The *Elusive* Free Trade Constitution

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In the United States, commentators often contend that both our constitutional structure of government and international legal institutions can be reformed to promote the general welfare at the expense of faction. Supposedly, one such innovation—touted widely in the literature—was the decision of Congress under the Reciprocal Trade Agreement Act (RTAA) in 1934 to promote reciprocity and delegate significant international trade authority to the President. In this now familiar tale of institutional beneficence, members of Congress agreed to sacrifice some portion of their constitutional authority for the greater good. By doing so, Congress was able to disempower narrow interest groups and enable the President to pursue trade policies that benefited the general welfare. There is one problem with this account. It is not quite true. Neither reciprocity nor the delegation of trade authority to the President in the 1930s were efforts to transcend interest group pressure; on the contrary, they were very much products of interest group politics. Moreover, they were not particularly novel. Both delegation and reciprocity had been deployed by Republicans to secure protectionist policy goals since the latter part of the nineteenth century. The anti-tariff coalitions in the Democratic Party in the 1930s were simply copying institutional tactics perfected by their protectionist opponents. Ironically, against this historical background, the 1934 delegation did not end up strengthening presidential authority in trade policy, it actually weakened it. The notion that the President is institutionally disposed to favor free trade is a myth; on the contrary, presidential preferences on trade policy are shaped by conflict among partisan coalitions. Sometimes those coalitions have sought to delegate authority because they favor lower tariffs and greater access to foreign markets, sometimes they have sought to delegate because they do not. In the end, there are likely no set of constitutional structures that will continually guarantee a path to free trade; instead, the relationship between free trade and constitutional institutions is largely contingent and dependent on factional politics. Those institutions that seem to favor export access in one era can be harnessed in service of protectionism in another, and vice versa.

In the history of American trade policy, no single event has been more important than Congress’s decision to adopt a range of legislative changes that began with the Reciprocal Trade Act of 1934 (RTAA).¹ Prior to that legislation, American trade policy was purportedly plagued by protectionist forces, which led to a rash of tariff increases in the early twentieth century that culminated in the infamous Smoot Hawley tariffs of 1930.² Reversing this spiral of ever increasing

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tariffs at the time seemed daunting because it was thought that Congress was perennially susceptible to capture by protectionist groups.

In the tale that is now conventional wisdom, certain reformers like Secretary of State Cordell Hull managed to persuade members of Congress to take a series of drastic legislative measures to curtail interest group influence in international trade policy. The most significant of these reforms purportedly involved wholesale devolution of Congress's foreign commerce powers to the President. At the heart of this institutional reform was the decision to empower the President to negotiate binding reciprocal agreements. Subsequent reforms that made trade agreements more likely, such as the use of congressional-executive agreements in lieu of treaties for ratifying international agreements, have even been compared favorably to constitutional amendments. Collectively, these acts of legislative altruism, which ostensibly shifted the balance of international trade authority from a protectionist Congress to a free trade president, have been credited with ushering in an era of liberalization the like of which has not been known in American commercial history.

There are two problems with this narrative. First, it is largely inconsistent with post-RTAA United States trade policy, in which Congress continues to play an active role. Second, and more importantly, it is also based on a misleading historical picture of pre-RTAA trade policy.

Scholars implicitly assume that congressional delegation of trade policy to the President prior to 1934 was somewhat anomalous or non-existent. It was not. On the contrary, delegation and reciprocity were largely Republican protectionist tools from the 1890s. The Republicans in the nineteenth century sought to delegate to the President in order to raise tariffs and keep imports out, while congressional Democrats tried to delegate in the 1930s in order to ensure access to foreign markets. In sum, delegation to the executive branch was simply exploited to push trade policies favored by conflicting business coalitions. Moreover, Republican presidents in the late nineteenth century deployed reciprocity in a strategic manner to achieve largely mercantilist objectives; in other words, the goal was to induce countries in Latin America to open up their

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3 See, i.e., NITSAN CHOREV, REMAKING U.S. TRADE POLICY: FROM PROTECTIONISM TO GLOBALIZATION 46-47 (2007) (discussing Hull's request to Congress "to grant authority to the president to negotiate bilateral concessions raising or lowering tariff rates up to 50 percent of the existing rates... providing reciprocal arrangements were made by the other part" and his proposal "to treat the bilateral agreements reached by the president as executive agreements, requiring no ex-post congressional approval"); I. M. DESTLER, AMERICAN TRADE POLITICS 14-17 (1995) (explaining Hull's role in formulating the provisions of the Reciprocal Trade Agreements Act of 1934).

4 See generally Bruce Ackerman & David Golove, Is NAFTA Constitutional, 108 HARV. L. REV. 799 (1995). But Ackerman and Golove's account differs from the thesis being offered here in one significant respect. What they were trying to capture was not the foundation of a free trade constitution, but the origins of the modern interchangeability doctrine between congressional-executive agreements and treaties. They located that origin in the broader social struggles that ensued in the wake of World War II. But the constitutional innovation they were describing had to do with United States' turn toward internationalism more broadly during that era, and the need to overcome the barriers the treaty clause imposed on the country's ability to enter into international agreements. For an incisive account of the use of treaties and congressional-executive agreements in United States history, see Oona Hathaway, Treaties' End: The Past, Present, and Future of International Lawmaking in the United States, 117 Yale L.J. 1238 (2008).

markets for surplus American industrial products, but with the caveat that access to protected markets in the United States would be non-negotiable. But there was little reason to assume that presidents would be institutionally predisposed to favor free trade policies. Republican presidents proved to be largely and stridently protectionist (like their congressional counterparts), while Democratic presidents and members of Congress favored export market access.

Furthermore, most accounts assume that prior to the passage of the RTAA, both free trade and export oriented groups suffered from significant collective action problems, which made them relatively weak in comparison to protectionist interest groups. That is also not true. The National Foreign Trade Council (NFTC), which lobbied hard in the early 1930s for reciprocity and greater trade liberalization, was a well-financed interest group founded in 1914 that was supported by a coalition of export oriented businesses. Other interest groups that actively campaigned for increased export access during the early 1930s included the American Importers and Exporters Association, the Foreign Commerce Club of New York, and the National Automobile Chamber of Commerce. At the turn of the twentieth century, the anti-tariff coalition was a sufficiently advanced political machine whose influence was not merely reflected in its ability to organize successfully for tariff reform and export access policies before Congress. It was also largely credited with providing crucial political support for the passage of the 16th Amendment, which established the modern income tax. Many anti-tariff interest groups, especially southern farmers, threw their weight behind the income tax because they hoped it would be a substitute for protective tariffs. And during the antebellum era, anti-tariff forces were able to coalesce and push through free trade arguments in Congress that led to rolling back of tariffs from 1832 until 1842. Thus, the notion that Congress was perennially subjected to one-sided pressures from protectionist groups prior to the 1930s was simply incorrect.

Ironically, the most conspicuous innovation of the 1934 act is that while it enhanced (or retained) presidential flexibility to pursue policies favored by export oriented Democrats, it actually constrained the policy flexibility of future Republican presidents. It did so by conditioning presidential trade policy on a series of reciprocal trade agreements with other nations that made it much more costly for the United States to raise tariffs unilaterally. For instance, by adopting a novel and

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7 In their national meeting in 1933, the NFTC developed a report that favored delegation because “with such power . . . the President or his representatives will be in a much stronger position in negotiations with foreign governments.” Changes in Tariff Convention Topic, NY TIMES, April 16, 1933, at N 15.

8 As one commentator observed:
Heeded by James Farrell, President of the United States Steel Corporations, the NFTC was composed of fifty of the nation’s leading industrialists, bankers, merchants, and transportation executives. The first truly national association devoted exclusively to promoting foreign trade and representing all economic sectors, it quickly became the most important organization of its kind, surpassing the Chamber of Commerce in this respect.

9 HENRY J. TASCA, THE RECIPROCAL TRADE AGREEMENT OF THE UNITED STATES: A STUDY IN TRADE PHILOSOPHY 17 (1938); see also Exporters in Fight to Aid Tariff Bill, NY TIMES, Nov. 27, 1932, at 10.

10 See discussion in text accompanying infra notes 14-15.

unconditional most-favored nation principle with respect to its international trade agreements, the RTAA ensured that any trade agreement concluded by the United States with another country would become effective with every country to which the United States had an MFN treaty. In other words, the congressional Democrats of the 1930s sought to entrench their preferences by locking in tariff reductions through MFN trade agreements, and thus ended up weakening presidential authority in international trade. Thus, before the 1934 Act, presidents previously had significant latitude over both raising and reducing tariffs, but as a practical matter after the Act and the subsequent passage of the GATT in 1947, they had less latitude to increase tariffs. To be clear, the RTAA did not prevent the President from imposing protectionist tariffs altogether. On the contrary, the statute did preserve the option of achieving protectionist goals in the context of reciprocal trade bargaining. It simply constrained the ability of the president to raise tariffs unilaterally.

In any event, the RTAA did not set out to establish a new free trade order. Rather, it enshrined a more mercantilist approach to trade policy, which sought to harmonize the needs of both protectionist and export oriented groups, albeit with a slant towards the latter. One upshot to this approach was that it helped craft a compromise that neutralized some of the more polarizing tariff conflicts of the nineteenth century, which often pitted free trade Democrats from the south against protectionist industry groups from the northeast. But the reform also came at a cost: it helped spur the modern political dynamic that eschews unilateral reduction of tariffs in favor of reductions negotiated under reciprocal trade agreements. In such a dynamic, a tariff reduction is treated as a concession by one country that ought only to be traded for the benefit of market access in another. The principal beneficiaries of trade policies in this framework are assumed to be exporters and import competing groups, while consumers are largely ignored or given short shrift. In the end, the resultant set of institutional arrangements embodied by the RTAA did not correspond to what any genuine regime of trade liberalization would resemble, which would be the unilateral reduction of trade barriers. Rather, it was the product of a messy and complex negotiation by groups with varying and often conflicting beliefs about the wisdom of tariff reductions, and it should be viewed as such.

In the next couple of sections, I will describe how the practice of delegation, which would presumably produce efficient trade policies, was often marred by distributive politics. To be sure, the RTAA was negotiated in an atmosphere of international economic crisis so one might conjecture that the rules of normal politics ought not to apply. The analysis here suggests the

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12 As Paul Krugman has observed, the reciprocity approach to trade bargaining cannot be comprehended as a tool for free trade:

Anyone who has tried to make sense of international trade negotiations eventually realizes that they can only be understood by realizing that they are a game scored according to mercantilist rules, in which an increase in exports ... is a victory, and an increase in imports ... is a defeat. The implicit mercantilist theory does not make sense ... but it nonetheless governs actual policy.

Nzelibe, The Elusive Free Trade Constitution

opposite—the environment surrounding the adoption of the RTAA was characterized by self-interested and strategic behavior by factions and partisan officials.

Throughout, I will closely examine the various plausible efficiency based explanations for the RTAA reforms—the delegation to overcome faction and the marketplace of ideas. And I will argue that there are strong empirical grounds to view either explanation with skepticism. Delegation did not overcome faction; indeed, it was itself a product of factional conflict. Also, the idea that the American people turned their back on protectionism in the 1930s is not quite true; on the contrary, trade politics was and largely continues to be dominated by narrow interest group politics.

In the end, the real lesson of the RTAA is that it illustrates the pitfalls behind the presumption that one can hardwire the general welfare through constitutional innovation. The history of American trade policy suggests that the preferences of both institutional actors and interest groups are fickle. Industries that champion free trade and market access in one period can become vehement protectionists in another. Realignment between the parties’ most powerful constituents can occur and completely overturn longstanding notions about partisan preferences for free trade. For instance, Democrats who championed trade reform and delegation in the 1930s have since switched spots with Republicans as the party of free trade. And presidents, ever mindful of the needs of their core coalitions, will often pursue policies that make such coalitions happy regardless of whether it maps neatly onto prevailing theories of economic welfare.

So why did the RTAA reform originate when it did and why did it remain relatively stable? Why, for instance, did anti-tariff Democrats not favor delegation and reciprocal trade agreements in the latter part of the nineteenth century even when they were in power? One likely reason was that they did not need them. Southern farmers enjoyed favorable access to European markets during much of that era because Britain had taken the lead in Europe in pushing for the unilateral reduction of tariffs. The call for tariff reform was triggered only when European countries turned away from free trade in the early twentieth century and started retaliating against the United States’ own high tariff regime. And as to why the RTAA regime continued to persist in the post-depression era, the tentative answer is that the trade preferences of many Republican based constituencies started to change in the 1940s. In other words, because of new market opportunities created in Europe as result of WWII, more Northeast industries started to become more export oriented and less resistant to lower tariffs. But there was one constituency that remained invariably constant in its low tariff preferences from the mid-nineteenth century through the modern era and helped cement the move away from unilateral protectionism: the southern Democrat.

1. Delegation as an Institutional Innovation to Overcome Faction

Social scientists often concede that while politicians may tend to act as self-interested actors who discount the social welfare, well-designed institutions can serve to constrain such politicians to supply the electorate with the policies they desire.
For many scholars, the crucial institutional innovation that ultimately overcame interest group capture in international trade was delegation. For instance, the sentiments expressed by prominent international trade scholar, I.M. Destler, are typical:

The Constitution grants the President no trade-specific authority whatsoever. Thus, in no sphere of government policy can the primacy of the legislative branch be clearer: Congress reigns supreme in trade, unless and until it decides otherwise. Beginning in the 1930s, Congress did decide otherwise, changing the way it handles trade issues. No longer did it give priority to protecting American industry. Instead, its members would give priority to protecting themselves from the direct, one-sided pressures from producer interests to make bad trade law. They would channel that pressure elsewhere, pushing product-specific trade decisions out of the committees of Congress and off the House and Senate floors to other governmental institutions.¹³

Commentators elsewhere have made comparable claims.¹⁴

A straightforward examination of the history pre-RTAA trade policy alerts us to some problems with the conventional narrative. Of course, since tastes for the general welfare are inherently non-observable, it will be hard to prove (or disprove) definitively whether members of Congress in the 1930s were motivated largely by noble ideals. But there are nonetheless reasons to be skeptical of such public-minded explanations.

First, given the collective action issues in providing free trade, one needs a plausible account of how political groups pressuring Congress for reform would overcome free riding problems, especially when the costs of organizing are presumably high and the benefits of free trade diffuse. Ultimately, without any such account, this explanation remains unconvincing. On the other hand, there were some politically connected groups that stood to benefit materially from tariff reform. At the heart of this coalition were Southern cotton and tobacco farmers, who derived a significant portion of their revenues from exports. The membership of this group was wide and varied; indeed, the Southern National Farmers Alliance was considered “the largest citizen organization of nineteenth century America.”¹⁵ While this sector was not necessarily small in number, its geographical concentration was high, and there is evidence that the costs of organizing were low. Indeed, the political prowess of this group and its offshoots were notable,

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¹³ I.M. DESTLER, AMERICAN TRADE POLICY 14 (2005). To be clear, not all commentators have embraced this benevolent account of institutional change under the RTAA. Political economy scholars of the rationalist school have tended to be skeptical. See discussion in infra note 13

¹⁴ Indeed, the notion that the President is institutionally predisposed to free trade has even been embraced by scholars who are skeptical of the altruistic account of congressional delegation. See Karen E. Schnetti, The Institutional Foundation of U.S. Trade Policy: Revisiting Explanations for the 1934 Trade Agreements Act, 12 J. Pol. Hist. 417, 429–30 (2000) (observing that presidents favored low tariffs because the President’s constituency is national while that of a member of Congress is local); Michael Bailey, Judith Goldstein & Barry R. Weingast, The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade, 49 WORLD POL. 309, 327 (1997) (same); David A. Lake, The State and American Trade Strategy in the Pre-Hegemonic Era, 42 INT’L ORG. 33, 38 (1988) (“[W]here the representative element of the state can be best understood as acting in the interests of society, to use Pareto’s famous distinction, the executive acts in the interests for society.”).

¹⁵ ENCYCLOPEDIA OF THE GREAT PLAINS 710 (Ed. by David J. Wishart 2004).
and it was credited with partially spearheading the campaign to pass the 16th Amendment—a measure with largely anti-tariff implications.  

But what was this anti-tariff coalition hoping to achieve? It seems unlikely that they were simply ideological crusaders for trade liberalization. Indeed, their campaign seemed targeted against Northeast industries whose preferences for tariffs sometimes led to the kinds of trade wars that obstructed the tobacco and cotton coalition’s access to foreign markets. Nonetheless, Southern farmers had for a long time embraced the rhetoric of laissez faire in international political economy, even if during the antebellum era it was juxtaposed uncomfortably with the highly regulated and statist framework of slavery. But the link between cheap slave labor and the export fuelled cotton industry was often viewed as complimentary. “Cotton South opponents of protection,” one commentator has argued, “saw freer trade as necessary for slavery’s continued profitability, and thus some perceived protection as an indirect effort to undermine slavery.”

In any event, southerners viewed the protectionist tariff as a levy disproportionately born by their region to the benefit of the northeast, and would have liked to eliminate it altogether. But they lacked the political numbers to do so. Eventually, as certain industrial sectors in the northeast and western grain farmers became more globally competitive in the early part of twentieth century, they too started to throw their weight behind securing greater access to foreign markets. In this picture, the logic of collective action that mobilized these latter groups in favor of tariff reform was often the concrete injury they suffered when foreign states increased their tariffs in retaliation against United States’ import competing policies.

Second, contrary to the conventional wisdom, delegation of trade authority was not novel at the time of the passage of the RTAA. Indeed, anti-tariff supporters were simply borrowing a page from their Republican opponents who had previously perfected delegation as an instrument for pushing protectionist goals. Take, for instance, the delegation that was the subject of

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

18 Id. at 101.

19 John Calhoun, an ardent free trade proponent, would give voice to the South’s concern in this 1828 letter to Micah Sterling:

Our industry, tho at home, by our own hands and our own soil, is engaged in cultivating the great staples of the country for a foreign market, in a market where we can receive no protection, and where we cannot receive one cent more to indemnify us for the heavy duties we have to pay as consumers. It is thus, that our labor is discouraged.


20 See PETER TRUBOWITZ, DEFINING THE NATIONAL INTEREST 73 (1998) (“Few southern Democrats were prepared to compromise agriculture in the name of industrial progress, especially when such temporizing could open them to attack from southern populists.”)

21 See discussion infra at notes __

22 See id.
controversy in the famous case of Field v. Clark.\textsuperscript{23} There the Court upheld a statute—Section 3 of the McKinley Tariff—that gave the President the power to levy predetermined duties or taxes based on his own determinations of whether trade policies between the United States and its trade partners were “reciprocally unequal and unreasonable.”\textsuperscript{24} McKinley, known as the “Napoleon of Protection,” was then a formidable Chair of the House Ways and Means Committee, who spearheaded the campaign under the eponymous statute to raise average tariffs across all imports close to 50%—which was the highest tariff of the era.\textsuperscript{25} Numerous historians have acknowledged the devastating impact of the McKinley tariff on key trading allies of the United States. For instance, Palen argues that the tariff caused the collapse of no fewer than 40 tobacco factories in Spanish Cuba, and helped undermine support for longstanding British free trade policy by galvanizing protectionist sentiments throughout the Empire.\textsuperscript{26} Indeed, the Cobden Club, the preeminent British free trade coalition, condemned the tariff as “an outrage on civilization.”\textsuperscript{27}

While the delegation implicated in Field is usually justified as a necessary legislative measure giving the President a freer hand to negotiate tariff reduction agreements,\textsuperscript{28} it did not seem that way to free trade Democrats in Congress or to the U.S.’s key foreign trade partners. Such groups recognized delegation as a transparently protectionist device that gave the President wide latitude in imposing harsh tariffs on any country that he concluded had unreasonable trade policies.\textsuperscript{29} In any event, free trade Democrats in Congress condemned Section 3 of the 1890 Tariff as unconstitutional.\textsuperscript{30}

Belying claims that protectionism exerts one-sided pressure on members of Congress, McKinley and his fellow protectionist Republicans were soundly defeated in the elections later that year.\textsuperscript{31} The tariffs had become widely unpopular. Free trade Democrats promptly removed the

\textsuperscript{23} 143 U.S. 649, 680 (1892).
\textsuperscript{24} Id. at 680 (quoting McKinley Tariff Act, 26 Stat. 567, 612 (1890)).
\textsuperscript{26} Marc-William Palen, Protection, Federation, and Union: The Global Impact of the McKinley Tariff upon the British Empire, 38 J. IMPERIAL & COMMONWEALTH HIST. 395, 397 (2010).
\textsuperscript{27} Id. at 399 (quotations omitted).
\textsuperscript{28} EDWARD STANWOOD, 2 AMERICAN TARIFF CONTROVERSYS IN THE NINETEENTH CENTURY 281 (1903) (justifying delegation to the president as a means “to secure reciprocal trade with countries”); see also Field, 143 U.S. at 691 (noting that, in the judgment of the legislative branch, “it is often desirable, if not essential for the protection of the interests of our people, against unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations”) (emphasis added).
\textsuperscript{29} STANWOOD, supra note 18, at 282. Specifically, the Democrats “maintained that the section conferred upon the President in a certain contingency the power to levy duties upon imports, which duties were not imposed by Congress; and that he was further entrusted with the power at his own discretion to abrogate those duties and reimpose them.” Id.
\textsuperscript{30} See JUDITH GOLDSTEIN, IDEAS, INTERESTS, AND AMERICAN TRADE POLICY 107 (1993) (“Democrats argued that the reciprocity amendment gave the president taxing rights that belonged exclusively to Congress.”); see also STANWOOD, supra note 18, at 282 (same).
\textsuperscript{31} GOLDSTEIN, supra note 20, at 107 (finding that passage of the McKinley Tariff did not harm the Democrats since, during the midterm elections, the party “played on public fears of price increases” to gain a majority); see also
offensive Section 3 in the Tariff Act of 1894. But Republicans reinstated it once they took the House in 1897. For good measure, the 1897 Act also included a Section 4, which allowed the President to negotiate five-year treaties provided the goods exported by the other country were not produced in the United States.

But what was so novel about Section 3 of the 1890 Act? It was not really the act of delegating trade policy authority to the President. Indeed, some variation of congressional delegation to negotiate had been in place since the early days of the Republic. Similar provisions were also in place that gave the President the power to restore trade relationships with countries once they met certain conditions. What was remarkable about Section 3 was that it gave the President the unilateral power to retaliate by raising tariffs against the U.S.'s trading partners once he determined they were engaging in unfair trade practices. Indeed, Marshall Field, the prominent Chicago department store that was the plaintiff in the Field v. Clark case, was challenging delegation on the basis that the President had raised tariffs on goods higher than what was authorized by Congress. It was President's authority to block imports unilaterally that was at issue in that controversy, not his authority to pursue trade liberalization.

Furthermore, Section 3 of the 1890 Act also embraced a policy of reciprocity in international commercial negotiations. Various scholars have made much of the relationship between reciprocity and trade liberalization, often assuming a close and symbiotic relationship between the two. In the context of the 1934 RTAA, one commentator succinctly articulated the received wisdom about this supposed relationship: “Reciprocity can help explain trade

BENSEL, supra note 15, at 478 (same); STANWOOD, supra note 18, at 294 (stating that "four weeks after the tariff act took effect . . . hardly a Republican representative from the Southern States survived" the election).

32 GOLDSTEIN, supra note 20, at 112 ("In 1894, the reciprocal provisions of the McKinley act had been repealed.").

33 Id.; see also Tariff Act of 1897, ch. 11, § 3, 30 Stat. 151, 204 (1897).

34 Tariff Act of 1897, ch. 11, § 4, 30 Stat. 151, 204 (1897).

35 See, i.e., Field v. Clark, 143 U.S. 649, 682-689 (1892) (listing legislative acts in which Congress delegated to the President the power to restore trade relations with foreign countries following their abolition of discriminatory trade practices).

36 McKinley Tariff Act, ch. 1244, § 3, 26 Stat. 567, 612 (1890) ("That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, . . . whenever, and so often as the President shall be satisfied that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other extractions . . . which in view of the free introduction of such [goods the President] may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of [such goods] for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid."). Similarly, "the Dingley act [in 1897] authorized the president to negotiate reciprocal trade treaties and to retaliate against countries found to be discriminating against American exports. The later act did not need Senate approval, the former needed the approval of both houses." GOLDSTEIN, supra note 20, at 112.

37 Similarly, the plaintiff in the other famous delegation case of J.W. Hampton v United States was also challenging the authority of the President to raise tariffs beyond that authorized by Congress. See J.W. Hampton, v United States, (upholding the delegation in the Fordney McCumber tariff of 1922, which gave the President authority to raise or lower statutory duties by as much as fifty percent for certain imports "upon investigation of the differences in costs of production" between the United States and foreign competitors.).
liberalization—the United States liberalized because it received something in return—greater access to its exports overseas.\textsuperscript{38}

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

We believe the repeal of the reciprocity arrangements negotiated by the last Republican Administration was a National calamity . . . Protection and Reciprocity are twin measures of American policy and go hand in hand. Democratic rule has recklessly struck down both, and both must be re-established. Protection for what we produce; free admission for the necessaries of life which we do not produce; reciprocal agreement of mutual interests, which gain open markets for us in return for our open markets for others. Protection builds up domestic industry and trade and secures our own market for ourselves; reciprocity builds up foreign trade and finds an outlet for our surplus.\textsuperscript{39}

The language above illuminates some wrinkles in the conventional narrative regarding the relationship between reciprocity and free trade. For while it is true that Section 3 of the 1890 Act helped achieve some notable trade agreements under the Republican administration of Benjamin Harrison,\textsuperscript{40} it did so by finessing the relationship among three factors: increased protectionism of import-competing industries, the manipulation of tariff levels on goods which were not produced domestically, and increased access to foreign markets in the American hemisphere for surplus industrial goods.

Ultimately, the McKinley Act’s odd combination of high protective tariffs and discriminatory reciprocity provisions for trade agreements coincided with the changing commercial needs of northeast Republican industries. Protected from European competition since the civil war, these industrial groups gradually realized that domestic demand could no longer absorb growing industrial output. Republican Secretary of State James Blaine assiduously led the charge to use reciprocity to seek new outlets for demand of these industrial goods in foreign markets. Rather than turning to Europe, however, the Republicans focused more on using the reciprocity provision in the 1890 Act to pry open markets in the developing world, especially in Latin


\textsuperscript{40} David M. Fletcher, Reciprocity and Latin America in the Early 1890s: A Foretaste of Dollar Diplomacy, 47 Pac. Hist. Rev. 53, 61 (1978) (“During 1891 and 1892 the United States negotiated eight reciprocity agreements involving Latin America,” of which “[t]he two most important were those with Brazil and Spain for Cuba and Puerto Rico.”).
America.\textsuperscript{41} But not all of the U.S.’s trading partners in the American hemisphere warmed up to this mercantilist logic. Colombia, Haiti, and Venezuela all rebuffed American overtures for reciprocal trade agreements in the early 1890s, and were punished by high retaliatory tariffs as a result.\textsuperscript{42}

More broadly, the motivations and tactics underlying Section 3 of the 1890 Act should not be confused with a policy favoring free markets. First, for Republicans, the increase of protectionist tariffs on European industrial products was a core part of the Act’s overall purpose. Second, the Republican drafters of Section 3 hardly intended reciprocity to be genuinely mutual; in other words, they believed that the U.S. would gain from trade agreements with Latin American countries without giving much in return.\textsuperscript{43} After all, agreeing to lower tariffs on goods one hardly produces is not much of a concession at all; on the contrary, it was deployed tactically as a device to increase bargaining leverage. Understandably, those free trade Democrats who denounced reciprocity often did so because they viewed it as unfairly coercive and one-sided.\textsuperscript{44} Such sentiments were very much at play when congressional Democrats in Congress repealed the reciprocity provision of the 1890 Act in 1894.\textsuperscript{45} And on the presidential campaign trail in 1896, while condemning the Democratic repeal, William McKinley did not mince words in describing what he envisioned were the true objectives of reciprocity:

In my judgment, Congress should immediately restore the reciprocity sections of the old law, with such amendments, if any, as time and experience sanction, as wise and proper. The underlying principle of this legislation must, however, be strictly enforced. \textit{It is to afford new markets for our surplus agricultural and manufactured products, without loss to the American laborer of a single day’s work that he might otherwise procure.}\textsuperscript{46}

Once McKinley won the presidential election in 1896, he rewarded northern business constituencies with a new protectionist tariff, the Dingley Tariff of 1897,\textsuperscript{47} which also restored the key reciprocity provisions of the 1890 Act.\textsuperscript{48} Again, free trade Democrats not only condemned

\textsuperscript{41} See Kevin Narinryn, \textit{Rational Idealism: The Political Economy of Internationalism in the United States and Great Britain}, 1 1870-1945, 12 SEC. STUD. 1, 13 (2003) ("Faced with high tariffs and intense competition in industrialized countries, businesses had little choice but to search for new markets in Latin America and East Asia.").

\textsuperscript{42} See PLETCHER, supra note 29, at 61–62.

\textsuperscript{43} See H.R. Rep. No. 1466, at 244 (1890) ("The aim has been to impose duties upon such foreign products as compete with our own ... and to enlarge the free list wherever this can be done without injury to any American industry, or wherever an existing home industry can be helped and without detriment to another industry which is equally worthy of the protecting care of the Government."); see also Guy Shirk Claire, \textit{Reciprocity as Trade Policy of the United States}, 141 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 38 (1929) ("These treaties in reality carried into effect the idea of tropical reciprocity and were all alike. They gave the United States an unusual advantage in foreign trade for practically no concessions at all.").

\textsuperscript{44} See Claire, supra note 29 at 38.

\textsuperscript{45} See id. ("[The Wilson Bill . . . aimed to stop reciprocity because it was being used as a weapon to force Latin America to open its markets to the United States. This law cancelled the treaties made under the McKinley Act. The Democrats believed international bad feeling would result from the operation of such a form of reciprocity.").

\textsuperscript{46} \textit{Reciprocity}, N.Y. Trib., Aug. 27, 1896, at 2.

\textsuperscript{47} Tariff Act of 1897, ch 11, 30 Stat. 151 (1897).

\textsuperscript{48} See Tariff Act of 1897, ch. 11, § 3, 30 Stat. 151, 204 (1897).
the protectionist aspects of the Dingley tariff, but also questioned the logic underpinning reciprocity. In the hearing over the proposed tariff, Democratic Representative Cochran of Missouri acutely pointed out the redistributive implications of reciprocity from the 1890 Act:

[Y]ou propose to give us reciprocity. Reciprocity with whom? The McKinley law gave us reciprocity, not with the great states of Europe, that consume the surplus agricultural products of this country, but with some of the Spanish-American countries and with some of the small islands adjacent to our coast . . . Who was benefited by these reciprocity treaties? The same trusts and combines that were benefited by other features of the McKinley bill . . ., and will be further be benefited by the passage of the bill now under consideration.49

These musings by Congressman Cochran further illustrate the complicated relationship between delegation, reciprocity, and factional rent-seeking in nineteenth century trade policy. In this picture, delegation and reciprocity were presumably deployed to further both the protectionist and export access goals of one specific faction at the expense of the export access goals of another. In any event, to make matters worse, Republicans pushed for more delegation in the Act of 1922, which not only gave the President the power to alter tariff rates by as much as 50 percent, but also gave him the unprecedented power to engage in tariff reclassifications.50 The Act also created the so-called scientific tariff, which sought to equalize the costs of production among countries so that no country could undercut the prices charged by American companies.51 Notably, one of the vocal critics of the constitutionality of presidential delegation in the 1922 Act and the bill version of the 1930 Smoot-Hawley tariffs was a certain Cordell Hull, a southern Democrat who was on his way to becoming one of the most pronounced anti-tariff voices on Capitol Hill.52

Against this background, the delegation accorded the President in the 1934 Act was not particularly original, nor was it necessarily flexibility enhancing. Indeed, it is better understood in part as a ploy by anti-tariff Democrats to undo the damage inflicted by previous Republican innovations in delegating tariff raising authority to the President. But Democrats had by then given up on piecemeal efforts of simply repealing protectionist legislation. They sought to entrench a legislative scheme that would make it more difficult for future Republican presidents to ever have the power of unilaterally raising tariffs or making other adjustments for import-competing industries. They were also miffed at how prior Republican presidents had converted

50 Tariff Act of 1922, ch. 356, §§ 315-16, 42 Stat. 858, 941-44 (1922) (permitting the President to “determine and proclaim the changes in classifications or increases or decreases in any rate of duty”); see also GOLDSTEIN, supra note 20, at 123-24 (underscoring that the President’s discretion to “raise or lower duties for the purpose of equalizing [production] costs” was “limited only by a 50 percent cap”).
51 Tariff Act of 1922, ch. 356, § 315, 42 Stat. 858, 941-43 (1922); see also GOLDSTEIN, supra note 20, at 124 (discussing the “scientific tariff” provision in the Tariff Act of 1922).
52 See Editorial Research Reports 1929 (Vol. 2), The Tariff Commission and the Flexible Tariff (1929), available at https://library.cqpress.com/cgi-bin/qresarcher/document.php?id=qresrch1929052900#.Uyp4aZzCa3o ("The opponents of the plan contend that the flexible system can never be made to work as a "scientific" method of tariff revision, and that the delegation to the President of broad power to alter tariff duties is an undesirable innovation in the plan of government established under the Constitution of 1789. This position was taken during the House debates by Rep. Cordell Hull, D., Tenn., member of the Ways and Means Committee.").
the Tariff Commission set up by Wilson into a protectionist scheme. The 1932 Democratic Party Platform announced that it would embrace "a fact-finding tariff commission free from executive interference."53 The 1928 Platform vowed to end "the executive domination which has destroyed the usefulness of the present commission."54

Having shed his prior qualms about unconstitutional delegation when he was a Congressman, Cordell Hull, Roosevelt’s Secretary of State, now helped set in motion his own scheme of delegation. That scheme involved the combination of an unconditional Most Favored Nations (MFN) clause in trade agreements, as well as presidential flexibility to reduce tariffs unilaterally in negotiations with foreign countries.55 And more importantly, reductions in tariffs would no longer be made through omnibus legislation through Congress, but through bilateral agreements with other countries. Congress would simply vote on a bicameral basis whether to approve trade negotiation authority, rather than approve specific trade agreements with other countries that would be subject to ratification under the Treaty clause.56 Subsequently, the GATT multilateral framework of 1947 also had the added dimension of ensconcing trade reduction authority into a broader institutional framework, where efforts to raise a tariff would no longer be a simple matter of a dispute between two states, but a violation of a rule governing a broader range of states. In any event, this episode would prove not to be the only time Hull would have a change of heart regarding the allocation of international trade authority. For instance, he strongly opposed the establishment of a tariff board under the Taft administration, which would have removed the setting of tariff rates from congressional control.57 But then he reversed course and endorsed the establishment of a similar board under the administration of Woodrow Wilson, a free trade Democrat.58

Once the shoe was on the other foot, it was the Republicans’ turn to denounce delegation of trade authority as unconstitutional.59 The Republican Party platform of 1936 not

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55 See Kenneth W. Dam, Cordell Hull, The Reciprocal Trade Agreements Act, and the WTO, 1 N.Y.U. J. L. & Bus. 709, 712 (2005) (describing Hull’s role as Secretary of State in securing both delegation and reciprocity under the RTAA); NITSAN CHOREV, REMAKING U.S. TRADE POLICY: FROM PROTECTIONISM TO GLOBALIZATION 47 (2007) (discussing Hull’s request that Congress “grant authority to the president to negotiate bilateral concessions raising or lowering tariff rates up to 50 percent of the existing rates on agricultural and industrial products”); see also GOLDSTEIN, supra note 20, at 140, 143 (discussing MEN and executive delegation).
56 NITSAN CHOREV, REMAKING U.S. TRADE POLICY: FROM PROTECTIONISM TO GLOBALIZATION 47-49 (2007). Specifically, Hull “asked Congress to treat the bilateral agreements reached by the president as executive agreements, requiring no ex post congressional approval,” a “radical departure from previous practices” that required congressional ratification of trade treaties negotiated by the president. Id. at 47. Though Congress granted the president trade negotiation authority, it limited such authority to three years. Consequently, the president had “to periodically return to Congress for new authority, which promised a continued negotiation between Congress and the executive.” Id. at 48-49.
58 See id.
only vowed to repeal the RTAA,\textsuperscript{60} but also “condemn[ed] the secret negotiations of reciprocal trade treaties without public hearing or legislative approval.”\textsuperscript{61} For the years prior to the 1940 election, the Republican leaders in the Congress and Senate overwhelmingly voted for repeal of the RTAA every time it came up for renewal.\textsuperscript{62} By the late 1940s, however, when some of the Republican business constituencies that initially supported repeal eventually became net exporters, a split emerged within Republican legislators and many decamped from their long-held protectionist positions to embrace free trade.\textsuperscript{63} This intra-coalitional split within the Republican Party ultimately made it more likely that the constitutional innovations that made the RTAA possible would remain durable.

In the post-RTAA era, delegation of free trade authority to the President has more or less followed a predictable pattern. The free trade party—the Republicans in the modern era—has generally preferred to delegate to the executive branch regardless of which party occupies the White House.\textsuperscript{64} By contrast, Democrats usually have been reluctant to delegate even during periods of united government. But given the pre-RTAA history, it is unlikely that this pattern has much to do with the trade preferences of the President, and more to do with the fact that modern multilateral trade negotiations constrain the ability of presidents to negotiate for protectionist provisions. The trade constituencies in both political parties understand well the constraints of these multilateral regimes, and their preferences on delegation reflect that understanding. There is a slight wrinkle to this story, however. With the proliferation of bilateral and regional trade agreements, presidents now have more flexibility to insert protectionist commitments into international trade agreements, and this has frequently triggered consternation by the free trade party in Congress.\textsuperscript{65}

2. The Marketplace of Ideas as a Spur to Constitutional Innovation.

In democracies, the assumption is often that the marketplace of ideas will serve to screen out institutions and policies that are unfounded, dubious, or that cater to the needs of narrow interest groups because such policies will likely be discredited when they are exposed to the light of public debate. To this end, one common argument made for the RTAA is that the Depression helped clarify the horrors of legislative supremacy in international trade.\textsuperscript{66}

\textsuperscript{60} See Republican Party Platform of 1936, THE AMERICAN PRESIDENCY PROJECT (June 9, 1936), http://www.presidency.ucsb.edu/ws/index.php?pid=29639#xsz1RR7G6gn4 (last visited Sept. 14, 2013) (“We will repeal the present Reciprocal Trade Agreement Law. It is futile and dangerous. Its effect on agriculture and industry has been destructive. Its continuation would work to the detriment of the wage earner and the farmer.”).

\textsuperscript{61} See id.


\textsuperscript{63} See id. at 647 (“Senate Republicans voting in 1934 were responsive only to import-competing interests, whereas those voting in 1945 were responsive to both import-competing and export-oriented interests.”).


\textsuperscript{65} See Jagdish Bhagwati.

There is one significant problem with this marketplace of ideas narrative: it does not quite match up with post-RTAA trade policy. First, and most importantly, the marketplace of ideas thesis is exaggerated and does not reflect the intense partisan conflict that surrounded both the enactment and subsequent history of the RTAA. Far from learning that the Smoot Hawley tariffs were a likely source of the global economic crisis, and that the RTAA was a solution, Republican legislators in both houses condemned the RTAA as a blatant partisan measure on behalf of interest groups associated with the Democratic Party. Indeed, as some commentators have observed, almost every member of Congress who voted for the Smoot Hawley tariffs also voted against the RTAA. And as discussed earlier, in the years after the passage of the RTAA and up until WWII, the Republican Party did not vary in its protectionist stance. Ironically, the economic opportunities provided by the war helped transform some of the northern industries that supported Republicans from import-competing groups to net exporters. Had the northern business interests from which the Republicans drew their support in 1932 persisted in their import-competing preferences through the 1950s, it is very likely that the constitutional regime underpinning the RTAA would have unraveled. And while other commentators have criticized the notion that Congress would willingly relinquish authority because of lessons learned, they nonetheless seem to accept the premise that a president will likely have more liberal trade preferences than Congress.

Second, the marketplace of ideas thesis does not adequately capture the ideational landscape of American trade policy prior to the 1930s, nor does it pay sufficient attention to the political economy factors that shaped trade policy at the time. As Goldstein points out in her in depth analysis of U.S. trade policy, by the advent of WWII the dominant academic discourse in the American academy already favored free trade. Even though a protectionist element was visible in some American economics departments by the latter part of the nineteenth century, it had all but vanished by the end of the century.

But despite the almost universal onesidedness of the ideational discourse in favor of trade liberalization, academics and policy experts had almost no discernible effect on the trajectory of American trade policy by the early twentieth century. Up until the 1940s, tariff policy had an almost predictable pattern. When Republicans were in power, they championed high tariffs (backed by their manufacturing base); when Democrats were in power, they (and their agricultural

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68 See text accompanying supra notes 47-51.
69 As Irwin and Kroszner observe: "Senate Republicans voting in 1934 were responsive only to import-competing interests, whereas those voting in 1945 were responsive to both import-competing and export-oriented interests." See Irwin and Kroszner, supra note 50 at 647.
71 See, e.g., Bailey et al., supra note 57, at 326-28 (observing that presidents favored low tariffs because the president's constituency is national while that of a member of Congress is local); Schnietz, supra note 9, at 429-32 (same).
72 See GOLDSTEIN, supra note 20, at 87-91.
73 See id.
constituents) pushed for tariff reform. If and when policy experts and academics testified about the effects of high tariffs before Congress, they were quietly ignored by those opposed to tariff reform, and bandied around opportunistically by those groups who stood to benefit materially from such reforms. There does not seem to be much evidence that the policy discourse influenced any politician who was otherwise responding to constituent pressure to take a different stance on the merits of tariff policy.

By the time the Smoot Hawley tariff was passed in 1930 (raising average ad-valorem rates to 52.8 percent), it was uniformly condemned by academic economists as an imprudent economic measure. These academic voices, however, seemed to have no effect on either the subsequent legislative debates or the eventual political outcome. Moreover, even after Smoot Hawley seemed to instigate a tariff war that led 26 major trading partners to implement quantitative restrictions and economic controls, and provoked the United Kingdom to abandon whatever remained of its free trade regime by 1932, there is little evidence that major Republican politicians experienced a change of heart or mind. Even when the Great Depression set in between 1929 and 1933 and the American economy had collapsed, Republican legislators remained convinced that Smoot Hawley had very little to do with the ensuing economic crisis, and that the RTAA was a constitutional and political travesty that threatened the American constitutional and economic order.

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

Finally, the flipside of the marketplace of ideas explanation is that it overlooks how much of the political will in favor of free trade during the early twentieth century might have been the result of vested interest, rather than ideas. While Cordell Hull (as both legislator and Secretary of State) undeniably had an evangelical bend to his crusade for trade liberalization, it is somewhat a reach to extrapolate that the RTAA and the post-war international order were born of moral conviction, rather than more mundane commercial considerations. There are many reasons to view any ideational explanation with some suspicion. First, as discussed earlier, there were strong and well organized business constituencies that lobbied for greater market access under the RTAA.

74 See Schnieth, supra note 9 at 128-32; Hiscox, supra note 54 at 674-75
75 See GOLSTEIN, supra note 20 at 134 ("American economists, disinterested in political affairs, were busy creating a discipline whose beauty was its abstraction and often its irrelevance for particular policy questions.").
76 See discussion in text at supra notes 7-10.
Second, there were also regional differences for the preference for free trade and international institutions that belie ideational accounts. Conventional accounts of the controversies underlying the ratification of the postwar U.N. institutions and the prewar trade regime sometimes explain it as pitting internationalists who supported the United Nations and the prewar trade regime against conservative isolationists. But as some commentators have observed, it was Southern politicians in the early part of the twentieth century who were most supportive of international law and the use of multilateral institutions to resolve economic policy issues, and the South was then (as now) hardly considered a bastion of progressive idealism or particularly susceptible to norms of global cosmopolitanism.\textsuperscript{78} For Southern politicians (a group to which Cordell Hull belonged),\textsuperscript{79} their preference for internationalist institutions from the 1930s through WWII was dictated by a simple logic: the economy of the South was tied strongly to agriculture, and southern farmers were largely an export oriented lot whose interests were most visibly threatened by Hitler's autarchic economic policies. As Peter Trubowitz put it, "in the final analysis, there can be little question that the South's interests were determined by its position in the international economy... The South was more vulnerable to the loss of overseas markets than the rest of the country."\textsuperscript{80}

By the early 1950s, however, southern Democrats were aligning with Republican constituencies in strident opposition to the proliferation of international institutions. What happened? The answer is that Truman had decided to break with Roosevelt's more delicate and nuanced approach on civil rights issues, and had gambled on courting the black vote whose demands included using international human rights agreements to overcome domestic obstacles to integration. According to the now famous Rowe Report, Truman was advised that his 1948 electoral victory hinged on the support of African American voters in the north who, "h[eld] the balance of power in Presidential elections for the simple arithmetic reason that the Negroes not only vote in a block but are geographically concentrated in the pivotal, large and closely contested electoral states such as New York, Illinois, Ohio, and Michigan."\textsuperscript{81} In hindsight, the Rowe Report gambles wrongly that Southern whites would not abandon the New Deal coalition and align with Republican business interests because of the civil rights issue.

Simply put, Truman's willingness to embrace key planks of the civil rights movement upset the key coalition that enabled Roosevelt to pursue multilateralism both during the 1930s and early 1940s. For instance, even James Byrnes, Truman's first Secretary of State who negotiated the peace treaties with key European allies at the end of the war and who started the process for the creation of West Germany, was a southern Democrat who eventually turned against Truman on the question of U.N. treaties and civil rights.\textsuperscript{82} Indeed, in order to satisfy human rights treaty skeptics, Eisenhower subsequently appointed Byrnes to replace Eleanor Roosevelt as the Delegate

\textsuperscript{78} See Peter Trubowitz, Defining the National Interest: Conflict and Change in American Foreign Policy 126-27 (1998).
\textsuperscript{79} The claim here is not that Hull's ideological posture was a mask for regional Southern commercial interests, but that his free trade positions both as Secretary of State and as a Senator and Congressman from Tennessee resonated with Southern interests and politicians. See id. at 128-29.
\textsuperscript{80} Id. at 134.
\textsuperscript{81} [Full citation for original source], quoted in David McCullough, Truman 590 (1948).
\textsuperscript{82} [FOOTNOTE]
to the U.N. But Byrnes had earlier been a champion of multilateral institutions and free trade. As described by the wartime British Ambassador Lord Halifax, Byrnes was "[a] fervent believer in international cooperation . . . [who] can be counted to show himself as a faithful disciple of Mr. Hull."

To be clear, the claim is not that ideational explanations cannot influence the preferences of politicians for free trade or international institutions, but rather that to be politically sustainable these ideas will usually have to resonate with the material or ideological interests of some core constituencies aligned with either of the political parties. Staking out high-minded views about the benefits of free trade or global multilateral institutions may frequently overlap with the more parochial objectives of a party's core constituents, but sometimes they will not. And when such divergences do occur, it is not far-fetched to assume that office-seeking politicians will be willing to sacrifice ideals about the general welfare for electoral self-interest.

III. An Institutional Solution to Faction?

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

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

However, there is much evidence in United States history that is in tension with this proposition. To put the matter delicately, the constitutional theories used to encourage free trade

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84 In some respect, this perspective accepts Weber's view that ideas could play a secondary role mobilizing and expressing interests. See MAX WEBER, FROM MAX WEBER: ESSAYS ON SOCIOLOGY 280 (H.H. Gerth & C. Wright Mills eds., 1958) ("Not ideas, but material and ideal interests, directly govern men's conduct. Yet very frequently the 'world images' that have been created by 'ideas' have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest").
85 See Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. REV. 1217, 1232–33 (2006) (critiquing the argument that Congress is more susceptible to narrow societal groups than the President).
86 See id.
in the early nineteenth century had been developed, in the first instance, explicitly in opposition to the national government and presidential power. For instance, Calhoun’s doctrine of nullification was embraced by South Carolina in 1832 as a device to circumvent the protective tariff favored by import competing groups dominant at the national level.87 In this case, Calhoun deployed states’ rights, rather than nationalism, as the preferred institutional mode for achieving free trade.88 And the logic of nullification was itself somewhat ingenious. Adopting the prevailing view of many Southern commentators and politicians of the era,89 Calhoun concluded that the protective tariff was unconstitutional but that the general revenue tariff was not.90 But therein lay the quandary: for even if this constitutional theory had traction, Calhoun recognized that courts would not be institutionally capable of distinguishing between a constitutionally permissible revenue tariff and an impermissible protective one.91 But South Carolina, an export-oriented state that would be harmed by a protective tariff and presumably not by a general revenue tariff, would have the right kind of incentives to nullify the constitutionally suspect type of tariff.

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

The Congress shall have power — To lay and collect taxes, duties, imposts, and excises for revenue, necessary to pay the debts, provide for the common defense, and carry on the Government of the Confederate States; but no bounties shall be granted from the Treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry; and all duties, imposts, and excises shall be uniform throughout the Confederate States.92

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87 See PROCEEDINGS OF THE CONVENTION OF SOUTH CAROLINA UPON THE SUBJECT OF NULLIFICATION 15 (Boston, Beals, Homer & Co. 1832) (“[A]s the power to regulate commerce, conferred expressly for its security, cannot be fairly exerted for its destruction, so neither can it be perverted to the purpose of building up manufacturing establishments—an object entirely beyond the jurisdiction of the Federal Government.”).
88 Indeed, the key pro-nullification faction in South Carolina was called the “States Rights and Free Trade Association.” See WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836, 224 (1966).
90 See KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWER AND CONSTITUTIONAL MEANING 72-106 (1999) (discussing John Calhoun’s argument that the protective tariff was unconstitutional but that the case was nonjusticiable.); see FREEHLING, supra note 69, at 138-39.
91 Rough Draft of What is Called the South Carolina Exposition (1828), in 10 THE PAPERS OF JOHN C. CALHOUN 444, 446 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977) (“[T]he Courts cannot look in the motives of legislators,” but “are obliged to take acts by their titles and professed objects[,] and if these be Constitutional, [courts] cannot interpose their power, however grossly the acts may, in reality, violate the Constitution.”).
92 CONST. OF THE CONFEDERATE STATES OF AM. OF 1861, art. 1, § 8, cl. 1.
IV. A Speculative Conjecture

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

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

1. The rise of southern Democrats as a force in national politics.

From the end of the civil war until the Great Depression, Republicans dominated presidential politics by capturing the White House during twelve out of the sixteen elections. Not surprisingly, free trade Democrats opposed presidential delegation on trade policy during that period. But once southern Democrats gained the upper hand in the 1930s and started playing a more prominent role on the national political scene, they discovered that they could use delegation to further free trade objectives. Crucial to this dynamic, however, was that the Democratic Party that emerged after reconstruction and lasted until the 1960s was much more responsive to Southern economic interests than its reconstruction era predecessor. In the post-civil war era, for instance, Northern Democrats tended to be either ambivalent about tariffs or simply embraced protectionism, and Southern Republicans were reluctant to adopt the protectionist stance of the national party. Given this strong regionalist cast to party politics, it is more likely that the Democratic Party’s anti-tariff plank was a response to strong southern pressure, rather than any deep-rooted ideological commitment by that party to free trade. After all, Southern coalitions played a key role in pushing for the nomination of anti-tariff Democratic presidential candidates, including Presidents Grover Cleveland and Woodrow Wilson. Indeed, President Cleveland’s first administration, with its strong free trade platform, coincided with the return to dominance of the Southern wing of the Democratic Party.

The apparent incongruity that a region that recently had lost the civil war would have significant political sway on the national Democratic Party was the source of much heated political discourse in Northern states. In their 1894 platform, for instance, New York Republicans

93 DAVID MARGOILES, HENRY WATTERTON AND THE NEW SOUTH: THE POLITICS OF EMPIRE, FREE TRADE, AND GLOBALIZATION 17 (2006) (quoting Henry Watterson from the KY. LEADER (July 26, 1888)).
94 RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900, 474 n.33 (2000); see also id. at 125 ("[I]n the industrial states of the East, the Democrats were much more restrained in their opposition to the tariff; many of them even embraced protection.").
95 See BENSEL, supra note __ at 125 ("[I]n the industrial states of the East, the Democrats were much more restrained in their opposition to the tariff; many of them even embraced protection."). As a result of the compromise of 1876, the Democratic Party had once again become a dominant political force in the South, and thus begun the southernization of the Democratic Party.
96 RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900 474 n. 33.
Nzelibe, The Elusive Free Trade Constitution

explicitly invoked regionalist rhetoric in chiding Northern Democrats for supporting President Cleveland's tariff cuts:

We Denounce Northern Democratic Congressmen for permitting Southern members to protect the chief product of their section while removing or largely reducing protective duties on the products of the North; thus permitting the South, by legal enactment in time of peace, to destroy our prosperity and accomplish what it failed to do by illegal enactment in time of war. 97

The Pennsylvania Republicans struck an equally ominous tone in their 1894 platform: "[The Wilson Tariff] is an attempt upon the part of the Free Traders of the South to reduce the industries of the North to the level of those in the South." 98

2. The Rise of a New Mercantilist Coalition Favoring Market Access

By the early twentieth century, the Northeast industrial sector that traditionally favored the Republican Party had ceased to adopt a largely monolithic approach to tariffs, as more industries started to become competitive internationally. By the time the RTAA passed, the pro-reform coalition now included manufacturers who imported raw materials for finished products as well as export oriented industries, such as aircraft, cameras, and automobiles. 99 In addition, western grain farmers, normally predisposed to protectionism, had by the 1930s warmed up to the idea of using reciprocity to open up European markets for surplus grain products. 100 It was the concrete injury suffered from dwindling access to European markets that likely mobilized all these latter groups in favor of tariff reform. But there is a certain irony to the backlash against rising European trade barriers: after all, it was the increase in American protectionism during the late 19th century, partly as a result of the innovation under the McKinley Tariffs of 1890, which had raised domestic pressures in Britain for ending its long-running system of free trade. 101

97 [Full Citation of original source], quoted in Bensel, supra note 75, at 126.
98 Id. This era was the first time the Democrats had taken the White House since the civil war, and it marked the fruits of the political bargain captured in the compromise of 1877. See generally Allan Peskin, Was There a Compromise of 1877?, 60 J. Am. Hist. 63 (1973).
99 Karen E. Schnitzer, The Reaction of Private Interests to the 1934 Reciprocal Trade Agreements Act, Int'l Org. International Organization / Volume 57 / Issue 01 / Winter 2003, pp 213-233 at 217. See id. As discussed earlier, a significant segment of this sector would cement its export access preferences towards the end of WWII. See id. However, protectionist industries would still remain the more dominant part of the Republican coalition for the foreseeable future. The latter would include heavily protected industries like mining, toymakers, textile producers, and scientific instrument manufacturers
Nzelibe, The Elusive Free Trade Constitution

There is a significant twist to this narrative, however. Reciprocity and international trade agreements were not necessarily the preferred strategy of anti-tariff coalitions from the South. Indeed, even southern officials within Roosevelt’s cabinet were initially skeptical. Secretary of State Hull, for instance, favored a policy of unilateral reduction of tariffs, but he received significant push back from those legislators backed by the western grain coalition and northeast industrial groups. Thus, the resultant bargain among these three coalitions was something of a compromise: southern politicians agreed to reciprocity with the hope that it could be used to rationalize the abuse of domestic tariffs, while the western grain farmers and northeast industries were more vested in dismantling the spread of discriminatory trade barriers in Europe. For the latter two constituencies, delegation and reciprocity would serve a dual function: they would serve the goal of protecting import-competitive industrial groups and western grain farmers while simultaneously pushing market access for those sectors that had surplus materials to export. But the normative gloss on this arrangement was that it had the potential of creating a harmony of interests between export access and protectionist groups. At bottom, the two new pro-reform constituencies from the west and northeast were hardly enthusiasts of free trade; on the contrary, they believed there was still a place for protectionism when one faced foreign competition, but they considered it more important at the time to stop the increasing spread of trade barriers in Europe. This coalition disliked the Smoot Hawley regime not necessarily because it was protectionist, by because they believed its tariff level had gone beyond legitimate protection and had triggered unnecessary trade retaliation.

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

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

Contemporary commentary on the RTAA reinforced the notion that its key reciprocity provisions were intended as a practical concession to the political and economic realities of the depression, rather than a device for promoting liberalization. For instance, Henry Grady, a leading trade official and an early supporter of the RTAA felt it sufficiently important to pen an essay defending the new legislation in broad terms against its free trade critics: “The trade agreements program is not in any sense a free trade program. It is merely an attempt to remove the causes of

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102 Southerners were reluctant to embrace reciprocity as a trade policy, since they though there was little to gain by accommodating the needs of industrial groups.
104 Message to Congress Requesting Authority Regarding Foreign Trade, March 2, 1934, available at http://www.presidency.ucsb.edu/ws/?pid=14817
retaliation and to restore thereby to American enterprise its natural markets abroad and to retain at the same time reasonable protection for domestic industry."\textsuperscript{105}

Why did southern Democrats who favored free trade not push more aggressively for bilateral international trade agreements in the 19th century? The answer is that the cotton south might have concluded that international trade agreements were unnecessary to secure favorable access to European markets during that period. The 1846 repeal of the corn laws in Britain had already set the stage for ending agricultural protectionism in much of Europe in the nineteenth century, and the 1860 Cobden-Chevalier treaty between France and Britain had extended tariff reduction to other products.\textsuperscript{106} Thus, there was little or no reason for either reciprocity or international trade negotiations to register as a political strategy for the cotton south in the late nineteenth century. They were aware that the political economy of British textile industry demanded the importation of cheap raw cotton, and that whether or not there were trade agreements would be of little consequence. To be sure, domestic tariffs were generally high in the United States during that period, and southern agriculturalists tended to oppose them as a tax on the southern economy by the Northeast, in addition to the concern that they may provoke retaliation. This dynamic might partly explain why free trade Democrats tended to be hostile to both the delegation and reciprocity provisions favored by Republicans in the late nineteenth and early twentieth century.

When Britain’s economy started declining in the late nineteenth century, it started to experiment modestly with a protectionist system of imperial preferences in favor of its own colonies.\textsuperscript{107} But it was the global response to the 1930 Smoot Hawley tariffs that marked the end of the era of easy access to European markets. This fragile political situation came to a head in 1932 during the Ottawa conference, in which the British formally established a broad system of discriminatory imperial preferences.\textsuperscript{108} Secretary of State Hull would later condemn the Ottawa tariffs as the "greatest injury, in a commercial way, that has been inflicted on this country since I have been in public office."\textsuperscript{109} At bottom, it was the likely harm from these imperial preferences that goaded export groups in the United States in 1934 to mobilize in favor of a greater executive branch role in negotiating bilateral trade agreements. Prior to that triggering event, reciprocity and delegation would not have been that useful to free trade coalitions.

Thus, contrary to the conventional wisdom, the relative paucity of international trade agreements entered into the United States prior to the RTAA did not reflect the impotence of

\textsuperscript{105} Henry F. Grady, The New Trade Policy of the United States, 14 FOR. AFF. 283, 295 (1936). Grady was the Chief of the Division of Trade Agreements in the Department of State. Earlier in the essay, he would explicitly criticize as imprudent the idea of the unilateral reduction of tariffs:

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

\textit{Id. at 284.}

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export access groups during that era. Neither did the subsequent spread of such international agreements after the RTAA signal the retreat of protectionism. During the latter part of the 19th century, farming coalitions and other export-oriented businesses in the United States enjoyed generous access to European markets without the benefit of trade agreements.100 And in the post-RTAA era, export access to foreign markets has sometimes floundered despite the proliferation of reciprocal trade agreements.111 Ultimately, the modern practice of reciprocity in trade negotiations owes its legacy not to the principled logic of laissez faire, but to the efforts of Republican protectionists of an earlier era who sought to entrench mercantilist logic in international trade. Perhaps, it is no small measure due to that troubled heritage that the free trade economist, Jagdish Bhagwati, warned that in the modern age: “reciprocity can turn rapidly into a negation of an open trading system, making fair trade an enemy of free trade, and not an ally.” 112

In the end, the RTAA was the outcome of a bargain by groups with unwieldy and sometimes conflicting objectives over trade policy, and that it is how it should be viewed. To be sure, free trade ideas might have factored into the calculus of some of the key players, such as Cordell Hull, but a great many others were seeking objectives that were more pedestrian and mundane, such as increased market access. And a good many others thought the RTAA would simply serve as a Depression era measure that would help spur industrial production. Indeed, the longevity of the underlying regime crafted by the RTAA might be a testament to its hybrid and diffuse quality, which provides sufficient leeway for different trade coalitions to pursue their narrow objectives. Thus, even with the periodic resurgence of protectionist forces in modern American politics, the contours of the RTAA have remained largely intact. But the opponents of trade liberalization sometimes still get their way in the post-reform era. Trade talks have often been stalled or delayed. Presidents have been routinely denied fast track authority. Protectionist goals have been occasionally bundled up in international trade agreements. And non-tariff barriers have proliferated since the early days of the RTAA. Indeed, years after its passage, in 1938, Cordell Hull himself would come to rue the fundamental logic of this legislative compromise: “Only five percent of the RTAA bargain is economic, while the other 95 percent is more or less political or psychological.”113

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


\[111\] CORDELL HULL, THE MEMOIRS OF CORDELL HULL [insert page citation ]

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3. The displacement of traditional rent seeking from the tariff power to the taxing power.

The passage of the 16th Amendment had significant distributional implications among political and regional coalitions. However, one effect that is not sufficiently acknowledged is that it displaced much of political rent-seeking activity away from tariff collection towards the income tax. Thus, politicians who sought to reward favored constituencies realized that they could make more headway using the taxing power than by manipulating tariff schedules.114 While the passage of the 16th Amendment did not necessarily coincide with that of the RTAA, it likely played a key role in transforming the political dynamics of the era by lowering the stakes of tariff politics.

But this dynamic suggests that the reform of fiscal institutions may be particularly susceptible to intense social conflict. Attitudes towards such reform are unlikely to be symmetric across groups; on the contrary, while new institutions may expand the range of rent seeking options, they may also benefit certain interests at the expense of others. In this picture, the groups that profit from the old regime will likely resist change. And even if all groups concur on the need for fiscal reform as a measure to increase the state’s revenues, they may disagree strongly about how to how to allocate the burden, with each group preferring to shift the burden to the opposition. For instance, the modern income tax regime could be characterized as the culmination of such a reallocation conflict, in which anti-tariff southern farmers and progressive populists managed to prevail and impose their preferred fiscal regime over industrialists in the northeast.115

But beyond revenue collection, the larger lesson might be that with the growing complexity and size of the modern federal government, the institutional pathways that dominate rent-seeking in one era could eventually be replaced by more lucrative alternatives.116 Compared to the protectionist tariff, for instance, the current menu of rent-seeking options in the United States political structure might actually yield higher payoffs to special interest groups. In this respect, Pincus’s comparison between the antebellum and the modern tariff regime is particularly apt:

The tariff act of 1824 more faithfully reflected pressure group successes than do modern tariffs because firms today seek, besides tariffs and quotas, various subsidies, tax credits, military procurements, freeways, some which might be more easily secured or more attractive than protection, even for import-competing industries.117

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114 In the modern era, Stigler has argued that the income tax regime serves a particularly useful redistributive function in favor middle class groups, especially when measured against the tariff regime of the nineteenth century. George Stigler, Director’s Law of Public Income Redistribution, 13 J L & Econ. 1, 47 (1970).
115 See Monica Prasad, The Origins of Tax Systems: A French–American Comparison, 114 AMER. J. SOC. 1350, 1359 (2009);
116 Also interest groups might prefer
Nonetheless, rent expanding institutional reform might actually produce a paradoxical result. By increasing the range of institutional options for interest groups to pursue their rent seeking goals, it might actually lower the political stakes of social conflict.\textsuperscript{118} Potentially dangerous and destabilizing consequences might follow when interest groups have too few outlets for channeling their policy ambitions. One example from the antebellum era that readily comes to mind: the political crisis that erupted when in 1832 South Carolina felt it necessary to resort to the unusual tactic of nullification to push its preferred tariff preferences.

4. The creation of new institutional barriers to raising tariffs.

Rather than exploit the preferences of institutional actors, the RTAA more likely created a novel asymmetric structure in international trade agreements by creating more institutional barriers to raising tariffs, while simultaneously reducing barriers to lowering tariffs. It gave an edge to groups seeking market access, while preserving some leeway for powerful protectionist groups to meet their objectives.

This dynamic can be best illustrated by observing that prior to the 1934 regime, a protectionist interest group could simply lobby for a single piece of tariff legislation that could raise tariffs for the protected good against every country in the world to which the United States did not have a prior trade agreement. Opposition by export groups was often muted because it was difficult to show that any one piece of tariff legislation would harm access to foreign markets for any particular sector, although in the aggregate such tariffs often did. Furthermore, during that same period, if an export group sought lower foreign tariffs on goods it sought to export it would have to lobby for a bilateral agreement for each and every one of the countries to which it was seeking favorable market access. Finally, prior to the passage of the RTAA, the norm in the United States was that reciprocity would be accorded to its trading partners only on a conditional basis; in other words, it would not make available concessions to all countries just because concessions were made to one country. Post-RTAA, this asymmetric dynamic started unraveling when unconditional MFN clauses became the primary institutional mechanism for forging international trade agreements. And in the post WWII GATT period, when the modern multilateral framework was established, politicians who sought to adjust tariffs upwards would have to negotiate exceptions with every party to the multilateral agreement, or risk being held in violation of the agreement. On the other hand, if there were a downward adjustment in a particular tariff for any one country, any export oriented business interest whose country was privy to the multilateral agreement would automatically benefit from the adjustment due to MFN provisions.

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To summarize, this Part has suggested that the key factors that spurred the RTAA reforms were rooted in social conflict, instead of an effort to transcend interest group politics. But for each of these factors, the institutional dynamics that drove the reduction of tariffs were necessarily contingent. If, for instance, a flat tax were introduced, one could plausibly imagine that the

\[\textsuperscript{118} \text{Yet, even within specific any specific institutional arrangement, private groups might still exert their will at the level of structure in a manner that will obscure politically unpopular policy choices from voters. See, e.g. Daniel Kono, Optimal Obfuscation: Democracy and Trade Policy Transparency, 100 Am. Pol. Sc. Rev. 369 (2006).}\]
Nzelibe, The Elusive Free Trade Constitution

attractiveness of using trade barriers to reward special interests might increase. Alternatively, if regional trade agreements that enshrine labor side agreements proliferate, export groups might become more wary of using presidential flexibility to promote market access objectives.

V. Conclusion and policy implications

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

Second, the decision by politicians to embark on tariff reform in 1934 was not simply an artifact of enlightened policymaking; indeed, the reforms were very much the product of social conflict. Delegation, it has been commonly argued, was necessary to insulate Congress from being perenniably captured by special interest groups. But such an account rests on a model of capture that is skewed significantly in favor of protectionists. In this picture, export groups and consumers were seen as paralyzed by collective action problems and thus unlikely to push their agenda without intervention by well-intended political officials. The analysis here suggests otherwise. Far from being encumbered by the uncertainties of payoffs from institutional reform, the anti-tariff coalitions from the south were able to join forces with other groups in forging an institutional arrangement that would increase market access to Europe, while still preserving flexibility to negotiate benefits for powerful protectionist groups. But the outcome was a compromise that accomplished neither free trade nor protectionism, but a middle approach that embodied certain aspects of both.

Against this background, the real success of the RTAA was not that it succeeded in weakening interest group politics; rather, it was that by enshrining mercantilism, it helped lower the stakes of coalitional conflict in international trade. It did so by managing to accommodate the preferences of the most powerful protectionist and export access groups while downplaying those of consumers. In this picture, the larger lesson of the reform might not there was a danger of too many institutional outlets that cater to special interest groups, but that those available were too inflexible. For instance, one significant drawback to the tariff regime in early American history was that because it did not provide variety of options for protectionists to bargain with export groups, the stakes were often too high. If free trade groups managed to get tariffs lowered domestically, there would be no guarantee that foreign countries would lower theirs. And if
foreign countries were willing to lower their tariffs independently of trade agreements, then export groups had no reason to try to bargain with domestic protectionist groups. Thus, a disagreement over tariff levels could escalate to a destabilizing contest, as it almost did during the nullification crisis of 1832. Yet another drawback, which has not all been a focus in this paper, was the risk of tariff volatility.\textsuperscript{119} The era before 1934 was often characterized by sharp and dramatic changes in trade policy between Republican and Democratic administrations, alternating between high tariffs and repeals, delegation and congressional control, and reciprocity and unilateral action.\textsuperscript{120} Today, on the other hand, modern reciprocal trade agreements are more likely to facilitate mutually beneficial bargains among these groups, by permitting market access to be bargained selectively for tariff reductions on certain products, while preserving barriers for the most sensitive import competing sectors.

\textsuperscript{119} For instance, the tariff average for Democratic administrations during the post-civil war to 1932 was 28.4 percent, while the average tariff rate for Republican administrations was 44.3 percent. See Schnietz, Institutional Foundations, supra note ___ at 423-24.

\textsuperscript{120} See id.