

## Our Trade Law System

Kathleen Claussen

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### Recommended Citation

Claussen, Kathleen () "Our Trade Law System," *Vanderbilt Law Review En Banc*: Vol. 73: Iss. 1, Article 17.  
Available at: <https://scholarship.law.vanderbilt.edu/vlreb/vol73/iss1/17>

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# RESPONSE

## Our Trade Law System

*Kathleen Claussen*\*

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### INTRODUCTION

In *Misaligned Lawmaking*,<sup>1</sup> Timothy Meyer identifies a major problem in U.S. trade law design. Professor Meyer argues that there is a misalignment between trade liberalization laws—laws that enable the executive branch to lower trade barriers with other countries—and trade adjustment assistance laws—laws that provide financial help to workers displaced by competition with new imports.<sup>2</sup> This misalignment is the result of differences in the processes, nature, timing, and perceived impact of these two sets of laws, which were made separate beginning in 1962.<sup>3</sup> But all is not lost. The present moment,

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\* Associate Professor, University of Miami School of Law. I am grateful to Tim Meyer for the opportunity to respond to his Article. My thanks to Harlan Cohen and Simon Lester for comments on an earlier draft. Thanks also to the *Vanderbilt Law Review* student editors, and particularly Micah Bradley, for their invitation and engagement.

1. Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151 (2020) [hereinafter *Misaligned Lawmaking*].

2. *Id.* at 154–55.

3. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 [hereinafter 1962 Act] (codified as amended at 19 U.S.C. §§ 1801–1991 (2018)).

Professor Meyer tells us, is a critical juncture for correcting this misalignment.<sup>4</sup>

I fully agree with Professor Meyer in both respects. Trade lawmaking in the United States suffers from some serious misalignments, and not just with respect to trade adjustment assistance. Those misalignments are largely the product of complexities in our separation of trade law powers. Congress has the constitutional prerogative on foreign commerce but is ill-equipped to manage everyday trade decisions and negotiations with foreign trading partners. Consequently, our trade law walks a delicate line between flexible programmatic delegations to the executive and congressional maintenance of authority. Crafting that relationship effectively is a task of immense proportions. Our current approach is functional but flawed.

Now could be a decisive moment for reconsideration. A conversation about how to (re-)design the institutions that dominate trade policy is underway. But that project could just as easily exacerbate the misalignments and other shortcomings in our institutional design. Looking at trade law more generally, this Response argues that misalignments like those thoughtfully and importantly elaborated by Professor Meyer constitute one of three principal institutional difficulties with our trade law system as presently framed. In addition to a general degree of disorganization and misalignment, U.S. trade law suffers also from challenges in finding and defining its contours, and from challenges in responding to economic dynamism. This Response briefly lays out these adversities, contextualizing Professor Meyer's important contribution in broader trade strokes.<sup>5</sup>

In the first Part of this Response, I take up trade law's obscurity and circumscription: the wide web and resulting indeterminacy of what constitutes the field. Trade law's indefinite boundaries make it difficult to find and treat as a unit, but also difficult to avoid, and that uncertainty directly affects its governance. Misalignment, which I analyze second, is in some ways the natural result of this moving target. The legislative motors for dealing with trade law and policy are selective—aggregating and separating out potential trade-relevant

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4. *Misaligned Lawmaking*, *supra* note 1, at 154.

5. To be sure, Professor Meyer's Misalignment Thesis is not limited to trade. Importantly for regulatory bodies and for legislators, the Misalignment Thesis applies likewise to legislative bargaining struck over two or more interdependent policies. Under those circumstances, "the policy that is subject to more frequent or costlier renegotiation and implementation will be disfavored in the long run." *Id.* at 155. I consider here only the broader trade policy implications.

topics.<sup>6</sup> Consequently, as noted by Professor Meyer, trade issues tend to diverge in governance modality, instrument, and schedule. On the latter question of time and dynamism in trade law, which I take up third, trade policymaking struggles prospectively with responding to dynamism in the global and national economies and retrospectively with correcting issues arising in existing programs and institutions.

Each of these distinctions and qualities on its own may counsel piecemeal reform rather than a review of trade law as a whole, but to do so would be to the detriment of the larger trade law and policy project. Indeed, one of the central lessons of this Response is that policymakers' and scholars' inability to see trade law as a system is a major part of the problem. In any reassessment, lawmakers ought not to view the many aspects of trade policy in isolation, but rather ought to consider how the various powers in the broad swath of trade governance might substitute for each other or work together.

## I. DEFINITIONS

To change trade lawmaking through a holistic review and re-consideration requires additional work defining and finding trade law—a not insignificant task. Trade is far more complex than just the regulation of imports and exports. It has both international and domestic components.<sup>7</sup> It addresses regulatory non-tariff barriers to trade, as well as traditional tariff barriers.<sup>8</sup> Trade rules encompass aspects of environmental policy, food safety, human rights, and intellectual property protections, among much more.<sup>9</sup> Lawmakers today push far more content into “trade law” than would have been the case

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6. These decisions are often the products of political dynamics at the time of their enactment rather than principled policymaking choices. For example, lawmakers faced a similar, exceptional political situation in 2007, striking a bipartisan deal on certain sensitive trade-plus issues. See generally Charles B. Rangel, *Moving Forward: A New Bipartisan Trade Policy that Reflects American Values*, 45 HARV. J. ON LEGIS. 377 (2008) (discussing the May 10, 2007, political compromise regarding labor, intellectual property, and environmental provisions, among others, in U.S. trade agreements).

7. See Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 586–97 (2019) (discussing competing domestic and international paradigms in trade law).

8. Commentators have used the “plus” suffix to capture concepts that go beyond traditional trade agreement topics. Those commentators coin phrases like “GATT-plus” or “TRIPS-plus.” In prior work, I lump those together to use simply “trade-plus,” though I am not the first to use that expression as discussed therein. Kathleen Claussen, *Reimagining Trade-Plus Compliance: The Labor Story*, 23 J. INT'L ECON. L. 25, 26 (2020).

9. See, e.g., Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT'L L. & FOREIGN AFF. 209, 211, 221–38, 260, 263 (2011) (providing an overview of the expansion of trade agreements).

a half century ago.<sup>10</sup> But, as Professor Meyer shows, lawmakers also push some topics *out* from the dominant trade liberalization laws.

This Part reviews the boundary drawing that we do in trade—in the law, in practice, and in scholarship and commentary. It considers which elements of trade law dominate those spaces and which remain obscured. A full study of the expansion and contraction of trade law is beyond the scope of this Response, but trade’s changing and vague perimeter is an underlying and overlooked element of the construction of coherent and comprehensive law and policy. The circumscription of trade law has led to a series of disjunctions that Part II will take up. First, however, it is worth tracing the debates over how we define “trade law” and, commensurately, where we find it (or not). Demarcating the bounds of trade law is a challenge in both definition and location.

### A. Finding Trade Law

Although the Constitution grants Congress the power to collect duties and to regulate foreign commerce,<sup>11</sup> Congress has regularly delegated some of that authority to the executive branch. Most familiar is Congress’s delegation to the president to change tariff rates, either under particular factual circumstances or as part of a trade agreement negotiation.<sup>12</sup> Those delegations, and particularly those agreements, perceived by many to make up the foundation of our trade law today, have been the subject of considerable attention among scholars and Congress for the last several decades.<sup>13</sup>

By the middle of the twentieth century, governments began to see trade as a vehicle for achieving multinational regulatory goals. With that change, the idea of liberalization expanded beyond just tariff authorities. International trade negotiations in the 1960s and 1970s shifted attention from the reduction of traditional tariff barriers to the

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10. I describe how this has occurred in U.S. trade law in greater detail in forthcoming work: Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. (forthcoming 2021) [hereinafter *Trade Administration*].

11. U.S. CONST. art. I, § 8, cl. 3.

12. See, e.g., Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320 [hereinafter TPA 2015] (codified at 19 U.S.C. §§ 4201–4210); see also Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 TEX. L. REV. 1495, 1516 (2016); *Trade Administration*, *supra* note 10, at manuscript Part I.

13. See, e.g., Cathleen D. Cimino-Isaacs, et. al, *U.S. Trade Policy Primer: Frequently Asked Questions*, CONG. RES. SERV., R45148, 27 <https://fas.org/sgp/crs/row/R45148.pdf> [<https://perma.cc/A6BM-VEWQ>] (last updated Jan. 29, 2019) (describing how U.S. trade policy is premised on the delegation of certain powers to the president to negotiate trade agreements). In fact, international trade law textbooks made for law school classes today tend to focus precisely on what their titles suggest: the international framework where the rules of economic liberalization are enacted and played out.

elimination of “non-tariff barriers”—such as licensing requirements, health and safety regulations, and other administrative measures—that could be considered discriminatory to foreign business. Taken together, expanding markets and the proliferation of cross-border supply chains forced a dramatic change to the idea and practice of trade law.<sup>14</sup> These developments pushed trade out from a previously tariff-focused center into the far reaches of the administrative state. As a result, what we consider to be “trade law” is also now applicable to and produced in most regulatory areas.

A corollary of this expansion and the capaciousness of “trade” is that areas of policy that were once siloed (or that did not exist) became part of trade. Compare the “negotiating objectives” in trade promotion legislation from 2015 where Congress lays out the subject areas that any free trade agreement should cover with the same list of “negotiating objectives” in earlier legislation.<sup>15</sup> The 2015 legislation covers twenty-one issue areas in the negotiating objectives ranging from “trade in goods” to “anti-corruption.”<sup>16</sup> “Tradification” ushered in a new form of governance as the law became both a policy task and a policy limit across a broad swath of agencies.<sup>17</sup> By one count, there are today five-hundred customs-related laws that are administered by forty-seven agencies.<sup>18</sup>

Given this rapid and extensive expansion, trade law is now as difficult to locate as to define. One might expect to find trade law in Title 19 of the U.S. Code, named “Customs Duties,” or Title 15, called “Commerce and Trade,” but those titles would be insufficient, and in the case of the latter, surprisingly inaccurate. The U.S. House of Representatives Ways and Means Committee staff has developed since 1987<sup>19</sup> a *Compilation of U.S. Trade Statutes* (“*Compilation*”) that could be said to be a reasonably comprehensive collection of U.S. trade law,

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14. See, e.g., Lester, *supra* note 9, at 211, 221–38 (providing an overview of the expansion of trade agreements).

15. See, e.g., Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1101, 102 Stat. 1107, 1121–25 (codified as amended in 19 U.S.C. § 2901 (2018)).

16. TPA 2015, *supra* note 12, § 102.

17. *Trade Administration*, *supra* note 10, manuscript at Part II.A.1.

18. *Hearing Before the Subcommittee on Border and Maritime Security*, 113th Cong. 11, 18 (2014) (statement of Kevin K. McAleenan) <https://www.hsdl.org/?abstract&did=753146> [<https://perma.cc/RQG3-ZKT2>]. At least ten agencies are involved in trade monitoring and enforcement alone. GOVERNMENT ACCOUNTABILITY OFFICE, INFORMATION ON U.S. AGENCIES’ MONITORING AND ENFORCEMENT RESOURCES FOR INTERNATIONAL TRADE AGREEMENTS 7–9 (2017).

19. STAFF OF H.R. COMM. ON WAYS AND MEANS, 100TH CONG., OVERVIEW AND COMPIATION OF U.S. TRADE STATUTES III (Comm. Print 1987) (calling the *Compilation* a “more complete working document” than the 1984 “Overview of Current Provisions of U.S. Trade Law” that the Committee staff published in 1984 to serve as “a concise summary of the various statutory provisions relating to foreign trade”).

although even that is incomplete in certain respects.<sup>20</sup> A number of interesting observations may be made about this *Compilation*, which is comprised of seven chapters of trade-relevant topics.<sup>21</sup> Both with respect to its internal and external use, the House Ways and Means Committee staff critically arranges trade policy both in content and in organization. One of the *Compilation's* most valuable contributions is that it includes references to more than seventy different statutes, but fewer than half are exclusively trade-related. Rather than just focus on landmark tariff-changing acts, the *Compilation* pulls together all the individual provisions of statutes related to other topics that include a single provision of relevance to trade, such as Section 7 of the Rhinoceros and Tiger Conservation Act of 1994.<sup>22</sup>

What the *Compilation* does not highlight, and what the lay reader picking up the volume may miss, is that trade law has two unusual features, and those features complicate its application as well as its reform. First, unlike certain other areas where laws are regularly repealed and replaced, in trade, Congress has adopted building-block type statutes that either lightly amend or, more often, stand side-by-side with past laws. Many aspects of U.S. trade law therefore consist of minor modifications or institutional and programmatic supplements to statutes that date back to the middle of the twentieth century, or even earlier. These modifications and supplements are enacted in the form of omnibus bills that include provisions dealing with a wide variety of trade-related issues.<sup>23</sup> In this sense, U.S. trade law is highly modular.<sup>24</sup>

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20. STAFF OF H.R. COMM. ON WAYS AND MEANS, 113TH CONG., COMPILATION OF U.S. TRADE STATUTES (Comm. Print 2013). For example, the *Compilation* does not include certain executive agreements negotiated by the Office of the U.S. Trade Representative, like side letters to trade agreements, among others. The transmittal letter notes that the compilation is “not meant to be a comprehensive treatise of every trade-related law or program, nor does it cover provisions to regulate domestic commerce.” *Id.* at III.

21. The chapters are “Tariff and customs laws”; “Trade remedy laws”; “Other laws regulating imports”; “Preference Programs”; “Authorities relating to political or economic security”; “Reciprocal trade agreements”; “Organization of trade policy functions”; and “Trade Agreement Implementing Acts.” *Id.* at V–XI.

22. *Id.* at VII.

23. The omnibus trade bills that have had the greatest impact on U.S. trade policy include the Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.); Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-315, 48 Stat. 943 (codified as amended in scattered sections of 19 U.S.C.); 1962 Act, *supra* note 3; and Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. ch. 12).

24. For a study about the modularity of our trade lawmaking (although he does not use that term) and why that matters, see Steve Charnovitz, Comment, *Using Framework Statutes to Facilitate U.S. Treaty-making*, 98 AM. J. INT'L L. 696, 696 (2004) (discussing the way the United States implements trade law); see also Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 915 (1995) (arguing that the Trade Act of 1974, more than other omnibus trade acts before it, had a constitutional effect, “creating new rules for the law-making system itself”).

The systems created through the omnibus acts, which are heavily repetitive of their predecessors, are integrated instead through the shared practice of trade law institutions.

The statutory modularity is only one part of our trade law system, however, and among the easiest to identify. Considerable volumes of trade law are made in largely unseen ways, through the work of the executive branch alone, in the form of regulations and trade executive agreements.<sup>25</sup> Administrative agencies engage in the exercise of trade law and in its further development in their quotidian interactions with foreign trading partners. Some of that activity is directed by Congress, but not all.<sup>26</sup> In fact, Congress is often not aware of those activities such as the conclusion by agencies of trade executive agreements, negotiated agreements with trading partners organized and implemented by the executive branch without congressional review or approval. These are left out of the congressional *Compilation* and not organized by any of the relevant trade governance actors. In the absence of readily available public information about these agreements, they remain obscured from discussion about trade law generally, except perhaps among experts in the issue areas that they individually implicate.<sup>27</sup>

With such broad contours to expand topics in trade agreements and issues subject to trade rules and enforcement, and a lack of transparency in certain specialized areas by lawmakers, the limits of “trade law” as a field are easily blurred.

### B. Trade-Claiming

The boundaries of trade law matter most in determining who or what institution will oversee its application. “Trade-claiming”—my term for the labeling of a policy area as “trade” or not—is significant because viewing a subject as “trade” may determine which branch of government has responsibility for its governance. The scope of what counts as “trade” affects who manages it and under what terms. As noted at the outset, the foreign commercial enterprise, at least as a matter of constitutional law, falls under Congress’s exclusive purview.

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25. *Trade Administration*, *supra* note 10, manuscript at 27.

26. *Id.*

27. The lack of visibility is not limited to regulatory agreements. In some respects, support for trade adjustment assistance may also be hampered by its hiddenness in liberalization conversations. At the time it was decoupled, lawmakers likely underestimated its importance for the reasons Professor Meyer explains: at that time, it was seen as a backstop, a second-best alternative where trickle-down policies could not reach. See *Misaligned Lawmaking*, *supra* note 1, at 157–58. As globalization continued, however, the need grew for legislation designed to ensure an equitable distribution of the gains from liberalization.



Congress may choose to delegate that authority, but Congress retains the first and last word on its regulation. Trade-related issue areas that could be said to fall outside that umbrella or that are otherwise subject to competing claims of authority complicate that structure. Trade-claiming also matters because what we think of today as “trade” is often “free trade” or part of trade liberalization, but not exclusively so. As the prior Section showed, some new regulatory areas are brought into the fold of the liberalization project, while others remain outside or unnoticed.

Policy topics now claimed as part of “trade” or “subject to trade” rules including intellectual property, labor rules, and environmental protection are domestic policy areas in which Congress regularly legislates. And just like in trade, Congress regularly delegates those responsibilities to the executive branch. But the line between congressional and executive control becomes more difficult to identify where those policy areas intersect with foreign negotiations or where they have a connection with national defense and economic security. In those latter areas, the executive branch regularly claims inherent authority.<sup>28</sup> So claimed, Congress’s power to discipline the executive’s activities through oversight mechanisms or ex post review diminishes considerably.

At these policy crossroads, trade-claiming becomes more important, but also more contested. The simple idea of trade governance belonging to the legislative branch and other areas of foreign policy belonging to the executive is muddled. This question is a matter of ongoing scholarly debate and something on which the courts have occasionally opined.<sup>29</sup> The labels and the groupings given to various trade-related policies have meaningful impacts on how they are institutionalized and, in turn, on their successful outcomes.

Professor Meyer’s article brings us one step farther in identifying precisely how trade-claiming matters. He demonstrates that, when some pieces of the bargain are left out of legislative decision-making on the dominant policy (here, liberalization), not only may their institutional governance structure shift, but they may also be subject to

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28. See, e.g., *Hearing on U.S.-China Trade: Hearing Before the Comm. on Ways and Means*, 116th Cong. 22 (2019) (testimony of Robert E. Lighthizer commenting on the executive proceeding without congressional review on certain trade deals); Brief of Defendant, *Am. Inst. for Int’l Steel, Inc. v. United States*, No. 2019-1727, at \*29 (Fed. Cir. Sept. 18, 2019) (“In exercising his authority under Section 232, the President is unquestionably operating in the realms of national security and foreign trade . . . . The President’s independent powers over national security and foreign affairs mean that . . . all constitutional requirements are satisfied.”)

29. See, e.g., *Am. Inst. for Int’l Steel, Inc. v. United States*, No. 2019-1727, 2020 WL 967925 (Fed. Cir. Feb. 28, 2020), *petition for cert filed* (Mar. 27, 2020).

different rules and legislative treatment.<sup>30</sup> In the case of trade adjustment assistance, this separation has worked to the detriment of free trade ideals more generally by diminishing the salience of redistribution. Trade-claiming thus has not only constitutional and governance dimensions, but it also creates reverberations throughout the regulatory, fiscal, and international environments and the normative elements of what trade policy for the United States ought to look like.

## II. DISJUNCTIONS

Apart from the challenges of defining and finding trade law, a second related institutional flaw in our trade law system is that which Professor Meyer highlights: misalignment and general disorganization in trade policymaking. That our trade law system is disorderly may be unsurprising given its haphazard growth and competitive governance structure. A close study reveals multiple misalignments beyond just that between trade liberalizing statutes and economic welfare statutes. This Part looks at other disjunctions in trade law, especially those that seem to clash with or be segregated from trade liberalization law and policy. In these other instances, Professor Meyer's Misalignment Thesis also holds true, even if manifested in slightly different ways. The mitosis of trade-related policies creates alternative, competing chains of command. In these other instances of misalignment, we observe a range of divisions of responsibility between Congress and the executive branch, and between international and domestic policy tools. Seen together, these arrangements comprise a spectrum of approaches to various aspects of trade law. Here, I will focus on just two additional troubling misalignments with trade liberalization laws: first, authorizations to the president to raise tariffs for reasons of economic security, and, second, the integration of international labor provisions into trade agreements.

Alongside trade liberalizing delegations enabling the president to negotiate free trade agreements that lower barriers to trade, Congress has also delegated authority that allows the executive to *raise* tariffs under certain circumstances. This second set of tariffs enables the executive to impose additional tariffs on goods at the U.S. border when economic security so requires.<sup>31</sup> Together, the two sets codify

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30. See *Misaligned Lawmaking*, supra note 1, at 216–20 (discussing applications of the Misalignment Thesis).

31. Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. (manuscript at 6) (forthcoming 2020) [hereinafter *Trade's Security Exceptionalism*].

distinct approaches to trade—a primary tariff-lowering approach and a secondary security-premised tariff-raising approach.

In prior work, Professor Meyer made the point that Congress has retained different levels of control in assorted areas of trade delegations to the executive.<sup>32</sup> Indeed, historically, Congress has asserted greater control over tariff-reducing delegations than tariff-increasing delegations.<sup>33</sup> Professor Meyer argues that these differential levels of discipline incentivize the president to use tariff-raising authorities to fulfill the president's domestic economic goals.<sup>34</sup> And it goes still farther. Congressional review over tariff-raising delegations related to economic security or economic burden is far less intensive than it is with those related to trade liberalization, making the exceptional delegations procedurally distinct, as well as substantively distinct. The differential levels of discipline create a general misalignment in the legislative bargain underestimated by policymakers and commentators until now.

Although both authorities—liberalizing and tariff-raising—are delegated to the president, these two delegations are treated much like the Misalignment Thesis would predict. They are interdependent in that addressing one will have consequences that create demand for a policy response to the other problem. They are now decoupled in instrument and in practice: one in the form of standing statute, the other in a renewable statute leading to an international instrument. And, there is a lack of credible commitment to view them as linked in any way—either as substituting for each other or as working together—which is the element of this misalignment that is most dangerous to trade governance and to traditional liberalization advocates.<sup>35</sup> Further, the latter tariff-raising delegations are set apart from the liberalizing delegation along the same dimensions as the market access and labor-supporting statutes are separated. While the liberalization commitments are implemented by the executive, they are subject to some congressional checks and memorialized in trade agreements. The tariff-raising delegations, on the other hand, are implemented solely by the executive and not codified in any international instrument. With respect to the primary liberalizing delegations, Congress progressively added more procedural constraints which I call “trade delegation

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32. See Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 YALE J. INT'L L. ONLINE 16, 17–18 (2019) [hereinafter *Trade, Redistribution, and the Imperial Presidency*].

33. See, e.g., Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT'L L. 315, 333–39 (2018) [hereinafter *Separation of Trade Law Powers*].

34. *Trade, Redistribution, and the Imperial Presidency*, *supra* note 32, at 17.

35. The two authorities are substitutable as currently formed, but originally they were intended for similar policy outcomes. *Trade's Security Exceptionalism*, *supra* note 31, at manuscript 7.

disciplines.”<sup>36</sup> In contrast, Congress did little to nothing to control presidential action with respect to the tariff-raising delegations which were considered exceptions to the primary liberalization policy. The exceptions were left unchecked as they were not a part of what was seen as the main trade law program. Both sets of delegations carve out a space for executive action, but one does so in a bounded way while the other does not. This divergence in oversight reinforces the perception that free trade and economic security are in contrast with one another. Taken together, the misalignment between tariff-raising and tariff-lowering authorities has permitted the Trump Administration to apply the exceptions as the centerpiece of its trade policy.

As in the case of the economic welfare misalignment, this disjunction in trade policy has serious risks and high stakes. First, under the present system, the president could convert the exceptional tariff-raising opportunities to the rule or to the primary tool for trade policy. Second, the misalignment creates more friction among the branches in an area already fraught with sensitivities. Third, there is a danger that a system with such a clear path of least resistance toward increased control could precipitate a greater transfer of authority to the president or political paralysis. It should come as no surprise that presidents would take advantage of those authorities where the threshold to access is low. Finally, underlying many of the abovementioned concerns is a more general risk that an exception without sufficient discipline could lead to abuse.

Like in other areas of trade lawmaking, a status quo bias appears to explain the reinforced misalignment between the exceptional delegations and the liberalizing delegations.<sup>37</sup> Paths designed early in the development of modern U.S. trade law have tended to be followed throughout the law’s development. In the case of the security and liberalizing delegations, the legislative history shows this neglect may have contributed to misunderstandings in their meaning and purposes, and ultimately to different types of applications.<sup>38</sup>

We might also consider an additional misalignment that arises with respect to liberalization and labor. Labor rules in trade agreements, and particularly the enforcement of those rules, have been at the center of debates on new trade agreements.<sup>39</sup> Professor Meyer

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36. *Id.* at manuscript 7.

37. See *Misaligned Lawmaking*, *supra* note 1, at 186; *Separation of Trade Law Powers*, *supra* note 33, at 347.

38. *Trade’s Security Exceptionalism*, *supra* note 31, at manuscript 56.

39. See, e.g., Jude Webber, James Politi, & Mamta Badkar, *Mexico and US Settle Row Over USMCA Labour Enforcement*, FIN. TIMES, (Dec. 16, 2019)

discusses how labor enforcement was part of the market access-trade adjustment assistance bargain.<sup>40</sup> A further political bargaining exercise continues with respect to *international* labor rules which remain integral parts of trade agreements and part of the liberalization understanding. Indeed, the final agreement and implementation of the United States-Mexico-Canada Agreement, the successor to the North American Free Trade Agreement, was delayed while a new round of negotiations, instigated by Democrats in the House of Representatives, could occur to address international labor issues.<sup>41</sup> Thus, in one sense, after trade adjustment assistance addressing domestic labor concerns had been removed from trade agreements, international labor came in—and became central to the bargain. In the absence of any enforceable multilateral agreements on labor rules, policymakers integrated labor into unilateral, bilateral, and regional trade instruments.<sup>42</sup> This integration came from above and below; civil society and government actors forced this change. Throughout the legal universe, the nature of these labor commitments is to freeze domestic labor standards at an agreed threshold. They act as “standstill” provisions that preserve the status quo on labor in the domestic legal system of the countries involved. Somewhat ironically, however, since domestic labor issues had already been decoupled, international labor and domestic labor issues remain misaligned in trade policy.

To be sure, my criticism of the several misalignments in trade law is not an argument to legislate all trade issues together. To do so would be practically impossible, if not also politically so. But misalignment is different from a principled division of responsibility with regular accommodation in the legislative process. It is also different from a comprehensive review that permits thoughtful segregation of certain areas of trade lawmaking. The concern motivating this project is that certain disjunctions in U.S. trade law create instability and precipitate other unanticipated harms. In certain instances, in the absence of interlocking demands, for example,

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<https://www.ft.com/content/013a7816-2039-11ea-92da-f0c92e957a96> [https://perma.cc/9WG4-LXKQ].

40. *Misaligned Lawmaking*, *supra* note 1, at 209.

41. See Beth Baltzan & Jeffrey Kucik, *NAFTA's Replacement Gives Labor Some Shelter from Globalization's Storms*, FOREIGN POL'Y, (Jan. 16, 2020) <https://foreignpolicy.com/2020/01/16/usmca-mexico-canada-trump-workers-democrats-naftas-replacement-gives-labor-some-shelter-from-globalizations-storms/> [https://perma.cc/C79C-TQ48].

42. Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT'L L. 151, n.61 and accompanying text (1992) (discussing French-Italian accords of the early twentieth century; Hispaniola; Social Charter of the European Community; efforts toward a working group on labor standards in various rounds of negotiation toward the General Agreement on Tariffs and Trade).

employing separate policy instruments may be productive and desirable. Take export controls, for example. The United States restricts the export of defense articles, dual-use goods and technology, and other items related to the defense industrial base.<sup>43</sup> While these programs are commercial in nature, they are also dominated by defense and foreign policy considerations. The export control system is largely regulated by its own set of statutes, some of which implement international commitments.<sup>44</sup> These statutes do not fall in the same category of troubling decoupled-from-free-trade policies for reasons Professor Meyer sets out: they are not interdependent in their implementation.<sup>45</sup> We subject these different systems to different controls and renew them at different times without difficulties. The entirety of trade in one legislative instrument would surely be too unwieldy, but at least some aspects of this line-drawing need to be revisited.

### III. DYNAMISM

Looking at trade law over the course of our nation's history as Professor Meyer has done illuminates another troubling characteristic: some aspects of trade law appear highly path dependent or even static, while others are in a constant state of question and flux.<sup>46</sup> No obvious principle distinguishes among them. Rather, temporal discrepancies are found throughout trade law.

Temporary legislation, legislation that sets a date on which an agency, regulation, or statutory scheme will terminate, is used extensively in other areas of law.<sup>47</sup> In trade, however, it is not just the use of temporary legislation, but rather multiple competing timelines for complementary areas of trade policy, that obfuscate lawmaking. By way of one example, Professor Meyer analyzes how the decoupling of trade adjustment assistance from trade liberalization agreements

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43. IAN F. FERGUSSON & PAUL K. KERR, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM INITIATIVE, CONG. RES. SERV. 1 (Jan. 28, 2020) <https://fas.org/sgp/crs/natsec/R41916.pdf> [<https://perma.cc/Z84F-M98R>].

44. See, e.g., Katherine D. McManus & Harry R. Marshall, Jr., *United States Nuclear Export Controls*, 4 FORDHAM J. INT'L L.J. 265, 266 (1980) (describing the implementation into U.S. law of the Nuclear Non-Proliferation Treaty).

45. *Misaligned Lawmaking*, *supra* note 1, at 181.

46. See *id.* at 172–73 (tracing trade law throughout the United States' history).

47. Jacob Gersen describes advantages of this approach: "From an informational perspective, temporary legislation provides concrete advantages over its permanent cousin by specifying windows of opportunity for policymakers to incorporate a greater quantity and quality of information into legislative judgments. By redistributing the decision costs of producing legislation, temporary measures also facilitate experimentation and adjustment in public policy." Jacob Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 248, 255 (2007).

beginning in 1962 subjected each policy to different renewal timelines to the detriment of the former.<sup>48</sup> He describes how this temporal distinction creates uncertainty in the continuity of the trade adjustment assistance program and its financial security.<sup>49</sup> This decoupling shifts the timing of the trade adjustment assistance legislation out of step from trade liberalization which then alters the nature of the legislative bargain surrounding its renewal.

Consider other like patterns in trade lawmaking. For one, and as also seen in the data presented by Professor Meyer, Congress operates on different timelines when considering trade negotiating authority than it does for trade adjustment assistance. Trade negotiating authority in its modern form was first delegated in 1934 and renewed for short periods throughout the subsequent three decades.<sup>50</sup> Still today, Congress grants the president negotiating authority in short windows, but those windows do not always align with trade adjustment assistance.<sup>51</sup>

Second, and again consistent with Professor Meyer's exposé, the executive branch's negotiating authority expires, but not the negotiated agreements. Those agreements are approved by Congress and then subject to execution and implementation by the executive branch with little to no temporal oversight by Congress.<sup>52</sup> Trade executive agreements likewise may be of unlimited duration.<sup>53</sup>

Third, although certain trade programs like trade adjustment assistance and the Generalized System of Preferences expire, not so the agencies that are in place to administer such authority.<sup>54</sup> Congress puts time limits on trade authorities but not on the institutions that implement them. On the one hand, that this is so may entice those

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48. *Misaligned Lawmaking*, *supra* note 1, at 157–58.

49. *Id.* at 158.

50. Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-315, 48 Stat. 943 (codified as amended in scattered sections of 19 U.S.C.); DOUGLAS A. IRWIN, CLASHING OVER COMMERCE 433–519 (2017).

51. *See, e.g.*, 19 U.S.C. 4202(a)(1)(A); *Misaligned Lawmaking*, *supra* note 1, at 175–76 (providing a chart).

52. *See Misaligned Lawmaking*, *supra* note 1, at 191 (discussing temporal elements of agreements).

53. To be sure, most treaties and statutes are like this, but rarely are these other instruments the products of interdependent policies. The lack of a sunset or review clause is likely an advantage for continuity in business and generally may be useful for trade law, but it has the ancillary effect of further separating trade adjustment assistance from trade liberalization.

54. VIVIAN C. JONES, GENERALIZED SYSTEM OF PREFERENCES (GSP): OVERVIEW AND ISSUES FOR CONGRESS 9, CONG. RES. SERV., Nov. 7, 2019. The difference in the success of institutions is consistent with Professor Meyer's point that regulatory programs are distinct from fiscal programs in the misalignment scenario. *Misaligned Lawmaking*, *supra* note 1, at 194. It may signal that institutionalization further contributes to this differential and that embeddedness within an agency is a determining factor.

institutions to develop practices that entrench those programs—programs that may have only had weak political support in the first place. Such entrenchment might alleviate any concern about misalignment. On the other hand, because most agencies administer multiple programs, they could choose to treat misaligned programs in disparate ways with uneven outcomes for program beneficiaries. By disconnecting renewal of an agency from its program, executive or administrative motivation has the potential to influence the latter's continuation.

Fourth, Congress implemented an intricate trade remedies program in the Trade Act of 1930.<sup>55</sup> Since then, Congress has adjusted the program occasionally in fractional respects, while trade liberalization proceeded apace. Most of the rest of the 1930 Act was superseded by subsequent trade lawmaking, but the trade remedies program remains intact—and deeply institutionalized. Here we have an example of a trade law program that continues without renewal or reconsideration and that is intended to be responsive to and in service of trade liberalization, which is regularly reviewed.<sup>56</sup> Like the security-liberalization misalignment, such an arrangement creates incentives for agencies and other actors to use these disjunctions as leverage.

Fifth, while trade negotiating authority permitting the president to negotiate mostly lower tariff rates with trading partners requires congressional renewal, our delegated security exceptions and other tariff-raising authorities do not expire. Within the omnibus trade acts, authorities delegated to the president to raise tariffs have no time limit, but those to liberalize are temporary delegations only.<sup>57</sup>

These divergent timelines suggest that some programs and principles of trade law have been locked in without need for additional consideration, while others left unfixed must be regularly reconsidered. They also suggest that the difference between those categories is reasonably haphazard and arbitrary. Looking across the trade law system and over time, one observes a normalization of liberalization as a policy, but one also observes significant variation in what pieces get

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55. Act of June 5, 1930, Pub. L. No. 71-304, 46 Stat. 497.

56. To be sure, this problem is not limited to interbranch temporal or substantive divisions. Fragmentation within the executive branch itself, as highlighted also in Part I of this Response, contributes to the temporal discrepancy difficulty. Professor Meyer has contemplated a solution in separate writing: Timothy Meyer & Ganesh Sitaraman, *It's Economic Strategy, Stupid: The Case for a Department of Economic Growth and Security*, 3 AM. AFF. 1 (2019) <https://americanaffairsjournal.org/2019/02/its-economic-strategy-stupid/> [<https://perma.cc/AL8D-HQKV>].

57. Compare 19 U.S.C. § 2411 (not limiting the years to which the tariff-raising authority applies), with 19 U.S.C. § 4202(a)(1)(A) (only allowing the president to negotiate free trade agreements before July 1, 2018, or July 1, 2021, if authorities are extended).



normalized or secured. In the present political environment, policymakers have a reasonable expectation of trade promotion authority to negotiate trade agreements. But it was not always that way. As noted above, negotiating authority was not so automatic; it was tied to a short congressional leash until such time as support for liberalization was secured on a broader scale.<sup>58</sup> Trade adjustment assistance has not benefitted from the same degree of reliability—at least not yet.

There is far more to trade's intertemporality than can be explored in this short Response. More work is needed to understand broadly the temporal features of trade lawmaking. Professor Meyer lays the foundation for this work.<sup>59</sup> He notes that lawmakers often revisit laws in light of new information or to renegotiate the distribution of costs and benefits, but they do so after having established *ex ante* the terms under which renegotiation occurs.<sup>60</sup> That much is undoubtedly true, though trade law's iterativeness is uneven, as this Part demonstrates.

In revealing this difficulty, Professor Meyer again highlights one manifestation of a larger problem with trade law in the United States: its inability to respond well to economic change considering the various competing statutory timelines at work. The question of time as it relates to trade institutions' ability to react to developments in the global marketplace is a major issue of institutional design to be revisited. Our present dependence on original bargaining or unique political moments would appear to put more pressure on lawmakers in the first instance. But trade law also exhibits a great deal of experimentation, and with that, potential for redesign and reconsideration.

#### CONCLUSION

To resolve this detrimental configuration and create stability in trade lawmaking, Professor Meyer maintains that misaligned trade policies need to be subject to legislative renegotiation on the same timeline and implemented on the same terms.<sup>61</sup> If possible, such a relinking could prove a significant improvement in trade institutional design. Certainly, viewing these areas as siloed is not productive. It generates perverse legal and political incentives. As a practical matter, however, the difficulty of reframing should not be understated.

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58. IRWIN, *supra* note 50, at 433–519.

59. *Misaligned Lawmaking*, *supra* note 1, at 181.

60. *Id.*

61. *Id.* at 206–15.

*Misaligned Lawmaking* elucidates helpfully a phenomenon that, now identified, can be seen to pose an acute danger to trade law's precarious footing. Ultimately, scholars have paid insufficient attention to how to think about trade law outside the primary trade law liberalization norm. Seeing trade law and policy as a mutually reinforcing and singular system would be a good first step. At this critical juncture, Professor Meyer's thought-provoking contribution advances the conversation toward a corrective, productive future.