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Trade's Security Exceptionalism

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ARTICLE

Trade's Security Exceptionalism

Kathleen Claussen*

Abstract. At the core of U.S. trade law is an under-studied structural dichotomy. On the one hand, well-established statutory authorities enable the President to eliminate trade barriers through negotiations with U.S. trading partners. On the other hand, different, lesser-known authorities allow the President to erect trade barriers on an exceptional basis where necessary for U.S. economic security. Rather than thinking of free trade as a source of or tool for economic security as political theorists long have, our law codifies these authorities as though they are in contrast to one another—allowing departures from the free trade norm when security so demands. Further, the two categories of authorities suffer from a mismatch in what I call “trade delegation disciplines”: While Congress kept tight controls on the President’s free trade negotiations, it abandoned controls on the exceptional, security-driven authorities, empowering the executive to handle U.S. trade interests in an unbridled way that our nation’s Founders feared.

This Article is the first to identify how trade law has exceptionalized security. It develops an original typology of the categories of congressional delegations that constitute our exceptional trade apparatus. This structural account delivers both positive and normative payoffs. Apart from explaining the institutional terrain, identifying the dichotomy challenges the traditional assumption that all executive departures from the prevailing

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free trade norm are illegal and illegitimate. The historical record demonstrates that, surprisingly, security exceptionalism in U.S. trade law is the product of misunderstood statutes that have been unmoored from their original purposes. Finally, although the exceptions may be difficult to undo or to correct, this analysis shows that trade law has space for a wide array of innovative and nontraditional disciplines that could serve to limit the damage that exceptionalizing security has caused. A review of those options likewise provides certain lessons for the limitations of the nondelegation doctrine and separation of powers.

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Introduction

The conventional view on trade law in the United States is that it comprises a set of delegations from Congress to the President that facilitate international cooperation in favor of economic liberalization.¹ This Article argues that this account is incomplete. In fact, our trade law is riddled with underused and under-studied exceptions. Whereas the literature has focused on shared powers to negotiate and implement free trade agreements, this research shows that U.S. trade law is a substantially mixed bag of delegations. That bag contains not just authorities to break down barriers to trade but also, surprisingly, authorities to put up barriers in certain circumstances. The latter delegations are now being rediscovered, and they all have one thing in common—they all purport to empower the President to put up those barriers in the interest of U.S. economic security.²

This Article provides the first comprehensive study of what I term “trade’s security exceptionalism”—and with some urgency.³ As recent events have

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1. *See, e.g.*, CATHLEEN D. CIMINO-ISAACS ET AL., CONG. RESEARCH SERV., R45148, U.S. TRADE POLICY PRIMER: FREQUENTLY ASKED QUESTIONS 27 (2019) (describing how U.S. trade policy is premised on the delegation of certain powers to the President to negotiate trade agreements). In fact, most international trade law textbooks today focus precisely on what their titles suggest: the international framework where the rules of economic liberalization are enacted and played out. Few spend considerable time on U.S. trade statutes, except as they are relevant to international agreements. *See, e.g.*, JOOST H.B. PAUWELYN ET AL., INTERNATIONAL TRADE LAW, at xi-xxi (3d ed. 2016) (noting in the table of contents the United States as one of a handful of case studies).
 2. I discuss my choice and use of the term “economic security” below at text accompanying notes 70-72.
 3. Scholars from other areas of law, particularly foreign relations law, have developed ideas about exceptionalism from which this Article draws inspiration, but I use the term differently. As elaborated below at text accompanying note 22, I am not claiming as a central point that trade is exceptional within foreign affairs or that its reliance on exceptions makes it exceptional. Rather, this Article seeks to elaborate on the unexpected function that trade’s overlooked exceptions have played in shaping trade policy. This clarification is important given the diverse usages of “exceptions” and “exceptionalism” in the foreign affairs literature. *See, e.g.*, Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539 n.51 (1999) (defining foreign affairs exceptionalism as “the view that the usual constitutional restraints on the federal government’s exercise of power do not apply in the area of foreign affairs”); Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226 (arguing against a distinct exceptionalism doctrine in the national security context of emergency detention policies); Harold Hongju Koh, Foreword, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003) (asserting that “American Exceptionalism” is a “leitmotif” in contemporary media); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584-85 (2017) (noting that immigration law has exceptions—areas where the Supreme Court has developed “special immigration doctrines that depart from mainstream constitutional norms”—and that these exceptions make immigration law distinct from other areas of law); Ganesh Sitaraman & Ingrid Wuerth, *The*
footnote continued on next page

brought these exceptions to the fore, commentators have claimed that trade law, its institutions, and the “trade rule of law” are under threat.⁴ While those assessments underscore the important potential consequences of those policy choices, I argue in this Article that our trade law is structurally predisposed to entertain these excursions. But it was not always this way.

Trade law in the United States finds its foundation in the Constitution, which grants Congress the power to collect duties and to regulate foreign commerce.⁵ For many years, Congress did just that. Beginning in the late nineteenth century, however, Congress began to delegate considerable trade power to the President.⁶ Eventually, Congress granted the President authority to negotiate reciprocal trade agreements with U.S. trading partners in which both sides agree to remove or reduce trade barriers, for example, by lowering tariff rates.⁷ Those statutes and those agreements, perceived by many to make

Normalization of Foreign Relations Law, 128 HARV. L. REV. 1897, 1900 (2015) (using “exceptionalism” as a “belief that legal issues arising from [an area of law] are functionally, doctrinally, and even methodologically distinct from those arising in [another area]”).

4. See, e.g., Rachel Brewster & Sergio Puig, Symposium Introduction, *Can International Trade Law Recover?*, 113 AM. J. INT'L L.: UNBOUND 38, 38 (2019) (arguing that there is a “substantive and procedural onslaught on international trade law”); Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115, 117 & n.8 (2019) (showing that some industry members also share the view that the United States is pursuing a power-based trade policy by quoting Ambassador Rufus Yerxa, former Deputy U.S. Trade Representative (USTR) and Deputy Director General of the World Trade Organization (WTO), as saying, “[t]he Trump administration pretty much signaled it is throwing out the rule book on trade” (quoting David J. Lynch et al., *Trump Imposes Steel and Aluminum Tariffs on the E.U., Canada and Mexico*, WASH. POST (May 31, 2018, 1:32 PM CDT), <https://perma.cc/27JF-7FHT>)); Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L L. ONLINE 37, 41-42 (2018) (asserting that the Trump Administration's trade policies represent a return to power-based trade policy and a turn away from multilateral rules); Manfred Elsig et al., *Trump Is Fighting an Open War on Trade. His Stealth War on Trade May Be Even More Important.*, WASH. POST (Sept. 27, 2017, 4:00 AM PDT), <https://perma.cc/TK3E-W7M6> (claiming that the Trump Administration's trade policies are harming the WTO); Matthew Kahn, *Pretextual Protectionism? The Perils of Invoking the WTO National Security Exception*, LAWFARE (July 21, 2017, 2:51 PM), <https://perma.cc/H2TM-G3JW> (referring to the Trump Administration's expected invocation of a national security exception at the WTO as the “nuclear option” or “third rail” of international trade); Zachary Karabell, *Trump's Creative Destruction of the International Order*, FOREIGN POL'Y (June 11, 2018, 9:37 PM), <https://perma.cc/QT6Y-36UN> (considering the change to the prior neoliberal order); Anthea Roberts et al., *The Geoeconomic World Order*, LAWFARE (Nov. 19, 2018, 11:17 AM), <https://perma.cc/K76B-YWSH> (arguing that we are “entering into a new geoeconomic world order”).
5. U.S. CONST. art. I, § 8, cls. 1, 3.
6. See *infra* Part I.
7. See Reciprocal Trade Agreements Act of 1934, ch. 474, 48 Stat. 943 (codified as amended in scattered sections of 19 U.S.C.).

up the foundation of our trade law today,⁸ have been the subject of considerable attention among scholars and Congress for the last several decades. When examined closely, however, it becomes clear that Congress has delegated two distinct sets of tariff-related authorities to the President. In addition to those well-studied delegations that enable the President to *eliminate* tariffs through negotiations that lead to reciprocal free trade agreements with other countries, a second set enables the executive to *impose* tariffs when economic security so requires.⁹ In contrast with the familiar first group, the second is underanalyzed and its potential is not fully known. Together, the two sets codify distinct approaches to trade—a primary, tariff-lowering approach and a secondary, security-premised, tariff-raising approach. Recent invocations of the latter are likely just the tip of the iceberg.

By unearthing these sets of delegations, this Article provides a framework, through some reverse engineering, for understanding U.S. trade law and policy. It offers a thorough descriptive review of the United States's exceptional statutory trade law apparatus and shows that the economic security exceptions have grown in scope and power. Two types of these exceptional delegations surface: one group with *express* security rationales, or “hard security exceptions,” and another with *functional* security rationales, or “soft security exceptions.” Both types rely on a general concept of U.S. economic security— notions of which have evolved over time.

The dichotomous framework comprising free trade and economic security powers is not just a scholarly metaphor for thinking about past congressional-executive action: Seeing trade law as structured according to two contrasting sets of delegations helps us deconstruct the present so-called trade war and contextualize it in a much longer separation-of-trade-law-powers tradition. Importantly, this structural appraisal of trade law illuminates another layer to trade's security exceptionalism: a divergence in the way Congress oversees one set of delegations as compared to the other. With respect to the primary liberalizing delegations to make robust free trade agreements, Congress progressively added more procedural constraints. In contrast, Congress did little to nothing to control presidential action with respect to the exceptions. The exceptions were left unchecked as they were not a part of what was considered the main trade law program. Both sets of delegations carve out a space for executive action, but one does so in a carefully circumscribed way while the other does not. This mismatch in what I call “trade delegation

8. Trade agreements and international trade institutions have been the main subject of trade scholarship, teaching, and policy for the last twenty years. To be sure, the object of this study is not an exhaustive review of all trade law. My emphasis is on foreign-facing U.S. laws, particularly congressional delegations to the President to manage the United States's relationships with its trading partners.

9. See *infra* Part I.B.

disciplines” allows the President to act without any supervision when he wishes to set higher tariffs on certain goods or on goods coming from certain countries. Thus, the two-track statutes laid the foundation for the current terrain in which the Trump Administration’s application of the exceptions is the centerpiece of its trade policy, pushing the bounds of the executive’s foreign commerce authority.¹⁰

A further aim of this Article is to develop a positive theory of trade’s security exceptionalism to examine why and how this dichotomy emerged, particularly given that the prevailing view in other fields such as political science is that trade and security are complementary.¹¹ As the history recounted here reveals, no single motivation drove the implementation or longevity of these exceptions, and in some instances their permanence appears incidental.

Path dependence in our exceptionalist approach obscures the question as to how the law *should* manage matters of economic security. From a policy perspective, trade’s security exceptionalism is a double-edged sword. Special security delegations to the executive or dispensations may be used for necessary emergency measures, but they can also be abused. For a field that relies on stability and predictability to avoid global financial crisis, trade law’s exceptional framework creates real and considerable risk at the same time that it creates flexibility. This difficulty raises the question whether it is possible to develop trade law in such a way that manages any overreach that may occur when the motivating values underlying free trade principles and economic security goals fail.

Expanding definitions of “security,” and particularly economic security, complicate the issue, marrying domestic and international concerns in unique

10. See, e.g., Chad P. Bown & Soumaya Keynes, Trade Talks, *US Trade Policy Before Trump, with Ambassador Michael Froman* at 12:26-13:53, TRADE TALKS (July 19, 2019), <https://perma.cc/MV4M-3UK3> (noting “an evolution in the relationship between economics and national security . . . in the current administration, where now China, as a national security threat, seems to be the dominant perspective . . . they’ve re-linked the trade issues, but in somewhat the opposite direction, saying, if you work with us on a national security issue, you may get a better deal on the trade side”); Anshu Siripurapu, *Analysts Weigh Legality of U.S.-China Trade Deal*, INSIDE U.S. TRADE (Mar. 15, 2019, 1:57 PM), <https://perma.cc/4C9A-4RXX>; Todd Tucker, *Are National Security Tariffs Legal?*, MEDIUM (Feb. 16, 2018), <https://perma.cc/7YPP-RCA3>.

11. Note that the type of complementarity may differ just as definitions of “trade” and of “security” may differ. In other words, there is a broad theme in the literature that the two ideas interact in positive ways, not in opposition. See, e.g., Kal J. Holsti, *Politics in Command: Foreign Trade as National Security Policy*, 40 INT’L ORG. 643, 644 (1986) (referring to the work of Robert Gilpin and Robert Keohane to support this claim); Brian M. Pollins, *Conflict, Cooperation, and Commerce: The Effect of International Political Interactions on Bilateral Trade Flows*, 33 AM. J. POL. SCI. 737, 758 (1989); Andrew Holland, *How Trade Agreements Build Peace*, AM. SECURITY PROJECT (July 28, 2017), <https://perma.cc/DK2F-PXNN>.

ways as trade does.¹² It takes but a few examples to illustrate the problem: Is it possible to construct a policy for engaging with China, perceived by some as a threat to U.S. security, that strikes the right balance for U.S. farmers, ranchers, other workers, and entire industries while still maintaining a viable system of international rules? Is there an approach that can appropriately support U.S. businesses in the face of globalization while still promoting cross-border activity with trading partners like Mexico? Questions like these are central to contemporary trade policy.

While the target of this Article is U.S. law regulating imports and exports, the province and influence of trade exceptionalism are not so limited. Twenty-first century trade law is a patchwork of domestic and international rules. It encompasses institutions at both levels that complement and reinforce each other.¹³ Trade institutions are intended to constrain incentives by states (internationally) and the executive (domestically) to break the rules for short-term political or economic gains. But in both systems, they also provide for exceptional behavior where security demands. In other words, there is a parallel story to be told of international exceptions. The multilateral trade system accommodates security as a circumstance precluding wrongfulness or as an excuse from liability.¹⁴ It legalizes certain exemptions from the rules, allowing a government to claim security in its defense. Exceptions at the domestic level are framed differently, but they nevertheless also permit action contrary to the principal norm. In contrast to the excuse-from-liability approach in international law, U.S. law grants the President access to additional powers where an emergency, a threat to the U.S. economy, or national security so justifies.¹⁵ What is important for my purposes is that while they frame the

12. See J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1022-32 (2020) (discussing the expanding definition of “national security” and its impact on international economic law); Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 586-97 (2019) (discussing the competing domestic and international paradigms in trade law).

13. For example, the United States has regularly entered into agreements with trading partners or at the WTO that are then implemented into U.S. law. See, e.g., United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, 125 Stat. 428 (2011) (codified as amended in scattered sections of 19 and 26 U.S.C.) (codifying into U.S. statutes the commitments negotiated by the U.S. executive branch with South Korea).

14. See Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 366-69 (describing how national security can be used in different ways across areas of international law, but especially so in trade); see also Hannes L. Schloemann & Stefan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT'L L. 424, 426 (1999) (“Wherever international law is created, the issue of national security gives rise to some sort of loophole The right of any nation-state to protect itself . . . has been a bedrock feature of the international legal system.”).

15. See *infra* Part I.B.

issue differently, both domestic and international law tend to see traditional ideas of free trade as being in opposition to ideas of security.¹⁶

I argue that there is another way, even if it is handicapped by U.S. judicial doctrines, and that more ought to be done to reconcile concepts of free trade and economic security in the law. The present structure exceptionalizes economic security to its detriment. This is not to suggest that the concept of an exception or the availability of emergency action is not warranted; rather, I maintain that, in the case of trade, their justifications are inconsistent with other frames—frames that have long guided the U.S. trade/security relationship in practice—and that the record shows that was not the intention of the drafters of these exceptions.¹⁷ I set out alternative normative visions, rooted in U.S. history, that counsel a mutually reinforcing relationship between trade and security. These visions were not lost but simply overshadowed by the trajectory of trade patterns and constitutional law doctrines. As this Article reveals, today's codified exceptionalism is itself exceptional. Recognizing the historical forces informing the present moment opens up new lines of inquiry into appropriate configurations of power across the branches.

As is clear from the themes that it brings together, this Article is situated at the intersection of three different areas of scholarship: trade law, administrative and constitutional law concerning the separation of powers, and national security law. While any two of these areas have found overlap in important past work,¹⁸ no study has sought to reconcile all three. Commentary on these areas has remained siloed, just as the law has. This Article tries to begin a conversation among them, legally and academically.

16. See General Agreement on Tariffs and Trade [hereinafter GATT] art. XXI, Oct. 30, 1947, 61 Stat. A3, A63, 55 U.N.T.S. 187, 266; *infra* Part I.B.

17. See *infra* Part II.C.

18. See, e.g., Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT'L L. 315, 316-20 (2018) (discussing trade and the separation of powers); Ryan Goodman, *Norms and National Security: The WTO as a Catalyst for Inquiry*, 2 CHI. J. INT'L L. 101, 101-02 (2001) (discussing trade and national security); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 142-43 (2018) (discussing the intersection of the separation of powers and national security); Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1191 (1986) (discussing separation of powers and trade); Harold Hongju Koh & John Choon Yoo, *Perspective, Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 715-16 (1992) (discussing trade and national security); John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 DICK. J. INT'L L. 203, 203-04 (1995) (discussing the separation of powers and trade); Meyer & Sitaraman, *supra* note 12, at 651 (commenting that "trade conflicts rarely involve . . . immediate risks to national security"); Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1422 (2012) (discussing national security and the separation of powers).

To be sure, that there are security exceptions throughout trade law should not be surprising, especially to national security scholars. National security scholars both in political theory and in law have long recognized the structure of presidential authority as shaped by exceptions.¹⁹ Those scholars likewise see recent trade moves as part of the Trump Administration's larger project of making claims concerning "national security" to justify expansive executive authority in collision with longstanding foreign policy goals or the administration of the regulatory state.²⁰ Security-specific exceptions are prevalent in our law, permitting the President to move government resources without congressional approval or to take immigration action, among other authorizations, based on security needs.²¹ Economic security remains an underexplored area, however. Thus, this analysis underscores where the law and discussions about the law may fail to accommodate global and institutional needs when it comes to trade and security. Rethinking what makes the best confluence of powers in this respect may be trade law's next essential undertaking.

The Article proceeds in three parts. Part I presents the two groups of trade law delegations. It charts these features for the first time, looking beyond just the traditionally discussed aspects of the hallmark trade acts and noting that they differ along three dimensions: (1) purpose or justification (free trade or economic security); (2) their prescription for tariffs (more or fewer); and (3) the procedures that apply to them (strict or loose). The Part introduces a taxonomy of trade's delegation disciplines and shows how, as a result, our trade law structure is predisposed toward presidential trade actions in favor of exceptional policy choices and against a free trade norm. Part II considers the positive and

19. See, e.g., Rana, *supra* note 18, at 1422 (discussing the drift toward greater executive power in security arrangements in law); *id.* (referring to the normalization of emergency (citing Kim Lane Scheppelle, *Exceptions That Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 124, 124-34 (Jeffrey K. Tulis & Stephen Macedo eds., 2010))).

20. The move toward broader claims of national security can be seen in areas as diverse as immigration, foreign investment, and individual rights. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting) (commenting that the Trump Administration's Muslim-ban policy "masquerades behind a facade of national-security concerns"); Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 20, 2019) (declaring a national emergency concerning immigration and smuggling at the southern border of the United States); Dave Philipps, *Judge Blocks Trump's Ban on Transgender Troops in Military*, N.Y. TIMES (Oct. 30, 2017), <https://perma.cc/JDN3-3L49> (reporting on the Trump Administration's claim of national security to justify expelling transgender individuals from the U.S. military); Adam Rhodes, *CFIUS Casts Wider Net, with Eye on Consumer Data Access*, LAW360 (Apr. 10, 2018, 5:26 PM EDT), <https://perma.cc/GU4C-2S7W> (examining how "the Committee on Foreign Investment in the United States has been broadening its view of what constitutes a national security concern severe enough to block a deal").

21. See Harlan Grant Cohen, *The National Security Delegation Conundrum*, JUST SECURITY (July 17, 2019), <https://perma.cc/S4NA-LMD3>.

normative payoffs of this structural model. In so doing, it explains why trade law developed in this dichotomous way and demonstrates that, unexpectedly, these exceptions are partly a product of experimentation and incidental trade lawmaking in the United States. Last, Part III argues that this research corrects certain misconceptions among commentators about current trade law practices. The Trump Administration's invocation of the exceptional delegations is an outlier among past uses, but not as much of an outlier as critics think. Still, because the dangers of exceptionalism outweigh its rewards, I agree with critics that revision is needed. As de-exceptionalizing is likely not possible, lawmakers ought to consider innovative delegation disciplines to better manage the policymaking space on trade and security. The Article concludes with takeaways for broader debates surrounding the nondelegation doctrine and the separation of powers.

A final note about terminology: Although trade is unique in many respects when compared with other areas of cross-border regulation, that is not the focus of my exceptionalism critique.²² As noted above, capacious national security exceptions are common in statutes governing other bodies of law. The claim here is narrower: I develop a structural analysis of U.S. trade law as a way to understand the legal forces shaping the present moment. While lawmakers have developed a primary free trade norm, they have likewise developed and neglected a set of exceptions. Nearly all of those exceptions can be and have been viewed as authorizing the President to raise tariffs where security or emergency dictates. The Trump Administration has relied heavily on these seemingly forgotten domestic authorities that specifically call into question the separation of trade law powers in the interests of global authority. My research uncovers these domestic authorities hiding in plain sight, and I argue that, as currently structured, they contribute to instability in U.S. trade law and policy; but it does not have to be that way.

22. Cf. Meyer & Sitaraman, *supra* note 12, at 587-90 (arguing that trade is dissimilar in important respects to other foreign affairs and national security policy areas). While I agree with Meyer and Sitaraman that trade ought not to be seen as exceptional "simply because it touches on foreign affairs," *id.* at 588, trade is arguably exceptional and unique in at least three ways: First, it is constitutionally specially situated as compared to other areas of foreign affairs in the relevance of Articles I and II to its direction; second, it relies upon binding, enforceable international agreements, which could be said to occupy the field and, in policymaking, likewise looks both inward and outward more than do other areas; and third, as illustrated in this Article, it is characterized in the last fifty years by remarkable consistency in a now-bipartisan, normative commitment to a guiding ideology and governance concept. I am exploring some of these issues in a forthcoming study on executive trade agreements. Kathleen Claussen, Trade Executive Agreements (May 26, 2020) (unpublished manuscript) (on file with author).

I. Our Trade Law Architecture

Understanding the workings of U.S. trade law requires a sense of what this body of law comprises. Colloquially, “trade” involves a wide range of international transactions as well as certain domestic regulations with cross-border impact. Legally, a complex institutional design governs what we think of as trade.²³ Today’s trade law is more expansive than ever before.²⁴ It not only encompasses tools that include traditional border measures, like tariffs, but it also involves regulatory measures that in prior decades would not be considered to fall under the trade umbrella at all. It covers private rights of action as much as it governs state action.²⁵

So where does one locate the rules that comprise U.S. trade law? Even if we could articulate a comprehensive concept of “trade,” we might still struggle to find all the applicable U.S. laws that manage it. As a single body, it is as difficult to locate as it is to define. There is no particular handbook or signaling mechanism to help identify where to find “trade” statutes or regulations.²⁶ One might expect to dig into Title 19 of the U.S. Code, named Customs Duties, or Title 15, called Commerce and Trade, but those would be insufficient—and in the case of the latter, inaccurate²⁷—excavation sites. Similarly, although there is a U.S. Court of International Trade (CIT) that receives roughly two to four hundred new cases each year,²⁸ those important cases are only a small part of the trade law landscape. We could look to trade law scholarship for a guide, but much greater emphasis is placed on international institutions than on domestic ones, making U.S. trade law—to the extent it differs from international law—

23. That complex design includes both transnational and domestic elements, as introduced briefly at note 13 above.

24. *See, e.g.*, Claussen, *supra* note 18, at 316 (discussing the growth of “bilateral and regional trade agreements”); Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT’L L. & FOREIGN AFF. 209, 211, 221-42 (2011) (providing an overview of the expansion of trade agreements).

25. *See* Lester, *supra* note 24, at 211, 221-42.

26. Some private outfits have sought to compile collections for practitioners. *See, e.g.*, *U.S. Trade Laws*, WASH. TRADE REP., <https://perma.cc/YK8V-QM9E> (archived Oct. 20, 2019).

27. Title 15 concerns mostly interstate rather than foreign commerce.

28. U.S. Courts, Table G-1: U.S. Court of International Trade—Cases Filed, Terminated, and Pending During the 12-Month Periods Ending September 30, 2015 and 2016 (n.d.), <https://perma.cc/87MR-P5GH> (showing 390 cases filed from 2014 to 2015, and 270 from 2015 to 2016); U.S. Courts, Table G-1: U.S. Court of International Trade—Cases Filed, Terminated, and Pending During the 12-Month Periods Ending September 30, 2017 and 2018 (n.d.), <https://perma.cc/33CV-H6JS> (showing 313 cases filed from 2016 to 2017, and 242 from 2017 to 2018); U.S. Courts, Table G-1: U.S. Court of International Trade—Cases Filed, Terminated, and Pending During the 12-Month Periods Ending September 30, 2018 and 2019 (n.d.), <https://perma.cc/C8QP-PTHA> (showing 223 cases filed from 2018 to 2019).

seem elusive.²⁹ The slippery territory between domestic and international trade law further underscores one of the primary points of this Article: Until recently, narrow delegations of authority to the President to adjust individual U.S. tariff rates on particular products had declined in importance as international trade law and megaregional free trade agreements were seen to occupy and govern the public trade space.³⁰

Also lost from most accounts of U.S. trade law is the fact that over many years of passing omnibus trade acts, Congress sometimes empowered the President to lower tariffs and sometimes empowered him to raise tariffs, particularly in light of security concerns. This Part identifies those contrasting authorities and analyzes how free trade and ideas of economic security have become dichotomous in U.S. law. The exceptional delegations differ from the free trade delegations not just in their justification and in their direction but also in many respects in the stringency of the oversight that applies to their exercise. The Part begins by looking at the congressional delegations to the President regarding free trade: those that enable the President to engage in trade liberalization. These delegations make up the dominant and well-studied norm in trade law in favor of lowering tariff and other barriers. Then this Part turns to the second category: the exceptions, or, as I will illustrate, how trade became “securitized.”

A. The Codification of Free Trade

Over the course of the twentieth century, many of the world's major powers worked their way to free trade as a guiding principle for rulemaking. They institutionalized those rules at the international level.³¹ It was not an easy path, nor is the exercise of lowering barriers to trade complete. Getting to “yes” on free trade required a massive change in thinking among policymakers

29. Since the 1970s, trade has been seen as an “intermestic” policy area, requiring both domestically and internationally oriented lawmaking. See Bayless Manning, *The Congress, the Executive and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFF. 306, 309 (1977).

30. Exacerbating this perception is the fact that few law schools offer any courses on U.S. trade law. I cover both U.S. and international trade law in one course. Many colleagues have reported to me that they address U.S. trade law only incidentally in an international trade law course, if at all. Practice in domestic trade remedies has continued to flourish, but few scholars have focused on that side of the law. For example, a Westlaw search yields fewer than fifteen law review articles that address trade remedies in any detail in the last three years. A search on November 15, 2019 for ATLEAST5 “trade remedies” in “Law Reviews & Journals” for the last three years generated thirteen results, several of which are not full-length law review articles.

31. See WILLIAM DEESE ET AL., U.S. INT'L TRADE COMM'N, PUB. 4094, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS: SIXTH UPDATE 2009, at 60-61, 70-75 (2009), <https://perma.cc/E53F-W739>.

internationally³² and domestically, particularly within Congress.³³ Still, although Congress and the executive, like analogous institutions in other countries, have debated the appropriate levels of liberalization, its pace, the development of safeguards for the losers in the system, and how to manage collateral damage from these economic principles, generally, trade liberalization has proceeded expeditiously in recent decades.³⁴ In recent years, the partisan debates over liberalization have taken place not over the relative value of it as compared to protectionism, but rather with regard to the minutiae of implementation and substance at the margins, or in relation to trade-plus issues³⁵ such as the harmonization of regulations.³⁶ Free trade has far outdone protectionism in strength of principles on the global scale.

On the law side, the effort to codify and regulate a system of importation and exportation facilitating free trade necessitated an institutional reconfiguration. The challenge for U.S. law was that developing reciprocal arrangements for free trade in principle and in practice required negotiation with other countries—a move that meant codifying a process for giving greater trade power to the President.

In the earliest days of U.S. trade lawmaking, Congress regularly issued tariff schedules pursuant to its Article I authority.³⁷ Tariffs were the primary

32. See Gilbert R. Winham, *The Evolution of the World Trading System—The Economic and Policy Context*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 5, 11-23 (Daniel Bethlehem et al. eds., 2009).

33. See DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY 413, 454 (2017); DAVID A. LAKE, POWER, PROTECTION, AND FREE TRADE: INTERNATIONAL SOURCES OF U.S. COMMERCIAL STRATEGY, 1887-1939, at 6-7 (1988) (describing the U.S. transition to liberalism).

34. See LAKE, *supra* note 33, at 6-7; William J. Mateikis, *The Fair Track to Expanded Free Trade: Making TAA Benefits More Accessible to American Workers*, 30 HOUS. J. INT'L L. 1, 7-10 (2007).

35. “Trade-plus” topics are commitments incorporated into trade agreements beyond traditional tariff barriers. See Kathleen Claussen, *Reimagining Trade-Plus Compliance: The Labor Story*, 23 J. INT'L ECON. L. 25, 26 (2020).

36. See, e.g., Isabelle Hoagland, *Sen. Kaine Knocks Administration for Lack of Engagement on USMCA*, INSIDE U.S. TRADE (May 3, 2019, 8:30 AM), <https://perma.cc/6KH8-4SFB> (reporting on Senator Tim Kaine’s complaint about the absence of executive cooperation); William Alan Reinsch & Madeleine Waddoups, *The Road to Ratification: Democrats’ Resistance to the USMCA*, CTR. FOR STRATEGIC & INT’L STUD. (May 16, 2019), <https://perma.cc/M7HV-6N5D> (reviewing Democrats’ concerns with the latest proposed trade agreement: “labor enforcement, environmental regulation, and pharmaceutical provisions”).

37. For instance, the tariff acts from the eighteenth and nineteenth centuries are summarized in U.S. TARIFF COMM’N, THE TARIFF AND ITS HISTORY: A COLLECTION OF GENERAL INFORMATION ON THE SUBJECT 70-84 (1934).

instrument of trade law and policy, and Congress regulated them fully with few exceptions.³⁸

National and international forces began to shift during the presidencies of Chester A. Arthur and Grover Cleveland. Their advocacy for lower tariffs did not succeed until after it cost Cleveland his reelection in 1888.³⁹ The Tariff Act of 1890 was the first domestic legislation to grant the executive a license to negotiate agreements with foreign countries to adjust tariffs by proclamation.⁴⁰ To be sure, the Act was highly protectionist, but it included certain flexibilities for the President and enabled the duty-free entry of certain raw materials as proposed by President Cleveland.⁴¹

38. See DEESE ET AL., *supra* note 31, at 65 (“Prior to the 1930 act, tariff changes were viewed as entirely the domain of Congress.” (footnote omitted)); Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change*, 35 GEO. WASH. INT’L L. REV. 1, 6 (2003) (“Prior to the twentieth century U.S. regulation of foreign commerce was almost exclusively a congressional prerogative . . .”). Indeed, the U.S. Treasury derived about 90% of its revenue from customs duties before the Civil War. John Mark Hansen, *Taxation and the Political Economy of the Tariff*, 44 INT’L ORG. 527, 529 (1990). There were some instances of authorization for specific rate adjustments by the President or the Treasury and for the negotiation of rate changes by executive agreement. See Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. (forthcoming 2021). These adjustments, however, affected only minor parts of the tariff structure. The flexible tariff provision of the Tariff Act of 1922 required the President to raise or lower tariffs to equalize the costs of production of articles produced in the United States and in competing countries. See ch. 351, § 315(a), 42 Stat. 858, 941-42 (repealed 1930); Francis B. Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 763 (1939).

39. LAKE, *supra* note 33, at 98-99. President Benjamin Harrison nevertheless succeeded in issuing some tariff adjustments, granting country-specific exemptions from custom duties for certain goods, by proclamation. See, e.g., Proclamation No. 26, 27 Stat. 1025, 1025-26 (1892) (Guatemala); Proclamation No. 27, 27 Stat. 1026, 1026-27 (1892) (Austria-Hungary).

40. Tariff Act of 1890 (McKinley Tariff), ch. 1244, § 3, 26 Stat. 567, 612; see also Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1292-94 (2008); F.W. Taussig, *The New United States Tariff*, 4 ECON. J. 573, 573-74 (1894).

41. See Hathaway, *supra* note 40, at 1292-93 (noting the incorporation of the Cleveland proposal); *Historical Highlights: The McKinley Tariff of 1890*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES (archived Apr. 4, 2020), <https://perma.cc/2SZU-93HE>. A special commissioner appointed by President McKinley negotiated eleven agreements with foreign countries, but these did not receive congressional approval and never came into effect. See William B. Kelly, Jr., *Antecedents of Present Commercial Policy, 1922-1934*, in *STUDIES IN UNITED STATES COMMERCIAL POLICY* 3, 26 & n.75 (William B. Kelly, Jr. ed., 1963). Shortly thereafter, McKinley changed his view in favor of free trade, and became President, paving the way for the Tariff of 1897, which authorized the President to enter into agreements to reduce certain import duties for limited periods, Tariff of 1897 (Dingley Act), ch. 11, § 4, 30 Stat. 151, 204-05. The 1897 law also authorized the Secretary of the Treasury to impose an offsetting duty if he found a government was subsidizing exports. *Id.* § 5, 30 Stat. at 205. The Revenue Act of 1913 similarly gave the President the power to negotiate “trade agreements with foreign nations wherein

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The critical juncture for executive empowerment and the promotion of trade liberalization was the enactment of the Reciprocal Trade Agreements Act of 1934 (RTAA).⁴² The RTAA allowed the President to enter into trade agreements and to proclaim lower duties on foreign goods entering the United States without congressional review.⁴³ For the next several years, Presidents negotiated a number of agreements with trading partners under this authority.⁴⁴

The RTAA represented a major step in securing a longstanding free trade policy⁴⁵ in its empowerment of the President to enter into trade agreements with foreign governments to reduce import restrictions. It also entrenched the importance of international instruments in building policy and disseminating this idea to U.S. trading partners. Reciprocal trade agreements that lowered tariffs then became the primary instrument for U.S. trade policy.⁴⁶

Following World War II, Congress continued to delegate its authority to engage in negotiations with trading partners that aimed to lower tariffs and tariff barriers to the President and executive agencies. It renewed the RTAA authority multiple times.⁴⁷ By the mid-1940s, that delegation had expanded to include the authority to negotiate multilateral instruments, not just bilateral agreements.⁴⁸ Although there were some peaks and valleys in congressional openness to enhancing the President's free trade authority, the executive-driven agreements proliferated.⁴⁹

The 1962 Trade Expansion Act reflected Congress's position that lowering tariff barriers was such an important undertaking that it required the creation of a new office—the Special Trade Representative for Trade Negotiations, which would later become the ambassador-ranked, cabinet-level position of

mutual concessions are made looking toward freer trade relations and further reciprocal expansion of trade and commerce," subject to congressional approval. Ch. 16, § 4, 38 Stat. 114, 192.

42. See Abraham Berglund, *The Reciprocal Trade Agreements Act of 1934*, 25 AM. ECON. REV. 411, 415-16 (1935).

43. Reciprocal Trade Agreements Act of 1934, ch. 474, § 1, 48 Stat. 943, 943-44 (codified as amended at 19 U.S.C §§ 1351-1354 (2018)).

44. See ASHER ISAACS, INTERNATIONAL TRADE: TARIFF AND COMMERCIAL POLICIES 257 (1948).

45. *But see* IRWIN, *supra* note 33, at 442 (noting that "[t]he trade agreements program is not in any sense a free trade program," but rather "an attempt . . . to restore . . . to American enterprise its natural markets abroad and at the same time [provide] reasonable protection for domestic industry" (alterations in original) (quoting Henry F. Grady, *The New Trade Policy of the United States*, 14 FOREIGN AFF. 283, 295 (1936))).

46. See Hathaway, *supra* note 40, at 1293-98 (referring to this shift to reciprocal agreements and describing it as a "sea change" in lawmaking authority).

47. Koh, *supra* note 18, at 1195 n.14.

48. See Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOK. J. INT'L L. 101, 117-19 (1992).

49. See IRWIN, *supra* note 33, at 443-47.

the U.S. Trade Representative (USTR), housed in the Executive Office of the President.⁵⁰ A major concern among legislators at the time of the USTR's creation was foreign discrimination against U.S. imports, and that the State Department was ill equipped to carry forward a liberalization policy given its other foreign policy interests.⁵¹

The 1974 omnibus trade act overhauled how Congress and the executive branch could organize the U.S. government position regarding free trade agreements. It brought the final implementation of agreements back to Congress, as now agreements dealt not just with tariff barriers but also the elimination of regulatory barriers to trade.⁵² Changes to the latter required legislative implementation.⁵³ In general terms, in what is now known as "fast track" or Trade Promotion Authority (TPA) legislation, Congress invites the President to initiate negotiations with trading partners, and Congress also sets the terms of engagement between itself and the executive branch for the period of negotiations.⁵⁴ The original 1974 act authorizes the President "to take all appropriate and feasible steps within his power . . . to harmonize, reduce, or eliminate . . . barriers to (and other distortions of) international trade."⁵⁵

Other subsequent major trade acts would follow, including the implementing legislation for multilateral negotiations that imposed additional reductions in tariffs in 1979,⁵⁶ legislation that renewed authority for trade agreements and enabled a way forward for agreements with Canada and Israel in 1984,⁵⁷ and legislation that again renewed the authority to lay the groundwork for the negotiation of the North American Free Trade Agreement

50. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 241, 76 Stat. 872, 878 (repealed 1975); Reorganization Plan No. 3 of 1979, 3 C.F.R. 513, 515 (1980).

51. *See, e.g.*, PAUL H. DOUGLAS, IN THE FULLNESS OF TIME: THE MEMOIRS OF PAUL H. DOUGLAS 481-85 (1972) (describing Senator Douglas's shock at the behavior of the State Department); Paul Lewis, Spotlight, *Presidential Pick for Trade Talks Proves a Quiet Man*, N.Y. TIMES (Mar. 16, 1975), <https://perma.cc/C3JS-TG8M> (describing legislators' concern that the State Department was "too soft on foreigners" when it came to trade negotiations).

52. Trade Act of 1974, Pub. L. No. 93-618, § 102(b)-(c), 88 Stat. 1978, 1982-83 (1975) (codified as amended at 19 U.S.C. § 2112(b)(1), (c) (2018)).

53. *Id.* § 102(c), 88 Stat. at 1983 (codified at 19 U.S.C. § 2112(c)).

54. 19 U.S.C. §§ 4201-4210; Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 145, 163 (1992); *see also* Edmund Walter Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 493-505 (1990) (discussing the fast track procedural process and the interaction between Congress and the executive branch).

55. Trade Act of 1974 § 102(a) (codified at 19 U.S.C. § 2112(a)).

56. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 19, 26, and 28 U.S.C.).

57. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (codified as amended in scattered sections of 19, 26, and 28 U.S.C.).

in 1988.⁵⁸ Each of these statutes continued to promote executive-driven free trade agreements, making fewer changes to other aspects of the trade law regime.⁵⁹

Further cementing the free trade norm, beginning in the 1980s, Congress enacted a number of statutes that offered conditional, nonreciprocal lower tariff benefits to selected developing countries under preference programs.⁶⁰ The idea behind these statutes was to reward developing states for meeting benchmarks set by Congress with lower or no duty treatment.⁶¹ At various points, Presidents have suspended or terminated benefits to countries benefiting from these programs.⁶²

These delegations—those that promote the preference systems and those that permit the President to engage in reciprocal trade agreements—have been renewed on multiple occasions.⁶³ Although fast track authority has occasionally lapsed,⁶⁴ Congress has repeatedly extended that authority in the interest of

58. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1102, 102 Stat. 1107, 1126-28 (codified as amended at 19 U.S.C. § 2902).

59. In this Article I do not take up changes these omnibus acts made to trade remedies, although even in that area the foundational rules are found in the Tariff Act of 1930. Nevertheless, I exclude discussion of trade remedies as they implicate a different set of considerations, such as the participation of industry and a detailed administrative process with little to no discretion for the President.

60. *See, e.g.*, African Growth and Opportunity Act, Pub. L. No. 106-200, tit. I, 114 Stat. 251, 252-75 (2000) (codified as amended in scattered sections of 19 U.S.C.); Andean Trade Preference Act, Pub. L. No. 102-182, tit. II, 105 Stat. 1233, 1236-44 (1991) (codified as amended at 19 U.S.C. §§ 3201-3206); Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 369, 384-98 (1983) (codified as amended in scattered sections of 19, 26, and 33 U.S.C.); Trade Act of 1974, tit. V (codified as amended at 19 U.S.C. §§ 2461-2467).

61. *See, e.g.*, VIVIAN C. JONES, CONG. RESEARCH SERV., RL33663, GENERALIZED SYSTEM OF PREFERENCES (GSP): OVERVIEW AND ISSUES FOR CONGRESS 2, 9 (2019), <https://perma.cc/ZP64-7JCK> (explaining the GSP rationale).

62. At least a dozen countries have had their GSP eligibility terminated or suspended at various points, for example, for labor reasons. *See* Kimberly Ann Elliott, Peterson Inst. for Int'l Econ., Preferences for Workers? Worker Rights and the US Generalized System of Preference, Speech for the Faculty Spring Conference: '98 "Globalization and Inequality" Calvin College, Grand Rapids, Michigan (May 28, 1998), <https://perma.cc/W9V8-D4WT> (naming by year of suspension or termination Nicaragua, Romania, Chile, Paraguay, Burma, Central American Republic, Liberia, Sudan, Syria, Mauritania, Maldives, and Pakistan (partial suspension)).

63. *See, e.g.*, Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320 (codified in scattered sections of 19 and 26 U.S.C.); Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, tit. XXI, 116 Stat. 933, 993-1022 (codified in scattered sections of 19 U.S.C.).

64. *See, e.g.*, IAN F. FERGUSSON, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 1 (2015), <https://perma.cc/2684-KUFT>.

negotiating bigger and better free trade agreements.⁶⁵ Accordingly, since the first half of the twentieth century, Congress and the executive branch have pushed U.S. trade policy in the direction of trade liberalization and lower trade barriers. By the end of the century, the United States and other countries had written these free trade rules into broad international agreements.⁶⁶

While this condensed synopsis paints a rosy picture about trade liberalization winning the day over protectionism, this is not to suggest that it was all seamless—or that the process is complete. In the early days, Republicans were loudly wary about both delegations to the President and the trade agreements program.⁶⁷ Some Democrats likewise have voiced considerable concern about the impact of trade liberalization on workers and on industry.⁶⁸ These detractions, while important and forceful, have not been substantial enough to call into doubt the broader liberalization agenda that has dominated U.S. trade policy for nearly one hundred years.⁶⁹

But a review of U.S. trade law that lauds the triumph of a free trade agenda over protectionism misses the fact that a different binary quietly emerged: one that separates free trade from economic security, permitting through a back door what appear to some to be dangerous protectionist measures.

B. Emergencies and Exceptions

Alongside these liberalizing delegations that empowered the President to negotiate barriers down, Congress also created exceptional authorities that permit the President to raise barriers up. This Subpart develops a typology for identifying and locating the exceptions and emergency authorities and demonstrates a shared foundation in ideas of economic security across the types.

Upon inspection, two types of these exceptional delegations appear, hiding in plain sight—one group of delegations permits the President to raise tariffs

65. *See id.* at 5-8.

66. *See* JEFFREY J. SCHOTT ET AL., PETERSON INST. FOR INT'L ECON., NO. PB16-8, IMPLICATIONS OF THE TRANS-PACIFIC PARTNERSHIP FOR THE WORLD TRADING SYSTEM 9-11 (2016), <https://perma.cc/TQX3-4LWU>; David A. Gantz, *The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. L. 57, 60 (2016).

67. *See* IRWIN, *supra* note 33, at 431; HENRY J. TASCA, THE RECIPROCAL TRADE POLICY OF THE UNITED STATES: A STUDY IN TRADE PHILOSOPHY 33-38 (1938).

68. These debates continue today, as can be seen in the negotiations of the United States-Mexico-Canada Agreement. *See, e.g.*, William Mauldin, *Trump's New NAFTA Faces Mounting Resistance in Democratic House*, WALL ST. J. (Apr. 28, 2019, 7:42 PM ET), <https://perma.cc/V8C8-UG3L>.

69. I.M. Destler recounts how both parties were able to embrace free trade because, for a critical period, trade was not a major issue in political life. I.M. DESTLER, AMERICAN TRADE POLITICS 30-32 (4th ed. 2005).

on the basis of dangers to “national security” or in the case of a “national emergency,” and another group permits the President to raise tariffs based on criteria related to other nations’ unfair treatment of, restrictions on, threats toward, or discrimination against the U.S. economy. I refer to the former as exceptional delegations with *express* security rationales, or “hard security exceptions,” and the latter as exceptional delegations with *functional* security rationales, or “soft security exceptions.” Taken together, all the exceptions rely on a general concept of U.S. “economic security”—the meaning of which has evolved over time.

Today, the term “economic security” integrates ideas of economic success, dominance, independence, and hegemony that are consistent with the way the term has been used as ideas of security and economic fairness have evolved and become intertwined.⁷⁰ The term captures notions of economic growth and stability, as well as freedom from economic interference by adversaries. But, as a concept, “economic security” belies a precise definition with hard edges that can be clearly identified. The fuzziness in its content reflects the nebulous nature of the statutory exceptions. In the case of the hard security exceptions, often the statutory burden for demonstrating a “security” threat is so low that the actual work that the concept of “security” is doing in this space is considerably limited. Nevertheless, when invoking exceptions of both types, Presidents and their designees regularly speak in terms that reflect ideas of economic security.⁷¹ Congress likewise elaborated on the

70. As early as the 1990s, commentators noted that “the foreign policy establishment has embraced the concept of ‘economic security,’” as seen in the creation of the National Economic Council, an economic counterpart to the National Security Council, and the broader uses of economics and security. *See, e.g.*, Russell Dean Covey, Note, *Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout*, 105 YALE L.J. 1311, 1334 & n.123 (1996). In 2011, the Congressional Research Service pulled these ideas together for members of Congress. *See* DICK K. NANTO, CONG. RESEARCH SERV., R41589, *ECONOMICS AND NATIONAL SECURITY: ISSUES AND IMPLICATIONS FOR U.S. POLICY* 4-24 (2011), <https://perma.cc/A9MC-7EX6>. For a recent iteration, see Aaron Mehta, *Trump's National Security Strategy Unveiled, with Focus on Economics*, DEF. NEWS (Dec. 18, 2017), <https://perma.cc/E8TK-6UL2>. The goal here is to aggregate diverse ideas about “economic security” with the recognition that both words of the term themselves encompass assorted ideas.

71. *See, e.g.*, Isabelle Hoagland, *Lighthizer Clarifies Section 232 “Program” to Probing Senators*, INSIDE U.S. TRADE (July 26, 2018, 4:37 PM), <https://perma.cc/WU5X-FL3L> (“[I]f you decide that you need to protect an industry, you can’t be [in] a position where the protection is of no value [I]f you’ve made a decision that it’s in the national interest to save the steel industry, then you have to put in place a program that actually works” (first alteration in original) (quoting USTR Robert Lighthizer)); Andrew Preston, *President Trump Claims National Security Requires Tariffs. That’s Not as Strange as It Sounds.*, WASH. POST (Aug. 17, 2018, 3:00 AM PDT), <https://perma.cc/8ARX-ZR3Y> (commenting that “national security is about protecting America’s values, morals, culture and economy” and citing President Trump as saying, “[w]e will defend our people, our nations, and our civilization from all who dare to threaten our way of life,”

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purpose of its delegation as being related to a broad umbrella of economic security issues.⁷²

The relationship between free trade and economic security gained renewed popular attention⁷³ with the Trump Administration's imposition of tariffs on imports of steel and aluminum beginning in 2018.⁷⁴ Despite this present attention, the history of trade exceptionalism long precedes recent events. In fact, as the following case studies show, the steel and aluminum tariffs do not represent a new turn in trade as some have suggested, but rather are a recent manifestation of the decades-old codification of security as exceptional.

1. Hard security exceptions

Each of the authorities that I discuss in this Subpart has what I call a "hard security" component. That is, the statutes expressly state that the President may act only if he has identified a threat to the U.S. national security. The case study delegations presented here are the Trading with the Enemy Act (TWEA) and companion International Emergency Economic Powers Act (IEEPA), section 232 of the Trade Expansion Act of 1962, and section 201 of the Trade Act of 1974. I describe them in brief here and return to discuss their complex histories in Part II.

TWEA,⁷⁵ enacted in 1917, gives the President the power to oversee or restrict any and all trade between the United States and its enemies "during the

while noting that "his rhetoric is little different from his predecessors"); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 10, 2017, 2:43 AM), <https://perma.cc/X6WP-YUK2> ("The United States has been reminded time and again in recent years that economic security is not merely RELATED to national security—economic security IS national security. It is vital to our national strength."); Robert D. Williams, *The Commerce Department's Self-Defeating Conception of National Security*, LAWFARE (Feb. 26, 2018, 6:00 PM), <https://perma.cc/5WG2-96WB> (noting that China likewise has expanded its definition of "national security" to include reference to maintaining competitive advantages in critical industries).

72. See *infra* Part II. Members of Congress have also recently placed greater emphasis on these terms. See *Senators Introduce Bipartisan Legislation to Counter International Predatory Economic Practices: Legislation Would Require National Economic Security Strategy to Ensure American Competitiveness*, TODD YOUNG: U.S. SENATOR FOR IND. (Apr. 26, 2018), <https://perma.cc/2N9W-H96T>.

73. See, e.g., *America and China Are in a Proper Trade War*, ECONOMIST (Sept. 20, 2018), <https://perma.cc/Q3YG-37ZF>; Sean Rossman, *What Is a Trade War? And Why Is Trump Targeting China?*, USA TODAY (updated Apr. 6, 2018, 2:08 PM ET), <https://perma.cc/QHQ4-WK6M>; Ana Swanson, *Trump's Trade War with China Is Officially Underway*, N.Y. TIMES (July 5, 2018), <https://perma.cc/M24J-C6WN>.

74. See RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 5-14 (2020), <https://perma.cc/3WEC-J74Q>.

75. Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. §§ 4301-4336, 4338-4341 (2018)).

time of war.”⁷⁶ It was one of twenty-two statutes Congress passed enabling the President to take control of private property for public use during World War I.⁷⁷ Extensive in every respect, TWEA gave the President exceptional control over private international economic transactions. It permitted the President to “investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange . . . by any person within the United States.”⁷⁸ Most of the extensive presidential powers created during the war were repealed by 1921, but TWEA was not.⁷⁹ In 1933, President Franklin D. Roosevelt relied on TWEA to proclaim a bank holiday, suspending all transactions at all banking institutions in the United States for four days,⁸⁰ to “wage a war against the emergency” that was the Great Depression.⁸¹ Given that the United States was not at war, Roosevelt’s invocation of TWEA was likely legally insufficient, but the Congress effectively ratified his actions by passing the Emergency Banking Relief Act three days later, which amended TWEA to be effective “[d]uring time of war or during any other period of national emergency declared by the President.”⁸² This amendment gave the President far-reaching authority to declare a national emergency and then implement restrictions on trade and exchange regardless of the existence of any war. TWEA was then used from the 1930s through the 1960s as a tool for monetary policy and to implement sanctions on foreign adversaries both during and outside of wartime.⁸³

In 1971, President Nixon used TWEA in a new way: to place a 10% ad valorem tariff on all goods entering the United States after he ended the convertibility of the U.S. dollar to gold.⁸⁴ In 1977, in light of this unusual use of

76. First War Powers Act, ch. 593, § 301, 55 Stat. 838, 839-40 (1941) (codified as amended at 50 U.S.C. § 4305(b)(1)(B)) (amending TWEA).

77. See CHRISTOPHER A. CASEY ET AL., CONG. RESEARCH SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 3 (2019), <https://perma.cc/V7T8-CPXE>; J. REUBEN CLARK, JR., EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER, 1917 DEALING WITH THE CONTROL AND TAKING OF PRIVATE PROPERTY FOR THE PUBLIC USE, BENEFIT, OR WELFARE 2, 8, 16, 18, 40 (1918).

78. Trading with the Enemy Act, § 5(b) (codified at 50 U.S.C. § 4305(b)).

79. See L. ELAINE HALCHIN, CONG. RESEARCH SERV., NO. 98-505, NATIONAL EMERGENCY POWERS 5 (2020), <https://perma.cc/HQH5-ZHE9>.

80. Proclamation No. 2039, reprinted in 48 Stat. 1689 (1933).

81. Franklin Delano Roosevelt, Inaugural Address: March 4, 1933, in 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 11, 15 (1938).

82. Emergency Banking Relief Act, ch. 1, § 2, 48 Stat. 1, 1 (1933) (emphasis added).

83. CASEY ET AL., *supra* note 77, at 8.

84. Proclamation No. 4074, 3 C.F.R. 80 (1972); see also *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 567, 570 (C.C.P.A. 1975).

the statute as well as other political factors,⁸⁵ Congress passed IEEPA.⁸⁶ Accompanying legislation reduced the TWEA's authority again to times of war.⁸⁷ At the same time, however, IEEPA recreated TWEA's peacetime authority with more substantive guidance. Then and now, it allows the President to declare "a national emergency" to deal with an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."⁸⁸ Today under IEEPA, the President may

investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation, or exportation of . . . any property in which any foreign country or a national thereof has any interest by any person . . . subject to the jurisdiction of the United States.⁸⁹

Since its inception, IEEPA has been used primarily for the U.S. sanctions program.⁹⁰ In 2019, however, President Trump threatened to use his authority to put tariffs on goods imported from Mexico, citing an immigration emergency on the southern U.S. border.⁹¹ Although, as of May 2020, those tariffs have not been implemented, the announcement prompted a reconsideration of whether Congress intended for the statute to be used in this way.⁹²

Security issues arose in other congressional-executive trade delegations in the 1950s when increasing dependence on foreign oil was perceived to threaten national security.⁹³ Oil and other raw materials were the impetus for what became the "national security import restriction," known colloquially as

85. See H.R. REP. NO. 95-459, at 3-5, 7 (1977) (concluding, after noting the tariff increase, that TWEA had become "an unlimited grant of authority"); H. COMM. ON INT'L RELATIONS, 95TH CONG., REVISION OF TRADING WITH THE ENEMY ACT 3 (Comm. Print 1977).

86. International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626-29 (1977) (codified as amended at 50 U.S.C. §§ 1701-1706 (2018)).

87. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 102, 91 Stat. 1625, 1625 (1977) (codified as amended at 50 U.S.C. § 4305).

88. International Emergency Economic Powers Act § 202(a) (codified at 50 U.S.C. § 1701(a)).

89. 50 U.S.C. § 1702(a)(1)(B).

90. See CASEY ET AL., *supra* note 77, at 25-30; Stephanie Zable, *What Comes After Tariffs: An IEEPA Primer*, LAWFARE (July 19, 2018, 3:12 PM), <https://perma.cc/S76M-A22T>.

91. *Statement from the President Regarding Emergency Measures to Address the Border Crisis*, WHITE HOUSE (May 30, 2019), <https://perma.cc/P2H6-W3FW>.

92. See Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE (June 3, 2019, 4:19 PM), <https://perma.cc/Q3DW-BVPC>.

93. IRWIN, *supra* note 33, at 512, 517.

“Section 232,” in reference to section 232 of the Trade Expansion Act of 1962—the omnibus act that codified the concept.⁹⁴

Section 232 of the Act⁹⁵ allows any public or private actor to request that the Department of Commerce initiate an investigation as to whether an article “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.”⁹⁶ The Department may also initiate an investigation itself.⁹⁷ Where the importation of a product is found to threaten U.S. national security, the President can determine the nature and duration of action that, “in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”⁹⁸ There is no limit in the statute as to what types of tariffs or quotas the President may impose. Section 232 does, however, require that the Secretary of Commerce and the President,

in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements [and] . . . anticipated availabilities of . . . raw materials . . . essential to the national defense . . . In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security . . .⁹⁹

Twenty-four section 232 national security investigations were initiated on or before 1994, one was initiated in 1999 and another in 2001, and then the statute fell into disuse.¹⁰⁰ Across those investigations, the Commerce Department (or Treasury, in the early days) reached negative determinations in

94. See H.R. REP. NO. 84-50, at 29 (1955) (expressing concern over the need to protect “essential” industries “so that the Nation can quickly call upon them in time of emergency”). The House Report states: “Preservation and expansion of domestic sources of essential raw materials are also vital to our Nation’s security. Yet, our capacity to produce coal, oil, lead, zinc, tungsten, manganese, and a variety of other raw materials, has been damaged by imports.” *Id.* at 30; see also S. REP. NO. 84-232, at 4 (1955); Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT’L BUS. L. 235, 241-42 (1990).

95. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862 (2018)).

96. 19 U.S.C. § 1862(b)(1)(A).

97. *Id.*

98. *Id.* § 1862(c)(1)(A)(ii).

99. *Id.* § 1862(d).

100. See BUREAU OF INDUS. & SEC., U.S. DEP’T OF COMMERCE, SECTION 232 INVESTIGATIONS PROGRAM GUIDE: THE EFFECTS OF IMPORTS ON THE NATIONAL SECURITY 13-20 (2007); FEFER ET AL., *supra* note 74, at 3-4, app. B-1 (detailing past section 232 investigations and actions taken by Presidents).

sixteen instances.¹⁰¹ Presidents chose to take action on five occasions—all of which were related to petroleum products or crude oil.¹⁰² Since the start of the Trump Administration, the Commerce Department has undertaken five section 232 investigations.¹⁰³ In 2018, following an investigation by the Commerce Department in which the Department concluded that imports of steel and aluminum posed a threat to national security, President Trump declared that the United States was overly dependent on such imports, as they were “essential for key military and commercial systems.”¹⁰⁴ The President imposed tariffs on both products.¹⁰⁵ He later deferred action on two additional recommendations from the Commerce Department regarding threats to national security posed by the importation of automobiles and auto parts and by certain imports of uranium.¹⁰⁶

Another provision with a hard security rationale is the safeguards provision in section 201 of the Trade Act of 1974.¹⁰⁷ Safeguards are temporary tariff measures intended to help a U.S. industry cope in the face of a sudden and unexpected surge in imports of a particular product.¹⁰⁸ The language of that statute authorizes the President to take action where the U.S. International Trade Commission (ITC), an independent agency, concludes after an investigation that the sudden increase in imports of a particular product is a “substantial cause of serious injury, or the threat thereof, to the domestic industry.”¹⁰⁹ The President may then take “all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry

101. FEFER ET AL., *supra* note 74, at 3-4, app. B-1. One was terminated before reaching any decision. *Id.* at app. B-1.

102. Of these five decisions to take action, two were embargoes on oil from Iran and Libya, in 1979 and 1982 respectively. *Id.* at 3. In one instance, instead of taking action on the section 232 recommendation, the President deferred a formal decision and pursued voluntary restraint agreements. *Id.* at app. B-1.

103. *Id.* at app. B-1.

104. Donald J. Trump, Proclamation No. 9704, 3 C.F.R. 39 (2019) (quoting the Secretary of Commerce).

105. FEFER ET AL., *supra* note 74, at app. B-1.

106. See RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., IF10971, SECTION 232 AUTO INVESTIGATION 1 (2020), <https://perma.cc/ZE9A-8G8P>; Brett Fortnam, *Trump Sets Six-Month Deadline to Negotiate Auto Deal with EU, Japan*, INSIDE U.S. TRADE (May 17, 2019, 10:43 AM), <https://perma.cc/8LZM-EBGN>; Donald J. Trump, *Memorandum on the Effect of Uranium Imports on the National Security and Establishment of the United States Nuclear Fuel Working Group*, WHITE HOUSE (July 12, 2019), <https://perma.cc/68PS-79WF>.

107. Trade Act of 1974, Pub. L. No. 93-618, § 201, 88 Stat. 1978, 2011-14 (1975) (codified as amended at 19 U.S.C. § 2251 (2018)).

108. *Safeguard Actions*, OFF. U.S. TRADE REPRESENTATIVE, <https://perma.cc/GA2D-E5JJ> (archived May 25, 2020).

109. 19 U.S.C. § 2251(a).

to make a positive adjustment to import competition.”¹¹⁰ In considering what action to take among all his powers, the statute directs the President to take into account “the national security interests of the United States” along with “other factors related to the national economic interest of the United States.”¹¹¹ Thus, this statute likewise allows the President to raise tariffs on goods, or otherwise take action in the interest of economic security where an industry faces serious injury.

Between 1975 and 2001, the ITC conducted seventy-three section 201 investigations.¹¹² In twenty-six instances, Presidents acted on the ITC’s positive determination that imports were a threat to domestic industry by implementing tariff increases or another type of trade restriction.¹¹³ No new section 201 investigations were initiated between 2001 and the start of the Trump Administration, however.¹¹⁴ On January 23, 2018, following two ITC investigations, President Trump announced that he would impose section 201 tariffs on imports of large residential washing machines and solar silicon photovoltaic cells and modules.¹¹⁵ Between that announcement and February 2019, these tariffs and tariff-rate quotas were applied to approximately \$7.1 billion worth of imported goods.¹¹⁶

2. Soft security exceptions

In contrast with the express security-focused statutes, U.S. trade law features several statutes that delegate tariff-raising authority to the President when the U.S. economy is burdened or restricted by the behavior of a U.S. trading partner. Although these statutes do not have an explicit security premise, they nevertheless serve the same function by permitting the President to raise tariffs when he perceives a threat to U.S. commerce. Given the way that Presidents and their designees have interpreted the open-ended delegation

110. *Id.*

111. *Id.* § 2253(a)(2)(F), (I).

112. BROCK R. WILLIAMS ET AL., CONG. RESEARCH SERV., R45529, TRUMP ADMINISTRATION TARIFF ACTIONS (SECTIONS 201, 232, AND 301): FREQUENTLY ASKED QUESTIONS 9 (2019), <https://perma.cc/UY5C-2CU8>.

113. *Id.* The ITC reached negative determinations in thirty-three cases and Presidents chose not to act in fourteen others. VIVIAN C. JONES, CONG. RESEARCH SERV., IF10786, SAFEGUARDS: SECTION 201 OF THE TRADE ACT OF 1974, at 2 (2018), <https://perma.cc/H747-BBU4>.

114. WILLIAMS ET AL., *supra* note 112, at 9. This may have been because in 2003, dispute settlement proceedings at the WTO led to the conclusion that President Bush’s quotas and tariff increases on steel imports were inconsistent with the United States’s WTO obligations (after which President Bush terminated the action). *See id.*

115. JONES, *supra* note 113, at 1.

116. *See* WILLIAMS ET AL., *supra* note 112, at 3.

to determine whether there is a commercial threat or burden to the United States, the broad umbrella term of “economic security” equally applies to the deployment of these exceptions to raise tariffs.¹¹⁷ Even leaders from the defense community have appropriated the functional security exceptions, what I call here “soft security exceptions,” as fitting tools for addressing adversaries and allowing the United States to “stick up for” itself.¹¹⁸

One such statutory provision, section 301 of the Trade Act of 1974,¹¹⁹ requires the USTR, upon finding that “(1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and (2) action by the United States is appropriate,”¹²⁰ to

take all appropriate and feasible action authorized under subsection (c) . . . and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.¹²¹

The statute authorizes the USTR to suspend trade concessions, impose duties or other import restrictions, enter into a binding agreement with the country in question, or take other action at the direction of the President.¹²²

117. For a list of some of the ways President Trump has used the term, see note 71 above. *See also* Isabelle Hoagland, *Ross: EU Should Emulate China and Negotiate with U.S. if 232 Tariffs Are Imposed*, INSIDE TRADE (May 30, 2018, 9:57 AM), <https://perma.cc/3TSH-LHZ9> (“[Section 232] isn’t by any means confined strictly to military applications. . . . It’s obviously mainly not a direct military thing but infrastructure and the economy are what gives you military security” (quoting U.S. Secretary of Commerce Wilbur Ross)). The use of soft security exceptions to address Chinese intellectual property practices and the use of a hard security exception to address global steel production contribute to the perception that what were thought of as traditional *commercial* tools are being used for *national security* threats and what were thought of as national security tools are being used for commercial threats. Trump’s USTR, Robert Lighthizer, mixes and matches, for example, by referring to the action against China under section 301, a traditional economic tool, as supporting U.S. economic security. *See U.S.-China Trade: Hearing Before the H. Comm. on Ways and Means*, 116th Cong. 6 (2019) (statement of Robert E. Lighthizer, U.S. Trade Rep.) (noting that President Trump directed the Office of the USTR to conduct a study under section 301 as part of a program to “defend our workers, farmers, and ranchers and our economic system”).

118. *See A Conversation with Ash Carter*, COUNCIL ON FOREIGN REL. (July 9, 2019), <https://perma.cc/9FVT-Y3WL> [hereinafter Carter Interview].

119. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43 (1975) (codified as amended at 19 U.S.C. § 2411 (2018)).

120. 19 U.S.C. § 2411(b).

121. *Id.*

122. *Id.* § 2411(b)-(c).

Section 301 has been invoked over one hundred times in its history and, according to certain experts, has effectively discouraged breaches of international trade law or served as a deterrent for problematic trade behavior by U.S. trading partners.¹²³ Historically, most applications of the statute have been triggered primarily by industry (rather than by self-petition by the government),¹²⁴ and of the more than one hundred petitions, the USTR implemented trade restrictions in only sixteen prior to 2018.¹²⁵ In 2018, the USTR concluded, following an investigation, that China had engaged in acts, policies, or practices related to technology transfer, intellectual property, and innovation that are unreasonable or discriminatory and that burden or restrict U.S. commerce.¹²⁶ Acting on this conclusion, the President issued proclamations directing the USTR to implement tariffs on a wide range of products imported into the United States from China.¹²⁷ Considering the scope of affected products, this application of section 301 is by far the most momentous.

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123. See WILLIAMS ET AL., *supra* note 112, at 9; Warren Maruyama, *Section 301 and the Appearance of Unilateralism*, 11 MICH. J. INT'L L. 394, 397-400 (1990); Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263, 274 (1992) (discussing a theoretical analysis of unilateral sanctions); see also A. Lynne Puckett & William L. Reynolds, *Current Development, Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?*, 90 AM. J. INT'L L. 675, 675 (1996). Any interested individual may file a petition requesting that action be taken under section 301. 19 U.S.C. § 2412(a); see also Judith Hippler Bello & Alan F. Holmer, *Current Development, Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT'L LAW. 211, 213 (1987).
124. See U.S. Trade Representative, *List of Section 301 Enforcement Petitions* (n.d.), <https://perma.cc/DZL5-YE6P>.
125. See WILLIAMS ET AL., *supra* note 112, at 9; Judith Hippler Bello & Alan F. Holmer, *Section 301 Recent Developments and Proposed Amendments*, 35 FED. B. NEWS & J. 68, 68-70 (1988) (describing section 301 and illustrating some of its uses in the 1980s). As with section 201, section 301 fell out of favor after the establishment of the WTO and after a WTO case between the European Communities (EC) and the United States highlighted an ongoing controversy about its consistency with the multilateral rules. See, e.g., Seung Wha Chang, *Taming Unilateralism Under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Sections 301-310 of the Trade Act of 1974*, 31 LAW & POL'Y INT'L BUS. 1151, 1153-55 (2000); Kathleen Claussen, *Can International Trade Law Recover? Forgotten Statutes: Trade Law's Domestic (Re)turn*, 113 AM. J. INT'L L. UNBOUND 40, 41-42 (2019); John Gero & Kathleen Lannan, *Trade and Innovation: Unilateralism v. Multilateralism*, 21 CAN.-U.S. L.J. 81, 81-82 (1995); Marjorie A. Minkler, Note, *The Omnibus Trade Act of 1988, Section 301: A Permissible Enforcement Mechanism or A Violation of the United States' Obligations Under International Law?*, 11 J.L. & COM. 283, 283 (1992).
126. *Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 13,099, 13,099-100 (Mar. 27, 2018); see also *USTR Updates Section 301 Investigation*, OFF. U.S. TRADE REPRESENTATIVE (Nov. 20, 2018), <https://perma.cc/KX8X-J8W5>.
127. WAYNE M. MORRISON, CONG. RESEARCH SERV., *IF10708, ENFORCING U.S. TRADE LAWS: SECTION 301 AND CHINA 2* (2019), <https://perma.cc/CX8K-MGTB>.

Another soft security exception with a less well-known pedigree is section 338 of the Tariff Act of 1930.¹²⁸ That section authorizes the President to impose “new or additional duties” where the President finds that a country discriminates against U.S. commerce “in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.”¹²⁹ The President can also authorize exclusion of articles if the country in question maintains the discriminatory practice.¹³⁰ Although section 338 has not been used to impose tariffs on other countries, its use was threatened repeatedly in foreign policy exchanges in the mid-twentieth century.¹³¹ Today, it rarely comes up in trade policy discussions or scholarship,¹³² although it remains available to the President. Certain other specialized exceptions with soft security rationales likewise can be found throughout the broader trade apparatus, such as those authorizing the President to act in case of currency emergencies¹³³ or agricultural necessity.¹³⁴

* * *

This structural rendering as characterized by exceptions does not capture perfectly all the nuance, political maneuverings, or external economic or socioeconomic forces pushing and pulling on trade law. Generalizing in this way has limitations, as any theoretical model or structural assessment would. Not reflected here are the intentionality, agency, and political influences that likewise matter in trade law and policy. Nevertheless, uncovering this structure provides a heuristic from which trade experts, practitioners, and policymakers can learn and engage and which I take up in Part III below. It sheds light on longstanding debates in trade law and beyond, including with respect to the separation of powers, as taken up in the next Subpart.

128. Tariff Act of 1930, ch. 497, § 338, 46 Stat. 590, 704-06 (codified at 19 U.S.C. § 1338).

129. *Id.* § 338(a) (codified at 19 U.S.C. § 1338(a)).

130. *Id.* § 338(b) (codified at 19 U.S.C. § 1338(b)).

131. John K. Veroneau & Catherine H. Gibson, Note, *Presidential Tariff Authority*, 111 AM. J. INT'L L. 957, 958 (2017). This authority was used against Germany and Australia during the interwar period. Benjamin H. Williams, *The Coming of Economic Sanctions into American Practice*, 37 AM. J. INT'L L. 386, 389 & n.3 (1943).

132. A Westlaw search of sources citing 19 U.S.C. § 1338 (under “Citing References,” filtered to “Secondary Sources,” and then filtered to “Law Reviews”) on May 10, 2020, yielded only fourteen law review articles citing section 338.

133. *See* Trade Act of 1974, Pub. L. No. 93-618, § 122(a)(2), 88 Stat. 1978, 1987 (1975) (codified at 19 U.S.C. § 2132(a)(2)).

134. *See* Agricultural Act of 1956, ch. 327, § 204, 70 Stat. 188, 200 (codified as amended at 7 U.S.C. § 1854 (2018)); Agricultural Adjustment Act of 1933, ch. 25, § 2, 48 Stat. 31, 32 (codified as amended at 7 U.S.C. § 602).

C. Divergence in Delegation Disciplines

Examining trade law through this structural lens also illuminates a serious disparity in the level of congressional control over its delegations, which is another core point of this Article. When comparing the two groups of delegations, congressional review over delegations related to economic security is generally far less intensive than it is with those related to trade liberalization. Congress uses different “trade delegation disciplines,” as I term them, with respect to one type of delegation versus the other, making the exceptional delegations procedurally as well as substantively distinct.¹³⁵ This divergence in oversight reinforces the perception that free trade and economic security are in contrast.

Congress typically has engaged one or more of four principal trade delegation disciplines. They map onto a spectrum of stringency and constraint. What is most noticeable is that the free trade norm is usually subject to the most stringent congressional review while the exceptions are subject to decreasing scrutiny. A number of practical implications flow from each approach.

The first trade delegation discipline regularly used by Congress is to make the President’s trade action subject to congressional direction prior to, during, or after the implementation of the President’s action. Direct congressional controls of this type can take a number of different forms. The most important is TPA/fast track control used in the free trade delegation for negotiating trade agreements. Under TPA/fast track in its current form, the President is required to consult regularly with Congress and eventually to present to Congress an implementing bill for the resulting trade agreement.¹³⁶ Congress votes on the agreement without any opportunity for amendment to the agreement itself.¹³⁷ In recent years, Congress has required extensive executive reporting and other forms of engagement prior to its legislative implementation of a free trade agreement.¹³⁸ In fact, as I have written in prior work, when granting the President authority to negotiate trade agreements, Congress puts considerable constraints on the President and requires multiple presidential engagements with Congress throughout the negotiation process.¹³⁹ Those constraints have

135. Writing in 1986, Harold Koh analyzed various “congressional controls on presidential trade policymaking,” and examined the importance of the legislative veto as a mechanism through which Congress could influence and oversee executive trade policy. Koh, *supra* note 18, at 1191. I build on this valuable work here in light of changes in trade law practice over the last thirty years. I use the word “discipline” to convey a system of rules of conduct with connotations of controlled behavior.

136. 19 U.S.C. § 4203.

137. *Id.* § 4202(b)(3).

138. *Id.* §§ 4203-4204.

139. *See* Claussen, *supra* note 18, at 336-38.

increased in each of the omnibus acts since the 1970s.¹⁴⁰ As the President started to engage in larger and more extensive trade agreements, Congress sought to reel in that activity with specific and binding speedbumps—procedural demands that allowed Congress to impress upon the President its preferences and direct the President where members had concerns.¹⁴¹ Some of these procedures included increased consultation through hearings, the creation of new offices for reporting purposes, obligatory reports to relevant committees, and express timelines.¹⁴² Ultimately, and most significantly in terms of discipline, Congress maintains the final vote on whether a trade agreement negotiated by the President and his designees will be implemented into U.S. law.¹⁴³

A further stringent trade delegation discipline that once figured prominently in both the free trade delegations and the economic security delegations has been erased from the law books. In 1983, the Supreme Court dealt Congress a significant setback in its trade management system with *INS v. Chadha*.¹⁴⁴ That decision concluded that legislative vetoes—one of Congress's "favorite administrative control device[s]"¹⁴⁵—were unconstitutional.¹⁴⁶ At the time, legislative vetoes were baked into several trade statutes and acted as a backstop against presidential action.¹⁴⁷ Writing shortly after *Chadha*, Harold Koh argued that despite the decision, but also partially because of it, Congress remained heavily involved in managing presidential trade action, for example, by voting on free trade agreements.¹⁴⁸ Although Congress did maintain the last

140. *Id.*

141. *Id.* One notable exception to this trend is the delegation to the President to enter into agreements that concern only tariff barriers. See 19 U.S.C. § 4202(a). There, Congress has remained detached, which may suggest that it is the nontariff barriers of free trade agreements, rather than just the fact of liberalization, that are motivating the increased oversight. The tariff barrier delegation is so rarely used that it has not played a significant role in trade lawmaking at least prior to the Trump Administration, but it presents a distinction worth acknowledging. As I show below in Part II, though, this delegation from which many of the liberalizing delegations have sprouted is ironically rooted in a security premise.

142. See 19 U.S.C. § 4204.

143. *Id.* § 4205.

144. 462 U.S. 919 (1983).

145. Koh, *supra* note 18, at 1210.

146. *Chadha*, 462 U.S. at 959. A legislative veto is an action with legislative effect but not accomplished through legislation and not requiring the President's signature. It is either a simple resolution, accomplished through the majority vote of only one house, or a concurrent resolution, accomplished through a vote of both houses, that nonetheless alters or overrides completed executive action—in effect, vetoing an act of the executive. See Koh, *supra* note 18, at 1196 n.16.

147. Koh, *supra* note 18, at 1196-1208.

148. *Id.* at 1210.

word with respect to the implementation of trade agreements, Congress lost its final oversight opportunity over the economic security delegations. That left Congress with authorizations to the President to raise tariffs on the books, but without ability to monitor or disallow any action the President would take. Congress's other trade delegation disciplines provide far less supervision and it is these that apply to the exceptions.

A second actively used trade delegation discipline is to make executive action contingent on the findings of the ITC. In fact, the ITC's role is broader: Congress has often granted authority to the ITC, an independent agency, to carry out an investigation or conduct research into a question.¹⁴⁹ Sometimes the ITC will provide reporting to Congress and sometimes to the President, or Congress will empower the ITC to take direct action without any political interference. For example, with respect to section 337 of the Tariff Act of 1930,¹⁵⁰ an authority similar to section 338, the ITC may impose penalties where it makes an affirmative determination about another country's trading practice.¹⁵¹ In other instances, Congress has created a process shared between the ITC and the Commerce Department. For example, in antidumping matters, both agencies must reach an affirmative decision before action is taken.¹⁵² In the case of section 338, the ITC provides information to the President that he can accept or reject in making his decision.¹⁵³

A third discipline is to give authority over tariff management to an executive branch agency such as USTR or the Commerce Department. These delegations follow a typical pattern: They provide that the President may take action "whenever," following the determination of an agency, he finds that the circumstances are warranted.¹⁵⁴ The agency factfinding is often within the

149. For a description of the ITC's activities, see *About the USITC*, U.S. INT'L TRADE COMMISSION, <https://perma.cc/J3UC-87U8> (archived Apr. 6, 2020).

150. Ch. 497, § 337, 46 Stat. 590, 703 (codified at 19 U.S.C. § 1337 (2018)).

151. Unfair competition under section 337 is one such area that is investigated by the ITC with evidentiary hearings held before an administrative law judge. See *Understanding Investigations of Intellectual Property Infringement and Other Unfair Trade Practices in Import Trade (Section 337)*, U.S. INT'L TRADE COMMISSION, <https://perma.cc/LW5U-HX4E> (archived Apr. 6, 2020).

152. See VIVIAN C. JONES & CHRISTOPHER A. CASEY, CONG. RESEARCH SERV., IF10018, TRADE REMEDIES: ANTIDUMPING AND COUNTERVAILING DUTIES 1 (2019), <https://perma.cc/N57S-AQ4R>.

153. See 19 U.S.C. § 1338(a), (g). The statute is ambiguous as to whether the President could make the factual finding on his own without any determination by the ITC. See Veroneau & Gibson, *supra* note 131, at 959. Section 201 of the Trade Act of 1974 is somewhere between an ITC contingency and an executive branch agency delegation in that it gives the ITC investigating authority, but action is then taken at the discretion of the President. For an overview, see generally JONES, *supra* note 113.

154. See, e.g., Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43 (1975) (codified as amended at 19 U.S.C. § 2411); Trade Expansion Act of 1962, Pub. L. No. 87-
footnote continued on next page

agency's control, and thus, although managed by civil servants, is highly subject to political overtones. Having agencies as custodians of process provides some distance from the White House, but only so much given that the heads of these agencies are political appointees shaping policy for the President. Nearly all the major trade acts in the second half of the twentieth century established these processes, including those for several of the exceptions discussed in this Article.¹⁵⁵ In the early 1990s, commentators noted with concern that under these conditions, a President could use a statute like section 301 opportunistically or imprudently.¹⁵⁶ Despite these apprehensions, no additional oversight mechanisms were added at that time.¹⁵⁷ Similarly, although section 232 requires an investigation, and that the work be carried out by an executive agency, not the President, the President can disregard the recommendation of the agency and impose tariffs anyway.¹⁵⁸ Further, in this configuration, the President's decision is subject to very limited judicial review. Stopping presidential

794, § 232, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862); Tariff Act of 1930, § 337 (codified at 19 U.S.C. § 1337). Some have said that the statutory language still permits action against “virtually any trade practice the USTR wishes to attack.” Sykes, *supra* note 123, at 305-06. Despite the capaciousness in the overall delegations, Congress has added certain procedural constraints, particularly on section 232 in the years following its original enactment. Some of those procedural constraints have been noted by the Court of International Trade in recent months. *See, e.g.*, *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1275-76 (Ct. Int'l Trade 2019); *see also infra* note 167.

155. *See, e.g.*, sources cited *supra* note 154.

156. *See, e.g.*, Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 113, 122 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (asserting that one needs a diagram to trace all the authorities of section 301, a section that makes up an “intricate maze” with “extremely wide loopholes”); Sykes, *supra* note 123, at 306.

157. The statute received technical amendments in later years, but those had no bearing on the scope of the delegation. *See* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, §§ 602(b)(1), 607, 130 Stat. 122, 184, 189 (2016) (codified at 19 U.S.C. § 2411); Miscellaneous Trade and Technical Corrections Act of 1996, Pub. L. No. 104-295, § 20(c)(4), 110 Stat. 3514, 3528 (codified as amended at 19 U.S.C. § 2411); Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 314(a)-(c), 621(a)(9), 108 Stat. 4809, 4939-40, 4993 (1994) (codified as amended at 19 U.S.C. § 2411). Originally section 301 was an authority delegated to the President. Trade Act of 1974 § 301. In the 1980s, the investigative power shifted to the USTR and with that some discretionary provisions were added. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1164-76.

158. *See* David Scott Nance & Jessica Wasserman, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. INT'L L. 926, 932-35 (1990) (explaining in detail the Commerce Department's process under section 232). Despite this presidential discretion, Congress did, in the first decades of section 232's existence, add certain procedural disciplines that should not be discounted. *See supra* note 154; *infra* text accompanying note 221. They are limited, however, by the program's limited transparency.

action, apart from procedural irregularities, likely would require a change to the law or a judicial decision either that the underlying exception is unconstitutional or that the President has exceeded the bounds of the delegation—approaches courts have yet to embrace.¹⁵⁹

Fourth, with respect to certain exceptions, Congress sometimes delegates exceptional trade authority directly to the President with little to no procedural check or control.¹⁶⁰ This type of blank check is perhaps most easily seen in IEEPA. Recall that IEEPA allows the President to declare a national emergency at his sole discretion and to subsequently take a wide range of actions.¹⁶¹ The primary oversight mechanism used by Congress in IEEPA is to require the President to consult with Congress, including through follow-up reports, prior to acting.¹⁶² Emergencies also automatically expire after one year unless the President notifies Congress of a renewal.¹⁶³ Otherwise, the President is free to act unchecked.

Finally, although the President's actions under any of the hard or soft security exceptions could be subject to international review at the World Trade Organization (WTO), the United States could claim, and recently has claimed, that its actions are protected by the WTO's own security exception discussed below in Part II.¹⁶⁴ As a result, institutional scrutiny in Geneva poses

159. *See, e.g.*, *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976) (holding that section 232 “easily fulfills the “intelligible principle” test set out in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), and that there was “no looming problem of improper delegation”). However, a new nondelegation challenge is now underway. *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1344-45 (Ct. Int'l Trade 2019) (finding that the court was bound to uphold the delegation because of precedent), *aff'd*, No. 2019-1727, 2020 WL 967925 (Fed. Cir. Feb. 28, 2020), *petition for cert. filed*, No. 19-1177 (U.S. Mar. 27, 2020); *see also* *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 582-84 (C.C.P.A. 1975) (finding that Congress's delegation in the Trading with the Enemy Act was not an unconstitutional one).

160. *See, e.g.*, *International Emergency Economic Powers Act*, 50 U.S.C. §§ 1701-1707 (2018). Josh Chafetz has rightly argued that the President is nevertheless always subject to at least some check even if unseen or subjective, political, or reputational. *See* JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS*, 45-77, 201-31 (2017) (referring to hard tools like appropriations and soft tools like speech).

161. *See supra* Part I.B.1.

162. 50 U.S.C. § 1703.

163. *Id.* § 1622(d). An emergency can be terminated through a joint resolution as well, but as a joint resolution is signed into law by the President, Congress could end an emergency declared by the President contrary to the President's position only by overriding a veto. *Id.* § 1622(c).

164. In fact, the United States has used other countries' retaliation against its security-premised tariffs as justification for offensive dispute settlement proceedings at the WTO. *See, e.g.*, Jack Caporal, *U.S. Initiates WTO Disputes over Retaliation to Section 232 Tariffs*, *INSIDE U.S. TRADE* (July 19, 2018, 4:29 PM), <https://perma.cc/X9CF-PZ6M>.

little threat of meaningful discipline over the President's actions.¹⁶⁵ The U.S. courts have likewise upheld broad-reaching presidential trade action.¹⁶⁶

In sum, Congress has almost exclusively increased its control over the President in the negotiation of free trade agreements, while using far less intense delegation disciplines with respect to the exceptions, in part as a result of the Supreme Court's action against the legislative veto in *Chadha*. Since the late 1980s, little legislative action has been undertaken to significantly alter the disciplines that oversee executive application of the powerful exceptional delegations.¹⁶⁷

II. Assessing Exceptionalism in Theory and in Practice

How does U.S. trade law's exceptionalist structure influence the shape of our trade policy? As others have noted, institutional structure shapes decisionmaking.¹⁶⁸ But, given the absence of scholarly discussion of this modeling of U.S. trade law, we still lack clear assessments of its efficacy. Legal exceptionalism, as I use the term, is undertheorized and underdeveloped across issue areas, despite the fact that exceptions are abundant in U.S. law.¹⁶⁹ The same is true in international law: Many international obligations are subject to

165. See Kathleen Claussen, *Trade War Battles: The International Front*, LAWFARE (July 27, 2018, 11:16 AM), <https://perma.cc/JG84-H76N> (listing several dispute settlement requests brought by the United States against trading partners at the WTO).

166. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 684-88 (1981) (upholding executive orders under IEEPA to suspend claims of American nationals against Iran); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 570-71 (1976) (holding that imposing a system of monetary exactions in the form of license fees was a valid exercise of the President's delegated authority under section 232 of the Trade Expansion Act of 1962); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 412-13 (1928) (upholding the delegation to the President of the authority to make tariff adjustments, used here to levy a tariff on imported barium oxide in excess of that set by statute, under the Tariff Act of 1922); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 690-92 (1892) (upholding the President's exercise of authority delegated to him under the Tariff Act of 1890 and the delegation itself); *U.S. Cane Sugar Refiners' Ass'n v. Block*, 683 F.2d 399, 404-05 (C.C.P.A. 1982) (upholding the President's proclamation on tariffs as a valid exercise of delegated authority); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 580-84 (C.C.P.A. 1975) (upholding the constitutionality of a presidential proclamation made under TWEA).

167. There has been some movement among agencies and some limited enhanced procedural mechanisms like the imposition of timelines. See, e.g., Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, sec. 1301(a), § 304(a)(2)-(4), 102 Stat. 1107, 1170-72 (codified as amended at 19 U.S.C. § 2414 (2018)); *id.* sec. 1501, 102 Stat. at 1257-60 (codified at 19 U.S.C. § 1862).

168. For an example relevant to this study, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2341-42 (2001).

169. Exceptionally, see Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 871-72 (1991).

exceptions,¹⁷⁰ although, despite their ubiquity, there is no systematic study of exceptions in international law. There are likewise no up-to-date scholarly accounts that seek to theorize U.S. trade law or understand its structure.

This Part seeks to start to fill these gaps by developing a positive theory of trade's security exceptionalism. It also considers under what circumstances trade exceptionalism may be useful and when it may not. In so doing, this Part addresses the payoffs of the exceptionalist approach as compared to alternative visions for managing free trade and economic security. We may not be able to identify a single best institutional framework for achieving economic security goals while furthering free trade norms, but we can evaluate the statutory structure brought to light in Part I against other options.

A fundamental difficulty of such an assessment is the mixed narrative about what the exceptions seek to achieve and what they have achieved in practice. From one perspective, giving the President special permission to depart from a primary norm in case of security presumes that security is not part of the primary norm or that the primary norm cannot accommodate security needs. As this Part shows, the story is more complicated than that: Not only is the history of the codified exceptions itself muddled, but also the leading contributions in political science and in history discredit the perception that free trade and economic security authorities are, were intended to be, or ought to be in opposition.

In addition, examining the efficacy of an exceptionalist approach to managing trade and economic security is still more challenging in light of the diverse ways and contexts in which exceptions may be and have been deployed. This is not an extensive survey of applications. While numerous examples exist in which exceptions have been used, the reasons for a particular outcome may nonetheless be overdetermined. Regardless, it is possible to deduce from an understanding of the inner workings of trade law how the *availability* of the exceptions may have an impact on internal levers of decisionmaking, and thus the influence the exceptions are likely to exert. This Part considers especially whether explanations consistent with certain leading analytical theories help explain the advantages of and justifications for trade exceptionalism.

170. Scholars have studied these individually at length. *See, e.g.*, Daniel P. King, *The Political Offence Exception in International Extradition*, 13 COMP. & INT'L L.J. S. AFR. 247, 248 (1980); Joyiyoti Misra & Roman Jordans, *Confidentiality in International Arbitration: An Introspection of the Public Interest Exception*, 23 J. INT'L ARB. 39, 40-42 (2006); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 508 (1999); Donald N. Zillman, *Energy Trade and the National Security Exception to the GATT*, 12 J. ENERGY & NAT. RESOURCES L. 117, 117-19 (1994).

A. The Efficacy of Exceptionalism: Possible Theories

Having separate tracks of delegations to the President for free trade and for economic security could promote both free trade and economic security in certain scenarios. For example, an open economy politics (OEP) justification of trade exceptionalism could entail a protectionist Congress tying its hands by delegating powers to a President who is assumed, by virtue of his nationwide constituency and responsibility for U.S. trade diplomacy, to be less prone to protectionist temptation, and hence less prone to abuse the exceptions.¹⁷¹ Further, OEP theory would suggest that, when it comes to security, Congress may find that the President is in the best position to assess such issues. Because of the President's security-related expertise, he can act quickly—quicker than Congress—to address threats of which he is uniquely aware. This theory would help explain why Congress delegates to the President on both the free trade track and on the exception track. It provides a rationale for giving the President full control over tariff authority.¹⁷²

In international diplomacy, it may be to the national advantage to have a tool such as tariffs in the President's foreign policy arsenal to give the President credibility and leverage in conversations with adversaries. The exceptions relax strict legal controls to enable the President to respond to external threats. They are necessarily left open ended given the potential scope of unknowable threats. Congress may wish to allow the President to be able to use tariffs as a

171. See KENNETH W. DAM, *THE RULES OF THE GLOBAL GAME: A NEW LOOK AT U.S. INTERNATIONAL ECONOMIC POLICYMAKING* 40-47 (2001) (observing how removing power from Congress made trade liberalization possible); see also DESTLER, *supra* note 69, at 14 (arguing that members of Congress delegated authority to “protect[] themselves[] from the direct, one-sided pressure from producer interests that had led them to make bad trade law”). *But see* Michael J. Hiscox, *The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization*, 53 INT'L ORG. 669, 677 (1999) (arguing that the idea that “any president, by dint of having a larger constituency, must be less protectionist than the median member of Congress, is hopelessly ahistorical”).

OEP emerged out of the school of international political economy in the late 1990s. See David A. Lake, *Open Economy Politics: A Critical Review*, 4 REV. INT'L ORG. 219, 224-25 (2009); Thomas Oatley, *Open Economy Politics and Trade Policy*, 24 REV. INT'L POL. ECON. 699, 699-700 (2017). OEP adopts assumptions of neoclassical economics and seeks to provide a bridge between economics and political science—making it a ripe theory for understanding U.S. trade law. Central to OEP theory is conceiving of political institutions as entities of aggregate interests, taking those interests as fundamental building blocks to how policies are formed. Lake, *supra*, at 224-25.

Economists have also examined the roles of special interest groups in the trade lawmaking and policymaking spaces. Most notably, Gene Grossman and Elhanan Helpman's work in the mid-1990s provided a foundation for understanding how the branches work together with industry and their lobbies. See Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833, 834-35 (1994).

172. *But see* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1248 (2006) (criticizing the OEP view as lacking support).

stick with competitors to indicate that they could face economic injury should they not comply with U.S. demands. From this perspective, such a structure may give the United States a method to make real-time adjustments that motivate trading partners to comply with international rules.

It could be, likewise, that economic security exceptions are necessary, if not advantageous, for getting buy-in from the executive to administer trade policy. Congress may find it useful to delegate some security-premised authority to the President as a way of managing the relationship between the legislative and executive branches in a delicate and politically sensitive area. By regulating economic security, Congress maintains some degree of control where the absence of any escape ramp could be seen to push the President to undertake extralegal tools in his capacity as commander in chief.

This view is consistent with rational design theories that are prevalent in international relations, where security exceptions have been studied extensively.¹⁷³ There, the conventional wisdom is that exceptions, including in international trade,¹⁷⁴ allow states to sign on to international agreements secure in the knowledge that unexpected developments of adverse rulings will not pose unacceptable shocks to their vital interests.¹⁷⁵ At the international level, the primary exception of relevance to this work is Article XXI of the General Agreement on Tariffs and Trade (GATT), finalized in 1947.¹⁷⁶ The original twenty-three contracting parties to GATT agreed to a baseline of tariff concessions and rules designed to prevent these concessions from being frustrated by individual members' inclination toward protectionist measures.

173. See, e.g., Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 699-700; Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 426 (2001); Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 560 (1991).

174. See Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 282 (1991) (arguing that the purpose of safeguard authority is to permit officials to "escape" from tariff concessions when the "political gains to officials in the importing country 'outweigh' the costs to the officials in the exporting country").

175. See Alford, *supra* note 173, at 702; Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 658-59 (2006) (discussing how overly capacious flexibility provisions may engender opportunistic behavior).

176. GATT, *supra* note 16, art. XXI, 61 Stat. A63, 55 U.N.T.S. 266. The United States was the primary advocate for the national security exception, as it would come to be known, in the course of the negotiations of the Havana Charter, the precursor agreement to the GATT that was intended to establish the ultimately failed International Trade Organization. See Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT'L L. 109, 118, 129 (2020).

Article XXI, drafted by the United States, codified a security justification for departure from the rules under broad, even if enumerated, circumstances.¹⁷⁷

Rational design theorists assert that this exception was added because it was the best way to get states to agree, notwithstanding their reluctance about international institutions and their desire to maintain their sovereignty.¹⁷⁸ Under a rational design view, exceptions are necessary as a sort of safety valve to avoid exit from the regime.¹⁷⁹ At the domestic level, enabling the President to take tariff measures in case of security concerns could also have the effect of incentivizing him to use economic tools over military options in cases of interstate conflict.¹⁸⁰

There may also be benefits of an exceptionalist structure for preserving free trade in case of a true military threat. Exceptional authorities may be critical for circumstances in which tariff adjustments are legitimately needed to permit the United States to be prepared for warfare.

177. GATT, *supra* note 16, art. XXI, 61 Stat. A63, 55 U.N.T.S. 266. The exception was not created from whole cloth; security exceptions had featured in earlier U.S. trade agreements, and the same exception appears in most bilateral and regional trade agreements in force today. *See* SEBASTIÁN MANTILLA BLANCO & ALEXANDER PEHL, NATIONAL SECURITY EXCEPTIONS IN INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS: JUSTICIABILITY AND STANDARDS OF REVIEW 1 (2020) (ebook); KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 179-86 (2010). Some WTO agreements also provide for emergencies, albeit in a different way from those found in U.S. law. These take on different names. *See, e.g.*, PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 630, 630-31, 655, 658-59 (2017) (discussing safeguard measures and balance-of-payments measures under WTO agreements).

178. For a popular summary on the trade exceptions that gets to this point, see Paul Krugman, Opinion, *A Trade War Primer*, N.Y. TIMES (June 3, 2018), <https://perma.cc/UCA4-AVKZ> (“Why are there exceptions? Political realism, again. The creators of the trading system realized that it needed some flexibility . . .”).

179. Alford, *supra* note 173, at 698; Holger P. Hestermeyer, *Article XXI: Security Exceptions*, in WTO: TRADE IN GOODS 569, 579-80 (Rüdiger Wolfrum et al. eds., 2010). On rational design generally, see Barbara Koremenos et al., *The Rational Design of International Institutions*, in THE RATIONAL DESIGN OF INTERNATIONAL INSTITUTIONS 1, 2 (Barbara Koremenos et al. eds., 2003).

180. In some ways, however, rational design theory's insights from the international sphere are inapposite in the domestic space. Whereas at the international level, states may need buy-in to build international institutions in which they give up some of their sovereignty, at the domestic level, no similar buy-in is clearly required between the two branches and there is no widespread power differential between the actors. Further, the nature of the exceptions differs because in international law, the exception is available as an excuse from liability or a circumstance precluding wrongfulness, whereas in domestic law there are no liability concerns for any party. Rather, in domestic law, the exception converts what would be unlawful executive action into lawful executive action.

Less deliberate reasons for using exceptions could be that market actors and global economic trends force the hand of Congress or that this structure simply serves U.S. and global markets best. It may be that the development of dominant free trade principles is a natural, market-driven outcome and that the exceptions are best viewed as forms of state intervention seeking to push back on those forces cautiously and where possible.¹⁸¹ Testing that theory would be challenging, as competing evaluations of the present trade war already reveal.¹⁸²

As a practical matter, though, lessons from the applications of the exceptions, recent and not recent, indicate that segregating trade and security delegations in these terms also has risks, especially in the absence of equivalent delegation disciplines.

B. Risks and Shortcomings

Lawmakers and scholars have long recognized the intersection between security and trade to be a potential flashpoint for political and societal dispute. Raj Bhala, writing in the 1990s, set out the concern that security and free trade may be incompatible with the growth of a rule-of-law paradigm in trade.¹⁸³ Since that time, however, those concerns appeared to have tapered off. In the last twenty years, trade peace and U.S. hegemony together with the rise of the WTO cabined those questions or channeled them into the multilateral trade law regime—at least until 2016, when those concerns resurfaced. This Subpart considers the possible downsides of trade's security exceptionalism. While exceptions are common in the law, the manner through which trade's security exceptions have been applied highlights the risks of the underlying structure that permits such an exercise.

181. Harlan Cohen helpfully contrasts this view with other areas of international law and foreign relations such as human rights, where state action is dominant and international action is an exceptional response to state failure. See Harlan Cohen, *Structured by Power, Directed by Law, Torn Between Concepts* (Mar. 2019) (unpublished comment) (on file with author).

182. See, e.g., Chris Prentice et al., *Factbox: Winners and Losers in Trump's Trade War with China*, REUTERS (June 19, 2019, 7:00 AM), <https://perma.cc/HR8V-DPJ7> (reflecting that some companies are finding the trade war helpful and that others are not).

183. Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 264 (1998) ("The new threats to the United States' national security, and the highly controversial legislation the United States has enacted to preserve national security, raise a fundamental problem for international trade lawyers, who may be inclined to view the boundaries of their field as narrow."). The Obama Administration's invigorated use of the WTO in lieu of unilateral tools may have (falsely) tempered those concerns. See Charlie Anderson, *President Obama on Enforcing Trade Rules: What You Need to Know*, WHITE HOUSE: BLOG (Sept. 13, 2016, 6:00 PM ET), <https://perma.cc/46ZQ-VBRQ>.

First and most obviously, exceptionalizing one tool over another, without more, risks that the President will convert the exception to the rule. Converting the exception to the rule could involve legitimate applications of the statute, but to excess. The legalization of a security exception may, in certain circumstances, give license for behavior contrary to congressional aims, particularly where the executive does not share the same stance on the primary norm as Congress. Where the executive does not share the congressional position on the primary norm, an exception that supports a contrasting norm invites the executive to promote its contrasting norm.¹⁸⁴

A second risk to exceptionalizing economic security from the rest of trade law is the creation of more friction between the branches in an area already fraught with sensitivities. Because the exceptions seek to navigate the fuzzy constitutional line between foreign affairs authority and foreign commerce authority—each ostensibly directed to a different branch—they risk contributing to a bilateral power struggle. Exceptionalizing from a primary norm through allocations of authority that may border on the President's inherent authority brings the branches together in potential clash.

Then there is the “give a mouse a cookie” danger. That is, granting the President these many exceptions creates a network of powers that the executive can use to manage fully and direct trade policies beyond congressional reach. American Presidents have attempted to increase their political leverage over the tariff by defining it, at least in part, as a foreign policy issue.¹⁸⁵ David Lake comments that “[b]y appealing to his position as the principal foreign policy decision maker, each president increased his legitimate authority in the tariff-making process.”¹⁸⁶ In some instances, a narrow exception became larger and less constrained in later iterations.¹⁸⁷

Statutory delegations of this sort also could create considerable path dependence and political paralysis.¹⁸⁸ It is much harder to take back an

184. Destler noted this concern: “By making protection the ‘exceptional’ recourse in the ‘normal’ process of trade-barrier reduction, the escape clause kept the quasi-judicial form of the old flexible tariff but turned the substance on its head.” DESTLER, *supra* note 69, at 22. These tools made the United States look like it was moving toward protectionist policy positions. Indeed, if they were used regularly, they would have had a protectionist result. *Id.* at 36-37.

185. See Meyer & Sitaraman, *supra* note 12, at 653-54.

186. LAKE, *supra* note 33, at 199.

187. For example, section 301 of the Trade Act of 1974 was originally a short, mandatory delegation cabined by a legislative veto. See Pub. L. No. 93-618, §§ 301-302, 88 Stat. 1978, 2041-43 (1975) (codified as amended at 19 U.S.C. §§ 2411-2412 (2018)). Following *INS v. Chadha*, 462 U.S. 919 (1983), the veto backstop was lost. When the statute was next revisited, Congress created greater discretion for the executive. See *supra* note 157.

188. See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 259 (2000).

empowering delegation in the face of a likely veto. In the international context, most states consistently include exceptions, especially national security exceptions, in their agreements.¹⁸⁹ Exceptions easily become intractable. Moreover, while there may be some advantage to using economic tools over military options, exceptionalism may actually encourage a shift toward economic tools to fight geopolitical battles that could be resolved in other ways. Those other ways, whether diplomatic or otherwise, may be less harmful to the national or global economy than tariffs would be. It is not clear that economic institutions can sustain the weight of the additional pressure put on them as an alternative to combat warfare.¹⁹⁰

Finally, underlying many of the abovementioned concerns is a more general risk that an exception without sufficient discipline could lead to abuse. For exceptionalism not to undermine a legal regime, the costs of opportunism and institutional competition on the part of the President must be greater than the gains of application. Some politicians have expressed concern about this possibility during the Trump Administration,¹⁹¹ but it has been a risk for the lifetime of the exceptions. A former Commerce Department official involved in the negotiations surrounding a section 232 investigation from 1983 described the investigation process as a sham: “It is based on a scenario . . . and depending on the scenario, you can predict the result.”¹⁹²

C. Inconsistent Antecedents

The dichotomization of free trade and security is also inconsistent with well-established understandings that free trade, rather than being security's antithesis, is a source of or tool for economic security.¹⁹³ These other narratives

189. MANTILLA BLANCO & PEHL, *supra* note 177, at 1.

190. See Cohen, *supra* note 181, at 4-5 (discussing tension between the two).

191. For one, Senator Tim Kaine characterized the Trump Administration's use of the security exception as “an abuse of power” and voiced the need “to protect the American economy by ensuring Congress reclaims its oversight of trade decisions.” Jordain Carney, *Democrats Introduce Bill to Rein in Trump on Tariffs*, HILL (Mar. 27, 2019, 11:30 AM EDT), <https://perma.cc/Q2G3-ZLX5>.

192. Craig Anderson Lewis, Note, *Waiting for the Big One: Principle, Policy, and the Restriction of Imports Under Section 232*, 22 LAW & POL'Y INT'L BUS. 357, 368 (1991) (quoting *Issues Relating to the Plastic Injection Molding Industry: Hearing Before the Readiness Subcomm. of the H. Comm. on Armed Servs.*, 100th Cong. 83-84 (1988) (statement of Clyde Prestowitz, Senior Associate, Carnegie Endowment for International Peace)).

193. This theme is prevalent in political science and history. For a quick summary of these areas, see generally Jonathan E. Hillman, Commentary, *Trade Wars and Real Wars*, CTR. FOR STRATEGIC & INT'L STUD. (Mar. 20, 2018), <https://perma.cc/AH76-V8UW> (describing the longstanding link between commerce and security). See also Joanne Gowa & Edward D. Mansfield, *Power Politics and International Trade*, 87 AM. POL. SCI. REV. 408, 416-17 (1993) (concluding that free trade is more likely within geopolitical alliances); Christine Margerum Harlen, *A Reappraisal of Classical Economic Nationalism* footnote continued on next page

have been central to U.S. trade policy since the Founding. The normative payoff of each vision is reflected in the alternative decisionmaking and policymaking structure each counsels for the trade-security relationship.

In the nation's earliest days, the tariff, not free trade, was a critical source of security. At a time when the success of the independent nation was still uncertain, the need for economic independence drove a high tariff.¹⁹⁴ A policy of protectionism was regarded by the nation's leaders as critical for national defense.¹⁹⁵ In the nineteenth century, the link between protectionism and independence became more pronounced in the context of the War of 1812, when a strong sense of nationalism and a concern for the country's defense crystallized around protection of manufacturing.¹⁹⁶ Articulating this relationship was "decisive in ensuring support for the tariff in the South."¹⁹⁷

By the early part of the twentieth century, however, the global economy had changed, as had the place of the United States in the world. Commerce and security remained linked, but it was then that free trade and the reduction of barriers to commerce began to be seen as a source of and tool for security. Economists had long recognized that free markets and free trade could serve as a source of national security.¹⁹⁸ Political theorists likewise had developed this foundational principle for centuries.¹⁹⁹ It was this motivation that led Secretary

and Economic Liberalism, 43 INT'L STUD. Q. 733, 733-35, 742-43 (1999) (revisiting the classical binary between economic liberalism and nationalism).

194. See WILLIAM HILL, *THE FIRST STAGES OF THE TARIFF POLICY OF THE UNITED STATES*, 43-58, 107-09 (Balt., Guggenheimer, Weil & Co. 1893).

195. See James R. Sofka, *The Jeffersonian Idea of National Security: Commerce, the Atlantic Balance of Power, and the Barbary War, 1786-1805*, 21 DIPLOMATIC HIST. 519, 520-21 (1997).

196. See IRWIN, *supra* note 33, at 129 (describing how leaders like Henry Clay believed that the country's national security depended on ending foreign dependence on critical supplies "such as boots and clothing, arms and munitions").

197. *Id.* at 131.

198. See Edward D. Mansfield & Jon C. Pevehouse, *Trade Blocs, Trade Flows, and International Conflict*, 54 INT'L ORG. 775, 775-76 (2000); Solomon William Polachek, *Conflict and Trade*, 24 J. CONFLICT RESOL. 55, 59-60 (1980).

199. See ALBERT HIRSCHMAN, *The Concept of Interest: From Euphemism to Tautology*, in RIVAL VIEWS OF THE MARKET SOCIETY AND OTHER RECENT ESSAYS 35, 43-44 (1992) (outlining the thesis of *doux commerce*, the idea of sweet or gentle commerce, which "held that commerce was a powerful civilizing agent" that would diffuse "virtues within and among trading societies"); Michael W. Doyle, *Three Pillars of the Liberal Peace*, 99 AM. POL. SCI. REV. 463, 463 (2005) (reviewing the intellectual history of this idea from Kant); see also Stephen J. Rosow, *Commerce, Power and Justice: Montesquieu on International Politics*, 46 REV. POL. 346, 347, 361 (1984). A competing idea is that trade increases international tensions, altering the balance of power between competing states by allowing quicker development of military rivals. John Maynard Keynes, *National Self-Sufficiency*, 22 YALE REV. 756, 757-58 (1933) (arguing for reducing international entanglement for the sake of peace); see also Harlan Grant Cohen, *footnote continued on next page*

of State Cordell Hull to seek to promote free trade for more than twenty years. Hull attributed war and the risk of war to economic rivalry, particularly with respect to access to foreign markets and competitive behavior to secure access to raw materials.²⁰⁰ Hull “came to believe that if we could eliminate this bitter economic rivalry, if we could increase commercial exchanges among nations over lowered trade and tariff barriers and remove unnatural obstructions to trade, we would go a long way toward eliminating war itself.”²⁰¹ Seen as naïve and idealistic by some of his contemporaries,²⁰² Hull nevertheless advocated tirelessly for ending barriers to trade of all types in the interest of peace.²⁰³

In later years, trade came to be seen as a tool of security. This idea undergirded reciprocal trade agreements and propelled the trade agreements program forward in the face of Republican opposition and lingering protectionism. For example, the justification for the trade agreements program changed in the years after 1934 to “countering the growing threats to world peace.”²⁰⁴ During World War II, Hull argued for the renewal of the RTAA on the basis that “[u]nless we continue to maintain our position of leadership in the promotion of liberal trade policies . . . the future will be dark indeed.”²⁰⁵

In the 1980s, theorist John Ruggie likewise developed his influential embedded liberalism narrative, premised on the idea that foreign economic policy has been embedded within a particular conception of security, often defined in terms of economic independence, and that efforts to liberalize trade

Editorial Comment, *Multilateralism's Life Cycle*, 112 AM. J. INT'L L. 47, 48-49 (2018) (arguing that recent antiglobalist turns are a result of multilateralism's successes).

200. Hull saw competition over raw materials as a source of conflict and commerce as a tool for peace. 1 CORDELL HULL, *THE MEMOIRS OF CORDELL HULL* 84 (1948) (“I saw that you could not separate the idea of commerce from the idea of war and peace . . . [and] that wars were often largely caused by economic rivalry conducted unfairly.”).

201. *Id.*

202. IRWIN, *supra* note 33, at 422.

203. 1 HULL, *supra* note 200, at 81-85. Hull later wrote: “I have never faltered . . . in my belief that the enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality, and the maximum practicable degree of freedom in international economic relations.” Cordell Hull, U.S. Sec’y of State, Address on the Occasion of the Presentation of the Woodrow Wilson Medal to the Honorable Cordell Hull (Apr. 5, 1937), in CORDELL HULL & HAMILTON FISH ARMSTRONG, *ECONOMIC BARRIERS TO PEACE* 8, 14 (1937).

204. IRWIN, *supra* note 33, at 446.

205. *Extension of Reciprocal Trade Agreements Act: Hearings on H.J. Res. 407 Before the S. Comm. on Finance*, 76th Cong. 16 (1940) (statement of Cordell Hull, Secretary of State).

had to accommodate security.²⁰⁶ In Ruggie's terms, trade policy had to take place within a particular (and broad) conception of security.²⁰⁷

In later years, the White House again adopted the instrumentalist perspective that trade can be seen as fostering security aims rather than the other way around. At least as early as 2002, the White House National Security Strategy linked national defense, security, and economic policies.²⁰⁸ President Bush noted that democracy and economic openness were also "the best foundations for domestic stability and international order."²⁰⁹ This view served as a driving force for trade lawmaking until recently.²¹⁰ Trade was considered essential in the maintenance of world peace and to avoid further emergency.²¹¹ Even lawmakers who were not in principle favorably

206. See generally John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 393-98 (1982) (setting out the narrative). My thesis pushes back on Ruggie's by suggesting that what happened in the twentieth century, by contrast, was at least a partial disembedding of free trade from its security setting.

207. *Id.* In contrast, my findings indicate that free trade and the neoliberalism of the postwar era disembedded trade from security, elevated trade liberalization to an end in and of itself, and made security an exception to the trade regime. Thus, contrary to the dominant narrative, there appears to be a broader story to be told about the codified disembedding of trade policy from broader national social purposes.

208. The Bush Administration's 2002 National Security Strategy identified free and open markets as critical to national security. See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17-18 (2002), <https://perma.cc/5TDD-LZHP>; see also Daniella Markheim & Anthony B. Kim, *Free Trade with the UAE Supports America's National Security Interests*, HERITAGE FOUND. (Mar. 4, 2006), <https://perma.cc/B295-5CZJ>.

209. Sara Fitzgerald & P.O. Driscoll, *Trade Promotes Prosperity and Security*, HERITAGE FOUND. (Dec. 18, 2002) (quoting George W. Bush, *Introduction to THE WHITE HOUSE*, *supra* note 208, at v), <https://perma.cc/H2GV-FRUK> (discussing the Bush Administration's economic security strategies).

210. This idea was at the heart of the Obama Administration's approach to negotiating the Trans-Pacific Partnership Agreement, for example. See Office of the U.S. Trade Representative, *TPP Made in America: The Trans-Pacific Partnership 1* (n.d.), <https://perma.cc/DZ9C-9W72>; Barack Obama, *Opinion, The TPP Would Let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), <https://perma.cc/7LF4-N2DA> ("As a Pacific power, the United States has pushed to develop a high-standard Trans-Pacific Partnership, a trade deal that puts American workers first and makes sure we write the rules of the road for trade in the 21st century."); see also Bown & Keynes, *supra* note 10 (discussing with former USTR Froman how the Clinton and Obama Administrations tried to integrate trade and security, whereas the Trump Administration makes one conditional on the other). This was likewise the case with the Bush Administration negotiating trade agreements with countries like Jordan and Oman. See MARY JANE BOLLE, CONG. RESEARCH SERV., RL33328, U.S.-OMAN FREE TRADE AGREEMENT 1-2 (2006), <https://perma.cc/498R-JEDP>.

211. See IRWIN, *supra* note 33, at 454 ("The general objectives of [a trade agreement renewed in 1943] are to substitute economic cooperation for economic warfare in our relations with other countries . . . and to create the kind of international economic relations
footnote continued on next page

inclined toward free trade picked up this trope in the interest of “keep[ing] the peace.”²¹²

Innumerable manifestations of the interconnectedness of free trade and economic security dot the legislative and administrative landscape. They are captured in now-defunct congressional commissions dedicated to investigating the growth of trade and “trade aspects of national security.”²¹³ Whether security used trade as a tool or trade served as a source of security, these integrated approaches formed the foundation for most of U.S. foreign-facing commercial lawmaking—that is, until they became obscured in recent rhetoric and, more importantly, in the U.S. Code.²¹⁴ But it was not always that way.

D. The Exceptions' Unexpected Origins and Inverted Purposes

A closer review of the historical record suggests that, surprisingly, what are now seen as anti-liberalizing exceptions actually began in several instances as liberalizing exceptions, meaning that they were intended to support the primary tariff-lowering norm. Although it did not become a popular policy option in the United States until the late nineteenth century, the idea behind this approach—that trade restrictions could be used sparingly to open foreign markets—originated centuries earlier.²¹⁵ Somewhere along the way to the present moment, the message appears to have been muddled.

One example of confusion on this score is the background of section 232. The original delegation to the President that became section 232 did not permit the President to raise tariffs; rather, it prohibited him from lowering them

upon which a structure of durable peace can be erected.” (quoting *Commercial Policy: The Reciprocal-Trade-Agreements Program in War and Peace*, 8 DEP'T STATE BULL. 169, 169 (1943)); LAKE, *supra* note 33, at 204.

212. IRWIN, *supra* note 33, at 454 (quoting 89 CONG. REC. 4310 (1943) (statement of Rep. Rayburn)).

213. For example, in 1966, Congress created the Commission on Foreign Economic Policy specifically to examine and report on “the subjects of international trade and its enlargement consistent with a sound domestic economy, our foreign economic policy, and the trade aspects of our national security.” Trade Agreements Extension Act of 1953, ch. 348, §§ 301, 309(a), 67 Stat. 472, 473-74. And even earlier, in December 1943, an interagency Special Committee on Relaxation of Trade Barriers reported that an “expansion in the volume of international trade after the war [would] be essential . . . to the success of an international security system to prevent future wars.” IRWIN, *supra* note 33, at 461; *see also* Benjamin A. Field & Kian J. Hudson, *The Bonds of Peace: A Defense of the National Security Perspective on Trade*, 42 N.C. J. INT'L L. 307, 316-23 (2017) (reviewing historical examples of “national security perspectives” on trade).

214. *See supra* Part I.B.

215. *See* Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 797-99 (2001) (citing ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 295 (Kathryn Sutherland ed., Oxford Univ. Press 1993) (1776)).

where “the President finds that such a reduction would threaten domestic production needed for projected national defense requirements.”²¹⁶ That language was added as an amendment to a two-paragraph act that extended trade agreement authority to the President for one year.²¹⁷ One year later, upon a further extension of that authority, Congress amended the language of this free-trade focused legislation²¹⁸ to “provide a means for assistance to the various national *defense* industries which would have been affected [by other amendments made by the Act].”²¹⁹ The 1955 legislation stated:

[W]henever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.²²⁰

This language was revised in the following three decades to further cabin the potential and actual applications by future Presidents to be consistent with free trade norms.²²¹

Consider also the soft security delegations. As early as 1794, Congress granted the President authority to take different types of action against trading partners who were unfairly discriminating against U.S. goods with higher tariffs.²²² Various statutes, precursors to what would become exceptions like

216. Act of July 1, 1954, ch. 445, § 2, 68 Stat. 360, 360 (repealed 1962).

217. *Id.* § 1, 68 Stat. at 360.

218. Trade Agreements Extension Act of 1955, ch. 169, § 7, 69 Stat. 162, 166 (repealed 1962).

219. S. REP. NO. 84-232, at 4 (1955) (emphasis added).

220. Trade Agreements Extension Act of 1955 § 7. The Office of Defense Mobilization, an independent agency in the Executive Office of the President, was primarily responsible for procurement for military purposes. Exec. Order No. 10,480, 3 C.F.R. 962, 962 (1949-1953). The Trade Expansion Act “transferred the fact-finding authority to the Office of Emergency Planning, which was abolished and its functions transferred to the Department of the Treasury in 1974.” Bialos, *supra* note 94, at 242 n.17. The Commerce Department picked up the authority as part of a 1979 reorganization. Reorganization Plan No. 3 of 1979, 3 C.F.R. 513, 515 (1980).

221. *See, e.g.*, Trade Act of 1974, Pub. L. No. 93-618, § 127(d), 88 Stat. 1978, 1993-94 (1975) (codified as amended at 19 U.S.C. § 1862 (2018)); Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862); S. REP. NO. 85-1838, at 11 (1958).

222. *See* K. Blake Thatcher, Comment, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 NW. U. L. REV. 492, 495-97 (1987) (outlining the history of like delegations).

sections 301 and 338, provided that the President could suspend trade benefits with trading partners whose measures substantially burdened U.S. commerce. For example, at the time of the Tariff Act of 1890, which put products on a duty-free list unless the President decided that the exporting country treated U.S. products unfairly, commentators noted the shift that had occurred to duty-free as the default with a narrow authorization to the President to depart in limited circumstances.²²³

By the start of the twentieth century, Congress had again modified those authorities to allow the President to respond to other countries' high tariffs and other practices through tariff micromanagement with the aim of reducing tariffs imposed by both other countries and the United States to zero. The Tariff of 1909 allowed the President to decide whether goods from a particular country would receive the minimum or maximum tariff arrangement.²²⁴ The Tariff was framed like the Tariff Act of 1890 in that the default position was that lowest tariff rates apply to products coming from a particular country "[p]rovided . . . [that] the President shall be satisfied . . . that the [relevant] government . . . imposes no terms . . . which unduly discriminate against the United States."²²⁵ The administration of the tariff rates for each affected country was left to the President with the idea that the President could use this tool to effectuate greater tariff reductions instead of having to negotiate reciprocal deals. In other words, giving the President the ability to implement the higher rate on a country's product might convince that country not to discriminate against U.S. goods.²²⁶ It was a step toward the entrenchment of a free trade norm.²²⁷

223. F.W. Taussig noted the peculiarity of this structure of the reciprocity provision. See F.W. TAUSSIG, *THE TARIFF HISTORY OF THE UNITED STATES: A SERIES OF ESSAYS* 251-83 (New York, G.P. Putnam's Sons 1896).

224. Tariff of 1909, ch. 6, § 2, 36 Stat. 11, 82. The undue discrimination could be "in the way of tariff rates or provisions, trade or other regulations, charges, exactions, or in any other manner." *Id.*

225. *Id.*

226. The minimum tariff became like a most-favored-nation tariff and the "[m]aximum tariff . . . nothing more than a threat used against other countries when these make a move to apply their own maximum tariffs." F.W. Taussig, *The Tariff Debate of 1909 and the New Tariff Act*, 24 Q.J. ECON. 1, 37 (1909). This history also suggests that courts analyzing the delegations in present challenges may need to look beyond the text to see this larger context. For example, in a recent case concerning section 232, the Court of International Trade suggested that using threats of tariff increases as leverage in unrelated trade negotiations could fall outside the scope of section 232. See *Severstal Exp. GmbH v. United States*, No. 18-00057, 2018 WL 1705298, at *9 (Ct. Int'l Trade Apr. 5, 2018). That may be the case for section 232 with its hard security rationale, but the record is more mixed than suggested by the court, as outlined above. Undoubtedly, the legislative record evidences that it is less true in the case of the soft security delegations.

227. Ultimately, economists did not think these new authorities would force tariff rates down, however. Taussig, *supra* note 226, at 37-38.

Thereafter, the U.S. Tariff Commission, created in 1916, in its early years reviewed the existing trade policies and recommended changes that would lead to the language of today's soft security exceptions—in the interest of “secur[ing] the removal of all discriminations which foreign countries may inflict upon the commerce of the United States.”²²⁸ The Commission expanded an initiative to make suggestions to Congress that broader executive engagement was necessary to address growing unfair trade practices with the intent of forcing countries to keep their tariff rates down.²²⁹ That message was reiterated by President Warren Harding in his State of the Union Address on December 6, 1921.²³⁰ He set out a proposal to give the executive greater tariff authority “to meet unusual and changing conditions which can not be accurately anticipated.”²³¹ Harding and the Tariff Commission lobbied successfully. Congress delegated broad authority to the President along these lines in the Tariff Act of 1922,²³² which was later replaced by the Tariff Act of 1930 and embodied in section 338.²³³

Likewise, what became section 301 was intended to stimulate fairness, to help “reach and enforce” free trade agreements.²³⁴ It was a threat that could be used with the carrot of an open market to “pry open foreign markets and thus further liberalize trade.”²³⁵ Section 301's dual aims can also be seen in the way its language tracks that of the TPA/fast track delegation. Compare the condition of the delegation in TPA 2015, which permits the President to pursue a free trade agreement,²³⁶ with that in section 301, which permits the President

228. U.S. TARIFF COMM'N, SIXTH ANNUAL REPORT OF THE UNITED STATES TARIFF COMMISSION 5 (1922) [hereinafter U.S. TARIFF COMM'N, SIXTH ANNUAL REPORT]; see also U.S. TARIFF COMM'N, UNITED STATES TARIFF COMMISSION: ORGANIZATIONS AND FUNCTIONS 5 (1969).

229. Stephen Meardon, *On the Evolution of U.S. Trade Agreements: Evidence from Taussig's Tariff Commission*, 45 J. ECON. ISSUES 475, 479 (2011).

230. 62 CONG. REC. 53 (1921) (State of the Union Address by President Harding).

231. *Id.* President Harding discussed the need for tariffs to be made “equitable” and to “not necessarily burden our imports and hinder our trade abroad.” *Id.*

232. Tariff Act of 1922, ch. 356, §§ 316-317, 42 Stat. 858, 943-46 (repealed 1930).

233. Tariff Act of 1930, ch. 497, § 338, 46 Stat. 590, 704-06 (codified at 19 U.S.C. § 1338 (2018)).

234. Alan F. Holmer & Judith Hippler Bello, Current Development, *The 1988 Trade Bill: Savior or Scourge of the International Trading System?*, 23 INT'L LAW. 523, 527 (1989). There is some debate about which forces were dominant in leading to the 1974 language. Compare *id.* (arguing that section 301's principal objective was to achieve multilateral trade liberalization), with C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 213-14 (1997) (arguing that section 301 “was designed to allow the President to take retaliatory action”).

235. Holmer & Bello, *supra* note 234, at 527.

236. 19 U.S.C. § 4202(b) (noting that the President may enter into specified trade agreements “[w]henver the President determines that . . . 1 or more existing duties or any other import

footnote continued on next page

to apply tariffs.²³⁷ On paper, they are very similar in what they require the President to find as a condition precedent,²³⁸ but each grants the President a different type of discretion: in one case to move tariffs down and in the other to raise tariffs up, seemingly temporarily, to break down trade barriers. Throughout the twentieth century, the legislative record clearly demonstrates that what are today considered soft security exceptions were intended as means by which to support free trade, even if cautiously. That message has been lost.

Ironically, the opposite is somewhat true as well. The free trade agreement program began as an “emergency,” security-driven program. In March 1934, as the kernel of the idea of a trade agreement program began to take shape, President Roosevelt requested from Congress authority to undertake trade negotiations with other countries.²³⁹ The Roosevelt Administration justified the request for authority, which was unprecedented, “on the grounds that the foreign trade situation constituted an ‘emergency’ and that decisive executive action to promote trade was desperately needed.”²⁴⁰ The emergency at that time was the unprecedented economic depression.²⁴¹ It was not, however, that the emergency message shifted from security to free trade. As described above, the two concepts were seen as coincidental and mutually reinforcing. Roosevelt’s principal message throughout the Depression likened economic crisis to war. In addresses to the public about the economic crisis, Roosevelt declared that “the Depression was to be ‘attacked,’ ‘fought against,’ . . . and ‘combatted’ by ‘great arm[ies] of people.’”²⁴² Others picked this up, blurring the lines between the executive’s military and economic powers.²⁴³ Without this authority, Roosevelt argued, the United States could not “adequately protect its

restriction of any foreign country . . . unduly burdens or restricts the foreign trade of the United States or adversely affects the United States economy”).

237. *Id.* § 2411(b) (permitting the President to apply tariffs “[i]f the Trade Representative determines . . . that . . . an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce”).

238. Both 19 U.S.C. § 2411(b) and 19 U.S.C. § 4202(b) provide for action if the President or the USTR finds that a restriction of another country “burdens or restricts” U.S. trade.

239. IRWIN, *supra* note 33, at 424-25.

240. *Id.* at 425.

241. 78 CONG. REC. 3580 (1934) (message of President Roosevelt); *see also* Kenneth W. Dam, *Cordell Hull, the Reciprocal Trade Agreements Act, and the WTO: An Essay on the Concept of Rights in International Trade*, 1 N.Y.U. J.L. & BUS. 709, 711-12 (2005) (discussing the contribution of the general increase in tariffs to the Great Depression).

242. CASEY ET AL., *supra* note 77, at 4 (alteration in original) (quoting various statements by Roosevelt); *see also* Roosevelt, *supra* note 81, at 14 (comparing the Depression to “armed strife”).

243. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 306 (1932) (Brandeis, J., dissenting) (describing the “long-continued depression” as “an emergency more serious than war”).

trade against discriminations and against bargains injurious to its interests.”²⁴⁴ Emergency economic conditions at that time required greater, not lesser, liberalization.

Some commentators have regarded the Roosevelt Administration’s advocacy as a critical turning point for the concept of economic security, after which it became “routine to use emergency economic legislation enacted in wartime as the basis for extraordinary economic authority in peacetime.”²⁴⁵ The intended solution for the crisis was the negotiation of agreements to break down barriers to trade. The opening words of the RTAA state that it was enacted “[f]or the purpose of expanding foreign markets . . . as a means of assisting in the present emergency in restoring the American standard of living.”²⁴⁶ It was a limited authority, enabling the President to act for just three years, after which the authorization would expire.²⁴⁷ Hence, to some degree, the RTAA was an emergency request that was repeatedly renewed until it became normalized and free trade became the primary norm.

* * *

The lost history of these exceptions provides a different narrative from that which dominates the present rhetoric about their use since 2017. While it appears to many that the United States is using tariffs offensively, having picked a fight with China,²⁴⁸ these tariff tools were in many ways intended to be defensive—to fight practices used by other nations against U.S. goods.²⁴⁹

244. U.S. TARIFF COMM’N, *supra* note 37, at 86.

245. CASEY ET AL., *supra* note 77, at 4 (citing William E. Scheuerman, *The Economic State of Emergency*, 21 CARDOZO L. REV. 1869, 1878 (2000)). Andrew Preston notes that Roosevelt changed the language of emergencies by using the term “national security” instead of self-defense. Preston, *supra* note 71.

246. Reciprocal Trade Agreements Act of 1934, ch. 474, sec. 1, § 350(a), 48 Stat. 943, 943 (codified at 19 U.S.C. § 1351(a)(1) (2018)).

247. *Id.* § 2(c), 48 Stat. at 944 (codified as amended at 19 U.S.C. § 1352(c)).

248. *See, e.g.*, Jeremy Diamond, *Trump Hits China with Tariffs, Heightening Concerns of Global Trade War*, CNN: POL. (updated Mar. 23, 2018, 6:10 AM ET), <https://perma.cc/LAY6-2YXV>; Shannon Togawa Mercer & Matthew Kahn, *America Trades Down: The Legal Consequences of President Trump’s Tariffs*, LAWFARE (Mar. 13, 2018, 10:41 AM), <https://perma.cc/H4AG-9XDF> (quoting the European Trade Commissioner Cecilia Malmstrom as saying that the tariffs are a “weapon to threaten and intimidate”); Ana Swanson, *Trump’s Tariffs, Once Seen as Leverage, May Be Here to Stay*, N.Y. TIMES (May 14, 2019), <https://perma.cc/Y4UX-8JZQ> (citing comments from scholars that the Administration is working against free trade).

249. As I have asserted elsewhere, a plausible argument can be made that the Trump Administration is using at least some of the exceptions in this manner—in other words, with the aim of enhancing liberalization by combatting China’s unruly behavior that harms liberalization goals. Claussen, *supra* note 125, at 43-44.

Their original purposes were largely antiprotectionist, whereas, at the present moment, they are seen as antiliberal and in tension with multilateral rules.²⁵⁰

If the exceptions were supposed to provide the President temporary tools to convince other trading partners to adopt free trade norms, why were they not revised to reflect this more clearly? Or, as free trade became the global norm, why were they not removed? Since 1974, and especially since 1994, the exceptions collected a considerable amount of legislative dust—which may mean that just having them available was sufficient deterrence for U.S. trading partners.²⁵¹ More likely, most trading partners, like most U.S. commentators, focused attention on the WTO and on free trade agreements.²⁵² While some exceptions were tweaked in later years, they were overshadowed by free trade priorities. The liberalization norm became entrenched, and trade agreements addressing trade-plus issues, like intellectual property, labor, and the environment, created a diversion for congressional attention.²⁵³ Meanwhile, tariff authorities languished, rarely tested except when private actors tried to take advantage of them, and even then with few major applications.²⁵⁴

A status quo bias could provide an additional plausible explanation for why Congress chose not to amend or repeal those delegations for many years, despite the growth of the free trade norm and the multilateral system.

250. See, e.g., Holmer & Bello, *supra* note 234, at 527 (referring to the threat of tariffs as a “stick”). Even though they are seen as antiliberal, they may not be intended as such by certain members of the Administration. The magnitude and scope of the many tariff actions, plus President Trump’s claim that he is a “Tariff Man,” contribute to this perception. See Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 4, 2018, 7:03 AM), <https://perma.cc/959A-QK5R> (“I am a Tariff Man. When people or countries come in to raid the great wealth of our Nation, I want them to pay for the privilege of doing so. It will always be the best way to max out our economic power. We are right now taking in \$billions in Tariffs. MAKE AMERICA RICH AGAIN”). Meanwhile, Trump Administration officials speak of the tariffs as a way to ensure and promote liberalization. See, e.g., Robert Lighthizer, *Opening Statement of USTR Robert Lighthizer to the Senate Finance Committee*, OFF. U.S. TRADE REPRESENTATIVE (June 18, 2019), <https://perma.cc/FLA8-4UU7> (“We believe our economic relationship with China has been unbalanced and grossly unfair to American workers, farmers, ranchers, and businesses for decades.”); Swanson, *supra* note 248 (reporting that the Secretary of the Treasury Steven Mnuchin said the Administration supports “free and fair reciprocal trade”).

251. See DEESE ET AL., *supra* note 31, at 62, 72-74 (describing the relevance of trade agreements made in these two years); WILLIAMS ET AL., *supra* note 112, at 9 (describing the lack of use of these authorities in recent years).

252. See, e.g., *supra* note 4.

253. See Claussen, *supra* note 18, at 328.

254. In some respects, the executive branch expanded its authorities from these exceptional delegations to make it harder for Congress to effectively oversee its actions. See Claussen, *supra* note 38; *The United States, Trade Remedies, and the World Trade Organization*, COUNCIL ON FOREIGN REL. (Oct. 16, 2017), <https://perma.cc/LJV8-JV5L> (noting that the U.S. “has not been recently a big user of safeguards”).

Members of Congress may be purposefully risk averse about making changes to statutory delegations in case those delegations later serve national needs. They may not have anticipated abuse. Like in other areas of trade lawmaking,²⁵⁵ an attenuated path dependence appears to explain large parts of trade law's exceptionalist architecture. Just as in the making of U.S. trade agreements, paths designed early in the development of modern U.S. trade law tended to be followed throughout the law's development with an impact on the resulting institutional structure.²⁵⁶ If anything, the legislative history shows this neglect may have contributed to misunderstandings about trade law's meaning and purposes, and ultimately to different types of applications—applications that, in the last two years, have been perceived not to support a liberalization norm.

This history also helps correct some confusion about the origins of exceptionalism. Most important, it demonstrates that the economic security exceptions were not intended to promote a protectionist norm. Curiously, recent trade policy choices that appear to prioritize high tariffs have been facilitated, at least legally, by the neglected exceptionalist structure that was designed to have the opposite effect.

III. Implications, Alternatives, and Extensions

As suggested in Part II, the current codified dichotomy need not be the only way to manage the relationship between free trade goals and economic security concerns. This Part considers other ways forward for trade law and takeaways for relevant areas of law confronting the same systemic questions. This Article therefore offers lessons both for trade policymakers and for the auxiliary literatures from which it draws, particularly for the study of the nondelegation doctrine and for scholarship on the separation of powers.

A. Lessons for Trade Law and Literature

Seeing trade law as a dichotomy between a free trade norm and economic security exceptions provides insight for larger debates in the trade law literature. Some commentators have criticized the recent imposition of the exceptional security-premised tariffs by the Trump Administration as an extralegal flexing of U.S. power at the expense of the multilateral trade law

255. *See* Claussen, *supra* note 18, at 316-17 (describing path dependence in trade agreements through "repeated use of standardized text").

256. *See, e.g.*, Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 ANN. REV. POL. SCI. 369, 392-93 (1999) (explaining that institutional design, once in place, is self-reinforcing).

system.²⁵⁷ In their view, the Administration's actions constitute an illegal or illegitimate turn away from the free trade rules that have dominated the last half century of trade lawmaking around the world and a turn toward protectionism. Those commentators refer to these tariff actions as part of a larger movement toward geoeconomics, where national economic interests defeat international commitments in a way that the last half century of institution building sought to prevent.²⁵⁸ Similar, more generalized rhetoric suggesting that the United States is in a trade war²⁵⁹ intensifies arguments that the Trump Administration has made a novel turn toward security and away from trade rules, using security as a pretext for economic nationalism.²⁶⁰

These arguments, despite their virtue for highlighting important inadequacies and inconsistencies, miss three key points. First, and most importantly, trade actions by the United States in the last two years are not lawless. They are not simply power plays in lieu of using rules. Nor are they a secret back-channel authority or something invented by the Trump Administration. Rather, these economic security authorities are prevalent in U.S. trade statutes and have remained on the books despite the entrenchment of the free trade norm. However sincere or insincere, the Trump Administration is using rules, just not the rules thought to be the primary rules.

Second, little about the Administration's policy of using these exceptions is particularly novel.²⁶¹ They have been deployed before, even if not for several years.²⁶² For the most part, this application is old wine in recycled bottles. More important still, the geoeconomic ingredients for such moves have been in place for some time now. What is different about this moment is that they

257. See, e.g., Schoenbaum & Chow, *supra* note 4, at 138 & n.149, 174-76; see also Padideh Ala'i, Essay, *The Vital Role of the WTO Appellate Body in the Promotion of Rule of Law and International Cooperation: A Case Study*, 44 YALE J. INT'L L. ONLINE 86, 88-89 (2019) (discussing the range of the Trump Administration's actions that threaten the rules-based system of international trade); Geraldo Vidigal, *Westphalia Strikes Back: The 2018 Trade Wars and the Threat to the WTO Regime* 1-2 (Amsterdam Law Sch., Legal Studies Research Paper No. 2018-31, 2018), <https://perma.cc/U9JX-T36F> (same).

258. See Roberts et al., *supra* note 4. But see Simon Lester & Inu Manak, Meet the New Geoeconomics, Same as the Old Geoeconomics (Mar. 20, 2019) (unpublished manuscript) (on file with author) (arguing that the recent trends are not new).

259. See, e.g., Paul Krugman, Opinion, *Bumbling into a Trade War*, N.Y. TIMES (Mar. 22, 2018), <https://perma.cc/8Y9W-UL9E>.

260. See Kahn, *supra* note 4.

261. See, e.g., WILLIAMS ET AL., *supra* note 112, at 9; Greg Ip, *The Flaw in Trump's National Security Tariffs Logic*, WALL ST. J. (Mar. 9, 2018, 11:28 AM ET), <https://perma.cc/KY5C-K9B9>.

262. See *supra* Part I.B.2 (discussing section 301's prior uses).

are being used at a level of magnitude that makes tariff raising appear to be the default rather than the exception.²⁶³

Third, arguments that the Trump Administration is abusing executive authority in trade²⁶⁴ are made without regard to the exact scope of the President's trade authority. This analysis provides a window into larger enduring debates about the relationship between Congress and the executive in the area of foreign commerce, particularly with respect to tariffs, where commentators have exhausted less energy. As early as the 1922 delegation that allowed the President to proclaim certain tariff rate changes, the U.S. Tariff Commission noted that

[i]t was realized at the outset that the rule or principle or policy upon which tariff rates are to be determined is distinctly a legislative problem and that the power to legislate may not be delegated. The finding of the facts, as well as the application of the rule or principle to those facts, however, was recognized as essentially an administrative problem.²⁶⁵

Scholarly attempts to grapple with the separation of powers in trade law have fallen along several general lines. Some scholars have considered that there ought to be a "balance" between Congress and the executive in managing trade policy and have addressed that directly.²⁶⁶ Some have acknowledged that trade agreements are particularly delicate given the executive's treaty authority, and that some shared understanding between the branches is necessary.²⁶⁷ Others

263. A further important difference compared to prior use of the exceptions is the backdrop of functioning multilateral institutions designed to serve as the venue for trade enforcement.

264. See, e.g., Editorial, *Donald Trump's Abusive Trade Powers Need to Be Reined In*, FIN. TIMES (June 13, 2019), <https://perma.cc/G9ZK-KMHA>.

265. U.S. TARIFF COMM'N, SIXTH ANNUAL REPORT, *supra* note 228, at 2. The Commission was likely trying to square the circle set up by *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892). There, the Supreme Court upheld the Tariff Act of 1890's provisions authorizing the President to suspend the duty-free status of specific goods if the President found that the exporting nation imposed "reciprocally unequal and unreasonable" import restrictions on U.S. goods. *Id.* at 692-93. The Court found that the statute did not "in any real sense, invest the President with the power of legislation." *Id.* at 692.

266. See, e.g., Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 239-41 (2009) (advocating for broadly rebalancing international lawmaking, including trade). Today's emphasis in the media is on Congress "taking back" its authority. See, e.g., Glenn C. Altschuler, Opinion, *How Congress Can Take Back Control over Tariffs*, HILL (June 2, 2019, 12:30 PM EDT), <https://perma.cc/PA2W-MJ43>; Henry Olsen, Opinion, *The President Has Too Much Power over Tariffs. Congress Should Reclaim That Authority.*, WASH. POST (June 14, 2019), <https://perma.cc/3FJ8-DWJ3>; Clark Packard, *Congress Should Take Back Its Authority over Tariffs*, FOREIGN POLY: ELEPHANTS IN THE ROOM (May 4, 2019, 4:19 PM), <https://perma.cc/5GBS-Q5K2>.

267. Harold Koh outlines five "regimes" of congressional-executive interaction in international trade relations. Koh, *supra* note 18, at 1231-33; see also Bruce Ackerman & *footnote continued on next page*

have focused on the substantive output of trade agreements and how to take into account domestic issues such as the regulatory aspects of the agreements, their broadening scope, their intersection with other areas of law, or their potential encroachment on state sovereignty.²⁶⁸ These works help discern the nature of the trade agreement space, where the emphasis is on lowering barriers to trade, but ultimately they pay insufficient attention to how to manage the congressional-executive relationship outside the primary free trade norm.

In an earlier era, commentators did consider certain tariff-raising statutes and noted the trade-offs of executive-driven tariff actions and the congressional commitment to the promotion of an enforceable, rules-based system for trade.²⁶⁹ Since that time (and prior to the Trump Administration), however, these potential dangers remained just that—distant possibilities unlikely to come to pass given the success of the multilateral system. Forgotten but not abandoned, the exceptions were never examined as a program of their own. Now maximized, the open-ended delegations have shifted trade authority to the executive, contributed to the creation of a massive trade administrative state, and chipped away at the free trade norm by giving the executive license to act always in the exception, even to negotiate agreements outside congressional control.²⁷⁰

David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 820-29 (1995) (describing how Congress and the executive have managed to set up a system for shared power under fast-track authority); Alan F. Holmer & Judith H. Bello, Recent Development, *The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L LAW. 183, 192-93 (1992) (describing how members of Congress decried the discretion granted to the executive in fast-track authority); Linarelli, *supra* note 18, at 224 (“Hardly anything can be found in the documentation relating to the drafting of the Constitution so as to glean any intent on the separation of powers in the area of foreign commerce.”). Representative Levin also addressed this issue in his consideration of Congress’s role in trade negotiations with Mexico. David S. Cloud, *Lawmakers Offer Plans to Modify Fast Track*, 49 CONG. Q. WKLY. REP. 1047, 1047 (1991) (quoting Levin as saying “[t]here is something between nitpicking and no role at all for Congress”).

268. For important recent contributions in some of these categories, see generally Alexia Brunet Marks, *The Right to Regulate (Cooperatively)*, 38 U. PA. J. INT'L L. 1 (2016) (addressing the regulatory state and sovereignty); Timothy Meyer, *Local Liability in International Economic Law*, 95 N.C. L. REV. 261 (2017) (addressing state and local issues); and Gregory Shaffer, *Alternatives for Regulatory Governance Under TTIP: Building from the Past*, 22 COLUM. J. EUR. L. 403 (2016) (evaluating trade negotiations on regulatory cooperation).

269. See, e.g., Hudec, *supra* note 156, at 116; Alan O. Sykes, “Mandatory” Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301, 310-12 (1990).

270. USTR Lighthizer has indicated an interest in negotiating trade agreements without congressional approval. Don Lee, *Lighthizer Spars with Lawmakers on Trump's Authority to Enact Trade Agreement with China*, L.A. TIMES (Feb. 27, 2019, 9:15 AM), <https://perma.cc/B3VC-X7RF> (noting that USTR Lighthizer asserted at a congressional hearing that the
footnote continued on next page

A further lesson for trade law and literature from this analysis is that the well-established delineation between free trade and protectionism is an outdated frame.²⁷¹ This Article tries to set the record straight as to the newly evolved structure. A more accurate structural model is one that sees the free trade norm in opposition to exceptional delegations with multiple motivations and possible outcomes.

B. Revisionist Futures

The mixed history may suggest that the Trump Administration's "three-digit actions"²⁷² are not necessarily an unprincipled return to protectionism. But if we accept the predominant view among trade experts that permitting unfettered use of exceptions is problematic, either because it creates unpalatable levels of risk or because it confuses congressional intent regarding the relationship between trade and economic security, we might consider whether and how to de-exceptionalize.²⁷³ Reconciling the opposing strands is not particularly difficult if the goal is simply to vindicate policy preferences. One can support or reject economic security exceptions in the service of a particular outcome (such as combatting unfair trade practices by a trading partner). But the task is more challenging if the search is for a structure that can be applied consistently in ways that provide predictable and reliable tools for legal actors and market participants.

1. Substantive recoupling

In theory, because Congress created this system, Congress should be able to take it back. With the creation of the WTO, Congress could have taken the exceptions off the books to signal its preference for multilateralism. As tools of an earlier age, the security exceptions served their purpose when needed and now, in light of the growth of the multilateral system, they should be retired.

Administration would expect to act without congressional approval to enforce the agreement); *see also* Claussen, *supra* note 22.

271. While this characterization is somewhat of an oversimplification, an alternate dichotomy has governed most of the policy and scholarly debates over the last century. *See, e.g.,* Koh & Yoo, *supra* note 18, at 750 (describing the controversy between protectionism and free trade in the context of congressional and presidential powers over trade); Note, *The Trade Act of 1971: A Fundamental Change in United States Foreign Trade Policy*, 80 YALE L.J. 1418, 1419-23 (1971) (describing the same protectionism versus free trade controversy).

272. Kathleen Claussen, *Trade War Battles: Congress Reconsiders Its Role*, LAWFARE (Aug. 5, 2018, 11:00 AM), <https://perma.cc/76YJ-FYZN>.

273. *See* Shaffer, *supra* note 4, at 41-42; Kahn, *supra* note 4.

As compared to other areas of foreign affairs, Congress is considerably involved in trade policy and this aspect should theoretically be no different.²⁷⁴

As a practical matter, however, the difficulty of reframing should not be understated, and not only because any legislative change would require overriding a likely presidential veto. First is a challenge of terms and concepts. Since the last major exceptions appeared in statute, the meanings of “trade,” “economic security,” and their underlying statutory manifestations have changed dramatically. Shifting global circumstances have precipitated a modified understanding of security, while a major international institutional system has likewise transformed trade grievances.²⁷⁵ Not only are our present terms and concepts outmoded, but to reconcile free trade and economic security seems in some ways to create an impossible bargain: Trade law may never be able to achieve the “security” outcomes that some policymakers believe it can. The two ideas appear to demand exclusivity, with each turning the other into a mere exception controlled by its own logic.²⁷⁶ Trade seeks to control national security through notions of economic efficiency and governance; national security seeks to instrumentalize trade to its ends. The conflict is highlighted in the architecture of U.S. trade law and made more complicated by the law and politics of both domestic and international trade policy, leading to more instability and demand for methods of mediation. Reconciling these concepts could put the liberal trade rule-of-law frame in jeopardy, especially in controversial circumstances.²⁷⁷

As compared to traditional military defense, maintaining “economic security” is made more complicated by the fact that so much of its content is beyond the reach of the state. In a market system, economic security depends on private actors as well as potentially complex economic forces in a globalized world.²⁷⁸ Adopting one of the alternative visions noted above, seeing free trade

274. See Claussen, *supra* note 18, at 318-19; Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1263-65 (1988).

275. See, e.g., Ankit Panda, *Geoeconomics and Statecraft in the Asia-Pacific: The Diplomat Speaks to Robert D. Blackwell and Jennifer Harris About Geoeconomics and Statecraft*, DIPLOMAT (May 21, 2016), <https://perma.cc/F47M-7B4Y>.

276. I thank Harlan Cohen for drawing my attention to this demand.

277. Some have argued it is already in jeopardy, either with respect to the present delegation situation or to the international space. For an overview, see Kathleen Claussen, *Essay, Old Wine in New Bottles? The Trade Rule of Law*, 44 YALE J. INT'L L. ONLINE 61, 61-62 (2019).

278. As former Secretary of Defense Ash Carter said in a July 2019 interview, “I don’t chalk [the trade war] all up to the Trump Administration, because, I don’t think, as I said, that we have—we’ve gotten from our economic—international economic policymakers a full playbook.” Carter Interview, *supra* note 118. Such a playbook “is intrinsically hard in a country like ours.” *Id.*

as a tool or source of security, engages a relatively narrow understanding of both concepts that may not fully account for the influence of today's business or macroeconomic factors.

An added practical challenge to recoupling is institutional. Different agencies with their respective equities are involved in this exercise as the trade administrative state spreads itself across many bureaucratic minisystems.²⁷⁹ Some of that is Congress's doing and was done to discipline its delegations, but some of that also came from the President when he sought advice on these issue areas. The result is a complex mosaic that is hard to rewind. Any change to the system that has developed will necessarily have institutional ramifications. The politicization of matters related to emergency powers exacerbates this exercise. An extensive political theory literature has explored opportunities to balance liberal democratic values with powers that seem inherently illiberal.²⁸⁰ That dilemma is an old one, and I do not seek to overlay those issues onto trade law other than as a guide to understanding the risks and rewards.²⁸¹ The upshot is that ending trade's substantive statutory exceptionalism is improbable.²⁸² Not only are the exceptions well entrenched, but some also serve as the basis for major cross-border programs and those, as well as some of the other soft security exception-premised actions, may be attractive tools that Congress finds worth keeping.²⁸³ Alternatively, Congress could try to provide greater substantive direction and definition to its delegations to clarify its

279. See Claussen *supra* note 38.

280. For overviews of these concepts, see generally GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., Univ. of Chi. Press 2005) (2003); NOMI CLAIRE LAZAR, *STATES OF EMERGENCY IN LIBERAL DEMOCRACIES* (2009); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., MIT Press 1985) (1934 rev. ed.); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210 (2004) (reviewing models of emergency power, including as exceptions, and their exercise by liberal constitutional governments); and Ole Wæver, *Securitization and Desecuritization*, in ON SECURITY 46 (Ronnie D. Lipschutz ed., 1995).

281. Others have applied this thinking to understand recent U.S. policy generally. See, e.g., Quinta Jurecic, *Donald Trump's State of Exception*, LAWFARE (Dec. 14, 2016, 1:01 PM), <https://perma.cc/2MMQ-57S2> (arguing that then-President-elect Trump may be a Schmittian executive who operates in a state of exception).

282. As Frederick Taussig wrote in 1909, "[a]n abrupt change of policy is as inexpedient as it is politically impossible." Taussig, *supra* note 226, at 8. This remains true despite the fact that some Republicans sought in 2018 and 2019 to make changes contrary to the President's wishes. See Adam Behsudi, *Grassley Forging Ahead with Bill to Rein in Trump's Tariff Powers*, POLITICO (June 11, 2019, 12:01 PM EDT), <https://perma.cc/6UKK-KSVN>.

283. As noted, IEEPA is the basis for the U.S. sanctions program. See *supra* text accompanying note 90. Additionally, sections 301 and 337 are closely connected with important intellectual property programs. See MORRISON, *supra* note 127, at 1-2; *About Section 337*, U.S. INT'L TRADE COMM'N, <https://perma.cc/CCB3-R6PF> (archived Apr. 10, 2020).

intention as to how the exceptions should operate in the service of the primary norm.²⁸⁴

Even if reform reuniting free trade and security in the substance and spirit of the law were possible, I remain skeptical about whether trade law, as presently understood, can adequately accommodate the underlying concerns. Given the political valence of these issues, there may not be a technocratic solution. Indeed, neither law nor politics seems particularly well equipped to manage the trade-security space.

2. Trade's innovative delegation disciplines

To the extent one accepts that substantive trade exceptionalism cannot easily be corrected, a natural second-best choice might be to try to cabin the downside risks through procedural checks.²⁸⁵ Additional delegation disciplines could serve as critical correction devices. This is especially true in an area with little to no engagement by courts. Where courts are removed from evaluating executive action, they may at least be able to assess whether appropriate procedures have been applied.

Congress's delegation of the last word to the President, at least when it comes to matters of security, which the President can easily claim, means that Congress must think of other disciplines for managing its tariff program. Part I addressed the disciplines that appear frequently in U.S. practice. Trade's delegation disciplines need not be binary. Rather, they can and do take many forms. Looking historically and holistically, the United States has experimented with how to manage the trade-related collaboration between the President and Congress for more than two hundred years.²⁸⁶ Although the four traditional approaches of consistent congressional engagement, ITC contingency, agency delegation, and nonintervention have dominated, the potential menu of options involves all sorts of collaborations and arm's length relationships that may both enhance and enable productive trade policy.

As a preliminary matter, we might seek to address the disparity in the breadth and force of congressional supervision over free trade authorities delegated to the President as compared to the exceptions. In other words,

284. For possible options and other suggestions to revisiting at least section 232, see Claussen, *supra* note 272.

285. As Aziz Rana observed regarding national security issues, lawyers tend to focus on procedural solutions. Rana, *supra* note 18, at 1420. We might also ask why more protections were not put on presidential delegations in the first place. See Jide O. Nzelibe, *The Illusion of the Free-Trade Constitution*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 5 (2016) (discussing political divisions as a possible answer); see also Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 286 (1986) (same).

286. See Claussen, *supra* note 38.

Congress could apply the same congressional oversight as is done for the free trade norm. A robust consultation and procedurally intricate system for tariffs like that found in the TPA/fast track context could help to temper exploitative applications. A TPA for tariff exceptions might include additional time limitations or a sunset clause and engagement with Congress before, during, and potentially after the President's decision. This approach also has downsides, however. TPA risks political paralysis in an area that is already fraught with political challenges. As I have written in earlier work, TPA can serve as a straightjacket to trade lawmaking.²⁸⁷ An overly interventionist Congress could likewise inhibit important tariff measures.

Congress could consider requiring further cross-agency interaction. At present, multiple agencies manage tariff authorities. Under this arrangement, these agency may choose to employ their exceptional tools on their own terms without a view to their cumulative effect. A hybrid discipline that brings together the USTR, which has an internationally focused mandate, with the Commerce Department and its domestically focused mandate could create more synergy and understanding about how each exception works, even if still imperfect.²⁸⁸

An additional option would be to work within the existing disciplines but adjust how they operate. For example, Congress could revise the processes for the investigations undergirding exceptional authorities such as sections 201, 232, 301, or 338 to alleviate their reliance on presidential factfinding. Carrying out those investigations with congressional engagement, beyond just reporting requirements, could provide a manageable check on executive action. Congress could also remove the possibility of political agencies initiating investigations and instead rely entirely on industry to bring forward cases. Creating a greater role for the ITC, in particular by taking away final authority from the President, could help depoliticize outcomes and channel them toward those supportive of free trade while maintaining flexibility.

But moving within and among existing disciplines is not the only option.²⁸⁹ Congress could also choose to create additional hybrid options or

287. These are the concerns that drive the OEP theory in favor of executive delegation. *See generally* Claussen, *supra* note 18, at 343-45 (discussing the various ways that congressional path dependence can prevent innovation in trade policy).

288. A hybrid approach such as this could help or hurt agency competition, which I have called the east-west divide, pitting the Commerce Department to the east of the White House against the USTR to the west. *See* Claussen, *supra* note 38. The agencies are in frequent contact, and Department of Commerce staff are often detailed to the USTR. On other agency competition in the news, see Damian Paletta, *Top Trump Trade Officials Still at Odds After Profane Shouting Match in Beijing*, WASH. POST (May 16, 2018, 6:42 PM EDT), <https://perma.cc/HG3F-ZGL8>.

289. I do not take up here the possible role of international-level disciplines given that the President can claim exception for his tariff actions in the current international trade
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new disciplines. For one, rather than move the administration of the exceptions vertically or horizontally, Congress could move diagonally to engage private-sector actors in decisionmaking. Our trade law apparatus already engages some private-sector committees in an advisory role.²⁹⁰ That role could be enhanced. Likewise, an independent committee made up of both agency representatives and private-sector actors, based on the model of the Committee on Foreign Investment in the United States but operating under the auspices of and reporting to Congress rather than the executive (and with industry input), could help cabin presidential abuse.²⁹¹

Perhaps most importantly, Congress could also create a larger role for courts. Indeed, in ordinary domestic law, one might expect courts to sort out these types of dilemmas. Judicial review provides a smoothing function or permits commentators to propose corrective lines of doctrine. As Jean Galbraith notes about foreign affairs generally, however, questions regarding the separation of powers between Congress and the President have mostly been determined outside the courts.²⁹² Especially in trade, the legislative and executive branches and, to some degree, global markets have served as much more important decisionmakers than judicial bodies. This is not to say courts have not been involved in trade lawmaking,²⁹³ but their authority is severely curtailed by their limited subject matter jurisdiction and longstanding doctrines that do not permit them to scrutinize certain executive actions.²⁹⁴

Outside of changes to the U.S. Code and lawmaking levers, greater convergence of these subject areas and groups would help. We need improved

law regime. *See supra* notes 176-77 and accompanying text (discussing the security exception in the GATT, its history, and possible applications).

290. Examples include the Advisory Committee for Trade Policy and Negotiations, the Agricultural Policy Advisory Committee, the Agricultural Technical Advisory Committees for Trade, the Industry Trade Advisory Committees, the Intergovernmental Policy Advisory Committee, the Labor Advisory Committee, the Trade Advisory Committee on Africa, and the Trade and Environment Policy Advisory Committee. *About Us: Advisory Committees*, OFF. U.S. TRADE REPRESENTATIVE, <https://perma.cc/DA67-HDRW> (archived Apr. 10, 2020).

291. *See* JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1, 4-6 (2020), <https://perma.cc/5GEC-4PSC>.

292. Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 990 (2013); *see also* Koh, *supra* note 18, at 1208 (calling the Supreme Court “traditionally a bit player in the intragovernmental struggle over trade management”).

293. *See supra* text accompanying note 28.

294. *See generally* Patrick C. Reed, *Expanding the Jurisdiction of the U.S. Court of International Trade: Proposals by the Customs and International Trade Bar Association*, 26 BROOK. J. INT'L L. 819 (2001) (discussing the limitations on the CIT's jurisdiction); Devin S. Sikes, *Why Congress Should Expand the Subject Matter Jurisdiction of the United States Court of International Trade*, 6 S.C. J. INT'L L. & BUS. 253 (2010) (arguing that the CIT's jurisdiction is overly limited).

linkages among the trade bar such as between those attorneys that work on international trade law with those that do U.S. customs or national security regulatory work. Collaborations between scholars with different backgrounds and interdisciplinary conversations could facilitate more creative thinking in this regard.

The conclusion that disciplinary change to our current trade policymaking apparatus is needed should not come as a surprise to the average reader. This is a problem that Congress, industry, and even U.S. trading partners have come to recognize, albeit belatedly. In the first two years of the Trump Administration, members of Congress introduced several bills that seeking to limit the President's authority under section 232 as well as additional bills that would address his authority under section 201, section 301, and IEEPA.²⁹⁵ As reflected in the diversity of this legislation, members appear to be divided on how to address the tariffs or whether to address them at all. Regardless of which path Congress chooses, if any, the biggest challenge is not opposition from any particular member, but rather the inevitable veto, raising the threshold for what will likely be required to get legislation across the finish line.²⁹⁶

Unfortunately, of the legislative proposals on the table as of May 2020, most are unlikely to create a major change in trade's security exceptionalism. Those that are the most likely to get bipartisan traction provide band-aid solutions such as defining "national security" in greater detail or shifting authority among politically controlled agencies.²⁹⁷ While those steps may place some additional constraints on the President, they do not adopt innovative disciplines that would police abuse in practice. More is needed.

295. See Claussen, *supra* note 272; Maria Curi, *Lawmakers Introduce Bill to Delay Potential Auto Tariffs*, INSIDE U.S. TRADE (Mar. 14, 2019, 2:38 PM), <https://perma.cc/PW4K-PEQK>; *GOP Bill Would Require Congressional Approval of IEEPA Declarations*, INSIDE U.S. TRADE (June 20, 2019, 10:07 AM), <https://perma.cc/7YCQ-HQTH>; Isabelle Hoagland, *Sens. Lankford, Coons Divided on USMCA Timing, United on Need for Tariff Legislation*, INSIDE U.S. TRADE (June 13, 2019, 3:26 PM), <https://perma.cc/5XXR-V72V>; *New Kaine-Carper Bill Would Give Congress Broader Trade Authorities, Influence*, INSIDE U.S. TRADE (Mar. 27, 2019, 2:36 PM), <https://perma.cc/P26P-7XPD>; *Rep. DelBene Introduces Bill to Prohibit the Use of IEEPA to Impose Tariffs*, INSIDE U.S. TRADE (June 28, 2019, 10:06 AM), <https://perma.cc/RCF6-RPR2>; *Rep. Murphy Introduces Bill to Give Congress a Say in National Security Tariffs*, INSIDE U.S. TRADE (June 25, 2019, 2:58 PM), <https://perma.cc/Z52X-8FMN>.

296. See Behsudi, *supra* note 282 (discussing the prospect of a strong bipartisan bill given the possibility that the President may not look favorably on such legislation); Maria Curi, *Toomey: Section 232 Bill Likely to Be Attached to "Must-Pass" Legislation*, INSIDE U.S. TRADE (Mar. 28, 2019, 5:53 PM), <https://perma.cc/RAX4-S64X> (emphasizing the need for "veto-proof" legislation).

297. See Claussen, *supra* note 272. As of May 2020, movement on any of this legislation remained elusive. See Hannah Monicken, *Grassley: Section 232 Reform Efforts Have Stalled, Could Be Over*, INSIDE U.S. TRADE (May 28, 2020, 3:06 PM), <https://perma.cc/8WXZ-2EAP>.

C. Beyond Trade

Reimagining delegation disciplines for trade's security exceptions implicates separation-of-powers questions that are hardly new. Outside of trade, administrative and constitutional law experts have long debated the congressional-executive relationship with the growth of the administrative state.²⁹⁸ A burgeoning literature on executive authority that does not need to be rehearsed here finds benefits in an unbound executive while also warning of its dangers.²⁹⁹ Oddly, that literature has not explored trade's delegation problem. Some scholars writing in the 1960s, during the period of major institutionalization for the exceptions, drew attention to the expanding trade administrative state on which the exceptions would come to rely.³⁰⁰ In the 1980s, political debates about import regulation prompted further consideration of the administrative components of tariff law generally.³⁰¹ But the separation-of-powers literature is remarkably light on trade's exceptions, how to make sense of them, how to discipline them, and what they might mean for the broader administrative law enterprise.

That is not to say that trade law and administrative law have not influenced each other extensively. When it comes to the nondelegation doctrine, trade cases loom large. Two tariff-related cases, *Marshall Field & Co. v. Clark*³⁰² and *J.W. Hampton, Jr., & Co. v. United States*,³⁰³ form the foundation of

298. See, e.g., Kagan, *supra* note 168, at 2246-53; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2-4 (1994); Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696-99 (2007).

299. Compare ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 3-5, 13 (2010) (arguing that a stronger executive power would allow the President to act swiftly and decisively to maximize the public wellbeing), with DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 2 (2006) (asserting that presidential authority should always be exercised within the confines of the rule of law to protect against arbitrary presidential action).

300. See George Bronz, *The Tariff Commission as a Regulatory Agency*, 61 COLUM. L. REV. 463, 463, 466 (1961) (discussing the Tariff Commission's distinct and independent functions that depart from those of other regulatory agencies due to its limited authority); Frederick Davis, *The Regulation and Control of Foreign Trade*, 66 COLUM. L. REV. 1428, 1428 (1966) (arguing that the administrative structure of trade regulation is inconsistent, conflicting, and needlessly complex).

301. See Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 548 (1987); William D. Araiza, Note, *Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response*, 99 YALE L.J. 669, 669-70 (1989); see also Tarullo, *supra* note 285, at 287.

302. 143 U.S. 649 (1892).

303. 276 U.S. 394 (1928).

the nondelegation doctrine.³⁰⁴ Both of these involved precursors to what would become today's economic security exceptions.³⁰⁵ Since the 1930s, however, exceptional tariff authorities faded from the doctrinal discussions, unsurprisingly given their lack of use. There was no major movement in opposition to the assignment of tariffmaking to nearly unreviewable executive discretion as it occurred between 1930 and 1974.³⁰⁶

But perhaps most important was the effect of a nontrade constitutional law case: *INS v. Chadha*,³⁰⁷ which upended the separation of trade-law powers overnight. The end of the legislative veto left a gap in the congressional-executive relationship on trade. By eliminating the legislative veto,³⁰⁸ and thereby its availability for exceptional presidential tariff authority, the Court left Congress exposed.³⁰⁹ *Chadha* stripped the exceptional tariff authorities of their most important congressional constraints and effectively required presidential support for new legislation if Congress wanted to reclaim that control.³¹⁰ Although Justice White's impassioned dissent in *Chadha* defending the legislative veto on functional grounds is not the law,³¹¹ it may make good sense for trade, and particularly tariff, authorities that are clearly differently situated from immigration law, the subject of *Chadha*. The consequence of the Supreme Court's foreclosure of the legislative veto without creating a mechanism for Congress to discipline the open-ended delegations in place at that time is that our present exceptional tariffmaking process is both

304. Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1852 & n.11 1856-66 (2019) (citing *J.W. Hampton, Jr., & Co.* as a leading case on the nondelegation doctrine and referring also to *Marshall Field & Co.*).

305. *Marshall Field & Co.* addressed a statute that permitted the President to raise tariffs on (that is, suspend the free import status of) products from a certain country "for such time as he shall deem just" when he determined that the other country has imposed duties on U.S. products that he found "unequal and unreasonable." 143 U.S. at 680 (quoting Tariff Act of 1890 (McKinley Tariff), ch. 1244, § 3, 26 Stat. 567, 612). *J.W. Hampton, Jr., & Co.* likewise took up a delegation to the President permitting him to adjust tariffs when he found that Congress's legislated duty rates did not "equalize . . . differences in costs of production in the United States and the principal competing country." 276 U.S. at 401 (quoting Tariff Act of 1922, ch. 356, § 315(a), 42 Stat. 858, 941 (repealed 1930)).

306. New attempts were made in the mid-1970s, but neither of those nondelegation challenges was successful. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 570-71 (1976) (involving a challenge to section 232 of the Trade Expansion Act of 1962); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 580-84 (C.C.P.A. 1975) (upholding the constitutionality of a presidential proclamation issued under TWEA).

307. 462 U.S. 919 (1983).

308. *Id.* at 959.

309. *See supra* notes 144-48 and accompanying text.

310. *See Chadha*, 462 U.S. at 985-87 (White, J., dissenting).

311. *Id.* at 967-1004.

“insulated from representative democratic politics and exempted from the administrative lawmaking procedures and constraints that define most other forms of economic regulation.”³¹² In the absence of judicial review, the post-*Chadha* administrative-law world puts considerable pressure on trade’s ex ante institutional design.³¹³

It would be ironic, but it is not impossible to imagine that the Supreme Court could take steps now to correct this omission through a nondelegation challenge to one of trade’s security exceptions.³¹⁴ The problem with bringing such a challenge points back to the core of this Article, however. The now acutely open-ended trade delegations to the President do not stand alone in congressional territory where the traditional nondelegation principles might apply; rather, they invoke security issues from which the Supreme Court is likely to shy away.³¹⁵ The trade experience makes clear that the legal formalism of the nondelegation doctrine is insufficient for managing complex issue areas such as economic security.

In the meantime, many projects remain. For now, trade’s security exceptions are sited squarely in the hands of the President until there comes a political moment that can accommodate changing them. In a multidimensional policy area such as trade, it may be that the traditional boundaries that limit cooperative models need to be relaxed. Given this landscape, legislators may wish to turn their attention to the development of alternative delegation disciplines. And scholars may wish to consider how better to maintain appropriate flexibility in those disciplines to accommodate a trade rule of law. Congress, courts, agencies, and the President all regularly engage in trade lawmaking, but we lack an account of how trade’s tasks ought to be allocated among these actors. This Article begins that effort, but trade’s unique position at the intersections of domestic and international policy, commerce, and security means that finding the constitutionally and practically appropriate separation of powers will remain a work in progress.

312. Tarullo, *supra* note 285, at 287.

313. The trade experience further demonstrates that “the contemporary state of the nondelegation doctrine represents something of a Pyrrhic victory for Congress.” KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* 69 (2008). In areas of clear congressional authority, the doctrine’s flexibility toward the executive branch may be more of a curse than a blessing.

314. *See* Am. Inst. for Int’l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1344-45 (Ct. Int’l Trade 2019), *aff’d*, No. 2019-1727, 2020 WL 967925 (Fed. Cir. Feb. 28, 2020), *petition for cert. filed*, No. 19-1177 (U.S. Mar. 27, 2020). A petition to the Supreme Court for a writ of certiorari is pending at the time of writing.

315. *See* Cohen, *supra* note 21 (elaborating on the conundrum posed by the security component in the Supreme Court’s possible upcoming review of a section 232 case).

Conclusion

This Article has identified an unseen and misunderstood structure in trade law with major implications for the separation of powers in the United States and for the global economy. Exceptional tariff delegations to the President based on economic security may entail certain benefits—to achieve other foreign policy objectives, for example, to deflect hot war or to provide leverage where highly institutionalized processes otherwise do not. They may help avoid a paralyzed Congress or the risks of path dependence and inflexibility that congressional decisionmaking on trade entails. They can create elasticity in what was once a very rigid and formal tariff-schedule process. But, as a means to structure and manage U.S. trade law, trade exceptionalism has more risks than benefits. It permits discretionary tariff actions with vast and immediate implications for markets, unlike traditional free trade agreements that not only take an extended period to negotiate, but also are heavily vetted internally and externally and typically involve just one or a few trading partners. And yet, despite their salience, any discussion about the influence of these divergent exceptions and trade's institutional architecture is often absent from debates about the allocation of powers between the President and Congress, debates about economic tools and national security, and debates about the content of trade law.

Exceptional tariff delegations are particularly detrimental without appropriate delegation disciplines. These two things together—excessive delegation without procedural checks and the invocation of economic security in the law—have served as a recipe for trade's executive aggrandizement. As I will show in a forthcoming companion article, exceptionalism has empowered Presidents to undertake major trade initiatives outside of congressional control, such as through the development of what I call “trade executive agreements.”³¹⁶ Congress ought to undertake the challenging task of seeking to correct this ambiguous structure and employ alternative mechanisms of oversight to more effectively deploy its constitutional authority, while still taking advantage of the executive's comparative advantages of speed, expertise, and knowledge of security and foreign affairs issues.

In sum, this study shows that statutory framing matters in the separation of trade law powers. Whereas the concept of trade law at the founding may have been effectively managed by Congress, issues of economic security that involve congressional and executive authorities have proven more difficult to administer. This Article has called for a review of the institutional structure and norms underlying the relationship between free trade and security. Questions about who ought to decide these issues are forcing a reconsideration

316. *See* Claussen, *supra* note 22.

of both the principal norm and the exceptions in U.S. political life. Accordingly, this Article has relevance not just for scholars but also for practitioners. First, it guides lawmakers as to how they might reshape U.S. trade law. Second, it provides an agenda for developing supplementary analyses on U.S. trade-law models.

Ultimately, trade exceptions may be fixtures in U.S. trade law, but they should be deployed with the recognition that they contribute to the President's creeping claims to unilateral power in foreign commerce. At the very least, twenty-first century economic pressures and changing narratives demand a renewed look at our dichotomous regime.