

Article

Regulatory capture's third face of power

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Abstract

The term 'regulatory capture' is frequently invoked to describe dysfunctional government institutions. In its casual use, it refers to a phenomenon in which regulations benefit regulated industries, rather than public interests. However, as an analytical concept, social scientists have struggled to empirically identify and define the processes in which capture emerges and sustains. In this article, I outline a cultural framework for regulatory capture by linking cultural sociology and the faces of power to existing capture theory. Through an ethnographic case study of digital trade provisions in international trade agreements, I show how capture occurs through the construction and manipulation of 'public interests'. I trace how capture (a) *emerges* when industry lobbyists extend existing schemas of a policy network into new frames and (b) is *institutionalized* into regulatory agencies when policy-makers adopt and enact these frames into knowledge production and law. Thus, capture appears through a veneer of consensus, which suppresses alternative interests and policy outcomes.

Key words: regulation, culture, networks, power, elites, trade, interest groups

JEL classification: K2 regulation and business law

1. Introduction

Over the past century, alongside the growth of the administrative state, scholars have focused on the concept of regulatory capture to understand why public policies often favor the industries they are tasked to regulate. At the least, capture can produce biases favoring industry interests at the expense of broader public interests. At its worst, regulatory capture can result in crises, disasters and significant failures of governance, ranging from the 2008 financial crisis ([Johnson and Kwak, 2011](#)) to the BP oil spill ([Whitehouse, 2010](#)) and the Boeing 737 Max disasters ([U.S. House Committee on Transportation and Infrastructure, 2020](#)).

With these implications in mind, scholars have endeavored to identify, measure and provide solutions for regulatory capture. However, capture remains a slippery concept and is

often used instrumentally by political actors when they fail to ‘get their way’ (Yackee, 2022) or to argue for deregulation (Adler, 2021). Recent work has sought to specify heuristics and methods for diagnosing capture, agnostic of political or normative implications (Carpenter and Moss, 2014; Rex, 2020). These methods typically involve examining whether policy outcomes diverge from clearly stated public interests or whether regulatory decisions consistently favor one interest group over another.

However, in this article, I argue that a critical hallmark of regulatory capture is not observable conflict, but rather, consensus and complacency. In the days before financial crises, oil spills and plane crashes, we rarely see fights between clear ‘public’, ‘private’ or competing interest groups; rather, failures of governance tend to shatter our taken-for-granted safety and stability. To better understand and diagnose regulatory capture, we must ask: how is this consensus constructed and by whom? How does it obscure information and policy frameworks that could shape regulatory outcomes?

I define regulatory capture as a process through which corporate lobbyists suppress alternative interests not merely through overt, measurable impositions of will, but also through the shaping of the cultural understandings that give rise to durable policies and regulatory agencies over time. I conceptualize regulatory capture in two stages. In its first stage, *emergence*, industry lobbyists¹ pursue a dual strategy of network embedding and schema extension to influence policy outcomes. Network embedding is a process in which corporations mobilize lobbyists to gain access to policy networks and the policymaking process. Schema extension occurs when these lobbyists seize upon the existing cultural schemas of a policy network and extend these schemas into frames that incorporate industry interests. In the second stage of regulatory capture, lobbyists and public officials *institutionalize* capture through channels such as knowledge production and reproduction of policy outcomes in various legal institutions. These actions not only constrain future policy outcomes but also further incorporate industry-favored cultural frames into underlying cultural schemas.

This article advances research on regulatory capture on several fronts. First, it gives further analytical rigor to the term ‘regulatory capture’ by specifying its cultural dimensions. I show that contemporary debates about regulatory capture parallel the longstanding debate regarding the ‘faces of power’ and how researchers should operationalize and measure interest group power. I argue that the capture literature typically relies on the first and second faces of power to detect capture (Dahl, 1961; Bachrach and Baratz, 1962). I build on recent cultural approaches to capture (Kwak, 2014; Rilinger, 2023) to specify the mechanisms through which the third face of power operates (Lukes, 2005).

1 I use the term lobbyist to refer to any individual whose job responsibility involves policy support for a non-state organization’s interests (e.g. private company, trade association, non-profit) before government entities. This definition is more expansive than the legal definition of a registered lobbyist in the Lobbying Disclosure Act of 1995, which focuses on interaction with elected and appointed officials, and stipulates thresholds for lobbying expenditures and time spent lobbying. Many individuals I have interviewed describe their job as doing the work of lobbying but do not register as lobbyists based on subjective judgments of time use, or because they only interact with non-appointed officials in federal agencies, that is civil servants. In the study of regulatory agencies, most government officials are ‘non-covered’ officials, with whom lobbyists do not have to report their interactions. This obviously poses significant methodological problems for those who rely on lobbying registrations to study regulatory processes.

Second, I incorporate recent theoretical insights on cultural schemas and cognition (Lizardo, 2017; Boutyline and Soter, 2021) into the study of regulation and policymaking. Although regulatory studies have largely moved beyond rational exchanges between regulators and lobbyists (Stigler, 1971) toward the study of social processes, the micro-level cultural mechanisms of influence between lobbyists and regulators have often been underspecified.

Furthermore, this article answers the call for ethnographic inquiry in studies of political economy, power and elites (Cousin *et al.*, 2018; Jackson, 2018), and in the study of regulatory capture (Carpenter and Moss, 2014). To illustrate both theoretically and methodologically how to undertake a cultural study of regulatory capture, I present an ethnographic case study of digital trade policy. Triangulating observational data, interviews and public records, I demonstrate how technology lobbyists with no initial presence in the trade policy domain came to capture US trade agencies.

In what follows, I extend the existing theoretical frameworks of regulatory capture and draw upon cultural sociology, relational sociology and theories of power to articulate a cultural approach. After providing a brief overview of the policy context, I then describe the ethnographic fieldwork and analytical methods I undertook for this study. I present empirical findings to illustrate the process of capture in two sections, emergence and institutionalization. I conclude with a discussion of these findings and their implications for the study of regulation and culture.

2. Culture, power and capture

In recent years, scholars have debated how capture emerges, how capture should be diagnosed and its potential policy solutions. While early models of regulatory capture framed policy outcomes and political spending as 'goods' demanded and supplied by industries and self-interested legislators (Olson, 1965; Posner, 1969, 1974; Stigler, 1971), more recent work has instead focused on empirically measuring the behavior of lobbyists and regulators on the ground. As the administrative state has grown in size and authority, scholars have expanded capture to not only include those prior materialist accounts of protectionist, rent-seeking behavior, but also broader conceptions of regulatory bias.

As a result, definitions of capture vary greatly. Carpenter and Moss observe in their edited volume on the subject that scholars are 'quick to see capture as the explanation for almost any regulatory problem', (2014, p. 3) and rely on either coincidence and correlation to define capture, or high-profile disasters, rather than demonstrating the mechanisms through which policymakers come to favor corporate interests. Similarly, Rex (2020, p. 272) notes that 'there are rival definitions, the public interest is often undefined, capture is treated dichotomously, and industry influence is often assumed without being proven'. Carpenter and Moss (2014) propose a set of conditions that must be satisfied to claim capture: agencies are said to be captured when there exists an identifiable 'public interest', 'industry interest' or 'special interest', and agencies consistently choose the industry/special interest over others, despite available evidence or statutes that would favor other interests (Yackee, 2014). Therefore, many scholars identify regulatory capture through policy outcomes, for example, accidents, governance failures and consistent decisions favoring regulated industries. However, this focus on observable outcomes limits our ability to detect and measure instances of regulatory capture. 'Public' interests are not necessarily easily identified or stated, and

there are often differing ideas of the ‘public interest’, some of which also align with, or are constructed by, one or many ‘special’ or ‘industry’ interests.

In many ways, focusing on observable wins and competing interests recalls the theoretical debate regarding the faces of power, and how scholars construct their objects of study. In a critique of *The Power Elite* (Mills, 1956), Dahl (1958, 1961) articulated what is now referred to as the ‘first face of power’, by arguing that power should be measured through the observation of political conflicts and their outcomes. Indeed, Carpenter and Moss’ conditions for identifying capture are remarkably similar to Dahl’s criteria for measuring power (see Dahl, 1958, p. 466). For Dahl, an interest group can be thought of as powerful if, during observable debate and conflict with other interest groups, they consistently influence decision-makers in their favor. In response, Bachrach and Baratz (1962) argued that this approach misses the ‘second face of power’ or the ability of interest groups to set agendas. If certain groups shape policymaking processes early on, then they can exclude competing interest groups, thus rendering covert conflict. Importantly, however, opposing interest groups are still identifiable, if not through their attempts to participate in political conflicts, then through the expression of grievances. In Lukes’ (2005) articulation of a third face of power, he critiqued such a behavioralist approach, arguing that power often suppresses even this expression of grievances. When certain interest groups shape the cultural and cognitive systems underlying institutional, collective and individual action, conflict is neither overt nor covert, but suppressed entirely. Thus, when the third face of power operates, actors internalize certain cultural schemas, precluding recognition of other potential interests or grievances. To use a sports metaphor, the first face of power is measured through the winner of the game, and the second face of power can be understood as the referee. The third face of power is the field, the rulebook, and agreement that there is even a game at all.

For the purposes of identifying regulatory capture, the third face of power differs from the first two faces of power on the issue of the ‘public interest’. Carpenter and Moss’ (2014) approach to regulatory capture, in its focus on identifiable and opposing interests, adopts a behavioralist approach. For a regulatory agency to be captured, some type of alternative interest or grievance aligning with ‘public interests’ must be both identifiable and intentionally overlooked. Industry interests are self-serving and driven by private profit-maximization, while ‘public interests’ are clearly contrasting, defeasible value claims relating to the ‘common good’ in a democratic society (Carpenter and Moss, 2014, p. 14). The ‘winners’ can be clearly seen and defined. The first-face struggles for power are typically short-term conflicts with discrete boundaries, for example, industry participation in rulemaking processes (Coglianese and Walters, 2016; Potter, 2019; Yackee, 2019). The second-face struggles are medium-term episodes that define political agendas, such as when interest groups pursue *ex parte* meetings (Libgober, 2020), coalitions form and crowd out dissenting interest groups (Nelson and Yackee, 2012; Heaney, 2014; Hojnacki *et al.*, 2015) or business interests control information (Shaffer, 2003; Woll and Artigas, 2007; Kerwin and Furlong, 2011). In these formulations, agencies adopt agendas that set aside the concerns of alternative, but observable, interest groups, making decisions resulting in the ‘suppression or thwarting of a latent challenge’ during the policymaking process (Bachrach and Baratz, 1962, p. 44).

However, regulatory capture’s third face of power operates in the long, historical process of constructing the ‘public interest’ itself. The third face of power operates when actors are able to constrain and distort others’ definitions of the ‘public interest’ (Lukes, 2005, p. 146). When regulatory capture occurs, regulators rarely outwardly and consciously thwart

established ideas of ‘public interest’. Rather, they operate in pursuit of certain policy objectives framed as the public interest, ranging from legislative intent to political values and professional norms. Based on these manipulable and varied conceptions of ‘public interest’ in particular regulatory domains, regulators perform their duties, design institutions and implement policies. In this vein, recent research on capture has begun to explore the cognitive and psychological dimensions of capture (Kwak, 2014; Rilinger, 2023). Kwak (2014) describes cultural capture as industry actors’ use of group identity, status and relationship networks to influence regulators. He argues that homophily will lead regulators to adopt positions of those who share similar social positions, rendering them subject to peer pressure and information capture, or the ability of lobbyists to control the information that regulators use to make decisions. Rilinger (2023) distinguishes between these information problems and what he calls worldview problems, which affect regulators’ basic understandings and deeply rooted worldviews.

Building on these cultural approaches, I argue that regulatory capture’s third face appears as cultural consensus around the ‘public interest’ within a policy domain. Capture occurs when an industry successfully narrows regulators’ ideas of the public interest and frames institutional objectives to focus on their own interests. Alternative interests and conflict (whether covert or overt) cannot be observed because within a policy domain, actors have accepted a shared cultural framework, institutionalized into existing policy frameworks, through which to interpret the ongoing and new policy issues.

To understand how actors manipulate constructions of ‘public interest’, I draw from recent work in cultural sociology on cognition and culture (Vaisey, 2009; Lizardo 2017; Boutyline and Soter, 2021) as well as longstanding research on the organizational state (Laumann and Knoke, 1987). Regulatory capture manifests in two stages, as visualized in Figure 1. In the first stage of capture, emergence, industry lobbyists modify structures through two processes: network embedding and schema extension.

Network embedding occurs when industries mobilize resources to hire lobbyists and embed themselves into existing policy domains. Policy domains consist of social networks of individuals and organizations spanning state agencies and non-state organizations, such as

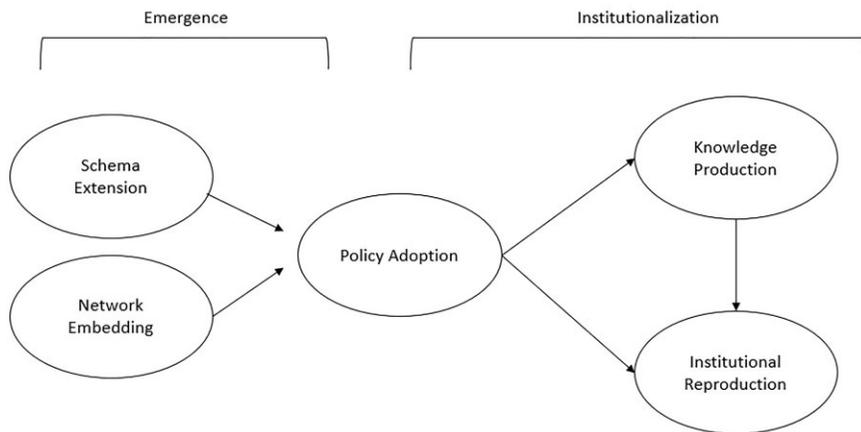


Figure 1 Stages of regulatory capture.

trade associations, advocacy groups and think tanks (Laumann and Knoke 1987; Knoke, 1994). Policy domains form around specific issue areas in which actors ‘take each other into account in their actions’ (Laumann and Knoke, 1987, p. 11). In practice, we often recognize policy domains by substantive focus, for example healthcare policy, tax policy, foreign policy, and as detailed in this article, trade policy. To embed oneself in a policy domain, one must establish a ‘criterion of mutual relevance’ (Laumann and Knoke, 1987, p. 11). Actors are deemed non-members of a domain if their actions are ‘inconsequential’ for shaping collective decisions within the domain. This does not mean that ‘losers’ or actors who are less influential or unsuccessful in their advocacy efforts are excluded. In fact, the actions of these actors are likely important for shaping others’ behavior during the policymaking process. Instead, non-members are those whose actions are not even registered, whose presence is completely suppressed, in policymaking processes. Importantly, the criterion of relevance is constructed by cultural understandings of policy problems, including narratives about causal stories, target populations, expertise, legitimacy and the public interest (Stone, 1989), and can change over time.

Schema extension occurs when lobbyists take existing understandings of ‘public interests’ and attempt to incorporate their clients’ interests into those understandings. I use the term ‘schema’ to refer to ‘socially shared representations deployable in automatic cognition’ (Boutyline and Soter, 2021, p. 730). Applied to policy domains, schemas constitute basic representations and assumptions for how the world works, how policy should be made and for which objectives. Schemas are shared among members of a policy domain and may not be held among those outside the policy domain. One test for sharedness may be a ‘taken-for-granted character or intelligibility’ (Boutyline and Soter, 2021, p. 739). For example, a basic, unconscious assumption that government intervention is bad for consumers because it distorts markets may be shared and implicit among trade regulators. However, this schema would not be taken for granted among regulators working in another domain such as public health, where regulators would believe that government intervention is necessary to protect consumer health. Schemas are automatic ‘Type I’ processes that are fast, unconscious and motivate action (Evans, 2008; Vaisey, 2009). However, schema extensions are ‘Type II’ processes that are slow, deliberative and justificatory. In my case study, I show that lobbyists were able to extend a libertarian schema with cultural frames that applied free market, free speech principles to issues around the Internet and data governance.

This cultural approach to understanding regulation aligns closely with recent research on the role of knowledge and expertise among policy professionals. Policymakers face multiple pressures and constraints throughout the policymaking process (Lindblom, 1959), often relying on communities of experts to inform their decisions. These experts include scientists (Jasanoff, 1990), economists (Berman, 2022; Fourcade, 2009) and lawyers (Conti, 2011; Dezalay and Garth, 2011). As I show in this article, corporate lobbyists also position themselves as experts in relation to regulators. When embedded in a community of trade policy professionals, the ‘information exchange’ or ‘subsidy’ (Hall and Deardorff, 2006) which lobbyists provides is often culturally and relationally constructed as expertise resting on shared cultural schemas.

While some approaches to capture have distinguished between material and cultural sources of capture (see Rex, 2020), this approach views the two as mutually dependent. Material sources of power are relevant here not because they are determinative of ‘who wins’ but because they afford economically dominant actors the ability to mobilize resources that can be

converted into social and cultural capital (Bourdieu, 1986). Well-resourced actors overcome collective action problems (Olson, 1965) to establish new lobbying groups, fund public relations campaigns, hire well-connected lobbyists and open offices in Washington so that their government relations offices can mobilize cultural frames and logics, which construct their economic power and market share as critical to US 'public interests'. It is not always the case that this conversion is done successfully. As several studies have shown, lobbying expenditures do not correlate with favorable policy change (Baumgartner *et al.*, 2009), and well-resourced groups are successful when working in coalition with groups that are able to mobilize cultural resources (Smith, 2000). Thus, the third face of regulatory capture cannot be reduced to material power alone—for capture to emerge, lobbyists must be able to mobilize cultural and relational resources to their advantage.

While the first stage focuses on the processes through which capture emerges, the second stage, institutionalization, demonstrates the potential manifestations of regulatory capture. The institutionalization of capture occurs when lobbyists and public officials embed their cultural understandings into regulatory institutions. In this sense, what was originally slow, deliberative reasoning begins to take on an automatic, unconscious character, buttressed by a growing body of law and knowledge. I offer two mechanisms illustrated in my case study, although capture could take shape through other mechanisms in other cases. First, I show that capture is institutionalized through knowledge production, in which lobbyists and public officials generate basic data and information in bodies such as the U.S. International Trade Commission (USITC), which regulators rely on to make public policy. Second, capture is sustained through recursive institutional reproduction (Halliday and Carruthers, 2007), in which public officials build from initial policy outcomes to create linkages and complementarities across various regulatory domains and domestic and international institutions. Frames extended from cultural schemas become engrained in legal and institutional frameworks, potentially rendering these frames into automatic, unconscious schemata themselves.

Through these processes, we see regulatory capture's third face of power. Whereas the first face of power leaves traces through observable outcomes, and the second face of power can be found in the ability of the industry to directly shape policy agendas, the third face of power shows itself as consensus and through taken-for-granted understandings of public policy. The third face of power underlies the other two faces and struggles in each dimension can operate simultaneously and on different time horizons. Thus, even when the third face of power operates, this does not mean a regulatory domain is completely free of observable conflict. There will still be competing interest groups and struggles around agenda setting, but these actors, together with regulators, will have a shared vocabulary and definition around what constitutes public interests. The extent to which ideas around public interests are inflexible and narrow, or adaptive and expansive, is shaped by struggles over the third face of power. That said, the third face of power is not autonomous from the first and second faces. First- and second-face struggles can impact how we conceive of public interests. But these struggles are not determinative of this broader cultural terrain in which ideas around the public interest are shaped, framed and manifested in regulation.

Furthermore, not all instances of consensus are cases of regulatory capture. Rather, capture only occurs when this consensus is based on frames and schema extensions introduced by a specific interest group, to the exclusion and suppression of alternative frameworks and potential interest groups. Proving this form of capture requires the process tracing of

lobbying behavior and policy change (Rex, 2020), with specific attention to the cultural frames mobilized. A cultural approach allows us to identify cases of capture where the first and second faces leave no traces—instances where perhaps there are no discernable alternative or oppositional interest groups, or perhaps a crisis or disaster has yet to happen.

3. The rise of digital trade

I illustrate the cultural dimensions of capture through the emergence of digital trade in the US trade policy. As a regulatory domain, trade policy has shifted in substance over the past century, moving beyond tariff setting in goods toward regulatory harmonization in areas such as labor standards, intellectual property, public health and environmental protection (Rodrik, 2018). These changes occurred as part of a focus on ‘non-tariff barriers’ in the 1970s which continued as the US trade officials sought to combat ‘unfair trade’ by other countries throughout the latter half of the 20th century (Destler, 1995).

Policies negotiated in trade agreements seek to not only constrain foreign regulations but also guide and constrain the US domestic regulations. Although the US negotiators aim to give domestic regulators policy space, in practice, they play a managerial role in domestic rulemaking practices (Claussen, 2021), and domestic policies have often been changed to comply with trade agreements (Brewster and Chilton, 2014; Conti, 2016). Thus, although trade policy is somewhat unique among regulatory domains in its internationally facing role, its content has significant implications for domestic regulatory agendas as well.

In this context, the digital trade agenda has emerged as a new area of trade policy aiming to set regulatory principles on the international flow of data. The current US digital trade policies limit regulations on consumer and corporate data flows, maintain cybersecurity protections and minimize corporate liability over online content and intellectual property. These policies are designed to ensure that the US technology companies have minimal barriers to entry, such as privacy regulations or localization requirements, and that they will not be legally liable for the copyright infringement or illegal content of its users. These changes in international trade law have been celebrated by the tech industry and policy-makers alike. The agencies that create, implement and enforce the digital trade agenda include the U.S. Trade Representative (USTR), the Department of Commerce (DOC) and the USITC. While the USTR negotiates the digital trade provisions in the US trade agreements, DOC performs a range of other tasks, such as enforcement, monitoring and analysis of trade agreements. USITC is an independent, non-partisan agency that among other functions produces fact-finding investigations and economic impact reports. Over the past decade, all three agencies have significantly increased agency resources dedicated to digital trade issues.

Yet 10 years ago, the term ‘digital trade’ was nowhere to be found in the trade policy lexicon, and the US negotiators pursued policies that contradicted the objectives of the digital trade agenda, to the satisfaction of influential copyright interests. These groups included trade associations representing the film industry, the music recording industry, the software industry and publishers. In 2010, USTR led international negotiations on the Anti-Counterfeiting Trade Agreement (ACTA), while Congress considered domestic legislation which would make online platforms such as Facebook and Google legally liable for copyright infringements on their websites.² If enacted, these laws would require Internet

2 The Stop Online Piracy Act (SOPA).

platforms to monitor and take down potential copyright infringements or face legal penalties. The Internet companies believed this would create overwhelming legal and financial burdens for themselves, while public interest groups feared it would increase censorship and surveillance of online speech. From 2010 to 2012, Internet companies and consumer activists jointly campaigned to defeat these proposed policies, using free market and free speech cultural frames to fight against further copyright burdens. The copyright proposals were quietly abandoned by the Obama Administration and Congress in 2012.

In the 5 years following this decision, trade negotiators reversed their policy position on copyright liability and adopted the digital trade agenda advocated by technology lobbyists. In 2015, trade negotiators finalized the Trans-Pacific Partnership (TPP), which committed signatories to not impose regulations or liabilities on Internet companies, ensuring the 'free flow of data'. Although the Trump Administration ultimately abandoned TPP, the US negotiators in 2018 committed to even stronger provisions in the US–Mexico–Canada Agreement (USMCA). In 2019, negotiators copied similar provisions in the US–Japan Digital Trade Agreement. Spanning the Obama and Trump Administrations, the digital trade agenda has withstood political shifts, both in the form of disruptions to the US trade policy and through increased public scrutiny on technology companies.

These digital trade agreements shape not only how the US tech companies operate abroad, but also potentially how they are regulated in the USA as well. The US trade negotiators have continued pursuing executive agreements on digital trade, while the US domestic regulatory landscape remains fragmented at the federal and state levels (Fefer, 2020). As the US Congress considers amending Section 230 of the Communications Decency Act or passing new privacy laws, advocacy groups and legislators have expressed skepticism over trade commitments that could bind and limit US legislators and regulators' policy space (Feiner, 2019), indicating that the consensus found in the trade policy domain may rely on narrowly defined 'public interests'. The US negotiators' sustained consensus in support of digital trade policy is therefore a ripe case for the investigation of regulatory capture.

4. Data and methods

To investigate this digital trade consensus, I relied on a combination of data sources and analysis methods, including participant observation and interviewing, and content analysis of the government records obtained through the Freedom of Information Act (FOIA) request. Capture can be misattributed unless one temporally locates when influence was exerted by specific actors (Rilinger, 2023). Therefore, my ethnographic inquiry included not only data collected in the period during the consolidation of consensus in the trade policy domain, but also in periods when this consensus was not yet established. Doing so required going back to trade policymaking before Internet companies entered the scene, prior to 2010. I triangulated these data sources not only to establish factual reliability (Duneier, 2011) but also to investigate the 'problematics' of the field (Smith, 1987) such as policy outcomes and economic analysis.

From 2018 to 2019, I conducted 6 months of fieldwork in Washington, D.C. This fieldwork occurred during key moments of policy agenda setting. During my first round of fieldwork in June–August of 2018, the Trump Administration began USMCA negotiations while announcing unprecedented unilateral tariffs, disrupting existing trade institutions. I returned

to the field in January 2019 after USMCA negotiations concluded and interest groups began campaigns for approval in Congress. My third and final period of fieldwork from June to July 2019 took place as Congress continued to consider the USMCA passage. The USMCA was ultimately approved by Congress in December 2019.

I entered the field as a member of the trade policy network, having been employed at USTR from 2015 to 2017. During my prior employment, I worked closely with public officials across political parties and established ties across the trade policy network with professionals in corporate lobbying, trade associations, law firms and think tanks. During the time between departure from the USTR and re-entry into the field as a researcher, I employed 'alternative casing' using sociological literature to increase my sensitivity to different concepts and defamiliarize myself with my field site (Tavory and Timmermans, 2012).

I conducted 33 interviews with policy professionals involved in the negotiation, implementation or enforcement of digital trade policies. All interview participants are represented by pseudonyms.³ I attended public, on-the-record events hosted by trade associations, professional associations and think tanks, including speeches, panels and receptions where public officials and trade lobbyists would be present. During and after these events, I took fieldnotes and later produced analytical memos. For interviews, I recruited public officials and lobbyists who have been active in the policy network. During these interviews, I asked participants to explain their understanding of digital trade policy, describe their relationships with other trade policy practitioners and walk me through the day-to-day routine of their work.

While my observations and interviews were limited to specific time periods of the policy formation process, I supplemented this fieldwork with documentation of events, interactions and communications outside the scope of my observations. I collected public comments filed in the Federal Register on copyright and digital trade-related measures, including comments on trade negotiations, USITC investigations and annual trade reports. I also collected press releases and reports produced by several prominent technology trade associations. In 2018, I filed a FOIA request to USTR for records of communication between technology lobbyists and USTR personnel. I also collected FOIA requests filed by other entities related to digital trade policy, yielding a total of over 900 pages of emails between lobbyists and USTR officials from 2013 to 2019.⁴ Documents, interview transcripts, fieldnotes and memos were analyzed and coded in MaxQDA. I used constructivist grounded methods (Charmaz, 2000) to map cultural schemas, trace cultural arguments and conceptualize different forms of interaction within the trade policy network.

5. Emergence

How does regulatory capture emerge? More specifically, how does a policy network take shape and settle on cultural frames that favor one industry, at the potential expense of other interests? In the case of digital trade, technology lobbyists mobilized to promote a libertarian

3 Individuals speaking at public events are not anonymized. Individuals with pseudonyms are assigned a first name only. First names do not reflect the gender of the participant. For the purposes of this article, I believe that obscuring the genders of my respondents aids anonymization while minimally impacting my analysis.

4 Details and documents related to these FOIA requests can be found on the author's website.

framework for data, drawing on the existing beliefs in laissez-faire economics and the potential for states to distort markets, slow economic growth and restrict innovation. By extending this schema, lobbyists attempted to apply a free market logic to the treatment of data flows for Internet-based commerce. In this section, I demonstrate how technology lobbyists established themselves in the trade policy network while framing support for specific policies to suppress other interests, particularly of intellectual property industries and consumer rights advocates.

5.1 Network embedding

After being threatened by proposed copyright liabilities in 2010, technology companies reactively banded together with the intention of embedding themselves in policy networks (Stirland, 2012). While they were previously 'allergic to Washington', as one trade negotiator described, over the course of a decade, technology companies hired lobbyists and joined trade associations with the goal of proactively influencing international trade policy. Lobbyists' ties to political appointees and staff in the second term of the Obama Administration (2012–2016) grew progressively, and despite turmoil in the Trump Administration (2016–2020), continued with non-political staff. These relationships between lobbyists and trade negotiators have progressed to the point where lobbyists no longer react to trade policy, but rather, proactively shape it.

Technology companies' initial efforts at network embedding took several forms, from joining the existing trade associations with well-equipped lobbyists, and forming new trade associations, to hiring or retaining lobbyists to advocate directly for their corporate interests. When Internet companies such as Amazon, Google and Facebook sought to increase their footprint in Washington, they joined the existing trade associations, such as the Coalition of Services Industries and the Information Technology Industry Council, using their membership to steer the policy objectives of these groups. In 2012, 14 companies formed the Internet Association, a trade association representing the interests of solely Internet-based companies. Furthermore, companies and trade associations seized on the revolving door to hire former officials from Congressional committees and trade agencies as lobbyists. These lobbyists then pursued multiple avenues for forming and deepening ties with public officials, ranging from formalized procedures, such as hearings, to informal ad hoc meetings, social appointments and appearances at public events.

Trade policy professionals form ties with their colleagues and other policy professionals, across sectors, through repeated formal and informal interactions. Thus, interactions between the government officials and lobbyists are multiplex: individuals both perform their professional duties and develop lasting ties distinct from professional duties. Many individuals are also former classmates and colleagues. Chris, a former Commerce official turned tech lobbyist, emphasized the importance of building rapport over time.

Sometimes, [meetings are like] hey, let's grab lunch, let's grab coffee, and catch up. And half of it is about our kids, and half of it is about this [work related issue]. We'll have a formal meeting [with government officials], but obviously we chit-chat before and after. Because we're human [...] So, a lot of it is just normal human interaction, right?

Although lobbyists deliberately form ties with public officials for the purpose of gaining influence, public officials also willingly cultivate these ties as well. The belief that

corporations hold valuable expertise is widespread among trade negotiators. By referring to lobbyists as ‘stakeholders’ rather than as lobbyists, the trade negotiators cast lobbyists as experts and valid participants in the public policymaking process. Public officials view it as their duty to meet with lobbyists on a regular basis. Mike, a trade negotiator, explained his approach:

So to get your handle on a problem, you’ve got to pull the right people together, and you’ve got to sift through all the various ideas, so we obviously have a lot of regular interaction with companies [...] I spend a lot of time with the companies trying to understand their business model, trying to understand how they interact with the governments in different countries, and then of course, socializing it within the building.

According to Mike, although his job title implies that he is an interlocutor for the USA, with diplomats representing other countries, he must also negotiate and manage relationships with the private sector.

One particularly effective way to ‘socialize’ tech lobbyists’ perspectives was to appoint an ally into political leadership. In 2013, as the USTR negotiated TPP, the Obama Administration appointed Robert Holleyman, longtime President and CEO of the Business Software Association, a software trade association, as the Deputy USTR.

[The tech companies] felt underrepresented at the political level, and I think Holleyman played that role, because he came from the tech sector, that he would be the champion for tech. And you know, as long as you have individuals who have the status and the authority and the interest, I think they’re fine.

Mike explained that Holleyman’s appointment was partly about welcoming the tech sector into the trade policy network and recognizing them as a valid stakeholder in the US trade policy agenda. When Holleyman began at USTR, he met frequently with tech lobbyists, not only in his office at USTR, but also through receptions and keynote speeches to trade associations and business groups.⁵ In the final days of the Obama Administration, Holleyman convened the Digital Trade Working Group, which launched with a stakeholder meeting at the US Chamber of Commerce in September 2017, and concluded the Obama Administration with another meeting with lobbyists in January 2017. In between, several meetings were convened internally among civil servants to discuss how to sustain the digital trade agenda through a political transition.

The close contact between lobbyists and civil servants continued through the transition. One trade negotiator, Ben, demonstrated how involved USTR kept lobbyists in the trade policymaking process: ‘In [my office], I deal almost exclusively with the private sector. And more than that I’m dealing with the private sector who are trade policy experts themselves.’ Ben then described how actively lobbyists engrained themselves in his work process:

Ben: For the most part over the past year, we would go to a substantive meeting in Geneva, and then in the weeks afterwards, we’d get requests from mostly industry associations for an update on what has happened, and what the path is, going forward [...]

Author: [...] When these groups are coming in and talking to you [...] are they giving you draft text?

5 Robert Holleyman’s calendar, obtained via FOIA request, is available on the author’s website.

Ben: They're not coming in and spouting talking points. They're not giving us draft text *because we haven't gotten to the text phase yet*. The way these meetings go is, generally we provide an update on what is happening and what approach we're taking [. . .] The remainder is usually devoted to companies talking about their particular interests, and inquiring as to whether and how their issues are being addressed in that forum. (my emphasis)

For some trade negotiations, which can stretch over years or even decades, this amounts to dozens of private meetings between lobbyists and public officials, *before any legal text gets written*, let alone before draft agreements are released for public hearings or Congressional approval. However, understanding the significance of the extent to which technology lobbyists have embedded themselves in the trade policy network since 2012—appearing at public events and directly advising public officials—requires examining the substance and meanings of their network ties. As they embed themselves in policy networks, the core task of the lobbyist is not merely to collect relationships, but to shape the premises of policy debates.

5.2 Schema extension

Schema extension describes the process through which lobbyists attempt to incorporate their clients' interests into policymakers' conception of the public interest. In the case of digital trade, technology lobbyists introduced frames around data regulation which fit into an existing libertarian schema around free trade. These frames were deployed to support anti-regulatory policies, in contrast to existing rule-of-law frames advanced by copyright groups.

The libertarian schema of free trade consists of a set of beliefs and understandings that link neoclassical economics and liberal notions of individual rights in a democracy (Boaz, 2019). In this schema, individual actors are naturally endowed with certain freedoms in the economic, civil and political realms. In particular, markets are thought to exist autonomously from the government. Free markets are constructed as spontaneously efficient and rational, while governments should be careful to not erect trade barriers that hinder growth and innovation. This creates a dualism between economic actors in the market, who should be left alone and trusted, and the government, which intervenes, restricts and distorts (Vogel, 2018).

Despite the obvious role that the trade negotiators play in constructing international markets, the libertarian schema guides much of the US trade policy in advocating for market opening and liberalization, as seen when regulations are labeled as 'non-tariff barriers'. The 'public interest' is thus imagined as a world where American businesses innovate and penetrate new markets, while consumers and businesses benefit from competition and cheap prices that result from liberalization and non-intervention. As one US negotiator succinctly summarized: 'Trade. . . we don't want governments screwing things up and putting in barriers, so a lot of the idea is. . . keep this ecosystem healthy and don't interfere with it.'

While a libertarian schema underpins much of trade policy, the extensions mobilized by tech lobbyists conflicted directly with rule of law frames advocated by copyright interests. Since the 1980s, copyright interests have used trade policy to enforce strong intellectual property standards around the world (Sell, 2003). Copyright lobbyists frame this issue as a matter of fairness for artists and creators, and as a necessary condition for innovation. Such logic was in play as copyright lobbyists advocated for policies through the 1980s to 2010. However, in a reactive move against ACTA and similar domestic policies, tech lobbyists

Table 1 Comparison of Libertarian and Rule of Law Schemas

Schema attributes	Libertarian schema	Rule of law schema
Advocated by	Internet-based tech companies	Copyright holders (film, music, etc.)
Policies for growth and innovation	Free and open markets	Enforceable laws and penalties
Imagined beneficiaries	Internet users	Artists and creators
State–market relationship	Impose as few barriers as possible	Regulate a level playing field
Law’s impact on Internet users	Ensure free commerce and speech	Rein in and punish copyright infringement
Law’s impact on Internet platforms	Shield from legal liability	Hold accountable for user behavior

seized on civil and economic libertarian frames to oppose the adoption of these policies, coupling free speech with free markets.

As technology lobbyists expanded their presence in the trade policy network, they grounded their justifications for a new digital trade agenda in this libertarian schema.

A free and innovative Internet is vital to our nation’s economic growth [...] It is the Internet’s decentralized and open model that has unleashed unprecedented entrepreneurialism, creativity and innovation. Policymakers must understand that the preservation of that freedom is essential to the vitality of the Internet itself and the resulting economic prosperity. ([Internet Association, 2012](#))

In other words, the Internet should remain unregulated. This message in 2012 was echoed by lobbyists in public events, hearings, public comments and private meetings. At a 2013 event at the Brookings Institution, a trade association lobbyist appeared on a panel alongside two senior USTR officials. While the USTR officials spoke to the unprecedented nature of the Internet and the lack of clarity on a policy approach (‘we have to rethink this [...] we’re trying to work through that’), the lobbyist on the panel argued that the existing libertarian concepts, which have ‘governed trade in goods for decades’, should be applied to data and digital commerce:

I think the key is doing this all in a way that is as least trade restrictive as necessary and that permits the digital economy to function because there is a real opportunity here. [...] We’ve been thinking through how to apply concepts that have governed trade in goods for decades. ([Brookings Institution, 2013](#))

Similar talking points and policy proposals circulated through other means, from public comments and hearings to private emails between lobbyists and public officials. From 2012 to 2015, FOIA requests to USTR on technology issues yielded 516 pages of emails between lobbyists and public officials.⁶ When I interviewed Mike in 2019, his view of trade and the Internet no longer reflected the uncertainty of USTR’s public position in 2013, but of the

6 FOIA Requests from the Electronic Frontier Foundation, see author’s website.

libertarian schema. 'Why not treat [digital trade] the way normal trade is treated? It fits... with the way trade works.'

5.3 Policy adoption

Through network embedding and extensions of the libertarian schema, technology lobbyists presented their policy objectives as rational and valid components of international trade law. In the TPP e-commerce chapter, the US trade negotiators finalized rules that limited governments' ability to restrict data flows, require localization and impose liabilities on the Internet platforms. These new policies allowed the US tech companies to conduct business abroad without regulatory burdens such as building in-country servers or fear of new domestic liability laws.

While TPP was a victory for the US technology interests, its fate was unstable. As the Trump Administration withdrew from TPP and broke away from the libertarian, free-market cultural schemas of the trade policy network, the digital trade agenda was equally threatened. In an email, a US Chamber of Commerce lobbyist reflects the precarity of the digital trade agenda to a Trump appointee at USTR:

I think folks are still recovering from meetings earlier in the year held elsewhere within the Administration that sounded alarm bells. Without throwing anyone under the bus, I sat through a highly contentious meeting where we were told we'd be lucky to get an e-commerce chapter in NAFTA, that fighting forced localization of data and supporting data flows was a lost cause, etc.⁷

However, during the initial moments of the Trump Administration, lobbyists remained in contact with civil servants at USTR, who kept digital trade issues on the agenda. When the Trump Administration announced that it would renegotiate NAFTA as USMCA, their agenda mirrored TPP digital trade rules. Chris, a technology lobbyist, told me that the Trump transition was challenging as many Trump appointees had no prior government experience in trade policy. 'A lot of times you see, someone was in the Clinton Administration, now they're in the Obama Administration. And if they were in the Bush Administration... you don't see as many people [...] joining the Trump Administration,' he reflected. When I asked him how digital trade made it into USMCA, he admitted, 'the top politicals have not focused on it as a major area [for reform]. And so the career staff has continued it.' In other words, the network embedding which tech companies pursued during the Obama Administration resulted in lasting influence across a political transition.

In the process of drafting legal text for USMCA, trade negotiators and technology lobbyists collaborated a great deal on the actual text itself. In a series of emails, the USTR negotiators and lobbyists for Facebook, Google, Microsoft and Amazon exchange questions and suggestions for the proposed USMCA text (Figure 2). The majority of the emails are redacted with codes indicating that the email records contain negotiating text. Records also indicate that these lobbyists held several in-person meetings with the USTR negotiators.

When USMCA was concluded in November 2018, it contained the digital trade provisions in TPP, plus stronger enforcement standards and additional protections for companies' source code and data (Lester, 2021). Furthermore, the chapter containing these provisions

7 Email from Sean Heather, Vice President of the U.S. Chamber of Commerce, to Jamieson Greer, Chief of Staff at USTR. August 9, 2017.

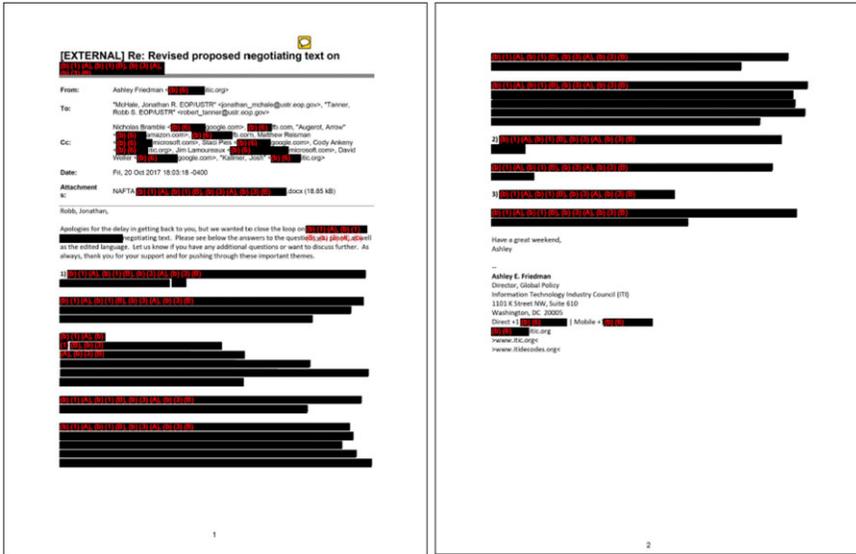


Figure 2 Email between trade negotiators and technology lobbyists.

was renamed from the e-commerce chapter to the digital trade chapter, further signaling the US government’s commitment to the digital trade agenda. Chris reflected to me, ‘if you look at the new NAFTA, it has probably the best digital trade chapter that’s ever been negotiated by the US government.’

Through the mutual reinforcement of cultural schemas and network ties among lobbyists and career trade negotiators, the digital trade agenda remained durable despite the uncertainty of the Trump Administration’s trade agenda. However, this single occurrence of policy adoption is insufficient to prove regulatory capture itself. Rather, as I demonstrate in the next section, the adoption of this policy, with the networks and schemas that supported it, allowed public officials to institutionalize the interests of Internet companies into the trade policymaking process, giving rise to a new legal order to reproduce and advance the digital trade agenda.

6. Institutionalization

For capture to occur, the cultural frames which give rise to policy adoption must also generate institutional changes that ensure the reproduction and sustenance of those frames and corresponding policies. In this section, I detail two processes of institutionalization—knowledge production and recursive institutional reproduction. The political process of negotiating USMCA became an opportunity for technology lobbyists to institutionalize their objectives into other agencies and international trade agreements. Figure 3, a 2017 email from a lobbyist for the US Council of International Business to a USTR negotiator, illustrates this multi-faceted effort:

In this email, the USCIB lobbyist highlights their priorities. Although the first bullet point acknowledges the uncertainty of the digital trade agenda during the Trump Administration

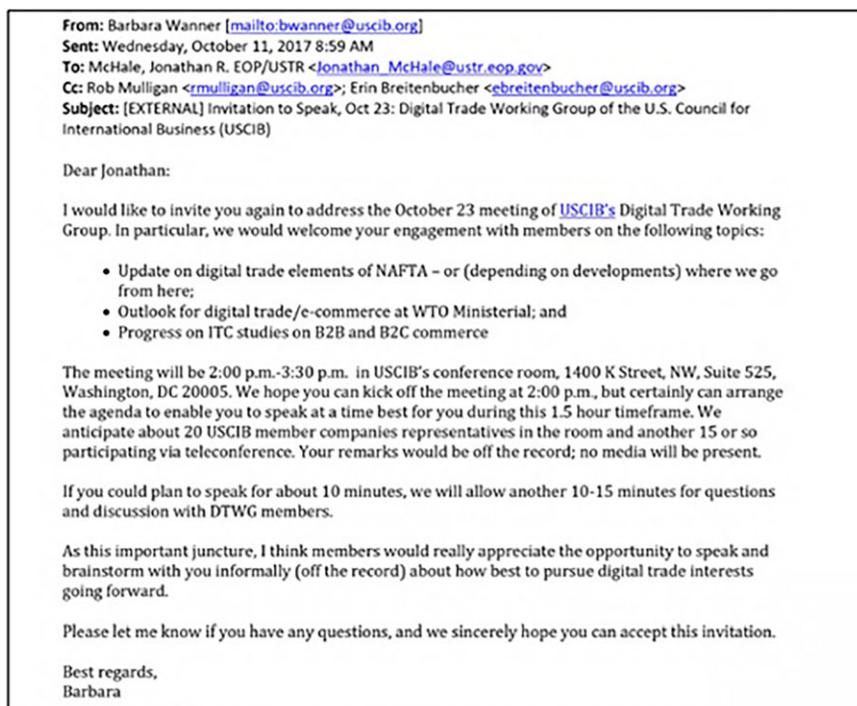


Figure 3 Email between technology lobbyist and trade negotiator.

(‘depending on developments’), the other two points emphasize the efforts lobbyists were taking, in parallel, to institutionalize digital trade priorities in other multilateral fora. A focus on ‘ITC studies’ speaks about efforts to influence the production of knowledge and expertise. Furthermore, updates on the World Trade Organization (WTO) speak to industry involvement in the reproduction of digital trade laws and norms across institutions. Together, these two processes have produced regulatory capture by locking in a consensus around digital trade within the USTR—not only in global contexts, in opposition to alternative models of technology regulation, but also in domestic contexts, as Congress and domestic regulators grapple with frameworks for technology regulation as well.

6.1 Knowledge production

In this section, I detail how technology industry lobbyists and policymakers have collaborated on knowledge production processes which support and sustain the digital trade agenda. While some have framed the coproduction of expertise as separate from regulatory capture (Slayton and Clark-Ginsberg, 2018), I show how knowledge production institutionalizes the industry’s schema extensions. Over the past decade, USITC has substantially expanded its research capacities regarding digital services and the Internet, in consultation with the technology industry. These efforts have produced datasets, methodologies and research findings, which are then amplified by think tanks and industry groups to emphasize the importance of digital trade to the US economy. As a major knowledge producer for the

US trade policy, USITC's research findings have become a mechanism through which trade policy professionals construct and sustain their understandings of digital trade.

Policymakers and lobbyists collaborated to spur USITC's research in digital trade. In the fall of 2016, as USTR prepared for the transition, the Digital Trade Working Group initiated a formal request for USITC research⁸ on 'barriers to digital trade on US firms' competitiveness in international markets' (USTR, 2017). This request was uniquely substantial as USTR had never requested a three-part report. The timeline laid out by USITC and USTR would stretch into the spring of 2019, 2 years into the Trump Administration.

Following this report, USITC developed a method to estimate the economic gains from digital trade provisions in trade agreements, by assuming these provisions would promote policy certainty, thereby increasing investment. They defined policy certainty to refer to the lack of regulations on data flows. When USITC included this estimate in their 2019 USMCA impact report, they revised their projection of a -0.12% loss in GDP to a 0.35% growth in GDP. Including this measure cast the technology sector as a decisive factor in the trade agenda, as the difference between economic decline and growth. Throughout this process, technology lobbyists frequently testified to, prepared reports for, and appeared at public events alongside USITC officials. Their influence over the production of trade knowledge has produced data and research by the US government that supports their policy objectives.

Cited heavily in USITC's reports, technology companies were seen as legitimate sources of both scientific and practical knowledge. Trade professionals had difficulty quantifying the gains from trade resulting from data transfers. Unlike trade in goods and services which could be quantified through economic transactions, the monetary value of traffic on social media sites and search engine activity, for example, were harder to estimate. To support its methodology, USITC relied heavily on testimony from and interviews with technology lobbyists.

Their assumption that policy certainty would lead to economic growth only applied to the technology sector, and USITC neglected to produce similar measures for other industries. Lobbyists for other industries, especially in response to Trump Administration threats, had also cited policy uncertainty as a major barrier to economic growth ([U.S. International Trade Commission, 2018](#)). Additionally, others noted that the adoption of USMCA would present greater uncertainty to some sectors.⁹ Furthermore, the importance of reducing uncertainty in USMCA was potentially overstated. In the previous testimony to USITC, lobbyists acknowledged that countries such as Canada and Mexico, where TPP rules were already in effect, were reliable allies ([U.S. International Trade Commission, 2017](#)). The USITC's measure for digital trade thus relied on an assumption that markets would grow if the status quo was codified into international law. Yet by applying this metric only to technology

8 Under Section 332 of the Tariff Act of 1930, the Executive Branch, Congress or USITC can initiate 'general factfinding investigations'. Submitting a request triggers a long timeline of legally mandated events—behind every 332 reports, there are economists and researchers on staff at USITC creating surveys, generating economic data, holding public hearings and writing hundreds of pages of analysis.

9 In response to the USITC report, Senator Pat Toomey (R-PA) criticized the claim that USMCA would reduce uncertainty, specifically pointing to the sunset clause, new automobile rules and the removal of Investor-State Dispute Settlement, claiming that these measures would create additional uncertainty relative to NAFTA ([U.S. Senate Committee on Finance, 2019b](#)).

companies, USITC cast digital trade as a unique competitive advantage for the USA, and an indispensable component of a trade agreement aimed at generating economic growth.

In turn, USITC has also become a vocal supporter of the digital trade agenda, actively demonstrating its efforts to the US technology industry. After the USMCA impact report was released, a USITC analyst appeared on a panel hosted by the Internet Association on the Hill. Alongside lobbyists for Facebook, Microsoft and technology trade associations, he touted the USMCA impact report and its methodologies. The day after this panel, USITC Commissioner Meredith Broadbent was the guest of honor at a breakfast hosted by two professional associations (Meridian International Center, 2019). Speaking to a small group of 30 policy professionals, many of whom were lobbyists, she made multiple references to the USITC report and future staffing increases. In recent years, USITC has increased its attention on digital trade, speaking specifically to digital trade provisions in its reports on services exports and the overall impacts of trade agreements.

USITC's research findings support a consensus within the trade policy network that casts digital trade's benefits for the USA as taken for granted, among industry groups, think tanks, agencies and Congress. Industry groups such as the Chamber of Commerce (Murphy, 2021) and the Internet Association (2019) cited USITC's reports extensively to call for further digital trade agreements. Brookings referenced USITC reports to contextualize calls for comprehensive digital trade rules (Meltzer, 2020), while the Peterson Institute concludes significant economic gains for the US services industry (Russ, 2021). The USITC reports have been heavily cited by Senators and federal government officials during public hearings (U.S. Senate Committee on Finance, 2019a, b) and in the confirmation process of the Biden Administration's USTR appointee (U.S. Senate Committee on Finance, 2021). Through concerted efforts to influence USITC, policymakers and technology lobbyists successfully created a base of knowledge, from a non-partisan, independent agency, to support and sustain the digital trade agenda.

6.2 Recursive institutional reproduction

Another form of institutionalization occurs through the interplay between different organizations and legal institutions, effectively reproducing policy outcomes and constraining alternatives for domestic regulators. Recursive institutional reproduction occurs through the multi-faceted creation of law, policy and cultural norms within complementary institutions. This process is recursive, occurring through cycles in which institutions adopt policies and practices in relation to each other (Halliday and Carruthers, 2007). In reproducing laws and policies across institutions such as free trade agreements, multilateral institutions and domestic agencies, it also fosters a system of compliance through both cultural understandings (Edelman *et al.*, 1999) and formal means. This process gives rise to the observable product of regulatory capture: a structure which produces policy frameworks that policy professionals take for granted, and within which they are constrained, culturally and legally, to act. In the case of digital trade, such a process began with the negotiation of TPP and inspired similar provisions in subsequent trade negotiations, gave rise to new frameworks in multilateral institutions and expanded trade enforcement to incorporate digital trade issues. In this section, I detail policymakers and lobbyists' efforts to create a structure of compliance through multiple institutions.

Trade agreements Since 2015, binding digital trade provisions have been copied from TPP into various multilateral trade agreements, including TPP's successor (CPTPP),

USMCA and several bilateral agreements. In total, 18 countries to date have adopted the US-style digital trade provisions (Burri and Polanco, 2020), with many more negotiations underway. Furthermore, the USA continues to push its digital trade agenda in the WTO through the ongoing e-commerce negotiations.

However, in the summer of 2018, as the Trump Administration threatened withdrawal from the WTO and pursued unilateral tariffs against the US allies, many trade professionals argued for institutional reproduction, in order to lock in and secure the digital trade agenda. In June of that year, I attended a panel event on the Hill, hosted by a trade association, which exemplified these efforts. The reproduction of digital trade rules was central among the panelists' remarks, especially for Christine Bliss, a well-embedded lobbyist. Before becoming president of the Coalition of Services Industries trade association, Bliss was a career civil servant and the Assistant USTR for Services during the Obama Administration, where she led negotiations on TPP digital trade provisions. In her opening remarks, she lamented the downfall of TPP that she had worked so hard on but emphasized the need for stability in digital trade. 'Given our current environment, I think where we start is always with maintaining the rule of law, and maintaining the rules that have been developed, whether it be in a bilateral, or regional, or multilateral trade agreements,' Bliss stated. After citing statistics speaking to the growth potential of the tech sector, Bliss then emphasized that to unlock this potential, the USA would have to negotiate further rules. 'We need to do more, and that's where ongoing [USMCA] negotiations are so important [...] So, we need to push on these issues very hard. We need to carry this very active trade agenda forward.'

Multilateral organizations In addition to the reproduction of legal text itself, the USA pursued non-binding methods of inducing compliance with digital trade norms. At the aforementioned panel, speakers celebrated the APEC framework on Cross-Border Data Flows, through which countries could certify compliance with the US digital trade provisions. The framework thus ensured that the US norms surrounding privacy would be in place in the Asia-Pacific countries and that the US tech companies would not have to concern themselves with the domestic regulatory compliance in these markets.

Institutions such as the WTO also serve as a site for the potential reproduction of digital trade norms, where many countries have adopted and continue to reproduce the US digital trade agenda. This process is contested, however, as other jurisdictions have advocated for an alternative agenda. As Mike, a US trade negotiator described:

We were at the WTO last week, and we're in this exploratory session for [digital issues]. They were talking about post-TPP, and they were continuing and adding these provisions in other negotiations going forward. Which I thought was fascinating. I mean, it's clearly caught hold. They get it, they understand that [digital trade] is a new regular element to trade rules. [...] So, we've got this odd situation of where Europe and China... they don't want to deal with the issues. And if we can't solve that, then we've got some serious problems. We've got to get at least Europe on board with this.

Furthermore, this clash has spilled over in the OECD, where negotiations over an international tax treaty have been stymied by proposals for digital services taxes in Europe. While tax policy is typically treated as a separate policy domain than trade policy, USTR has explicitly treated these proposed taxes as a trade issue.

Unilateral enforcement As a result of clashes within multilateral institutions, USTR, at the urging of US technology lobbyists, has also pursued unilateral channels to induce other

countries' compliance with the digital trade agenda. These efforts include both informal, relational campaigns and the deployment of existing domestic laws.

The USTR devoted significant resources to informal diplomatic pressure. One such target was Vietnam, which was a party to TPP and now its successor, CPTPP. The Vietnamese government proposed cybersecurity and tax laws that were inconsistent with data localization and non-discrimination principles in the digital trade agenda. A series of records in 2018 indicates that public officials and lobbyists were in constant contact about the implementation of these laws, including an in-person meeting convened by USTR in July 2018 with lobbyists from Microsoft, Apple, Google, Facebook and IBM. Two weeks later, Mike explained, 'the companies were complaining [about the laws], and we would consult with them, and then go talk to the Vietnamese.'

Mike described that while the USA was no longer part of TPP, they explored various methods for inducing compliance with digital trade policies. In addition to a potential WTO dispute, the issue was raised in meetings between USTR and Vietnamese trade officials, and through direct interaction between the US lobbyists and Vietnamese officials. Rick, a lobbyist for a large US technology company, mentioned the Vietnamese laws as well when I interviewed him just a few days after Mike. Rick described a meeting at the US Chamber of Commerce where he directly questioned Vietnamese officials on this issue, in front of other lobbyists and dignitaries. This fell in line with Mike's characterization of the process. Mike described a cultural, relational process, getting other governments to adopt US framing around digital trade. 'Part of it is a tax issue [...] it's sort of outside the lane of trade, but it is at the heart of cross-border business,' Mike conveyed. 'I mean, if a company is offering services from the U.S. into a foreign market, a [foreign government] is saying, you're making money, you should be paying taxes on your profits. We would say, no, you're paying taxes in the U.S., you're a U.S. company, you're offering services on a cross-border basis.' The challenge for public officials and lobbyists was to get Vietnamese officials to recognize this framework for classifying cross-border services.

The USTR also escalated from informal pressure to formal enforcement mechanisms. Similar concerns developed in Europe over tax policy. In 2019, as France enacted its digital services tax, the USTR announced that it would conduct an investigation under Section 301 of the Trade Act of 1974 to determine whether the tax was discriminatory to the US companies and whether the USA should retaliate against French imports. In the course of 6 months, the USTR received public comments and testimony from numerous trade associations and technology companies, including Google, Facebook, Apple and Amazon, as well as opponents of the measure, from the US-based importers of French goods. The USTR determined that the French tax was indeed discriminatory against the US tech companies and that it would impose retaliatory tariffs. This move, taken outside multilateral institutions, was meant to not only induce French compliance with digital trade norms but also serve as a symbolic message to other countries. In its press release announcing these tariffs, USTR Robert Lighthizer declared that 'USTR's decision today sends a clear signal that the United States will take action against digital tax regimes that discriminate or otherwise impose undue burdens on US companies' ([Office of the U.S. Trade Representative, 2019](#)). In 2020, the USTR indeed took action by announcing additional investigations on 10 additional countries ([Office of the U.S. Trade Representative, 2020](#)).

Altogether, through trade negotiations, multilateral fora and unilateral measures, USTR, in consultation with technology lobbyists, has sought the reproduction of the digital trade

agenda in multiple institutions. By negotiating new agreements and pursuing compliance through a range of new institutional instruments and existing tools, the USTR has effectively internalized technology industry interests into their own mission.

7. Discussion

From fights over copyright policy in 2010, to recent trade negotiations and enforcement actions, the digital trade agenda has developed from virtual non-existence to a burgeoning legal order, both ‘on the books’ and in practice. Internalizing tech industry interests, policy-makers have devoted enormous resources, devised new agreements and repurposed existing instruments to serve the digital trade agenda.

As a result, policy objectives and interests outside of this agenda are suppressed or relegated to areas outside of trade policy. The institutionalization of digital trade policy has produced a condition of regulatory capture by rendering competing interests, such as concerns over online privacy, irrelevant to the US trade policy institutions. In contrast, technology interests previously outside of the trade policy domain, such as taxation, are now addressed with trade instruments.

The study of regulatory capture is thus the study of the third face of power. One of regulatory capture’s hallmarks is the appearance of consensus or a taken-for-granted quality in which certain social and economic facts resonating with dominant cultural schemas are made legible and commonsensical, while others are obscured. Policymakers consent to corporate policy agendas not through coercion or overt corruption, but through a process in which lobbyists embed themselves in policy networks and extend the ‘public interest’ to incorporate their own interests (Figure 4). While public officials initially had no agenda for grappling with data and digital trade at the start of the Obama Administration—and in fact were pursuing policies that would contradict the digital trade agenda—they came to understand digital trade as a natural extension of ‘normal’ trade policy and pursued a legal order for digital trade. As I show in this article, this legal order developed with technology lobbyists driving every step of the process, from initial policy adoptions to knowledge production, implementation and enforcement.

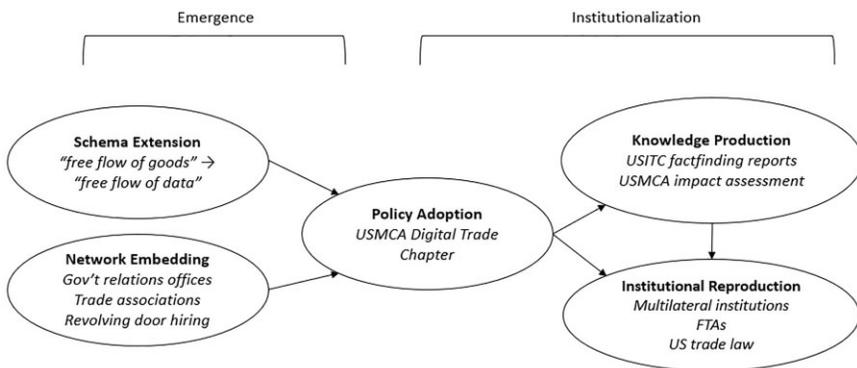


Figure 4 Stages of regulatory capture.

For those inside the US trade policy network, the development of the digital trade agenda seems natural and undisputable. Interviews with policy professionals reflect this taken-for-granted-ness. Thus, to question this consensus, we cannot observe alternative interests in the current moment, but instead must trace historical shifts and look outside the regulatory domain to imagine counterfactual scenarios. The USA, following ACTA, could have continued its hard line on copyright enforcement at the expense of Internet companies. The USTR could have also maintained relationships with consumer groups who now advocate for stronger domestic privacy regulations. The digital trade policies of other countries also suggest alternative models: for example, the European Union's policies on privacy, taxation and competition stand in stark contrast to the US pro-business, anti-regulatory approach, while Chinese digital policies emphasize state control and surveillance. Although some of these alternatives are more likely possibilities than others in the USA, that these roads are not taken suggests that the current US digital trade agenda is not the only natural way forward.

Regulatory capture is not a fixed, determined condition, but a dynamic process that characterizes specific US agencies and policy domains for a period of time. While the influence of the US tech industry was institutionalized in the structures of the US trade policymaking through the Trump Administration, their capture of policy was limited to the trade policy domain and does not necessarily reflect capture in other regulatory domains. Although lobbyists for the US tech companies have attempted to capture international regulatory bodies, the current international regime for regulating online data remains inconsistent and segmented (Aaronson and Leblond, 2018; Morita-Jaeger, 2021). Nonetheless, these efforts at the international level serve to reinforce a growing order at the domestic level.

While I argue that lobbyists for the US technology companies had successfully captured US trade policy, the conditions of the emergence and institutionalization of its regulatory capture also provide clues for the potential decline of capture. Ideas that are invoked through Type II cognition—like the application of libertarianism to digital trade—can be challenged because they are slow and deliberative. However, once routinized and adopted to a point where they become automatic and unconscious, they are much more difficult to undo. This separates the task of preventing regulatory capture from the task of eroding it. Preventing regulatory capture requires networks and institutions which call into question taken-for-granted assumptions and maintain openness throughout the policymaking process so that Type II culture does not become Type I schema.

Eroding regulatory capture requires some mechanism for weakening a Type I schema. However, the key here might not be to change the content of that schema, but rather refocus and prioritize a different schema for understanding 'public interests', held across the network. Such an example can be seen in the early periods of this case study. As technology lobbyists embedded themselves in the trade policy network, they promoted an alternative trade agenda differentiating that of US intellectual property holders. Prior to the defeat of ACTA, it appears that copyright interests enjoyed a period of regulatory capture themselves, institutionalizing their interests into domestic and international laws (Sell, 2003). Capture by copyright lobbyists declined when social movements, public interest groups and technology industry lobbyists, previously outsiders to the trade policy network, were able to embed themselves into trade policy networks and effectively cast intellectual property laws as overly punitive, a hindrance to the growth of the Internet, and restrictive of individual speech rights. After exposing the contradictions of the rule of law schema advocated by copyright lobbyists, technology lobbyists made a cultural and relational case for their interests as a

legitimate area of trade policy under a libertarian schema. As public skepticism of ‘big tech’ grows, new regulators and advocacy groups gain hold in Washington, and the consensus around liberalization in free trade continues to erode, the possibility of decline remains possible for the current period of digital trade regulatory capture as well.

Because the trade policy domain is distinctive in its legal authorities and institutional design, there are features of this case study that may not apply neatly to other regulatory domains. The USTR may be considered an extreme or likely case for capture, as it was historically designed to be responsive to concerns from exporting industries and their lawyers (Chorev, 2007; Dezalay and Garth, 2008). However, the USTR is not alone among agencies in its historical responsiveness to industry interests, and there are many areas where lobbyists engage in forum choice to advance their interests (Hall and Deardorff, 2006). Nonetheless, trade policy is subject to considerably less rulemaking and public comment than other domains (Claussen, 2021), and further empirical work might use these differences in institutional design to compare policy networks and schemas across domains.

While this article has focused on the mechanisms through which the third face of power is exercised, it also raises questions about the interrelation and ordering of struggles in each of the three faces of power. As demonstrated in this case study, the US tech interests emerged in the regulatory domain with a first-face policy struggle, in which competing interest groups could be observed around a concrete policy debate. A second-face struggle occurred through the agenda-setting processes around TPP. These first- and second-face struggles occurred alongside schema extension and network embedding processes, which give rise to the third face of power. However, the details of this particular case—that the first, second and third faces of power operated sequentially—should not be generalized to form larger arguments around the causal, temporal or sequential relationship between the three faces of power. Indeed, other cases of capture indicate that the first- and second-face struggles may never occur. Future studies could undertake comparative or meta-analyses to investigate these relationships.

The basic crux of the framework—that capture is fostered through underlying social networks and cultural schemas—can be applied widely and is supported by research in other policy domains. For example, Fligstein *et al.* (2017) show how by relying on the macroeconomic frames to make sense of economic indicators, financial regulators failed to anticipate the 2008 financial crisis. Suryanarayanan and Kleinman (2013) argue that agro-industrial expertise has dominated the U.S. Environmental Protection Agency’s criteria for evaluating insecticides. While each of these examples has been characterized as regulatory capture, unearthing the third face of capture in these cases would require that we examine the structure of a policy domain’s cultural schemas, when frames were introduced, who introduced them and whether they were broadly shared across a policy network. With tools from cultural sociology and network analysis, future research on regulatory capture can more precisely identify and measure instances of regulatory capture across agencies and policy domains.

8. Conclusion

This article outlines a cultural framework for understanding regulatory capture, resulting from the mobilization of cultural schemas and network resources by industry lobbyists. This expands upon prior theorizations of regulatory capture, which at first focused on market

characteristics and economic determinants, or more recently, examine agenda setting and the coincidence of agency decisions with industry interests. Linking these frameworks to longstanding debates on the faces of power, I demonstrate how regulatory capture can be studied in its third face using concepts from cultural and relational sociology. Through an ethnographic study of trade policy professionals, I show that the development of digital trade policy in the USA is one such instance of regulatory capture. Over the past decade, technology lobbyists have employed cultural influence to not only secure their policy objectives but also to institutionalize their interests into domestic and international trade laws. Through knowledge production regimes and recursive institutional reproduction, the US technology companies captured the US trade policy. The result is a consensus over the digital trade agenda, but the suppression of alternative interests and frameworks for unanticipated and new policy challenges ahead.

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