhower subsequently appointed Byrnes to replace Eleanor Roosevelt as the delegate to the United Nations.<sup>150</sup> But Byrnes had earlier been a champion of multilateral institutions and free trade. As described by the wartime British Ambassador Lord Halifax, Byrnes was “a fervent believer in international cooperation . . . [who] can be counted . . . to show himself a faithful disciple of Mr. Hull.”<sup>151</sup>

To be clear, the claim is not that ideational explanations cannot influence the preferences of politicians for free trade or international institutions, but rather that to be politically sustainable, these ideas will usually have to resonate with the material or ideological interests of core constituencies aligned with either of the political parties.<sup>152</sup>

145. *See id.*

146. Memorandum from James Rowe, Jr. (Sept. 18, 1947), in 14 A DOCUMENTARY HISTORY OF THE TRUMAN PRESIDENCY 29, 36 (Dennis Merrill ed., 1995).

147. *See* Nzelibe, *supra* note 144, at 667.

148. *See id.* at 667–68.

149. *See* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955, at 212 (2003).

150. *See id.* at 215–16, 241–42 (describing Eleanor Roosevelt’s removal from the post and her reaction to James Byrnes’s appointment).

151. Letter from E.F.L. Wood, Earl of Halifax, to Anthony Eden (July 3, 1945), reprinted in James L. Gormly, *Secretary of State James F. Byrnes, an Initial British Evaluation*, 79 S.C. HIST. MAG. 198, 204 (1978).

152. In some respect, this perspective accepts Weber’s view that ideas could play a secondary role mobilizing and expressing interests. *See* MAX WEBER, FROM MAX

High-minded views about the benefits of free trade or global multilateral institutions may frequently overlap with the more parochial objectives of a party's core constituents, but sometimes they will not. And when such divergences do occur, it is not far-fetched to assume that office-seeking politicians will be willing to sacrifice ideals about the general welfare for electoral self-interest.

### III.

#### CAN CONSTITUTIONAL STRUCTURE BE USED TO UNDERMINE SPECIAL INTERESTS?

What then are the forces that account for the relevant institutional changes that defined the RTAA? More importantly, why did that statutory scheme appear to lead to more trade liberalization, and why did it remain politically sustainable? This Article does not purport to answer these questions in any definitive manner, but it concludes that the established wisdom that presidential delegation and reciprocity weakened the role of special interest groups in international trade is unconvincing.

More significant, perhaps, is the broader question about whether there is any predictable and consistent link between constitutional structure and the question of the tariff. Conventional wisdom has generally assumed that entities that encompass bigger geographical areas will be less prone to protectionism than more decentralized structures.<sup>153</sup> That is one of the reasons why the President is often defended as an institutional bulwark of free trade against Congress. The logic that connects this kind of institutional structure to policy outcomes is somewhat unclear, although it is often framed in terms of the difficulty that factions ostensibly have capturing broader national institutions, like the presidency, as opposed to more local ones.<sup>154</sup>

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WEBER: *ESSAYS IN SOCIOLOGY* 280 (H.H. Gerth & C. Wright Mills trans. & eds., 1958) ("Not ideas, but material and ideal interests, directly govern men's conduct. Yet very frequently the 'world images' that have been created by 'ideas' have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest.").

153. See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. REV.* 1217, 1267–72 (2006) (criticizing the argument that Congress is more susceptible to narrow societal groups than the President is).

154. See *id.* David Moore has recently criticized the functional justification for having the President take the lead in foreign affairs, especially that aspect of the justification that relies on the "one voice" doctrine. See David H. Moore, *Beyond One Voice*, 98 *MINN. L. REV.* 953, 955–56 (2014). For arguments that the President has a more encompassing view of the national interest and thus is less susceptible to being captured by narrow interests, see Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23, 35 (1995) ("Representing as he does a na-

However, multiple episodes of United States history are in tension with this proposition. To put the matter delicately, the constitutional theories used to encourage free trade in the early nineteenth century had been developed, in the first instance, explicitly in opposition to the national government and presidential power. For instance, Calhoun's doctrine of nullification was embraced by South Carolina in 1832 as a device to circumvent the protective tariff favored by import-competing groups that dominated at the national level.<sup>155</sup> In this case, Calhoun deployed *states' rights*, rather than nationalism, as the preferred institutional mode for achieving free trade.<sup>156</sup> And the logic of nullification was itself somewhat ingenious. Adopting the prevailing view of many southern commentators and politicians of the era,<sup>157</sup> Calhoun concluded that the protective tariff was unconstitutional but that the general revenue tariff was not.<sup>158</sup> Therein lay the quandary: for even if this constitutional theory had traction, Calhoun recognized that courts would not be institutionally capable of distinguishing be-

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tional electoral college majority, the President at least has an incentive to steer national resources toward the 51% of the nation that last supported him (and that might support him again), thereby mitigating the bad distributional incentives faced by members of Congress."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) ("[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994) ("[B]ecause the President has a national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—it appears to operate as an important counterweight to factional influence over administration.").

155. See S.C. CONSTITUTIONAL CONVENTION, REPORT OF THE COMMITTEE OF TWENTY-ONE TO THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, ON THE SUBJECTS OF THE SEVERAL ACTS OF CONGRESS IMPOSING DUTIES FOR THE PROTECTION OF DOMESTIC MANUFACTURES, WITH THE ORDINANCE TO NULLIFY THE SAME (1832), reprinted in 43 NILES' WEEKLY REGISTER 231, 237 (1832) ("[A]s the power to regulate commerce, conferred expressly for its security, cannot be fairly exerted for its destruction, so neither can it be perverted to the purpose of building up manufacturing establishments—an object entirely beyond the jurisdiction of the Federal Government.").

156. Indeed, the key pro-nullification faction in South Carolina was called the "States Rights and Free Trade Association." See WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836, at 224–25 (1966).

157. See BRIAN D. SCHOEN, THE FRAGILE FABRIC OF UNION: COTTON, FEDERAL POLITICS, AND THE GLOBAL ORIGINS OF THE CIVIL WAR 139–41 (2009) (describing the view of many delegates from the lower South during the Philadelphia Free Trade Convention of 1831 that the protective tariffs were unconstitutional); see also BELKO, *supra* note 25, at 32–34.

158. See FREEHLING, *supra* note 156, at 138–39; KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 79–107 (1999) (discussing John Calhoun's argument that the protective tariff was unconstitutional but that the case was nonjusticiable).

tween a constitutionally permissible revenue tariff and an impermissible protective one.<sup>159</sup> But South Carolina, an export-oriented state that would be harmed by a protective tariff and presumably not by a general revenue tariff, would have the right kind of incentives to nullify the constitutionally suspect tariff.

The dreaded memory of the nullification crisis might explain why the framers of the Confederate Constitution did not follow the 1787 model in drafting similar language about the legislative power to raise tariffs. In an attempt to prevent the Confederate Congress from engaging in protectionism, its framers left little room for creative interpretation:

The Congress shall have power — To lay and collect taxes, duties, imposts, and excises, for revenue necessary to pay the debts, provide for the common defense, and carry on the Government of the Confederate States; *but no bounties shall be granted from the Treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry; and all duties, imposts, and excises shall be uniform throughout the Confederate States.*<sup>160</sup>

#### IV.

#### AN ALTERNATIVE ACCOUNT OF CONSTITUTIONAL CHANGE: SOCIAL CONFLICT

*The Democratic Party, except in the person of imbeciles hardly worth mentioning, is not on the fence. It is a free trade party or it is nothing.*

—Henry Watterson<sup>161</sup>

If the preferences of institutional actors likely fail to explain the decline of acute protectionism, what other forces contributed to its decline in the 1930s? A more plausible answer, although still largely speculative, is that the modern constitutional regime underpinning trade policy is the outcome of the convergence of four forces.

159. John C. Calhoun, *Rough Draft of What Is Called the South Carolina Exposition*, in 10 THE PAPERS OF JOHN C. CALHOUN 444, 446 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977) (“[T]he Courts can not look in the motives of legislators,” but “are obliged to take acts by their titles and professed objects[;] and if these be Constitutional, [courts] cannot interpose their power, however grossly the acts may, in reality, violate the Constitution.”).

160. CONST. OF THE CONFEDERATE STATES OF AMERICA art. I, § 8, cl. 1 (1861) (emphasis added).

161. DANIEL S. MARGOLIES, HENRY WATTERSON AND THE NEW SOUTH: THE POLITICS OF EMPIRE, FREE TRADE, AND GLOBALIZATION 17 (2006) (emphasis added) (quoting Henry Watterson).



A. *The Rise of Southern Democrats as a Force in National Politics*

From the end of the Civil War until the Great Depression, Republicans dominated presidential politics by capturing the White House in twelve out of the sixteen elections.<sup>162</sup> Not surprisingly, free-trade Democrats opposed presidential delegation on trade policy during that period.<sup>163</sup> But once southern Democrats gained the upper hand in the 1930s and started playing a more prominent role on the national political scene, they discovered that they could use delegation to further their free-trade objectives.<sup>164</sup> Crucial to this dynamic, however, was that the Democratic Party that emerged after Reconstruction and lasted until the 1960s was much more responsive to southern economic interests than was its Reconstruction-Era predecessor.<sup>165</sup> In the post-Civil War era, northern Democrats tended to be either ambivalent about tariffs or simply embracive of protectionism,<sup>166</sup> and southern Republicans were reluctant to adopt the protectionist stance of the national party.<sup>167</sup> Given this strong regionalist cast to party politics, it is more likely that the post-Reconstruction Democratic Party's anti-tariff plank was a response to strong southern pressure, rather than any deeply-rooted ideological commitment to free trade.<sup>168</sup> After all, southern coalitions played a key role in pushing for the nominations of anti-tariff Democratic presidential candidates, including Presidents Grover Cleveland and Woodrow Wilson.<sup>169</sup> Indeed, President Cleveland's

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162. See Narizny, *supra* note 28, at 11.

163. See *supra* Section I.B.2.

164. See *supra* Section I.B.3.

165. BENSEL, *supra* note 42, at 474 n.33; see also *id.* at 125 (“[I]n the industrial states of the East, the Democrats were much more restrained in their opposition to the tariff; many of them even embraced protection.”). For a discussion of the literature describing a realignment of partisan preferences in the 1960s in which the South moved from being solidly Democratic to Republican, see Charles S. Bullock III, *The GOP Comes of Age in the South*, 4 *ELECTION L.J.* 207 (2005).

166. See BENSEL, *supra* note 42, at 125. As a result of the compromise of 1877, the Democratic Party had once again become a dominant political force in the South, and thus began the southernization of the Democratic Party. See *id.* at 4, 15.

167. See *id.* at 126.

168. See *id.* at 125.

169. See Narizny, *supra* note 28, at 9–11 (describing the key role that southern Democrats played in securing Wilson's presidency); see also Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 *VA. L. REV.* 7, 31 n.102 (1994) (“While Roosevelt received between 23.7% and 29.4% of his electoral votes from the South in his four presidential wins, the South had provided 48.9% and 40.4% for Democrat Grover Cleveland's two wins, and 45.5% for Woodrow Wilson's 1916 victory.”).

first administration's strong free-trade platform coincided with the return to dominance of the Democratic Party's southern wing.<sup>170</sup>

This apparent incongruity—that the region that recently had lost the Civil War would have significant political sway on the national Democratic Party—was the source of much heated political discourse in northern states. In their 1894 platform, for instance, New York Republicans explicitly invoked regionalist rhetoric in chiding northern Democrats for supporting President Cleveland's tariff cuts:

We denounce Northern Democratic Congressmen for permitting Southern members to protect the chief products of their section while removing or largely reducing protective duties on the products of the North; thus permitting the South, by legal enactment in time of peace, to destroy our prosperity and accomplish what it failed to do by illegal enactment in time of war.<sup>171</sup>

The Pennsylvania Republicans struck an equally ominous tone in their 1894 platform: “[The Wilson Tariff] is an attempt upon the part of the Free Traders of the South to reduce the industries of the North to the level of those of the South.”<sup>172</sup>

### *B. The Arrival of New Coalitions Favoring Market Access*

By the early twentieth century, the Northeast industrial sector that traditionally favored the Republican Party had begun to abandon its largely monolithic approach to tariffs, as more of its industries became competitive internationally.<sup>173</sup> By the time the RTAA was passed, the pro-reform coalition included manufacturers that imported raw materials for finished products as well as export-oriented industries such as aircraft, cameras, and automobiles.<sup>174</sup> In addition, western grain farmers, normally predisposed to protectionism, had by the

170. See BENSEL, *supra* note 42, at 474 n.33.

171. *Id.* at 126 (internal quotation marks omitted) (quoting a position adopted by state legislators at the New York Republican Convention in 1894).

172. *Id.* This era was the first time the Democrats had taken the White House since the Civil War, and it marked the fruits of the political bargain captured in the compromise of 1877. See generally Allan Peskin, *Was There a Compromise of 1877?*, 60 J. AM. HIST. 63 (1973).

173. See *supra* notes 75–78 and accompanying text; see also Irwin & Kroszner, *supra* note 107, at 657–59.

174. See Karen E. Schnietz, *The Reaction of Private Interests to the 1934 Reciprocal Trade Agreements Act*, 57 INT'L ORG. 213, 227–28 (2003). As discussed *supra* Section I.B.3, a significant segment of this sector would cement its export access preferences toward the end of World War II. See *supra* text accompanying notes 107–09; see also Irwin & Kroszner, *supra* note 107, at 644–45; Jide Nzelibe, *In Praise of Faction: How Special Interests Benefit Constitutional Order*, 109 NW. U. L. REV. 639, 658–62 (2015) (discussing the constituencies that came to favor reform during this time period).

1930s warmed up to the idea of using reciprocity to open up European markets for surplus grain products.<sup>175</sup> It was the concrete injury suffered from dwindling access to European markets that likely mobilized all these groups in favor of tariff reform.<sup>176</sup> But there is a certain irony to the backlash against rising European trade barriers: after all, it was the increase in American protectionism during the late nineteenth century, partly as a result of policy innovations under the McKinley Tariff Act of 1890, which had raised domestic pressures in Britain to end its long-running system of free trade.<sup>177</sup>

There is a significant twist to this narrative, however. Reciprocity and international trade agreements were not necessarily the preferred strategy of southern anti-tariff coalitions.<sup>178</sup> Secretary of State Hull, for instance, initially favored a policy of unilateral reduction of tariffs, but he received significant pushback from Roosevelt's other economic advisers as well as legislators backed by the western grain coalition.<sup>179</sup> Ultimately, the resultant RTAA appeared to be a compromise between two coalitions: those who favored the reduction of domestic tariffs and those who simply wanted more access to European markets but still thought some measure of protectionism was desirable.<sup>180</sup>

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175. See Arthur W. Schatz, *The Reciprocal Trade Agreements Program and the "Farm Vote" 1934-1940*, 46 *AGRIC. HIST.* 498, 499-502 (1972).

176. See *id.* at 500-01.

177. See Palen, *supra* note 44, at 395-96. In the midst of a recession, Hull resigned himself to the position that multilateral tariff reductions would also be politically impracticable. See 1 CORDELL HULL, *THE MEMOIRS OF CORDELL HULL* 356 (1948).

178. Southerners were reluctant to embrace reciprocity as a trade policy, since they thought there was little to gain by accommodating the needs of industrial groups. They also thought it would yield trade agreements that would primarily benefit South American countries. See *supra* notes 80-84 and accompanying text; see also DAVID M. PLETCHER, *THE DIPLOMACY OF TRADE AND INVESTMENT: AMERICAN ECONOMIC EXPANSION IN THE HEMISPHERE, 1865-1900*, at 258-59 (1998).

179. See Schatz, *supra* note 175, at 498-502 (discussing western agricultural interests' positions on the unilateral reduction of tariffs during the 1930s); see also GOLDSTEIN, *supra* note 53, at 142 (discussing disagreement by members of Roosevelt's brain trust with respect to Secretary Hull's suggestion to unilaterally reduce tariffs).

180. For an endorsement of the view of the RTAA as a compromise approach among coalitions with different interests, see Schatz, *supra* note 175, at 499-502; Thomas Oatley, *The Cotton-Grain Coalition and the RTAA 1-2* (Dec. 2005) (unpublished manuscript), <http://www.unc.edu/~toatley/RTAA.pdf>. Finally, Andres Dür has argued that the purpose of the RTAA was not to promote free trade generally, but to protect exporter interests by reducing the harm inflicted by the recent increase in foreign preferential tariffs. See Andreas Dür, *Foreign Discrimination, Protection for Exporters, and U.S. Trade Liberalization*, 51 *INT'L STUD. Q.* 457 (2007).

In introducing the RTAA bill to Congress in 1934, Roosevelt did not even attempt to obscure the underlying mercantilist rationale of the legislation:

The exercise of the authority which I propose must be carefully weighed in the light of the latest information so as to give assurance that no sound and important American interest will be injuriously disturbed. The adjustment of our foreign trade relations must rest on the premise of undertaking to benefit and not to injure such interests. In a time of difficulty and unemployment such as this, the highest consideration of the position of the different branches of American production is required.<sup>181</sup>

Contemporary commentary on the RTAA reinforced the notion that the statute's key reciprocity provisions were intended as a practical concession to the political and economic realities of the Depression, rather than a device for promoting liberalization. For instance, Henry Grady, a leading trade official and an early supporter of the RTAA, felt it sufficiently important to pen an essay defending the new legislation in broad terms against its free-trade critics: "The trade agreements program is not in any sense a free trade program. It is merely an attempt to remove the causes of retaliation and to restore thereby to American enterprise its natural markets abroad and to retain at the same time reasonable protection for domestic industry."<sup>182</sup>

Why did southern Democrats who favored free trade not push more aggressively for bilateral international trade agreements in the nineteenth century? The answer is that the "Cotton South" might have concluded that international trade agreements were unnecessary to secure favorable access to European markets during that period.<sup>183</sup> The 1846 repeal of the Corn Laws in Britain had already set the stage for ending agricultural protectionism in much of Europe in the nineteenth

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181. President Franklin D. Roosevelt, Message to Congress Requesting Authority Regarding Foreign Trade (Mar. 2, 1934) (emphasis added).

182. Henry F. Grady, *The New Trade Policy of the United States*, 14 FOREIGN AFF. 283, 295 (1936). Grady was the Chief of the Division of Trade Agreements in the Department of State. Earlier on in the essay, he would explicitly criticize as imprudent the idea of the unilateral reduction of tariffs:

At a time when we are just emerging from the depression it would be particularly difficult to make tariff adjustments downward without some assurance of immediate compensations in the form of increased exports. Under present conditions, unilateral tariff action is not economically and politically a practicable alternative to the program now in operation.

*Id.* at 284.

183. See, e.g., J.W. HARRINGTON & BARNEY WHARF, *INDUSTRIAL LOCATION: PRINCIPLES, PRACTICE, AND POLICY* 198 (1995) (discussing Britain's reliance on American cotton production during the late nineteenth century).

century,<sup>184</sup> and the 1860 Cobden-Chevalier treaty between France and Britain had extended tariff reduction to other products.<sup>185</sup> Thus, there was little to no reason for either reciprocity or international trade negotiations to register as a political strategy for the “Cotton South” in the mid-to-late nineteenth century. They were aware that the political economy of the British textile industry demanded the importation of cheap raw cotton, and that whether or not there were trade agreements would be of little consequence.<sup>186</sup> To be sure, domestic tariffs were generally high in the United States during that period, and southern agriculturalists tended to oppose them as a tax on the southern economy by the Northeast, in addition to the concerns that they might provoke retaliation.<sup>187</sup> This dynamic might partly explain why free-trade Democrats tended to be hostile to both the delegation and reciprocity provisions favored by Republicans in the late nineteenth and early twentieth centuries.

When Britain’s economy started declining in the late nineteenth century, it started to experiment modestly with a protectionist system of imperial preferences in favor of its own colonies.<sup>188</sup> But it was the global response to the 1930 Smoot-Hawley tariffs that marked the end of the era of easy access to European markets.<sup>189</sup> This fragile political situation came to a head in 1932 during the Imperial Economic Conference in Ottawa, in which the British formally established a broad system of discriminatory imperial preferences.<sup>190</sup> Secretary of State Hull would later condemn the so-called Ottawa tariffs as the “greatest

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184. See KEVIN H. O’ROURKE & JEFFREY G. WILLIAMSON, *GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY* 38 (1999) (“Britain finally made the decisive move toward free trade by repealing the Corn Laws in 1846. . . . The Cobden Chevalier treaty between France and the United Kingdom was not signed until January 23, 1860, but, though delayed, the signature heralded a decisive shift toward European free trade.”).

185. *Id.*

186. Cf. Douglas A. Irwin & Peter Temin, *The Antebellum Tariff on Cotton Textiles Revisited*, 61 J. ECON. HIST. 777 (2001) (concluding that the cotton industry in the United States was well established enough by the early part of the mid-1830s that cotton textile producers did not consider such tax policies to be critical to the industry’s success).

187. See TRUBOWITZ, *supra* note 35, at 50 (describing how southerners viewed the tariff as a tax that disproportionately burdened their interests); see also MEHROTRA, *supra* note 30, at 42 (“[T]he nineteenth century tariff had a clear and significant impact in redistributing wealth from agricultural sections of the country, namely the South and the West, to the industrial centers of the Northeast.”).

188. Steven E. Lobell, *Second Image Reversed Politics: Britain’s Choice of Freer Trade or Imperial Preferences, 1903–1906, 1917–1923, 1930–1932*, 43 INT’L STUD. Q. 671, 680–81 (1999).

189. See *id.* at 682.

190. See *id.* at 680.

injury, in a commercial way, that has been inflicted on this country since I have been in public life.”<sup>191</sup> At bottom, it was likely the harm caused by these imperial preferences that goaded export groups in the United States in 1934 to mobilize in favor of a greater executive-branch role in negotiating bilateral trade agreements. Prior to the triggering Ottawa tariffs, reciprocity and delegation would not have been that useful to free-trade coalitions.<sup>192</sup>

Thus, contrary to the conventional wisdom, the relative paucity of international trade agreements to which the United States was a party prior to the RTAA did not reflect the impotence of export access groups during that era. Neither did the subsequent spread of such international agreements after the RTAA signal the retreat of protectionism. During the latter part of the nineteenth century, farming coalitions and other export-oriented businesses in the United States enjoyed generous access to European markets without the benefit of trade agreements.<sup>193</sup> And in the post-RTAA era, export access to foreign markets has sometimes floundered despite the proliferation of reciprocal trade agreements.<sup>194</sup> Ultimately, the modern practice of reciprocity in trade negotiations owes its legacy not to the principled logic of *laissez faire*, but to the efforts of Republican protectionists of an earlier era who sought to entrench mercantilist logic in international trade.<sup>195</sup> Perhaps it is in no small measure due to that troubled heritage that free-trade economists Jagdish Bhagwati and Douglas Irwin warned that in the modern age, “reciprocity turns rapidly into a

191. RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY: ANGLO-AMERICAN COLLABORATION IN THE RECONSTRUCTION OF MULTILATERAL TRADE* 19 (1956).

192. See Thomas W. Zeiler, *GATT Fifty Years Ago: U.S. Trade Policy and Imperial Tariff Preference*, 26 *BUS. & ECON. HIST.* 709–10 (1997) (describing American export groups’ hostility to Britain’s imperial trade preferences); see also Stephen Haggard, *The Institutional Foundations of Hegemony: Explaining the Reciprocal Trade Agreements Act of 1934*, 42 *INT’L ORG.* 91, 99, n.29 (1988) (observing that industrial groups favoring reciprocal trade legislation in the United States pointed to the existence of imperial tariff preferences as a motivation).

193. See Scott C. James & David A. Lake, *The Second Face of Hegemony: Britain’s Repeal of the Corn Laws and the American Walker Tariff of 1846*, 43 *INT’L ORG.* 1, 2, 16–21 (1989) (suggesting that the repeal of the Corn Laws helped stimulate broader free-trade preferences in the United States).

194. See generally IRWIN, *supra* note 1 (describing the rise in protectionist sentiments in the United States). Irwin observed nineteen years ago that American exports as a proportion of GDP had not changed much since the late nineteenth century. See Douglas Irwin, *The United States in a New Global Economy?: A Century’s Perspective*, 86 *AM. ECON. REV.* 41, 41 (1996) (“In 1889, merchandise exports as a share of GNP stood at 5.6 percent. In 1989, this share stood at 7.1 percent—hardly a dramatic change.”).

195. See *supra* notes 173–82 and accompanying text.

negation of an open trading system, making fair trade an enemy of free trade, not its ally.”<sup>196</sup>

In the end, the RTAA was the outcome of a bargain by groups with unwieldy and sometimes conflicting objectives over trade policy, and that is how it should be viewed. To be sure, free-trade notions might have factored into the calculus of some of the key players, such as Cordell Hull, but a great many others were seeking objectives that were more pedestrian and mundane, such as increased market access.<sup>197</sup> And a good many others thought the RTAA would simply serve as a Depression-era measure that would help spur industrial production.<sup>198</sup> Indeed, the longevity of the underlying regime crafted by the RTAA might be a testament to its hybrid and diffuse quality, which provided sufficient leeway for different trade coalitions to pursue their narrow objectives.<sup>199</sup> Thus, even with the periodic resurgence of protectionist forces in modern American politics, the contours of the RTAA have remained largely intact.<sup>200</sup> But the opponents of trade liberalization sometimes still get their way in the post-reform era: Trade talks have often been stalled or delayed,<sup>201</sup> Presidents have been denied fast-track authority,<sup>202</sup> and non-tariff barriers have proliferated since the early days of the RTAA.<sup>203</sup> Indeed, four years after the RTAA’s passage, Cordell Hull himself would come to

196. Bhagwati & Panagariya, *supra* note 116, at 127.

197. See Schatz, *supra* note 175, at 499–502 (describing westerners’ conversion to free trade as a means of disposing of their “agricultural surpluses”); see also Oatley, *supra* note 180 (manuscript at 15) (attributing the formation of the cotton-grain coalition to the grain-belt’s abandonment of protectionist policies).

198. See Schatz, *supra* note 175, at 498 (“The Roosevelt administration proposed the reciprocity program to Congress in 1934 as an emergency measure to help stimulate economic recovery by increasing American exports.”)

199. See TRUBOWITZ, *supra* note 35, at 102–04 (describing an alliance between Northeast industries that were becoming export oriented in the 1930s and southern agriculture in favor of lowering tariffs); Oatley, *supra* note 180 (manuscript at 15) (exploring how the RTAA helped forge an alliance between cotton farmers and grain groups).

200. See Bailey et al., *supra* note 24, at 324–25.

201. See, e.g., Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT’L L.J. 573, 573 (2010) (discussing a breakdown in the Doha round of trade negotiations and attributing it in part to “the widespread protectionist reactions from both developed and developing countries”).

202. Patrick Jamesa & Michael Lusztig, *Predicting the Future of the FTAA*, 6 NAFTA 405, 409 (2000) (discussing the denial of fast-track authority to President Clinton after NAFTA).

203. See *id.* at 408; Daniel Y. Kono, *Optimal Obfuscation: Democracy and Trade Policy Transparency*, 3 AM. POL. SCI. REV. 369 (2006); see also Hiscox, *supra* note 120, at 672 (observing that “nontariff forms of protection, which do not generate customs revenue, have become increasingly important in the wake of the post-1934 tariff reductions”).

rue the fundamental logic of this legislative compromise: “Only five percent [of the RTAA bargain] is economic, while the other 95 percent is more or less political or psychological.”<sup>204</sup>

So was the RTAA ultimately a success from a social welfare perspective? Insofar as the statute is an institutional framework for channeling conflict among competing trade factions, the response is probably yes. But insofar as it is a vehicle for promoting trade liberalization, the answer is less certain. One might conjecture that by helping reduce the risks of trade wars and harmonizing the interests of conflicting trade coalitions, the RTAA sapped some of the resolve of those early-twentieth-century constituencies that genuinely were committed to the unilateral reduction of trade barriers.

### C. *Displacing Rent-Seeking: From Tariffs to Taxes*

The passage of the Sixteenth Amendment had significant distributional implications for various political and regional coalitions.<sup>205</sup> However, one effect that is not sufficiently acknowledged is the amendment’s displacement of substantial political rent-seeking activity away from tariff collection and toward the income tax. Thus, politicians who sought to reward favored constituencies realized that they could make more headway using the tax power than they could by manipulating tariff schedules.<sup>206</sup> While the passage of the Sixteenth Amendment did not coincide with that of the RTAA, it likely played a key role in transforming the political dynamics of the era by lowering the stakes of tariff politics.<sup>207</sup>

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204. STEWART PATRICK, *BEST LAID PLANS: THE ORIGINS OF AMERICAN MULTILATERALISM AND THE DAWN OF THE COLD WAR* 124 (2009) (internal quotation marks omitted) (quoting JAMES N. MILLER, *WARTIME ORIGINS OF MULTILATERALISM, 1939–1945: THE IMPACT OF ANGLO-AMERICAN TRADE POLICY NEGOTIATIONS* 46 (2003)).

205. See Morgan & Prasad, *supra* note 29, at 1362 (“[F]or farmers, the income tax represented primarily an alternative to the detested tariffs and secondarily a means by which to redistribute wealth from the manufacturing Northeast”); see also MEHROTRA, *supra* note 30, at 122–23 (describing southern and western support for direct and progressive taxes while groups like the New York Chamber of Commerce were opposed).

206. In the modern era, Stigler has argued that the income-tax regime serves a particularly useful redistributive function for middle-class groups, especially when measured against the tariff regime of the nineteenth century. George J. Stigler, *Director’s Law of Public Income Redistribution*, 13 J.L. & ECON. 1, 1–6 (1970).

207. Others have observed how the passage of the Sixteenth Amendment affected analysis of future tariff policy. See, e.g., Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOK. J. INT’L L. 101, 103 (1992) (“After the ratification of the Sixteenth Amendment in 1913, this emphasis changed when the income tax replaced tariffs as the most important source of revenue. Tariffs remained primarily as



But an examination of the forces that unleashed the move toward the modern income tax suggests that the reform of fiscal institutions may be particularly susceptible to intense social conflict. Attitudes toward reforming the collection of state revenues are unlikely to be homogenous across groups; while new fiscal arrangements may expand the range of rent-seeking options, they may also benefit certain interests at the expense of others.<sup>208</sup> The groups that profit from the old regime will likely resist change. And even if all groups concur on the need for fiscal reform as a measure to increase the state's revenues, they may disagree strongly about how to allocate the tax burden, with each group preferring to shift the burden to the opposition. The modern income tax regime could be characterized as the culmination of a reallocation conflict in which anti-tariff southern farmers and progressive populists managed to prevail over industrialists in the Northeast and impose their preferred fiscal regime on the nation.<sup>209</sup>

But beyond revenue collection, the larger lesson might be that due to the growing complexity and size of the modern federal government, the institutional pathways that dominate rent-seeking in one era could eventually be replaced by more lucrative alternatives. Compared to the protectionist tariff, for instance, the current menu of rent-seeking options in the United States' political structure might actually yield higher payoffs to special interest groups. In this respect, Jonathan Pincus's comparison of the antebellum and modern tariff regimes is particularly apt: "The Tariff Act of 1824 more faithfully reflected pressure group successes than do modern tariffs because firms today seek, besides tariffs and quotas, various subsidies, tax credits, military procurements, freeways, some which might be more easily secured or more attractive than protection, even for import-competing industries."<sup>210</sup>

Nonetheless, rent-expanding institutional reform might actually produce a paradoxical result. By increasing the range of institutional options for interest groups to pursue their rent-seeking goals, it might actually *lower* the political stakes of social conflict.<sup>211</sup> Potentially

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a tool of protection, and discussion of the propriety of tariffs focused on the debate over liberal trade theory.").

208. See MEHROTRA, *supra* note 30, at 264–65; Morgan & Prasad, *supra* note 29, at 1362–66.

209. See Morgan & Prasad, *supra* note 29, at 1362.

210. JONATHAN J. PINCUS, *PRESSURE GROUPS AND POLITICS IN ANTEBELLUM TARIFFS* 167 (1977).

211. Yet, even within any specific institutional arrangement, private groups might still exert their will at the level of structure in a manner that will obscure politically unpopular policy choices from voters. See, e.g., Kono, *supra* note 203, at 369 (con-

dangerous and destabilizing consequences might follow when interest groups have too few outlets for channeling their policy ambitions.<sup>212</sup> One example from the antebellum era that readily comes to mind: the political crisis that erupted when in 1832, South Carolina felt it necessary to resort to the unusual tactic of nullification to push its preferred tariff preferences.<sup>213</sup>

#### D. *The Triumph of Mercantilism*

Rather than exploiting the preferences of institutional actors, it is more likely that the RTAA produced a novel asymmetric structure in international trade agreements by creating more institutional barriers to raising tariffs while simultaneously reducing barriers to lowering tariffs. It gave an edge to groups seeking market access while preserving some leeway for powerful protectionist groups to meet their objectives.<sup>214</sup>

This dynamic can best be illustrated by the fact that prior to the 1934 regime, a protectionist interest group could simply lobby for a single piece of tariff legislation that would raise tariffs for the protected good against every country in the world with which the United States did not have a prior trade agreement.<sup>215</sup> Opposition by export groups was often muted because it was difficult to show that any one piece of tariff legislation would harm access to foreign markets for any particular sector, although in the aggregate such tariffs often did.<sup>216</sup> Furthermore, during that same period, if a group sought lower foreign tariffs on goods it wished to export, it would have to lobby for a bilateral agreement with each and every one of the countries to which it was seeking favorable market access. Finally, prior to the passage of the RTAA, the norm in the United States was that reciprocity would be accorded to its trading partners only on a conditional

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cluding that “democracy promotes ‘optimal obfuscation’ that allows politicians to protect their markets while maintaining a veneer of liberalization”).

212. *See, e.g.*, Nzelibe, *supra* note 174, at 641–42 (expanding upon the argument that activity by special interest groups may in fact promote institutional stability).

213. *See id.* at 653–55 (analyzing the South Carolina Nullification Crisis of 1832 as an example of this phenomenon); *see also supra* text accompanying notes 178–80.

214. There is a literature that explores the use of international agreements to attain distributional domestic goals. *See* Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT’L L. 1 (2007); Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT’L L. 501, 512–13 (2004); Nzelibe, *supra* note 144, at 635–36.

215. *See, e.g.*, DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 223 (1999) (examining the ad hoc system of tariff legislation).

216. *See* GILLIGAN, *supra* note 71, at 11–12; Hiscox, *supra* note 120, at 678.

basis; in other words, it would not make available concessions to all countries just because concessions were made to one country.<sup>217</sup> Post-RTAA, this asymmetric dynamic started unraveling when unconditional MFN clauses became the primary institutional mechanism for forging international trade agreements.<sup>218</sup> And in the post-World War II GATT period, when the modern multilateral framework was established, politicians who sought to adjust tariffs upwards would have to negotiate exceptions with every party to the multilateral agreement, or risk being held in violation of the agreement.<sup>219</sup> However, under the latter regime, if there were a downward adjustment in a particular tariff for any one country, any export-oriented business interest whose country was privy to the multilateral agreement would automatically benefit from the adjustment due to MFN provisions.<sup>220</sup>

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To summarize, this Part has suggested that the key factors that spurred the RTAA reforms were rooted in social conflict, rather than an effort to transcend interest group politics. However, for each of these factors, the institutional dynamics that drove the reduction of tariffs were necessarily contingent. If, for instance, a flat tax were introduced, one could plausibly imagine that the attractiveness of using trade barriers to reward special interests might increase. Alternatively, if regional trade agreements that enshrine labor-side agreements proliferate, export groups might become more wary of using presidential flexibility to promote market-access objectives.

## V.

### THE NORMATIVE PAYOFF: LET SPECIAL INTERESTS FIGHT

Thus far, I have argued that using constitutional structure to weaken the role of interest groups in trade policy is misguided. The history of American constitutional experiments cuts against the wisdom of such institutional engineering.

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217. RICHARD POMFRET, *THE ECONOMICS OF REGIONAL TRADING ARRANGEMENTS* 18 (1997) (“From its first commercial treaty, with France in 1778, until 1923 the USA maintained that MFN pledges must be interpreted as conditional, even when the precise wording of a treaty was unclear.”).

218. *See* GOLDSTEIN, *supra* note 53, at 140, 143 (discussing MFN and executive delegation, as well as the role of unconditional MFN provisions under the 1947 GATT regime).

219. *See* General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

220. *See id.*

To be clear, the issue is not whether free trade promotes consumer welfare. The logic that underpins the beneficial effects of free trade is powerful,<sup>221</sup> and the evidence in support of it quite persuasive.<sup>222</sup> The real challenge is the dearth of convincing mechanisms for translating constitutional structure into specific trade policy outcomes. Without such mechanisms, claims that Presidents are likely to pursue free trade more vigorously than Congress are no more than wishful thinking. Moreover, if constitutional arrangements like delegation are themselves the products of social conflict, the causal power of such arrangements to weaken interest groups might be quite limited.

In any event, a much bigger problem in the reform literature is the tendency to view the role of interest groups in trade policy as dangerous. The usual argument against rent seeking in international trade runs like this: because protectionist groups are more likely to overcome collective-action problems than are other groups, trade policy is likely to be *biased* against free trade.<sup>223</sup> In this account, the capture theory will generally benefit groups that seek to profit from the largesse of the state.<sup>224</sup> Thus, a solution often proffered is to insulate trade policy as much as possible from the whims of legislative politics.<sup>225</sup> However, the reality is that the incentive effects of interest group politics in international trade cut both ways. Far from being indolent or hamstrung by collective action problems, export groups in the United States favoring lower tariffs have often been able to organize and promote political structures that advanced their objectives.<sup>226</sup>

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221. See Paul R. Krugman, *The Narrow and Broad Arguments for Free Trade*, 83 AM. ECON. REV. 362 (1993) (“One thing that almost all economists have almost always agreed about . . . is the desirability of free trade.”); see also Jagdish Bhagwati, *The Case for Free Trade*, SCI. AMER., Nov. 1993, at 42.

222. IRWIN, *supra* note 1, at 42–45 (discussing evidence in support of free trade’s benefits).

223. See DESTLER, *supra* note 16, at 5 (“There was a chronic imbalance between those who benefit from trade protection and those who pay the costs . . . . It was an imbalance in intensity of interest and, as a result, in political organization. Producers and workers threatened by imports tend to be concentrated, organized, and ready and able to press their interests in the political arena.”).

224. See *id.* at 4; see also Sungjoon Cho, *Towards a New Economic Constitution: Judicial Disciplines on Trade Politics*, 42 WAKE FOREST L. REV. 167, 182 (2007) (discussing advantages that protectionist groups have under a capture theory of trade policy); John O. McGinnis & Mark Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 556 (2001) (contending that “[a]n administration or agency charged with international regulation would be particularly prone to capture by protectionist interest groups”).

225. See *supra* notes 14–16 and accompanying text.

226. Other scholars have made this point about the influence of pro-free-trade groups. See, e.g., GILLIGAN, *supra* note 71, at 61–89 (illustrating with historical examples how export groups were able to mobilize in favor of free trade).

In many circumstances, such groups were able to engage and overcome their protectionist adversaries in legislative political contests.<sup>227</sup> Rather than stand in the way of good trade policy, such groups likely provided Congress with the necessary motivation to forge the political compromises that helped propel trade reform in the modern era.<sup>228</sup>

So can constitutional structure still play a role in trade policy in this scenario? Yes, but not in the way often envisioned. Perhaps instead of seeking to deploy constitutional structure to weaken specific interest groups, we should encourage structures that produce more conflict among interest groups in trade policy.

The American experience with interest group conflict yields certain valuable lessons about the likely policy effects of constitutional structure. First, and most importantly, structures that might be viewed as hindrances to free trade in one era might become assets in another, and vice versa. Thus, rather than immerse oneself in searching for lasting institutional preconditions for free trade, it is more fruitful to appreciate that such preconditions are likely to be contingent on specific historical circumstances. If such structures happen to yield a temporary advantage to groups whose goals are aligned with reducing trade barriers, one is likely to discover such information through interest group struggle.<sup>229</sup> Simply put, the very process of allowing interest groups to fight over their preferred institutional arrangements will illuminate our understanding of the likely policy effects of different institutional structures.<sup>230</sup> However, the caveat is that such knowledge might only hold true for a certain period and under very specific conditions.

Second, letting interest group conflict over constitutional structure run its course might actually yield innovative and less harmful rent-seeking alternatives. As discussed earlier, the longstanding conflict between pro-tariff coalitions and southern free-trade groups helped unleash the modern federal income tax system, an innovation that provided a new outlet for groups seeking special favors from the

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227. See *supra* Sections IV.1–2.

228. See *supra* Sections IV.1–2.

229. For a discussion of how interest-group struggles can sometimes produce valuable information or protect constitutional values, see Jide O. Nzelibe, *supra* note 174, at 642–47; see also MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATION OF AMERICAN DEMOCRACY* 7–10 (2013).

230. See Nzelibe, *supra* note 174, at 647 (“Such factions may not only supply the relevant energy and resources for ushering their favored institutions through the political process, they also have incentives to alert the public and politicians of the costs and benefits of any institutional alternatives being considered.”).

national government.<sup>231</sup> With the availability of new mechanisms to dispense economic rents to interest groups, there was likely less pressure to use trade barriers as a means of rewarding political coalitions. Thus, the changes wrought by the Sixteenth Amendment's income tax provision likely reduced the stakes of the politics involved when coalitions seek rents from the government.<sup>232</sup> Somewhat paradoxically, creating more avenues for rent-seeking by interest groups might prove to be beneficial, especially if it deflects attention away from the most unproductive forms of rent-seeking.

#### CONCLUSION

This Article makes two claims. First, the core institutional reforms that defined the RTAA of 1934 were neither novel nor necessarily conducive to free trade. On the contrary, both delegation and reciprocity had been originally deployed by Republican constituencies in the late nineteenth century to achieve protectionist goals. Of course, those institutional arrangements might have been marshaled in the service of a different set of goals in 1934, but the relationship between tariff reduction and reform was contingent on the particular distribution of political power during that era. Anti-tariff Democrats largely profited from delegation under the RTAA because they had overcome years of Republican political dominance at the White House.<sup>233</sup> Had the political circumstances been reversed, the policy implications of the RTAA reforms might have looked quite different.

Second, the decision by politicians to embark on tariff reform in 1934 was not simply an artifact of enlightened policymaking; indeed, the reforms were very much the product of social conflict.<sup>234</sup> Delegation, it has commonly been argued, was necessary to insulate Congress from perennially being captured by special interest groups.<sup>235</sup> But such an account rests on a model of capture that is skewed significantly in favor of protectionists. In this picture, export groups and consumers were seen as paralyzed by collective action problems and thus unlikely to push their agenda without the intervention of well-intended political officials.<sup>236</sup> The analysis here suggests otherwise. Far from being encumbered by the uncertainties of payoffs from institutional reform, the anti-tariff coalitions from the South were able to

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231. *See supra* notes 205–13 and accompanying text.

232. *See supra* notes 205–12 and accompanying text.

233. *See* Hiscox, *supra* note 120, at 671.

234. *See infra* Part IV.

235. *See, e.g.*, Irwin, *supra* note 1.

236. *See, e.g.*, Gilligan, *supra* note 71.

join forces with other groups in forging an institutional arrangement that would increase market access to Europe, while still preserving the flexibility to negotiate benefits for powerful protectionist groups.<sup>237</sup> The outcome was a compromise that accomplished neither free trade nor protectionism, but a middle approach that embodied certain aspects of both.<sup>238</sup>

Against this background, the real success of the RTAA was not that it succeeded in weakening interest group politics; rather, it was that by enshrining mercantilism, it helped lower the stakes of coalitional conflict in international trade. It did so by managing to accommodate the preferences of the most powerful protectionist and export access groups while downplaying those of consumers.<sup>239</sup> In this account, the larger lesson of the reform might not be that there was a danger of too many institutional outlets that catered to special interest groups, but that those available were too inflexible. For instance, one significant drawback to the tariff regime in early American history was that because it did not provide a variety of options for protectionists to bargain with export groups, the stakes were often too high for the parties to come to an agreement.<sup>240</sup> If free-trade groups managed to get tariffs lowered domestically, there would be no guarantee that foreign countries would lower theirs.<sup>241</sup> And if foreign countries were willing to lower their tariffs independently of trade agreements, then export groups had no reason to try to bargain with domestic protectionist groups. Thus, a disagreement over tariff levels in the nineteenth century could have escalated to become a destabilizing contest, as it almost did during the South Carolina Nullification Crisis of 1832.<sup>242</sup> In the modern institutional environment, by contrast, interest groups have a greater range of rent-seeking outlets, and thus the stakes of politics are generally less pronounced.<sup>243</sup>

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237. See *supra* Section IV.B.

238. See *supra* notes 179–82 and accompanying text.

239. See, e.g., GILLIGAN, *supra* note 71, at 62; see also *supra* notes 179–82 and accompanying text.

240. See Douglas A. Irwin, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s* (describing the complaint, advanced by export groups in the late nineteenth and early twentieth centuries, that the then-effective tariff framework “was too rigid”), in *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 325, 329 (Michael D. Bordo et al. eds., 1998); see also *supra* notes 206–13 and accompanying text.

241. See Irwin, *supra* note 240, at 328–29.

242. See *supra* notes 155–60 and accompanying text.

243. See *supra* Section IV.D.