

12-1-2020

Brave New World: A Post-Coronavirus Perspective on Trade

Kevin J. Fandl

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>



Part of the [Commercial Law Commons](#), [Comparative and Foreign Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), [Law and Economics Commons](#), [President/Executive Department Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Kevin J. Fandl, *Brave New World: A Post-Coronavirus Perspective on Trade*, 29 J. L. & Pol'y 57 (2020).
Available at: <https://brooklynworks.brooklaw.edu/jlp/vol29/iss1/2>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

BRAVE NEW WORLD: A POST-CORONAVIRUS PERSPECTIVE ON TRADE

*Kevin J. Fandl**

Trade policy during the Obama Administration largely reflected the pinnacle of the globalist moment in history. The dream of global peace through economic security was on the cusp of being achieved, with a comprehensive set of trade alliances linking countries both economically and politically to one another, a worldwide system of rules which nearly all countries abided in their economic relationships, and a deeply integrated global supply chain that not only enabled companies to satisfy consumer demands at exceedingly low cost and rapid development, but also empowered more and more workers in poor countries to join the global economy. This had been the pursuit of the progressive politicians in the early twentieth century at the start of the modern global era—the liberal world order. All of this began to visibly crumble with the election of Donald Trump in 2016. His promises of cutting ties with trading partners that did not give the United States a fair deal and relinquishing global leadership in exchange for national sovereignty struck a chord with American voters. Voters understood that the institutions we built had failed them in some fashion and saw the America First policies of Mr. Trump as the answer to their economic woes. The economic protectionism that has taken place during the Trump Administration has not been seen since the 1930s, just before the outbreak of World War II. Withdrawal from international institutions, trade wars with friends and foes, immigration bans, and a general disregard for diplomacy, are

* Kevin J. Fandl, Ph.D. (George Mason University), J.D./M.A. (American University), B.A. (Lock Haven University), is the Edna Tuttleman Fellow and Associate Professor of Business Law at Temple University's Fox School of Business (Kevin.Fandl@Temple.edu). He is the former Senior Counsel to the Assistant Director for U.S. Immigration and Customs Enforcement.

indicative of America's withdrawal from the liberal economic order that it built to help the world recover after World War II. The Coronavirus and subsequent global economic collapse hastened the negative economic fallout from these actions; however, the belief that America should go it alone has been rising for decades. In the past, legislators and the executive have exercised restraint, understanding the dramatic effects that a world without U.S. leadership would have on American and global economic growth and peace. With that restraint now gone, we are proceeding at full speed toward the destruction of the liberal world order. In this short paper, I argue that precisely at a moment of crisis like that presented by a global health pandemic, it is the rules-based international order that has the best chance of slowing the slide toward authoritarianism and global recession. My contribution is focused on the economic policies inherent in the liberal world order and how those have guided us toward strong and sustainable economic growth for seventy-five years. Without American leadership at the helm, chances for survival of that order and the economic prosperity that it brought are dim.

INTRODUCTION

The start of the second decade of the second millennium was unlike what anyone had expected. The year opened with a divisive trade war between the United States and most of the world, with China as a central target. A highly contagious virus spread rapidly from China throughout the rest of the world, causing hundreds of thousands of deaths and mass lockdowns. And the world teetered on the edge of global economic collapse as global supply chains broke down, consumer demand evaporated, and stores of all sizes threw in the towel. Not since World War II had a threat to the livelihoods of so many individuals been so great.

At a similarly momentous and dark time in our recent history, America joined its victorious World War II allies in a show of leadership and cooperation. They vowed to build a world order premised on the ideals of democracy, rule of law, and freedom and to secure the world against the horrors of war and economic

collapse.¹ The equivalent moment in 2020 has taken the world in the opposite direction, withdrawing the United States from its position of global leadership in an active effort to undermine the very institutions that have kept the peace for so long. Scholar Robert Kagan predicted this moment in his book, *The Jungle Grows Back*, where he cogently argues that the creators of the liberal world order in the twentieth century, the United States in particular, have failed to tend to the global garden and allowed “the jungle” of nationalism, unilateralism, and tribalism to creep back in.²

The legal and policy decisions of the Trump Administration, from withdrawal from international institutions to unilateral trade wars with friends and foes alike, have been costly for the global economy. But perhaps more importantly, these actions, which garner significant public support, have highlighted the withered support remaining for American leadership in the global economy.³ The most concerning element of the move away from globalism and toward nationalism is the possibility that this is not a temporary blip in the history of liberalism but rather the emergence of a new world order—one in which the United States plays a supporting role, at best.

¹ See, e.g., Tim Wallace, *Why the World Needs a New Bretton Woods Moment*, THE TELEGRAPH (May 27, 2020, 6:00 AM), <https://www.telegraph.co.uk/business/2020/05/27/world-needs-new-bretton-woods-moment> (discussing the creation of the Bretton Woods institutions in 1944).

² See generally, ROBERT KAGAN, *THE JUNGLE GROWS BACK* (2018).

³ See Ian Bremmer, *The Era of American Global Leadership Is Over. Here's What Comes Next*, TIME (Dec. 19, 2016), <https://time.com/4606071/american-global-leadership-is-over> (describing the Trump Administration's approach to American withdrawal from the global economy).

The move toward nationalism is visible in a number of segments of society, including global security,⁴ health,⁵ and immigration.⁶ But perhaps nowhere is it more evident than in the trade arena. Candidate Donald Trump ran on a platform of bringing jobs back to America,⁷ renegotiating trade deals on more favorable terms, aggressively pursuing unfair actions by China, and withdrawing from President Obama's crowning achievement in trade, the Trans-Pacific Partnership ("TPP"). He laid out his plan in June 2016 in a speech entitled, "Declaring American Economic Independence."⁸ In that same speech, Trump called the WTO "disastrous."⁹

After being elected, President Trump followed through on his campaign promises to launch a trade war to try and bring companies

⁴ See, e.g., David Reid, *Three Charts that Show Why Trump Thinks NATO Is a Bad Deal*, CNBC (Dec. 3, 2019), <https://www.cnbc.com/2019/12/03/three-charts-that-show-why-trump-thinks-nato-is-a-bad-deal.html> (providing context for the Trump Administration's concerns over the viability of NATO); Philip Stephens, *Donald Trump's Retreat Is the Greatest Threat to Global Security*, FIN. TIMES (June 14, 2018), <https://www.ft.com/content/c607dbe4-6f09-11e8-852d-d8b934ff5ffa> (suggesting that U.S. withdrawal from global leadership opens the door to alternate actors, such as Russia or China); Ryan Browne & Zachary Cohen, *US to Withdraw Nearly 12,000 Troops from Germany in Move that Will Cost Billions and Take Years*, CNN (July 29, 2020), <https://www.cnn.com/2020/07/29/politics/us-withdraw-troops-germany/index.html> (discussing the U.S. decision to withdraw troops stationed in Germany as part of NATO).

⁵ See, e.g., Berkeley Lovelace Jr., *Trump Says the U.S. Will Cut Ties with World Health Organization*, CNBC (May 29, 2020), <https://www.cnbc.com/2020/05/29/trump-says-the-us-will-cut-ties-with-world-health-organization.html> (discussing Trump's withdrawal from the World Health Organization).

⁶ See, e.g., Michael D. Shear & Miriam Jordan, *Trump Suspends Visas Allowing Hundreds of Thousands of Foreigners to Work in the U.S.*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/06/22/us/politics/trump-h1b-work-visas.html> (explaining the Trump Administration's decision to suspend the issuance of visas for high-skill foreign workers).

⁷ Charlotte Alter, *Transcript: Read the Full Text of the Fourth Republican Debate in Milwaukee*, TIME (Nov. 11, 2015, 7:34 AM), <https://time.com/4107636/transcript-read-the-full-text-of-the-fourth-republican-debate-in-milwaukee> (explaining Trump's position of bringing jobs back to the United States).

⁸ Donald J. Trump, *Declaring American Economic Independence* (June 28, 2016), https://assets.donaldjtrump.com/DJT_DeclaringAmericanEconomicIndependence.pdf.

⁹ *Id.*

back to the United States, withdrew from the TPP,¹⁰ and pursued economic sanctions against China for their unfair trade practices.¹¹ He renegotiated the U.S.-Korea free trade agreement (“KORUS”),¹² and the North American Free Trade Agreement (“NAFTA”),¹³ now known as the U.S.-Mexico-Canada Agreement (“USMCA”). And he continued the freeze on the appointment of WTO Appellate Body judges, effectively stunting that organization.¹⁴ These actions have hurt consumers as well as producers, from farmers to manufacturers, and damaged relationships with our trading partners.¹⁵

¹⁰ *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, PRESIDENTIAL MEMORANDA (Jan. 23, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement>.

¹¹ See Krishnadev Calamur, *Trump Has Already Started Four Trade Wars—and Counting*, THE ATLANTIC (July 6, 2018), <https://www.theatlantic.com/international/archive/2018/07/us-china-tariffs/564440> (discussing the Section 301 tariffs levied on China).

¹² See Simon Lester, Inu Manak & Kyoung-hwa Kim, *Trump’s First Trade Deal: The Slightly Revised Korea-U.S. Free Trade Agreement*, CATO INST. FREE TRADE BULLETIN NO. 73 (June 13, 2019), <https://www.cato.org/publications/free-trade-bulletin/trumps-first-trade-deal-slightly-revised-korea-us-free-trade>.

¹³ See Mary E. Lovely & Jeffrey J. Schott, *The USMCA: New, Modestly Improved, but Still Costly*, PETERSON INST. FOR INT’L ECON. (Dec. 17, 2019, 5:00 AM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/usmca-new-modestly-improved-still-costly> (discussing the changes that the USMCA made to the original NAFTA agreement).

¹⁴ See Jennifer Anne Hillman, *A Reset of the World Trade Organization’s Appellate Body*, COUNCIL ON FOR. REL. (Jan. 14, 2020), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body> (describing the blockade of new judges to the WTO’s Appellate Body, which began under President Obama, albeit for different policy reasons).

¹⁵ See, e.g., Josh Zumbrun & Bob Davis, *China Trade War Didn’t Boost U.S. Manufacturing Might*, WALL ST. J. (Oct. 25, 2020, 3:36 PM), <https://www.wsj.com/articles/china-trade-war-didnt-boost-u-s-manufacturing-might-11603618203> (describing the negative impact of the trade war on U.S. manufacturing); Menzie Chinn & Bill Plumley, *What Is the Toll of Trade Wars on U.S. Agriculture?*, PBS NEWS HOUR (Jan. 16, 2020, 1:06 PM), <https://www.pbs.org/newshour/economy/making-sense/what-is-the-toll-of-trade-wars-on-u-s-agriculture> (discussing weakened U.S. agricultural exports since the start of the trade war).

In the liberal world order, the vision of trade is based upon a concept of rules, interdependence, and equality of access to markets. Arising from the ashes of a protectionist empire that collapsed under the weight of tariffs and non-intervention, the liberal approach attempted to tie countries together into a rules-based system in which all countries would benefit more from open trade and following the rules than they would if they operated unilaterally. It was an ingenious tool to smooth trade tensions and deflect conflicts into a universally agreed upon set of rules. It was, in effect, trade democracy. And it may be the lynchpin holding the liberal world order together.

This paper is not about trade in the Trump era. It is not a critique or criticism of the actions taken by a single protectionist executive to see his own personal agenda implemented on a global stage. Rather, I hope to use this paper to forecast the world ahead, taking into account the road that we have traveled and predicting our next destination. To do so, I will take us through a brief history of the liberal world order to get better acquainted with how and why it was built over the last seventy-five years. I will focus principally on trade law and policy throughout that period, from the General Agreement on Tariffs and Trade (“GATT”) through the TPP. I will talk also about the fall of the Soviet Union and the rise of China to provide context for the changing nature of U.S. leadership of the liberal world order and how a more powerful China might affect the future of trade. In my analysis section, I will explore recent trends in trade, from the movement of global supply chains to the build-up of regional trade agreements to the future of the WTO. With these trends, I will attempt to construct a view of the global trade system after the pandemic, a world that I surmise will be far more realist and skeptical toward liberal values than before.

I. HOW DID WE GET HERE?

In his 1980 song, *Once in a Lifetime*, singer David Byrne of the musical group the Talking Heads observed the successes all around him—a beautiful house, a beautiful wife—and famously asked,

“how did I get here?”¹⁶ Forty years later, we might ask the same question about the economic prosperity that many of us take advantage of today—how did we get here? It seems that the “elites,” who benefit the most from globalization, took for granted that working class Americans were satisfied with the way things were going and that they would not object to the comparatively slow pace of their economic growth compared to that of the upper class. The technocrats at the helm of government presumed that everyone recognized the role that globalization played in bringing prosperity and peace to the world and that they would turn a blind eye to the job losses associated with outsourcing and immigration, the downward pressure on wages from foreign competition, and the exploding economic deficit leading to cuts in social programs. They were mistaken.

The 2016 election of Donald Trump—and the positions of all major parties on trade during the 2016 election—¹⁷revealed what many economists and policymakers had not expected—Americans were willing to abandon the idea of free trade in the interest of potential domestic economic security.¹⁸ For the first time in recent history, presidential candidates from the right, left, and even the extreme left, proudly asserted their doubts about the benefits of continued expansion of free trade.¹⁹ American economic growth had

¹⁶ See Talking Heads, *Once in a Lifetime*, GENIUS, <https://genius.com/Talking-heads-once-in-a-lifetime-lyrics> (last visited Nov. 17, 2020) (“And you may find yourself in a beautiful house, with a beautiful wife[,] [a]nd you may ask yourself, ‘Well . . . how did I get here?’”).

¹⁷ See John Brinkley, *Why is Trade Such a Big Deal in the Election Campaign?*, FORBES (Mar. 3, 2016, 10:19 AM), <https://www.forbes.com/sites/johnbrinkley/2016/03/03/why-is-trade-such-a-big-deal-in-the-election-campaign/?sh=57906822331d>.

¹⁸ See *Donald Trump’s Economic Promises*, BBC NEWS (Nov. 9, 2016), <https://www.bbc.com/news/business-37921635>.

¹⁹ See Ewan Roy, *What Are the U.S. Presidential Candidates Saying About International Trade?*, TRADE READY (Mar. 15, 2016), <http://www.tradeready.ca/2016/trade-takeaways/u-s-presidential-candidates-saying-international-trade/> (explaining how all of the major 2016 presidential candidates supported withdrawing from the recently negotiated Trans-Pacific Partnership trade agreement).

slowed²⁰ and more and more jobs had disappeared, especially in the manufacturing sector,²¹ leading many Americans to question the validity of the liberal economic order (perhaps without using those words). Successful politicians tapped into this sentiment and began making aggressive cases against globalization, outsourcing, the WTO, and other components of the liberal world order. The race to turn back the clock on globalization had begun.

II. THE LIBERAL WORLD ORDER: PEACE THROUGH TRADE

In his 1933 inaugural address, Franklin Delano Roosevelt told Americans, “[o]ur international trade relations, though vastly important, are, in point of time and necessity, secondary to the establishment of a sound national economy.”²² Eight years later, he would be sending Americans into war to protect the very values that he advocated at home—freedom, security, and democracy. By 1944, FDR was leading the push for international security through the creation of liberal institutions backed by American firepower.

The term “liberal world order” was not used to describe the system that the United States and its allies had built in the early twentieth century. The term itself is largely associated with international relations scholar, G. John Ikenberry, who described it in the 1990s as a form of “structural liberalism.”²³ Ikenberry asserted that, following the second World War, “the United States and its allies created a political, economic, and strategic order that was explicitly conceived as a solution to the problems that led to the depression and world war.”²⁴ He went on to explain how liberalism

²⁰ *U.S. Economic Growth Slowed in 2016 to 1.6%*, CBS NEWS (Jan. 27, 2017), <https://www.cbsnews.com/news/u-s-economic-growth-slowed-in-2016-to-1-6/> (explaining that economic growth in 2016 was the lowest since 2011).

²¹ See Martin N. Baily & Barry P. Bosworth, *US Manufacturing: Understanding its Past and its Potential Future*, 28 J. OF ECON. PERSP. 3, 4–6 (2014) (arguing that, while overall manufacturing in the U.S. has remained steady, most of that is driven by computers and electronics).

²² Franklin Delano Roosevelt, First Inaugural Address (Mar. 4, 1933) (transcript available in the Yale Law School’s Avalon Project Library).

²³ See, e.g., Daniel Deudney & G. John Ikenberry, *The Nature and Sources of Liberal International Order*, 25 REV. OF INT’L STUD. 179, 180–82 (1999).

²⁴ *Id.* at 180.

itself was inadequate to describe this new order, which went beyond the ideas of promoting democracy and capitalism and instead created an interdependent system that tied the gains of one to the gains of all.²⁵ This system included “transnational relations” and U.S. leadership as integral components.²⁶

The primary elements of the liberal world order include: (1) institutions that promote and protect a rules-based system;²⁷ (2) rule of law;²⁸ (3) U.S.-led security alliances;²⁹ (4) capitalism and free market-orientation,³⁰ and; (5) liberal democracy. Without a doubt, these concepts paint the world quite differently from the way the realists might see it. Liberalism focuses on cooperation rather than competition, integration rather than isolation, and trade rather than war. These foci have been the justification for decades of American intervention in foreign conflicts from Korea to Vietnam to Iraq. They have been the concepts utilized to build the modern world trade system we rely upon today. And they have contained innumerable threats from North Korea to Iran to terrorists in Afghanistan, from spreading far beyond their borders.³¹

Yet there is a common misconception about the origins of the liberal world order. It is often assumed that the United States sought to assert its righteousness upon the world and to pursue its own interests at any cost. This assumption may be best linked to President Woodrow Wilson, who planted the seed for the modern liberal world order in 1918, when he traveled to Europe at the end of the Great War. In his famous “Fourteen Points” speech that year,

²⁵ *Id.* at 180–83.

²⁶ *Id.* at 186 (“Far from being ancillary or derivative, transnational relations are a vital component of the operation of this system.”).

²⁷ *See id.* at 182 (discussing the related concept of “security co-binding”). *See also* Daniel H. Deudney, *The Philadelphian System: Sovereignty, Arms Control, and Balance of Power in the American States-Union, Circa 1787–1861*, 49 INT’L ORG. (Spring 1995).

²⁸ Deudney & Ikenberry, *supra* note 23, at 192 (referring to “civic identity” as a set of common norms agreed upon by the Western political order).

²⁹ *See id.* at 185 (justifying the consensual and non-coercive based leadership of the United States in the liberal world order).

³⁰ *See id.* at 190 (explaining the importance of “advanced capitalism,” which creates high prospects for economic gains, and also promotes free trade as a means of pursuing economic and political openness).

³¹ G. JOHN IKENBERRY, *A WORLD SAFE FOR DEMOCRACY* 194–95 (2020).

Wilson advocated for a peaceful world unified in democratic principles and territorial integrity, facilitated by the equalizing League of Nations.³²

Wilson's moral compass was pointed in the right direction, but his political naivete was reflected in the many compromises made through the Treaty of Versailles, the ultimate collapse of the League of Nations, and the onset of World War II.³³ It would be decades before his liberal vision would be realized.

The interceding years between the Wilson Administration and the Administration of Franklin D. Roosevelt were filled with scandal and ineffectiveness. Warren Harding, who followed Wilson in office, filled positions with his friends, kept the United States out of the League of Nations, and died (from a heart attack) in the midst of the "teapot dome" scandal involving oil leases in Wyoming.³⁴ Calvin Coolidge followed Harding and attempted to restore confidence in the White House with a quiet, conservative approach to politics. One of his principal achievements was passage of the Immigration Act of 1924, which restricted immigration from Asia, and a continued abstention from the United States joining the League of Nations.³⁵ Lastly was President Herbert Hoover, who may have unintentionally become the most important figure in establishing the liberal world order. Hoover in many ways embodied the approach of the Trump Administration in its support for minimal federal government intervention, support for states' rights, and a strong belief in individualism.³⁶

The interwar period between World Wars I and II was a period of retraction from the global stage. The American lives lost during the Great War left a bad taste in the mouths of many Americans for

³² President Woodrow Wilson, Fourteen Points Speech (Jan. 8, 1918) (transcript available in the Yale Law School's Avalon Project Library).

³³ See, e.g., Colin Dueck, *Hegemony on the Cheap: Liberal Internationalism from Wilson to Bush*, 20 WORLD POLICY J. 1, 2–3 (2003–2004).

³⁴ Warren G. Harding, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/warren-g-harding/> (last visited Jan. 7, 2021).

³⁵ *The Immigration Act of 1924 (The Johnson-Reed Act)*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> (last visited Jan. 7, 2021).

³⁶ David E. Hamilton, *Herbert Hoover: Life in Brief*, MILLER CENTER, <https://millercenter.org/president/hoover/life-in-brief> (last visited Nov. 18, 2020).

international diplomacy. Nationalist sentiment prevailed and America withdrew from the world. “This ruinous decision to step away from responsibility and decline the mantle of leadership directly paved the way for World War II, and it symbolized the high price of American neglect of international relations during the 1920s and 1930s.”³⁷ The American nationalist position was cemented with its refusal to join the League of Nations and its hesitance to enter World War II.

At home, the 1920s and early 1930s in the United States were also a time of optimism, growing wealth, and rapid industrialization.³⁸ Yet they were a time of tremendous increases in inequality, a concentration of wealth among a select few industrialists, and wild speculation on markets. President Hoover was warned about this speculation but, given his focus on laissez-faire economics and minimal government intervention, chose not to intervene in the market.³⁹ Market speculation drove the stock market to its highest level ever in September 1929. Consumers were taking on more risks by financing major purchases, such as automobiles, and firms were taking on credit under the belief that the market would only continue to rise.⁴⁰

Highly leveraged banks, following the optimism of the day, invested heavily in utilities stocks using debt to make such investments. As word got out that new regulations of those utilities would be coming, and federal interest rates began to rise, restricting access to credit, nervous investors began to withdraw their money from the banks. On Black Thursday (October 24, 1929) and Black Tuesday (October 29, 1929), mass selloffs compromised the viability of many banks and led the stock market to drop to 248 by

³⁷ Jessica Wang, *Looking Forward in a Failing World: Adolf A. Berle, Jr., the United States, and Global Order in the Interwar Years*, 42 SEATTLE U. L. REV. 385, 388 (2019).

³⁸ See, e.g., Gary Richardson et al., *Stock Market Crash of 1929*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/stock_market_crash_of_1929 (explaining that the value of the stock market during the “roaring twenties” rose from 63 in August 1921 to 381 in September 1929).

³⁹ See MARTIN L. FAUSOLD, *THE PRESIDENCY OF HERBERT C. HOOVER* 68–71 (3rd ed. 1985).

⁴⁰ Richardson et al., *supra* note 38 (describing the actions of the Federal Reserve leading up to, and following, the 1929 stock market crash).

the end of the year. This continued unabated until the market lost 90% of its value by the end of 1932.⁴¹ The market would not recover fully until 1954.⁴²

President Hoover took a number of immediate steps to try and reverse the dramatic economic collapse that was rapidly unfolding in the previously optimism-heavy America. Given the limited powers of the federal government at the time, Hoover's main weapon to combat the crisis was to encourage states to take action. He did so by creating a commission on employment that would coordinate state and local relief efforts, though this had limited success.⁴³ In 1932, Hoover created the Reconstruction Finance Corporation to make emergency loans to businesses in fear of default.⁴⁴ He secured congressional funding for this program via the Emergency Relief Construction Act in July 1932.⁴⁵

A. *The Great Tariff Mistake*

The actions of the Hoover Administration to respond to the economic crisis of the 1930s are largely similar to those of the Trump Administration's response to the economic crisis of the 2020s. Both Presidents took a hands-off approach that sought voluntary actions by states, localities, and the private sector. Both contended that self-reliance and resilience would get Americans through the crisis.⁴⁶ And both downplayed the depth and length of

⁴¹ *The New York Stock Market Crash of 1929 Preludes the Great Depression*, GOLDMAN SACHS, <https://www.goldmansachs.com/our-firm/history/moments/1929-financial-crash.html> (last visited Nov. 14, 2020).

⁴² See Richardson, et al., *supra* note 38.

⁴³ Herbert Hoover Presidential Library and Museum, *The Great Depression*, NAT'L ARCHIVES, <https://hoover.archives.gov/exhibits/great-depression> (last visited Nov. 13, 2020) (discussing the creation of the President's Emergency Committee for Employment in 1930).

⁴⁴ *The Great Depression*, THE AM. YAWP, <http://www.americanyawp.com/text/23-the-great-depression/> (last visited Nov. 12, 2020).

⁴⁵ Emergency Relief and Construction Act of 1932, H.R. 9642, 72nd Cong. § 1 (1932).

⁴⁶ *Compare Herbert Hoover on the Great Depression and New Deal, 1931–1933*, GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/spotlight-primary-source/herbert-hoover-great-depression-and-new-deal-1931–1933> (last visited Nov. 12, 2020) (explaining Hoover's

the economic pain.⁴⁷ Unemployment in 1933 reached 24.9% and GDP shrunk to -8.5% in 1930.⁴⁸ In April 2020, unemployment reached 14.7%⁴⁹ and GDP for the first quarter of 2020 declined to -4.8%.⁵⁰ At the time of this writing, those numbers are widely expected to worsen.

However, Hoover also signed into law the Tariff Act of 1930, which dramatically thwarted growth in international trade.⁵¹ The Act, commonly known as the Smoot-Hawley Tariff Act, was proposed before the stock market crash at the behest of Republicans

refusal to engage federal resources in the midst of the Great Depression), with Michael D. Shear et al., *Inside Trump's Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html> (describing Trump's push for states to take action to reopen their economies in the face of high risks from the Coronavirus); see also Kate Bennett, *New Ivanka Trump Initiative Tells Out-of-Work Americans to 'Find Something New'*, CNN (July 14, 2020), <https://www.cnn.com/2020/07/14/politics/ivanka-trump-find-something-new-unemployment/index.html> (discussing the first daughter's initiative to push the unemployed into different positions).

⁴⁷ *Compare American Experience, The Great Depression*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/dustbowl-great-depression/> (last visited Nov. 15, 2020) (recalling Hoover's reference to the Great Depression as a "passing incident in our national lives"); with Jesse Hellmann, *Trump Downplaying Sparks New Criticism of COVID-19 Response*, THE HILL (July 6, 2020, 4:13 PM), <https://thehill.com/policy/healthcare/506075-trump-downplaying-sparks-new-criticism-of-covid-19-response> (scrutinizing Trump's lack of attention to the effects of the Coronavirus on the economy).

⁴⁸ See Kimberly Amadeo & Somer G. Anderson, *Unemployment Rate by Year Since 1929 Compared to Inflation and GDP*, THE BALANCE, <https://www.thebalance.com/unemployment-rate-by-year-3305506> (last updated Sept. 17, 2020) (providing unemployment and GDP data for every year since 1929).

⁴⁹ TED: The Economics Daily, *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, U.S. BUREAU OF LABOR STATISTICS (May 13, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm>.

⁵⁰ *Gross Domestic Product, 1st Quarter 2020 (Advance Estimate)*, U.S. BUREAU OF ECON. ANALYSIS (Apr. 29, 2020), <https://www.bea.gov/news/2020/gross-domestic-product-1st-quarter-2020-advance-estimate>.

⁵¹ Leonard Silk, *Protectionist Mood: Mounting Pressure Smoot and Hawley*, N.Y. TIMES (Sept. 17, 1985), <https://www.nytimes.com/1985/09/17/business/protectionist-mood-mounting-pressure-smoot-and-hawley.html>.

and special interests seeking tariff protection in the face of rising competition.⁵² Centrist Republicans defeated the first attempt to raise tariffs in 1929, but once the stock market collapsed and unemployment soared, Hoover had the political support that he needed to enact the Bill. Some have argued that Hoover supported the Bill because it included desired revisions to the Fordney-McCumber Tariff Act of 1922 (“FTC”), which empowered the Executive to set tariff rates through the use of an independent commission.⁵³ Yet the opposition of the business and economist communities, along with democrats in Congress, nearly sunk the law.⁵⁴ The Bill passed in the Senate by a vote of 44 to 42 (5 democrats in support) and the House by a vote of 222 to 153 (14 democrats in support).⁵⁵

Passage of the Smoot-Hawley Tariff Act of 1930 included protection for its intended target—farmers—as well as numerous other special interests that did not want to be left outside the government’s protectionist umbrella.⁵⁶ Tariffs increased to an average of 20%, making foreign imports more expensive and thus

⁵² See, e.g., Kumiko Koyama, *The Passage of the Smoot-Hawley Tariff Act: Why Did the President Sign the Bill?*, 21 J. OF POL’Y HIST. 163, 178–79 (2009) (describing Hoover’s overarching push to revise existing trade legislation long before Smoot-Hawley).

⁵³ Pub. L. No. 67-318, 42 Stat. 858 (1922). See also Kevin J. Fandl, *National Security Tariffs: A Threat to Effective Trade Policy*, U. PA. BUS. L. J. (forthcoming, 2021) (explaining the support of the Harding Administration for these higher tariffs to protect against competing imports of agriculture).

⁵⁴ See, e.g., John Steele Gordon, *The Great Mistake*, BARRON’S, <https://www.barrons.com/articles/SB50001424052970203952604575552230198296558> (last updated Oct. 23, 2010) (quoting J.P. Morgan’s Thomas Lamont as saying to Hoover at the time, “I almost went down on my knees . . . to beg Herbert Hoover to veto the asinine Hawley-Smoot tariff. That act intensified nationalism all over the world”; and Henry Ford who visited the White House and called the bill “an economic stupidity”).

⁵⁵ Will Kenton, *Smoot-Hawley Tariff Act*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/smoot-hawley-tariff-act.asp> (last updated Sept. 5, 2020).

⁵⁶ David Greene, *Smoot-Hawley Tariff Act: A Classic Economics Horror Story*, NAT’L PUB. RADIO (Apr. 5, 2018, 4:58 AM), <https://www.npr.org/2018/04/05/599707003/smoot-hawley-tariff-act-a-classic-economics-horror-story> (explaining that over 800 goods received some type of protection under the Act).

less competitive on the American market.⁵⁷ As expected, this action resulted in immediate retaliation, with many of our trading partners raising tariffs on American exports, further weakening an already floundering American economy.⁵⁸ In the three-year period between 1929 and 1932, U.S. exports declined by 78%, from \$5.24 billion to \$1.16 billion.⁵⁹

It is important for readers to understand the economic position of the United States at the time of passage of the Smoot-Hawley Act in 1930. Only forty years prior, Representative and soon-to-be President William McKinley crafted highly protective legislation in the form of the McKinley Tariff Act of 1890.⁶⁰ That Act raised the average tariff on imports from 38% to 49.5%.⁶¹ Yet there was little retaliation at the time because the United States was a largely agricultural country, importing its manufactured goods from Europe and exporting its basic commodities.⁶² This created a surplus for European countries, exporting higher value manufactured goods and importing agricultural goods from the United States.⁶³ Their retaliation against the high American tariffs had little effect since the United States was not exporting manufactured goods—yet.⁶⁴

By 1930, big change had arrived. America had become a major manufacturing economy with over half of its exports constituting manufactured goods.⁶⁵ Accordingly, Europe now had ample

⁵⁷ See Douglas A. Irwin, *The Smoot-Hawley Tariff: A Quantitative Assessment*, 80 REV. OF ECON. & STAT. 326, 330–33 (1998) (expressing the trade-weighted average change in tariffs following the Act).

⁵⁸ See generally JOSEPH M. JONES, TARIFF RETALIATION: REPERCUSSIONS OF THE HAWLEY-SMOOT BILL (Univ. of Pa. Press ed., 1934) (describing, chapter by chapter, the responses of European countries to the Hawley-Smoot Tariff Act).

⁵⁹ See Gordon, *supra* note 54.

⁶⁰ *The McKinley Tariff of 1890*, HISTORY, ART & ARCHIVES, THE U.S. H. OF REP., <https://history.house.gov/Historical-Highlights/1851-1900/The-McKinley-Tariff-of-1890/> (last visited Nov. 13, 2020).

⁶¹ Jay Chittooran, *History Says Trade Protectionism Has Never Worked*, THIRD WAY (Sept. 12, 2016), <https://www.thirdway.org/memo/history-says-trade-protectionism-has-never-worked>.

⁶² André Siegfried, *European Reactions to American Tariff Proposals*, FOR. AFF. 13 (Oct. 1929).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

ammunition to launch a defensive trade policy against America.⁶⁶ And as Professor André Siegfried at the École Libre des Sciences Politiques noted at the time, “the main factor in the formation of the common consciousness becoming manifest today is the presence of a powerful, rich and dominant United States. The spectacle of that successful country is a lesson which cannot possibly be ignored. But at the same time the fact that America is somewhat lacking in international mindedness is a warning.”⁶⁷

The critiques of both Siegfried and Jones in the early 1930s were astute and prescient, anticipating not only the retaliation that would come from passage of the Act, but also the changing economic relationships developing rapidly in the early twentieth century.⁶⁸ The United States was not only emerging as a major economic player on the world stage, but also, following World War II, a major political leader as well. This was not necessarily a role the United States was looking to play; however, by the time of the election of Franklin Roosevelt in 1932, it became apparent that the world was becoming more interdependent than ever before and that it needed direction and leadership.

The 1930s were a time of economic and political calamity as well as a time of change. As the United States exploded onto the scene as a major economic power, threats to democracy arose from all corners, including the rise of Mussolini in Italy, Hitler in Germany, and Franco in Spain, as well as across parts of Latin America.⁶⁹ Benito Mussolini’s rapid rise to power in 1922 created a fanatical nationalism, capitalizing on the traumatic experiences of Italian soldiers in World War I and seeking to reinvigorate the nation with powerful leadership that reflected the historical power of the Roman Empire.⁷⁰ Adolf Hitler followed Mussolini’s playbook,

⁶⁶ See JONES, *supra* note 58, at 11–14 (providing a comprehensive analysis of the tariff act and its associated defensive tariffs).

⁶⁷ See Siegfried, *supra* note 62, at 19.

⁶⁸ *Id.*

⁶⁹ See, e.g., Olivia B. Waxman, *What to Know About the Origins of Fascism’s Brutal Ideology*, TIME (Mar. 22, 2019, 2:46 PM), <https://time.com/5556242/what-is-fascism> (explaining the origins of fascism).

⁷⁰ See, e.g., David AJ Richards, *Liberal Democracy and the Problem of Patriarchy*, 46 ISR. L. REV. 169, 187–88 (2013) (describing the role played by masculinity in furthering violent oppression in Italy and Germany).

mixing in anti-Semitism and anti-immigrant sentiments to create an even more powerful fascist agenda that would lead to the loss of 85 million lives around the world.⁷¹

B. Betting on Liberal Trade

By the time of the 1932 election of Franklin Roosevelt, the threat from the collapse of world trade and the ascent of fascism made it abundantly clear that the new star on the global stage, America, had to take a stand. But it is important to recognize that Americans were not proactively asserting their position as a liberal democracy upon the world in an effort to set globalization in motion; rather, they were acting in defense of their own values and responding to a growing and tremendous threat to freedom the world over. As G. John Ikenberry noted in a recent article, “[t]he liberal order they went on to build was less about the triumphant march of liberal democracy than about pragmatic, cooperative solutions to the global dangers arising from interdependence. Internationalism was not a project of tearing down borders and globalizing the world; it was about managing the growing complexities of economic and security interdependence in the pursuit of national well-being.”⁷²

The end of World War II ignited the liberal world order and supercharged economic globalization. Defeat of the Nazi regime and the Japanese imperialists showed the strength of the belief in democracy and freedom. American support for global institutions returned, enabling the establishment of the United Nations in 1945, the Bretton Woods financial institutions in 1944,⁷³ and the first set of rules for international trade—the General Agreement on Tariffs and Trade (“GATT”) in 1947.⁷⁴ These institutions, along with American leadership and investment, sought to solidify the ideals

⁷¹ *Id.* at 189.

⁷² G. John Ikenberry, *The Next Liberal Order*, 99 FOREIGN AFF. 133 (2020) (seeing Roosevelt as a defensive tactician rather than a globalist).

⁷³ Consisting of the International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund.

⁷⁴ General Agreement on Tariffs and Trade, 1947, opened for signature Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187, as amended by Protocol to the General Agreement on Tariffs and Trade (Geneva 1979) at 3, GATT Doc.L/4875, BISD (26th Supp. 1980).

that the allies fought for during World War II—democracy, freedom, and peace through economic trade and stability.

The United States quickly emerged as a global political leader, establishing the Marshall Plan to both rebuild Europe and to ensure European support of American global leadership. In 1949, the Americans and Europeans entered into a strategic defense agreement—the North Atlantic Treaty Organization (“NATO”)—to provide for mutual defense of the allied member states.⁷⁵ And thanks to the Reciprocal Trade Agreements Act (“RTAA”) of 1934 in the United States,⁷⁶ America began negotiating bilateral trade agreements to provide for preferential market access and to put into practice the theory that trade promotes peace.⁷⁷ The era of interdependency in both political and economic relations had begun.

C. The Fall of the Soviet Union: U.S. Leadership Peaks

Despite fighting side by side during World War II, the Soviets and the Americans had very different ideas about politics and economics. Joseph Stalin’s Soviet Union was built on the heels of the Russian Revolution of 1917 when Vladimir Lenin led the overthrow of the long-standing monarchy. Stalin, like Lenin before him, pursued a radical leftist agenda that included communist principles, such as the elimination of private property and religion, along with the collectivization of agriculture. Stalin helped the Soviet Union to industrialize quickly and, following World War II, to forge their own path forward with their communist allies.

By the end of World War II, after defeating Germany and Japan, the Soviet Union began expanding its empire into Eastern Europe, threatening American allies in Western Europe. A new distrust emerged between the Americans and Soviets and the Cold War⁷⁸

⁷⁵ North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (entered into force Aug. 24, 1949).

⁷⁶ Reciprocal Trade Agreements Act of 1934, ch. 474, § 1, 48 Stat. 943, 943–44 (codified as amended at 19 U.S.C. §§ 1351–54 (2018)).

⁷⁷ See, e.g., Daniel Griswold, *Peace on Earth, Free Trade for Men*, CATO INST. (Dec. 31, 1998), <https://www.cato.org/publications/commentary/peace-earth-free-trade-men>.

⁷⁸ The term “Cold War” was first used by George Orwell in 1945. See George Orwell, *You and the Atomic Bomb*, THE TRIB., Oct. 19, 1945.

was set in motion. The United States pursued a policy of “containment” to resist the advances of the Soviet Union and the two nuclear powers fought proxy wars in North Korea, Vietnam and Cuba, among other places.⁷⁹ President Nixon attempted to thaw relations with the Soviets with a *détente* and by forging a new relationship with communist China to offset Soviet influence in the region.⁸⁰ This led to agreements to reduce nuclear arsenals⁸¹ and to utilize diplomacy rather than force to calm relations.

The Reagan era (1981–1989) coincided with advances in technology and lower costs for international trade. This, along with significant tax reforms that worsened inequality but also stimulated growth, led to the most rapid expansion in economic growth ever.⁸² On the contrary, the Soviet Union’s communist policies were failing to produce sustainable growth, effectively exposing the economic limits of communist policies. Soviet Premier Mikhail Gorbachev, who came to power in 1985, implemented radical economic and political reforms, but it was too little, too late.⁸³ President Reagan took a hardline approach to the Soviets and, given their weakened state, helped to foster the end of the Cold War.

President Reagan also, in many ways, signaled a low point in liberal ideals. “After 1980, Democratic liberalism remained

⁷⁹ See National Security Council Report, *United States Objectives and Programs for National Security*, NSC 68, (Apr. 14, 1950) (explaining the theory of containment).

⁸⁰ See Kevin J. Fandl, *Xi, Trump and the Death of the WTO*, (forthcoming 2021) (providing an overview of the rationale behind Nixon’s rapprochement with China).

⁸¹ Treaty Between the United States and the U.S.S.R. on the Limitation of Anti-Ballistic Missile Systems, Russ.-U.S. May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 (1972).

⁸² See Martin Anderson, *The Reagan Boom—The Greatest Ever*, N.Y. TIMES (Jan. 17, 1990), <https://www.nytimes.com/1990/01/17/opinion/the-reagan-boom-greatest-ever.html> (“[T]he seven-year period from 1982 to 1989 was the greatest, consistent burst of economic activity ever seen in the U.S. In fact, it was the greatest economic expansion the world has ever seen—in any country, at any time.”).

⁸³ See, e.g., Chris Miller, *Could Mikhail Gorbachev Have Saved the Soviet Union?*, FOREIGN POL’Y (Dec. 21, 2016), <https://foreignpolicy.com/2016/12/21/could-mikhail-gorbachev-have-saved-the-soviet-union> (discussing Gorbachev’s policies of *glasnost* (political openness) and *perestroika* (economic openness)).

directionless and the party as a whole lacked credibility.”⁸⁴ That changed with the fall of the Iron Curtain and the end of the Cold War that began in 1989.

The end of the Cold War meant the end to the bipolar power structure that had prevailed for 45 years. As the sole superpower, the United States needed a new justification for its foreign actions lest they be considered imperialist.⁸⁵ Following the terrorist attacks of September 11, 2001 and the subsequent “war on terror,” for many countries around the world, these imperialist fears were realized as the United States pursued terrorists in Afghanistan, Iraq, and in a number of developing countries.⁸⁶ This period in history threw doubt on the continuation of the liberal world order as some saw it as oppression and others—including many Americans—saw it as outdated.

D. The Liberal “American” Order?

American withdrawal from the world stage is a logical response to the dismantling of a world in which the only other superpower advocating an alternative to the liberal model was the Soviet Union. With the Soviets out of the picture, there was no perceived need for an aggressive and widespread American presence in the world to maintain peace.⁸⁷ As Ikenberry explained more recently, the liberal world order was a reaction to rising threats, principally from the Soviet Union’s expansion of communist ideas around the world.⁸⁸ So, once that threat had been neutralized, the United States no longer

⁸⁴ Sean Wilentz, *How Bill Clinton Saved Liberalism*, NAT’L PUB. RADIO (Oct. 4, 2011, 9:03 AM), <https://www.npr.org/2011/10/04/141035627/new-republic-how-bill-clinton-saved-liberalism> (describing the floundering ideas of the liberal agenda since the Vietnam War).

⁸⁵ See NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2002) (comparing the United States to the British Empire).

⁸⁶ See G. John Ikenberry, *Power and Liberal Order: America’s Postwar World Order in Transition*, 5 INT’L REL. OF THE ASIA-PACIFIC 133 (2005).

⁸⁷ But see Joseph S. Nye, Jr., *What New World Order?*, 71 FOREIGN AFF. 83, 95 (Spring 1992) (noting the very real possibility of another hostile threat rising to control in Europe, as had happened multiple times before).

⁸⁸ Ikenberry, *supra* note 86.

needed to pursue a costly foreign policy agenda in lieu of its own domestic goals. As Joseph Nye noted in 1992, “[t]here is no single competitor to liberal capitalism as an overarching ideology.”⁸⁹

As he announced the United States’ involvement in the Persian Gulf in 1991, President George H.W. Bush announced that we had entered a “new world order,” one with a single hegemon pursuing the interests of the liberal world order unimpeded. But what this reinterpretation of the liberal order meant was unclear. “In short the new world order has begun. It is messy, evolving and not susceptible to simple formulation or manipulation. Russia and China face uncertain futures.”⁹⁰ And it appeared that the American economy was not ready for the next challenge to its unitary power.

By the end of the Cold War, America’s national savings rate fell to 4.5% from a high of 7.5% in the 1970s. America’s education system was not keeping up with the still nascent but rapidly advancing move into technology. And American infrastructure was crumbling and in need of significant investment.⁹¹ With the perennial threat of the Soviets out of the way, Americans in the 1990s were able to refocus their efforts on domestic problems, most importantly, the economy.

President Bill Clinton is sometimes referred to as the savior of liberalism. Certainly, his record on welfare reform, fighting racism, and investing in education were reminiscent of the progressive FDR domestic agenda in the 1940s.⁹² However, Clinton’s singular focus was on domestic investment, not on foreign affairs or pursuit of the global ideals that informed the earlier progressive agenda.⁹³ His 1992 campaign slogan, “It’s the economy, stupid,” reflected the popular sentiment that the United States should retract from the

⁸⁹ Nye, *supra* note 87, at 84.

⁹⁰ *Id.* at 96 (describing the “new world order” as a blend of liberal values combined with realist tactics).

⁹¹ *Id.* at 94.

⁹² Wilentz, *supra* note 84.

⁹³ Stephen M. Walt, *Two Cheers for Clinton’s Foreign Affairs*, 79 NO. 2 FOR. AFF. 63–79 (Apr. 2000) (explaining that American distaste for a broader international role led to the election of a Congress and a President with stronger domestic agendas).

world and fix its domestic problems.⁹⁴ Likewise, the 1994 Republican sweep of Congress filled those halls with what we might call anti-globalists, uninterested in supporting foreign wars or international institutions.

Despite the domestic liberal reforms of the era, the 1990s also saw an American withdrawal from the world stage, further deepening the belief that a post-Cold War world did not require as much investment in global affairs by the United States. President Clinton pulled back from NATO, placing more responsibility on Europeans to maintain security while not outright withdrawing American support.⁹⁵ Congress withheld funding for the United Nations over their support of abortion.⁹⁶ Congress also prevented Clinton from attempting to normalize relations with Cuba, further entrenching its communist neighbor to the South.⁹⁷ And the United States chose not to involve itself in foreign conflicts, including the genocide in Rwanda in 1994.⁹⁸

One area in which President Clinton was able to find some success in foreign policy was with respect to China. China's assertion of power over its people in the 1989 Tiananmen Square suppression of peaceful protesters epitomized its human rights

⁹⁴ *Id.* at 68 (“Given the American public’s reluctance to take on ambitious foreign policy goals and the potential calamity of an intervention gone awry, Clinton’s approach was both prudent and appropriate.”).

⁹⁵ *Id.* (describing the U.S. negotiation of the Dayton Accords as reflective of the continuing U.S. commitment to peace in Europe).

⁹⁶ The Leahy Amendment, Pub. L. No. 103-306, 108 Stat. 1612 (1994) (preventing U.S. funding from being used to support abortions by international organizations); see also Nurith Aizenman, *Citing Abortions in China, Trump Cuts Funds for U.N. Family Planning Agency*, NAT’L PUB. RADIO (Apr. 4, 2017), <https://www.npr.org/sections/goatsandsoda/2017/04/04/522040557/citing-abortions-in-china-trump-cuts-funds-for-u-n-family-planning-agency> (discussing the Trump Administration’s attempt to withhold \$32.5 million in funding from the United Nations over their support for abortion).

⁹⁷ See Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 AM. BUS. L. J. 293–346 (Summer 2017) (tracing the history of the U.S. economic embargos on Cuba).

⁹⁸ Samantha Power, *Bystanders to Genocide*, THE ATLANTIC (Sept. 2001), <https://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571/> (reflecting on the “Clinton Apology” in 1998 for lack of American assistance during the genocide in Rwanda).

abuses, which did not coincide with the values of the liberal world order. In response, Clinton worked to strengthen ties with Japan to offset Chinese threats to Taiwan and greater East Asia.⁹⁹ And, following in the footsteps of his predecessor, Clinton attempted to use trade restrictions to facilitate improvements in human rights in China.¹⁰⁰ By 1996, Clinton decoupled human rights from economic issues, making the case that it would be more productive to work with China on non-economic issues if it is a part of the liberal economic system, which has more collective action power against a rising China.¹⁰¹

Around the same time, two other significant developments in trade were occurring. The first was the 1994 conclusion of the North America Free Trade Agreement (“NAFTA”), which Congress passed by large margins.¹⁰² The second was passage of the Uruguay Round Agreements Act, which recognized the existence of the new WTO that began operation in 1995.¹⁰³ Thus, while the Clinton Administration made a substantial turn inward to focus on domestic policy, it maintained its support for the liberal world order nevertheless.

We might say that the Clinton Administration was the first and last attempt to turn Cold War investments around into domestic investments. The economic rise of China in the 1990s and their ultimate accession to the WTO in 2001 once again created a bipolar global system, reestablishing the clear mission that the United States had during the Cold War; however, rather than protecting democracy and freedom, this time the United States would focus on

⁹⁹ Walt, *supra* note 93.

¹⁰⁰ See, e.g., *President Clinton’s Visit to China in Context*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/campaigns/china-98/visit.htm> (last visited Nov. 20, 2020).

¹⁰¹ *Full Text of Clinton’s Speech on China Trade Bill*, INST. FOR AGRIC. & TRADE POL’Y (Mar. 9, 2000), https://www.iatp.org/sites/default/files/Full_Text_of_Clinton’s_Speech_on_China_Trade_Bi.htm (transcribing President Clinton’s speech on normalizing trade relations with China).

¹⁰² Andrew Glass, *Clinton Signs NAFTA into Law, Dec. 8, 1993*, POLITICO (Dec. 8, 2020, 7:02 AM), <https://www.politico.com/story/2018/12/08/clinton-signs-nafta-into-law-dec-8-1993-1040789>.

¹⁰³ 19 U.S.C. § 3511 (1994).

protecting free and fair trade. I will discuss how China emerged in this space in the next section.

III. AN EMERGING THREAT: CHINA

At the end of the Cold War in 1991, China was a growing but still quite poor developing country. It was on track to becoming an important component in the world trade system,¹⁰⁴ but they were not perceived as an economic threat by most of the world. The Republic of China, which governed before the rise of Mao, had joined the GATT as an original member in 1948. But the following year brought China's revolution and the new People's Republic of China, which governs today. The prior government withdrew from the GATT and the new one did not join.

It was in 1986 that the People's Republic of China expressed its interest in joining the international trade body.¹⁰⁵ China saw membership in the GATT system as one of its economic policy objectives.¹⁰⁶ Since the 1949 revolution, China had been excluded from the growing multilateral trade system, missing out on Most Favored Nation ("MFN") trading status, which would have afforded China better terms of trade. They no longer wanted to be on the outside looking in.¹⁰⁷

¹⁰⁴ See *China's Economic Rise: History, Trends, Challenges, and Implications for the United States*, Cong. Res. Serv., <https://fas.org/sgp/crs/row/RL33534.pdf> (last updated June 25, 2019) (noting in its summary China's sustained growth over the years since "opening up to foreign trade and investment and implementing free-market reforms in 1979").

¹⁰⁵ See *Bilateral Agreement on China's Entry into the WTO Between China and the United States*, MINISTRY OF FOREIGN AFF. OF THE PEOPLE'S REPUBLIC OF CHINA, https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18051.shtml (last visited Nov. 20, 2020).

¹⁰⁶ *Meeting of the Working Party on the Accession of China: Statement by H.E. Vice Minister Long Yongtu, Head of the Chinese Delegation, at the Eighteenth Session of the Working Party on China*, WTO NEWS (Sept. 17, 2001), https://www.wto.org/english/news_e/news01_e/wpchina_longstat_17sept01_e.htm.

¹⁰⁷ See Chad P. Bown, *U.S.-China Trade Conflicts and the Future of the WTO*, 33 FLETCHER F. WORLD AFF. 27, 32 (2009) (describing the motivations behind China's push to join the WTO).

A second reason for China to join the GATT system was to facilitate its own internal economic reforms.¹⁰⁸ Like all acceding countries, China had to make substantial changes to its legal system to come into conformity with the rules and commitments of the GATT. In China's case, a number of specific reforms were also required, including liberalization of its financial services market, reductions in agricultural subsidies, privatization of state-owned enterprises and a commitment to protect intellectual property rights.¹⁰⁹ "When one takes into account the size of China's economy, its status as a developing country, and the degree to which China (until very recently) operated as a planned economy, the extent of China's commitments are unprecedented."¹¹⁰

China also may have wanted to join the liberal trade system at this time because of the fallout from the Asian Financial Crisis in 1997.¹¹¹ In his 2003 article, China scholar Nicholas Lardy argued that China escaped much of the economic damage from the crisis that its neighbors suffered because of China's largely closed economy.¹¹² However, the economic crisis did expose the weaknesses of China's banking and financial systems and the possibility of economic catastrophe if China opened to foreign markets, which it would have to do given its slowing economy. China's response to the crisis was a commitment to offer assistance to its neighbors while also pursuing significant economic reforms domestically.¹¹³

¹⁰⁸ *Id.* at 32–33 (suggesting that joining the GATT would offer China benefits in exchange for reforms that it already planned to implement).

¹⁰⁹ *Id.* (describing the commitments made by China to join the GATT/WTO).

¹¹⁰ Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 326 (2004) (describing the protocol of additional commitments made by China with the United States in its accession process).

¹¹¹ NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 16 (2002).

¹¹² Nicholas Lardy, *The Case of China*, BROOKINGS INST. (Mar. 1, 2003), <https://www.brookings.edu/articles/the-case-of-china/>.

¹¹³ See generally Wayne Morrison, *China's Response to the Global Financial Crisis: Implications for the United States*, CONG. RES. SERV. (June 3, 2009), <https://fas.org/sgp/crs/row/RS22984.pdf> (describing the risks posed to China's export-oriented economy for potential residual damage following the Asian Financial Crisis).

These three factors—desire for more foreign market access, internal economic reforms and concerns over regional economic crises—drove China toward the GATT with some sense of urgency. The reforms that China committed to making, including a reduction in the amount of support that its banking sector provided to state-owned enterprises, and an opening of its financial services market to foreign investment, would potentially improve domestic market efficiency while also aligning China's economy with the free market-based principles of the liberal world order.¹¹⁴

When making its request to join the GATT, China was classified by the World Bank as a low-income country. It would only move slightly ahead to the category of low-middle income country eleven years later, after the formation of the WTO.¹¹⁵ This enabled China to accede to the WTO as a developing country, a status that is self-designated according to WTO rules.¹¹⁶

Prior to its WTO accession, China operated outside of the global GATT system, meaning that it was not able to take advantage of (or offer others) most favored nation status. The favorable and multilateral terms negotiated in the GATT rounds were out of reach for China, just as China's market was not subject to the rules of the GATT system. However, this would not be a relevant issue for most of the twentieth century, as China spent most of that century as a developing country. When Richard Nixon announced his intention to visit China, the reaction of the market was silence.¹¹⁷

¹¹⁴ Halverson, *supra* note 110, at 338–39 (describing the reforms to China's banking and financial services sectors).

¹¹⁵ See Brad Setser, *U.S.-China Trade War: How We Got Here*, COUNCIL ON FOR. REL. (July 9, 2018), <https://www.cfr.org/blog/us-china-trade-war-how-we-got-here>.

¹¹⁶ *Who Are the Developing Countries in the WTO?*, WTO NEWS, https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm (last visited Aug. 20, 2020); J. Bacchus & I. Manak, *The Development Dimension: What to Do About Differential Treatment in Trade*, CATO INST., POL'Y ANALYSIS NO. 887 (Apr. 13, 2020), <https://www.cato.org/publications/policy-analysis/development-dimension-what-do-about-differential-treatment-trade#introduction>.

¹¹⁷ Leonard S. Silk, *Nixon, China and Wall St.*, N.Y. TIMES (July 21, 1971), <https://www.nytimes.com/1971/07/21/archives/nixon-china-and-wall-st-why-has-the-news-of-the-presidents-trip-had.html> (“The news of President Nixon's coming trip to Communist China, sensational as it is politically, produced virtually no effect on the stock market.”).

At the start of the GATT Uruguay Round in 1986, which would ultimately create the WTO, the United States and China each exported about \$4 billion in goods to one another.¹¹⁸ The United States even had a trade surplus with China in the 1980s, while simultaneously engaging in a trade war with Japan that generated a substantial trade deficit with that country.¹¹⁹ The 1980s would be the last time the United States would have a trade surplus with China.¹²⁰

The reason this background on China's economic relationship with the United States is so important is that it underscores how China was perceived by the West as it sought admittance to the liberal economic system. Rather than posing a threat, China presented an opportunity as a large, developing country for American firms looking to lower labor costs. Prior to 1984, foreign direct investment in China outside of Special Economic Zones was prohibited. But a new law in 1984 opened the door to investment in most economic sectors, creating new opportunities for American and other foreign firms to operate in China.¹²¹

The new approach to trade encouraged by the 1986 Foreign Investment Law in China emphasized investments in technology and in export-oriented sectors.¹²² China was striving to become an

¹¹⁸ GARY CLYDE HUFBAUER ET AL., U.S.-CHINA TRADE DISPUTES: RISING TIDE, RISING STAKES 77 (2006).

¹¹⁹ *China-U.S. Trade Issues*, CONG. RES. SERV. (July 30, 2018), https://www.everycrsreport.com/reports/RL33536.html#_Toc520881911 (describing the trade patterns between the U.S. and China from 1980 through 2018); *see also* Clyde H. Farnsworth, *Japan-U.S. Trade Gap \$13.4 Billion*, N.Y. TIMES (Jan. 19, 1982), <https://www.nytimes.com/1982/01/19/business/japan-us-trade-gap-13.4-billion.html> (describing the widening trade deficit the United States had with Japan in the 1980s).

¹²⁰ *China-U.S. Trade Issues*, CONG. RES. SERV. (July 30, 2018), https://www.everycrsreport.com/reports/RL33536.html#_Toc520881911 (describing the trade patterns between the U.S. and China from 1980 through 2018) (showing U.S. trade deficits with China since 1990).

¹²¹ Provisions of the State Council of the People's Republic of China for the Encouragement of Foreign Investment, promulgated by the State Council of the People's Republic of China on Oct. 11, 1986, *reprinted in* I COM. BUS. & TRADE L. 171 (1987).

¹²² Carolyn P. Casey, *The 1986 Provisions to Encourage Foreign Investment in China: Further Evolution in Chinese Investment Laws*, 2 AM. U. INT'L L. REV. 579, 582 (1987) (describing the investment provisions).

export-oriented economy with a strong domestic manufacturing base. Increased FDI in these sectors would help to facilitate that goal.¹²³ By the end of the 1990s, foreign firms accounted for over half of Chinese export enterprises.¹²⁴ FDI in China rose from \$19 billion in 1990 to \$300 billion by 1999.¹²⁵

During this period of rapid growth and opportunity in China, President Clinton, after a series of disputes in which non-GATT remedies had to be applied, sought the powerful leverage that could be applied if China were part of the multilateral trading system.¹²⁶ Thus, Clinton took the first step—one that would damage him politically—to bring China into the fold by normalizing U.S.-China trade relations.¹²⁷ President George W. Bush finalized the grant of normalized trade relations with China on December 27, 2001.¹²⁸

Defending his decision to support China's accession to the WTO, President Clinton noted:

By lowering the barriers that protect state-owned industries, China is speeding a process that is removing government from vast areas of people's lives. In the past, virtually every Chinese citizen woke up in an apartment or a house owned by the government, went to work in a factory or a farm run by the government and read newspapers published by the government. State-run workplaces also

¹²³ See, e.g., Y.Y. Kueh, *Foreign Investment and Economic Change in China*, 131 CHINA Q. 637 (1992) (explaining that FDI exposed China to foreign trade while also helping them to grow their export economy).

¹²⁴ *Foreign Direct Investment—The China Story*, WORLD BANK (July 16, 2010), <https://www.shihang.org/zh/news/feature/2010/07/16/foreign-direct-investment-china-story> (reporting outcomes from the Chinese Ministry of Commerce).

¹²⁵ EDWARD M. GRAHAM & ERIKA WADA, FOREIGN DIRECT INVESTMENT IN CHINA: EFFECTS ON GROWTH AND ECONOMIC PERFORMANCE, in *ACHIEVING HIGH GROWTH: EXPERIENCE OF TRANSITIONAL ECONOMIES IN EAST ASIA* 2 (2001).

¹²⁶ See Lael Brainard, *Trade Policy in the 1990s*, BROOKINGS INST. 1, 3 (June 29, 2001) (discussing the trade policy agenda of the Clinton Administration toward China, among other things).

¹²⁷ Clinton, *supra* note 101.

¹²⁸ Press Release, White House, President Grants Permanent Trade Status to China (Dec. 27, 2001) (taking effect on January 1, 2002).

operated the schools where they sent their children, the clinics where they received health care, [and] the stores where they bought food. That system was a big source of the Communist Party's power. Now people are leaving those firms, and when China joins the W.T.O., they will leave them faster. The Chinese government no longer will be everyone's employer, landlord, shopkeeper and nanny all rolled into one.¹²⁹

Referring to the admission of China and Taiwan (which were approved at the same time), then-U.S. Trade Representative Robert Zoellick noted, "[b]oth [countries] are already major influences in world trade. Their participation in the WTO will be a boost for us and them."¹³⁰ When negotiations between China and the 142 Member States of the WTO concluded in September 2001, then-Director General Michael Moore enthusiastically stated:

International economic cooperation has brought about this defining moment in the history of the multilateral trading system. With China's membership, the WTO will take a major step towards becoming a truly world organization. The near-universal acceptance of its rules-based system will serve a pivotal role in underpinning global economic cooperation.¹³¹

The final 900-page text included far-reaching commitments for China within the GATT rules-based system.¹³² Among other things, China immediately joined the Trade Related Aspects of Intellectual Property ("TRIPS") Agreement and vowed to protect intellectual property rights, and opened the door to foreign investment in the

¹²⁹ *Clinton's Words on China: Trade Is the Smart Thing*, N.Y. TIMES (Mar. 9, 2000), <https://www.nytimes.com/2000/03/09/world/clinton-s-words-on-china-trade-is-the-smart-thing.html>.

¹³⁰ *China Officially Joins WTO*, CNN (Nov. 11, 2001, 1:17 AM), <https://www.cnn.com/2001/WORLD/asiapcf/central/11/10/china.WTO/index.html>.

¹³¹ *WTO Successfully Concludes Negotiations on China's Entry*, WTO (Sept. 17, 2001), https://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

¹³² Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 405 (2002) (explaining the tremendous number of legal changes that China had to make in order to accede to the WTO).

form of joint venture agreements, elimination of agricultural export subsidies, and a commitment to modify domestic laws to come into conformity with the entire WTO agreement.¹³³ To the West, this was a far-reaching commitment of China and a sign of its willingness to operate within the liberal world order.

The hope for political reform in China following its accession to the WTO was high but has largely faded today. At the time, it was relatively clear to a liberal order-minded politician that once an economy sees the benefits of openness on their economy, they will have no choice but to spread that openness to the political system, as President Clinton noted above.¹³⁴ And to be clear, some political reforms have been enacted, including tepid support for local elections in rural China, broader access to information via the internet and acceptance of non-governmental organizations.¹³⁵

Even as recently as 2020, the signs that China sees no need for political reform despite market liberalization are clear. That year saw a peak of nearly 400 private Chinese firms mentioning Chinese Premier Xi Jinping directly in their financial statements.¹³⁶ In his recent book, *The State Strikes Back*, economics scholar Nicholas Lardy explained that the political reforms taking place post-WTO accession largely ceased after the 2015 financial crisis, when China reasserted central power to insulate its domestic market against global economic shocks.¹³⁷ Thus, while China has indeed benefited from its limited economic liberalization and from the market access provided through the WTO, their appetite for seemingly unnecessary political reforms appears to be diminishing.

There is little doubt that China's retraction from political reform and their limited economic reforms have frustrated the hopeful

¹³³ *Id.* at 405, 486.

¹³⁴ Clinton, *supra* note 101.

¹³⁵ Halverson, *supra* note 110 at 363–69 (discussing the limited political reforms that have taken place in China).

¹³⁶ *Xi Jinping is Trying to Remake the Chinese Economy*, THE ECONOMIST (Aug. 15, 2020), (showing a rising trend in references to the Communist party—and Mr. Xi in particular—in private financial statements).

¹³⁷ NICHOLAS LARDY, THE STATE STRIKES BACK: THE END OF ECONOMIC REFORM IN CHINA? 1 (2019).

liberals in the West.¹³⁸ This frustration has been exacerbated by China's growing economic muscle. China's rapidly developing export-oriented economy gave consumers from Brussels to Boston access to cheap goods and gave firms access to cheap parts for their assembly lines. Many American manufacturing firms were not able to compete with the low-cost and often subsidized production in China, causing them to lose market share. The result of increased imports from China to meet the demand of American firms and consumers, combined with low savings rates by Americans, was a trade deficit with China.¹³⁹

A. *It's Still the Economy, Stupid*

As I discussed above, China's economy took off in the 1990s thanks in part to a rapid rise in foreign investment. But the 1990s were not only a period of new investment in China—this was the period in which global supply chains emerged, dramatically reshaping the way that products were designed, manufactured, and distributed.¹⁴⁰ From containerization in the 1950s to lean production in Japan in the 1980s to the modern, high-tech cloud-based global supply chain system today, China emerged as a manufacturing

¹³⁸ See, e.g., Evan S. Medeiros, *The Changing Fundamentals of US-China Relations*, 42 WASH. Q. 93 (2019) (arguing that the U.S. has reached its limit of patience in waiting for Chinese reforms); Steven Erlanger, *Betraying Frustration with China, E.U. Leaders Press for Progress on Trade Talks*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/world/europe/china-eu-trade-talks.html> (describing European frustrations with delays on EU-China trade and investment terms).

¹³⁹ See Joseph Stiglitz, *The US Is at Risk of Losing a Trade War with China*, PROJECT SYNDICATE (July 30, 2018), <https://www.project-syndicate.org/commentary/trump-loses-trade-war-with-china-by-joseph-e--stiglitz-2018-07> (explaining that an increase in tariffs on Chinese imports will not reduce the trade deficit—Americans must save more in order to create a meaningful impact on the deficit).

¹⁴⁰ See, e.g., *The History and Evolution of the Global Supply Chain*, BLUME GLOBAL, <https://www.blumeglobal.com/learning/history-of-supply-chain/> (last visited Aug. 25, 2020) (discussing the evolution of supply chains).

center precisely in the right moment, and it has remained there ever since.¹⁴¹

The trade deficit with China is a microcosm of the U.S. trade balance with the entire world. As of April 2020, the United States has a global trade deficit—that is, imports minus exports from and to the entire world—of \$49.4 billion.¹⁴² The trade deficit with China in April 2020 was \$25.96 billion.¹⁴³ Of course, the U.S. trade deficit with the entire world—which includes China—is offset by U.S. exports to the rest of the world, including China. For instance, in the first quarter of 2020, the United States had a trade surplus with Brazil of nearly \$9 billion.¹⁴⁴

As I discuss in more detail below, highlighting a trade deficit with a single country in order to show economic strength or weakness is incomplete at best and dangerously deceptive at worst. With China, because of the tremendous amount of U.S. foreign direct investment there (approximately \$7.6 billion or 2% of overall FDI),¹⁴⁵ and because most of those investments are in manufacturing,¹⁴⁶ a simple calculation of imports minus exports can create a false image of the trade relationship. Consider the Apple iPhone, which is manufactured and exported from China to the

¹⁴¹ See Sanjeev Sanyal, *A Brief History of Supply Chains*, THE GLOBALIST (Mar. 22, 2012), <https://www.theglobalist.com/a-brief-history-of-supply-chains/> (providing a history of global supply chains).

¹⁴² *U.S. International Trade in Goods and Services, April 2020*, BUREAU OF ECON. ANALYSIS, <https://www.bea.gov/news/2020/us-international-trade-goods-and-services-april-2020> (last updated July 6, 2020).

¹⁴³ Harriet Torry, *U.S. Exports, Imports Fell Sharply in April Amid Coronavirus Disruptions*, WALL ST. J. (June 4, 2020, 1:13 PM), <https://www.wsj.com/articles/u-s-trade-deficit-likely-widened-in-april-amid-coronavirus-disruptions-11591268401> (discussing the overall trade deficit as well as the U.S. trade deficit with China and how the coronavirus may be affecting those numbers).

¹⁴⁴ BUREAU OF ECON. ANALYSIS, *supra* note 142.

¹⁴⁵ *U.S.-China Investment Ties: Overview and Issues for Congress*, CONG. RES. SERV. (Aug. 28, 2019), <https://crsreports.congress.gov/product/pdf/IF/IF11283> (explaining the FDI balance between the United States in China and the risks that it entails).

¹⁴⁶ *China: Foreign Investment*, SANTANDER, <https://santandertrade.com/en/portal/establish-overseas/china/foreign-investment> (last visited Aug. 25, 2020) (explaining that nearly 26% of all FDI is invested in manufacturing in China).

United States, adding approximately \$15.7 billion to the trade deficit.¹⁴⁷ However, that number does not take into account the fact that Apple primarily sources several of the components for the iPhone from outside China, Korea and Japan, and that the vast majority (estimated at 63%) of value comes from the intellectual property owned by Apple, not the manufactured good itself.¹⁴⁸ Once again, global supply chains and the nature of international trade today make trade deficits a poor measure of economic performance, and yet they are driving the conversation about rethinking our role in the global trading system.¹⁴⁹

“The most important economic truth to grasp about the U.S. trade deficit is that it has virtually nothing to do with trade policy.”¹⁵⁰ The trade balance between countries reflects the competing levels of investment and savings within each country. If one country saves and invests more domestically than the other, it will tend to run a trade surplus with that other country.

¹⁴⁷ Allison Schrager, *The iPhone Alone Accounts for \$15.7 Billion of US Trade Deficit with China*, QUARTZ (Mar. 21, 2018), <https://qz.com/1234437/the-iphone-alone-accounts-for-16-billion-of-the-us-trade-deficit-with-china/> (describing the impact of global supply chains on trade deficits).

¹⁴⁸ *Id.* (explaining that out of the \$1,000 cost for an iPhone X, the manufactured cost is roughly \$370.25).

¹⁴⁹ See Keith Johnson, *5 Takeaways from Trump’s New China Trade Pact*, FOREIGN POL’Y (Jan. 16, 2020, 12:48 PM), <https://foreignpolicy.com/2020/01/16/trump-new-china-trade-pact-takeaways/> (suggesting that the key goal for Trump is reducing the trade deficit with China, even though the January 2020 trade pact may violate WTO rules); see also Nicholas R. Lardy, *China and the WTO*, BROOKINGS INST. (Nov. 1, 1996), <https://www.brookings.edu/research/china-and-the-wto/> (explaining that U.S. policymakers intended to use China’s request to join the WTO as leverage to reduce the new trade deficit that had developed in the 1990s).

¹⁵⁰ Daniel Griswold, *America’s Misunderstood Trade Deficit*, CATO INST. (July 22, 1998), <https://www.cato.org/publications/congressional-testimony/americas-misunderstood-trade-deficit> (providing clear testimony to Congress on the lack of connection between a trade deficit and trade policy).

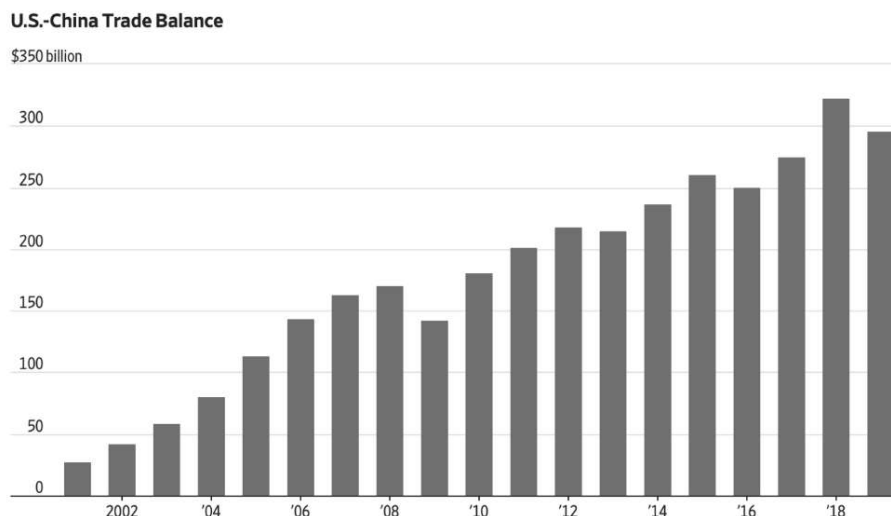


Figure 1. United States-China Trade Balance (2002–2019). Source: Chao Deng, In a Year of Trade War, U.S. Deficit With China Shrank, *WALL ST. J.* (Jan. 14, 2020).

Savings and investment rates around the world average about 20% of gross domestic product (“GDP”).¹⁵¹ However, China is an outlier with an average savings rate of 46% in 2017 [see Figure 2 below]. This extraordinary savings rate is likely the result of several factors, including the one-child policy and decollectivization of agriculture under Deng in the 1980s, the shift from a centrally-planned to a market-based economy and the resulting need to save for social security in the 1990s, and the rapid growth caused by the export boom post-WTO accession in the 2000s.¹⁵² Nearly all of this saving is coming from individual households, not from the government or corporate sector.¹⁵³

¹⁵¹ Longmei Zhang et al., *China’s High Savings: Drivers, Prospects, and Policies*, (IMF Working Papers, Working Paper No. 18/277, 2018).

¹⁵² *Id.* at 8–13 (providing a comprehensive analysis of the rationale behind the high savings rate in China).

¹⁵³ *Id.* at 9.

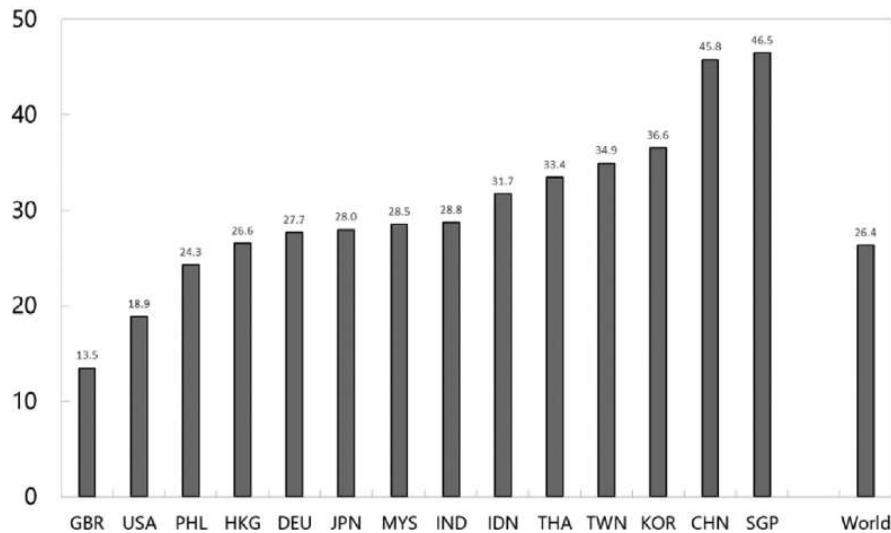


Figure 2. Global Savings Rates in 2017. Source: Longmei Zhang, et al., *China's High Savings: Drivers, Prospects, and Policies*, IMF Working Paper No. 18/277 (2018).

What this tells us is that the U.S. trade deficit with China is not caused by China's unfair trade practices or refusal of market access, but rather by the United States' consumption and lack of savings combined with Chinese non-consumption and significant savings. The deficit does indeed reflect a problem for policymakers, but it is not the problem that they think. Rather than focusing on sanctioning Chinese exports (which will inevitably worsen the deficit in the long-run),¹⁵⁴ policymakers in the United States should be focused on the lower-than-average American savings rate and take steps to improve that.

In his testimony to Congress in 1998, trade economist Daniel Griswold explained that one sure way to reduce a trade deficit would be a recession—natural or artificial.¹⁵⁵ A recession reduces levels of investment and consumption, forcing consumers and firms to act more cautiously by saving more. “If the trade deficit really is one of our nation's most pressing problems, the surest and swiftest way to

¹⁵⁴ Griswold, *supra* note 150 (explaining that raising tariffs will ultimately lead to a devaluation of the foreign currency, lowering the cost of their exports, thereby increasing demand for those exports even in the face of higher tariffs).

¹⁵⁵ *Id.*

tackle it would be to engineer a deep recession.”¹⁵⁶ His prediction seems to be playing out in 2020 in the midst of the deep recession growing out of the global health pandemic. In April 2020, savings rates in the United States reached an all-time high of 33% as consumption drops and consumers hold on to their capital.¹⁵⁷

A recent Article by law professors Thomas Schoenbaum and Daniel C.K. Chow eloquently explained the cause of trade deficits:

The underlying cause of the U.S. trade deficit is the macroeconomic imbalance between the low U.S. savings rate and the United States’ need for domestic investment capital. Since U.S. domestic savings fall far short of fulfilling the United States’ need for capital, the U.S. economy is sustained by massive amounts of foreign investment capital. The sources of this investment capital are the dollars earned when U.S. trading partners run trade surpluses with the United States. Understanding these macroeconomic facts is key to understanding trade imbalance problems.¹⁵⁸

The approach taken by the Trump Administration to address concerns over the large and growing trade deficit with China is not novel. It was tried by President Ronald Reagan when Japan was on the rise and was becoming the world’s supplier of technology in the 1980s. In that situation, Reagan convinced Japan to accept certain voluntary limits on their exports in order to protect the U.S. economy.¹⁵⁹ The result was an appreciation of the Yen and the

¹⁵⁶ *Id.*

¹⁵⁷ Maggie Fitzgerald, *U.S. Savings Rate Hits Record 33% as Coronavirus Causes Americans to Stockpile Cash, Curb Spending*, CNBC (May 29, 2020, 8:39 AM), <https://www.cnbc.com/2020/05/29/us-savings-rate-hits-record-33percent-as-coronavirus-causes-americans-to-stockpile-cash-curb-spending.html>.

¹⁵⁸ Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL’Y REV. 115, 118 (2019).

¹⁵⁹ See Lee Branstetter, *Do Trade Restrictions Work? Lessons from Trade with Japan in the 1980s*, PBS (Nov. 20, 2017, 2:29 PM), <https://www.pbs.org/newshour/economy/making-sense/do-trade-restrictions-work-lessons-from-trade-with-japan-in-the-1980s>.

creation of an asset bubble in Japan. But the deficit between the United States and Japan continued to grow.¹⁶⁰

This approach misunderstands the underlying causes of trade deficits, which have much more to do with consumer spending and saving than with trade practices. Rather than considering broad, macroeconomic reforms, the Trump Administration has scapegoated China as the cause for the deficit.¹⁶¹ And while China is the third largest exporter to the United States after Canada and Mexico,¹⁶² closing off trade with China would do little more than shift Chinese exports to a neighboring country, such as Vietnam. This began happening early on in the U.S.-China trade war.¹⁶³ Curbing the deficit will require cuts in government spending and improvements in consumer savings.¹⁶⁴

“If a country consumes more than it produces, it must import more than it exports. That’s not a rip-off, that’s arithmetic.”¹⁶⁵ These words, spoken by George P. Shultz, former United States Secretary of Labor, State and Treasury, simplified trade economics in a 2017 editorial in which he, like Feldstein, explained that eliminating a trade deficit with one country will just shift it to another country

¹⁶⁰ See Schoenbaum & Chow, *supra* note 158, at 119–20 (explaining the voluntary export restraints imposed on Japan in the 1980s and their unsuccessful attempt to reduce the trade deficit with Japan).

¹⁶¹ See Calamur, *supra*, note 11.

¹⁶² See *Top Trading Partners*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/statistics/highlights/toppartners.html> (last visited Nov. 13, 2020).

¹⁶³ See, e.g., Michelle Jamrisko, *Vietnam Tops List of Biggest Winners from U.S.-China Trade War*, BLOOMBERG (June 3, 2019, 6:12 AM), <https://www.bloomberg.com/news/articles/2019-06-03/vietnam-tops-list-of-biggest-winners-from-u-s-china-trade-war> (discussing the trade diversion taking place from China to Vietnam).

¹⁶⁴ See Schoenbaum & Chow, *supra* note 160, at 121–22 (emphasizing that the solution to a trade deficit is rather simple, but politically complex: reduce the federal deficit and incentivize consumer saving).

¹⁶⁵ See George P. Shultz & Martin Feldstein, *Everything You Need to Know About Trade Economics, in 70 Words*, WASH. POST (May 5, 2017), https://www.washingtonpost.com/opinions/everything-you-need-to-know-about-trade-economics-in-70-words/2017/05/05/a2b76a02-2f80-11e7-9dec-764dc781686f_story.html.

unless domestic consumers change their practices or domestic exporters sell more to that country.¹⁶⁶

The United States is the largest importer in the world. Buying over \$2.4 trillion of goods, the United States is the destination for 13.4% of world exports.¹⁶⁷ And with a population (in 2019) of over 328 million consumers earning an average of \$62,794, snapping up goods from China, Vietnam, and other less-wealthy countries is practically a national pastime.

The fact that the United States imports more than any other country is part of what is feeding its deficit problem. Consumer and government spending are the two largest components—by far—of U.S. GDP.¹⁶⁸ The other two components—investment and net exports—make up a far smaller share.¹⁶⁹ Consumer spending alone comprises roughly 70% of U.S. GDP, and with the tax cuts and other major initiatives of the Trump Administration,¹⁷⁰ government spending is making up much of the remainder.¹⁷¹

A trade deficit is not an indication of economic weakness and may even be a sign of economic health, considering the fact that it indicates consumers' ability to purchase imports from a country with which they export less, as well as the trust that other countries have that the country is creditworthy.¹⁷² Closing the valve on exports from China will only open a new valve with another country

¹⁶⁶ *Id.*

¹⁶⁷ Jeff Desjardins, *These Are the World's Biggest Importers*, WORLD ECON. FORUM (July 26, 2018), <https://www.weforum.org/agenda/2018/07/these-are-the-worlds-biggest-importers>.

¹⁶⁸ See Kimberly Amadeo, *The Components of GDP Explained*, THE BALANCE, <https://www.thebalance.com/components-of-gdp-explanation-formula-and-chart-3306015> (last updated June 26, 2020).

¹⁶⁹ *Id.*

¹⁷⁰ See, e.g., *Spending Has Increased \$800 Billion Under President Trump*, COMM. FOR A RESPONSIBLE FED. BUDGET (Feb. 12, 2020), <http://www.crfb.org/blogs/spending-has-increased-800-billion-under-president-trump> (explaining that while the rhetoric of the Trump Administration points to budget cuts, actual spending increased).

¹⁷¹ See Schoenbaum & Chow, *supra* note 160, at 120 (explaining the key components of U.S. GDP and how spending far outweighs saving).

¹⁷² See John D. Greenwald, *At the End of a Long Trade Policy Road*, 45 TEX. INT'L L.J. 157, 168–69 (2009) (explaining that the United States frequently runs trade deficits despite operating a stable and prosperous economy).

that produces the goods consumers want, likely at higher costs or lower quality.

The United States trade deficit with China is the subject of much ire in the Trump Administration. But it appears more likely that the growing deficit and strengthening position of China in the global economy is indicative of larger structural issues that need to be addressed. Though past administrations have utilized both economic and diplomatic channels to push China to play by the rules, the Trump Administration has relied solely upon trade sanctions (tariffs) to foster compliance. “If one sat down and made a determined effort, it would be hard to come up with a more economically wrongheaded, diplomatically toxic, and legally destructive negotiating position than that presented to China [in May 2018] by a visiting U.S. trade delegation.”¹⁷³

China’s rapid rise as an economic powerhouse is inevitable at this point and should be lauded for the positive effects it has had on the Chinese population. The question for the United States is whether they will engage with China in a meaningful way to steer them toward the rules of the liberal world order, or whether they would prefer to step aside and allow China, Russia, or another ambitious country to stake a claim on the future world order.

IV. A NEW WORLD ORDER?

The liberal world order I described above can roughly be divided into three areas: political, social and economic. The political area focuses on democracy promotion, rule of law, and governance. The social area focuses on human rights and basic liberties. And the economic area focuses on free trade and economic liberalization. I am only addressing the latter of those three areas in this paper; however, it is worth mentioning that, if the liberal world order is going to fall, the economic area will likely be the last element to do so.¹⁷⁴

¹⁷³ Editorial, *Donald Trump’s Irrational Trade Demands on China*, FIN. TIMES (May 7, 2018), <https://www.ft.com/content/22f89cac-4fbc-11e8-a7a9-37318e776bab>.

¹⁷⁴ Robert Kagan, *The Twilight of the Liberal World Order*, BROOKINGS INST. (Jan. 24, 2017), <https://www.brookings.edu/research/the-twilight-of-the->

China, and to a lesser extent Russia, pose the most significant social and political threats to the liberal world order. In both cases, democracy, accountability, and human rights interfere with their authoritarian forms of governance.¹⁷⁵ However, both of them have benefited from the economic liberalization associated with that Order—again, China more so than Russia. While each of those countries have done little to change their approach in the face of international opposition when it comes to social and political acts,¹⁷⁶ both have operated within the confines of the trade rules set by the WTO to resolve most trade disputes.¹⁷⁷

President Truman's Secretary of State, Dean Acheson, is renowned for a number of Cold War strategies, from the Truman Doctrine to the Marshall Plan to NATO.¹⁷⁸ The Truman Doctrine was considered the United States' declaration of "cold" war against communism. In his speech requesting \$400 million in funding to support democracy and fight communism as part of that Doctrine, President Truman said, "it must be the policy of the United States to

liberal-world-order/ (arguing that the threats posed to the liberal order by China and Russia are mainly to the political and social elements of that order).

¹⁷⁵ *Id.*

¹⁷⁶ See Javier C. Hernandez, *Harsh Penalties, Vaguely Defined Crimes: Hong Kong's Security Law Explained*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/world/asia/hong-kong-security-law-explain.html> (describing a Chinese national security law considered to violate freedoms in Hong Kong); Daniel Treisman, *Why Putin Took Crimea: The Gambler in the Kremlin*, FOREIGN AFF. (May/June 2016), <https://www.foreignaffairs.com/articles/ukraine/2016-04-18/why-russian-president-putin-took-crimea-from-ukraine> (analyzing the Russian incursion into Ukraine and annexation of Crimea).

¹⁷⁷ See Panel Report, *Russia—Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) (resolving a case involving a Russian invocation of the GATT national security exception in its actions on Ukraine); Panel Report, *United States—Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (Adopted Sept. 15, 2020) (reflecting one of several disputes brought to the WTO over unilateral U.S. actions against China).

¹⁷⁸ Robert Kagan, *How Dean Acheson Won the Cold War: Statesmanship, Morality, and Foreign Policy*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 14, 1998), <https://carnegieendowment.org/1998/09/14/how-dean-acheson-won-cold-war-statesmanship-morality-and-foreign-policy-pub-260> (tracing the often-infamous history of Dean Acheson).

support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.”¹⁷⁹

Secretary Acheson defended democracy by creating “situations of strength” around the world, projecting American influence and building American-led institutions.¹⁸⁰ What was key to the success of Acheson’s plan was the United States’ willingness to support its global outreach efforts. In the case of economic order, this meant maintaining effective institutions that would preserve economic growth. “The order’s ideological and economic core—the democracies of Europe and East Asia and the Pacific—had to remain relatively healthy and relatively confident.”¹⁸¹

The following four decades of the Cold War saw a tremendous expansion of American power and influence. And despite several significant military conflicts and economic downturns, Americans generally supported U.S. efforts to contain communism and promote democracy.

In the economic sphere, political differences could not stand in the way of economic relations. Even in the midst of the Cold War, the United States negotiated a trade treaty with the Soviets,¹⁸² just as today, U.S. firms continue to trade with China, and American consumers continue to buy Chinese goods in spite of the U.S.-China trade war. As Robert Kagan recently noted:

Competition in most spheres is necessary and even healthy. Within the liberal order, China can compete economically and successfully with the United States; Russia can thrive in the international economic order upheld by the liberal powers, even if it is not itself liberal.¹⁸³

¹⁷⁹ *This Day in History: President Truman Announces the Truman Doctrine*, THE HIST. CHANNEL (Nov. 13, 2009), <https://www.history.com/this-day-in-history/truman-doctrine-is-announced>.

¹⁸⁰ Kagan, *supra* note 178.

¹⁸¹ *Id.*

¹⁸² See Kazimierz Grzybowski, *United States-Soviet Union Trade Agreement of 1972*, 37 LAW & CONTEMP. PROBS. 395–428 (1972).

¹⁸³ See Kagan, *supra* note 174.

At the end of the Cold War, Francis Fukuyama published a well-received article entitled, *The End of History?*,¹⁸⁴ in which he suggested that the defeat of Soviet communism affirmed the dominance of the liberal world order. Once China peacefully acceded to the WTO, with full support from the last standing hegemon, it appeared that even a rising power was willing to abide by the rules of that order.¹⁸⁵ His prediction may have been premature.¹⁸⁶

With the end of the Cold War, Americans lost interest in promoting liberal values around the world. As I previously noted, there was no longer a prime directive as there was during the Cold War. And while the institutions from that period, from the GATT to NATO, continued to operate, it became ever more apparent that they would stagnate in the absence of U.S. leadership. The post-Cold War American administrations kept the organizations afloat but did little to retain the effectiveness that they had before.

Following the Cold War, more emphasis was placed on regional economic arrangements rather than unwieldy multilateral institutions such as the WTO.¹⁸⁷ The United States, Europe, Japan, and some emerging markets such as Chile and Turkey, looked for arrangements more tailored to their specific needs rather than focusing on broad-based trade liberalization for all countries. Ultimately, this led to more liberal trade; however, that liberalization was occurring in pockets and created a patchwork of specialized rules and procedures that made trade more complex and discriminatory. Despite this transition from multilateral to regional

¹⁸⁴ Francis Fukuyama, *The End of History?*, 16 NAT'L INTEREST 3 (1989). This work was later expanded into a book, see FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (Free Press ed., 1992).

¹⁸⁵ See Justin Hughes, *Globalization, Revising the Terms of Trade, and the Return of 'History'*, 14 OHIO ST. BUS. L.J. 15, 45–46 (2020) (discussing the belief in a single political order at the time of China's WTO accession).

¹⁸⁶ See, e.g., Louis Menand, *Francis Fukuyama Postpones the End of History*, NEW YORKER (Aug. 27, 2018), <https://www.newyorker.com/magazine/2018/09/03/francis-fukuyama-postpones-the-end-of-history#> (arguing that Fukuyama's predictions were timely but also incorrect).

¹⁸⁷ See Cathleen D. Simino-Isaacs et al., *World Trade Organization: Overview and Future Direction*, CONG. RES. SERV. 1 (Aug. 21, 2020) (explaining that the challenges of multilateral trade negotiations have led more countries to pursue free trade agreements outside of the WTO).

trade agreements, the consensus was that liberal trade was a net positive.

The expression “Cold War” had largely fallen out of common parlance since the breakup of the Soviet Union. But it has been making a comeback in reference to China, suggesting that, once again, two economic superpowers will be vying for economic and political dominance.¹⁸⁸ This saber-rattling, however, is unlikely to result in meaningful outcomes. Unlike the Soviet Union, which pursued global influence of its economic and political model, China appears to strive for economic and political success at home, not abroad.¹⁸⁹ Especially in light of the failures of the capitalist system in response to the 2008 financial crisis and the 2020 Coronavirus pandemic, China appears intent on proving to itself and to the world that its model—Chinese socialism—is a refined version of liberalist principles. But that approach, which requires strong central leadership and the extensive use of surveillance and micromanagement, is unlikely to be appealing to more than a handful of countries.¹⁹⁰

There are many similarities between the global health pandemic and subsequent economic depression of 2020 and the global financial crisis and subsequent global depression of the 1930s. One important similarity that is being overlooked is the opportunity that moment in history provided for the expression of a global vision for

¹⁸⁸ See, e.g., Alan Dupont, *The US-China Cold War Has Already Started*, DIPLOMAT (July 8, 2020), <https://thediplomat.com/2020/07/the-us-china-cold-war-has-already-started/> (laying out six parallels between the Cold War with the Soviet Union and the perceived Cold War with China); John Kemp, *United States and China Enter a New Cold War*, REUTERS (July 22, 2020, 8:02 AM), <https://www.reuters.com/article/us-global-politics-kemp-column/united-states-and-china-enter-a-new-cold-war-kemp-idUSKCN24N1MT> (implying that the closure of consulates in the U.S. and China indicates the start of a new Cold War); Ben Westcott, *There’s Talk of a New Cold War. But China Is not the Soviet Union*, CNN (Jan. 3, 2020), <https://www.cnn.com/2020/01/02/asia/us-china-cold-war-intl-hnk/index.html> (comparing the buildup to the Cold War with the Soviet Union and China).

¹⁸⁹ See, e.g., Hughes, *supra* note 185 at 47–48.

¹⁹⁰ See *id.* at 34–35 (explaining that, while China has no ideological mission to take over the world, it does have a model that may be attractive to some autocratic leaders).

the future. U.S.-led liberalism emerged out of the 1930s crisis. What can we expect from the 2020 crisis? I will try to answer that question in my closing remarks.

The Trump Administration's attacks on the liberal world order are not the first such efforts by the United States to undermine that system. After the United States was accused of violating international legal conventions by arming rebels to overthrow the Nicaraguan government, the Reagan Administration withdrew from the Optional Protocol to the United Nations International Court of Justice in 1985.¹⁹¹ President Bush likewise withdrew from the Optional Protocol to the Vienna Convention on Consular Relations after the ICJ ruled against the United States in a death penalty case in which the prisoner had not been given access to his consulate.¹⁹²

However, the skirmishes of the former administrations with international institutions were fought over procedural issues, such as the jurisdiction of an international tribunal. These differences kept the United States out of the League of Nations after World War I and blocked the creation of the International Trade Organization in 1947.¹⁹³ However, some institutions have given the United States benefits that it could not achieve unilaterally, yet without extracting an ounce of sovereignty. Among these is the World Trade Organization.

The threat to the liberal global trade institutions that evolved from the 1940s through today is real and worrisome. The very institutions that were built to protect against unfair trade are today being accused of fostering unfair trade.¹⁹⁴ Reform of those institutions is necessary, starting with the GATT rules that govern

¹⁹¹ See Farooq Hassan, *A Legal Analysis of the United States' Attempted Withdrawal from the Jurisdiction of the World Court in the Proceedings Initiated by Nicaragua*, 10 U. DAYTON L. REV. 295 (1985).

¹⁹² See Frederic L. Kirgis, *President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, 9 AM. SOC'Y OF INT'L L. (2005).

¹⁹³ Douglas A. Irwin, *Clashing Over Commerce: A History of U.S. Trade Policy*, 648–49 (2017). <https://www.nber.org/system/files/chapters/c13863/c13863.pdf>.

¹⁹⁴ See Jomo Kwame Sundaram, *Free Trade Agreements, Trade Policy and Multilateralism*, 59 DEVELOPMENT 40, 44 (June 2016) (describing the Trump Administration's desire to renegotiate trade agreements on the basis of their unfairness toward the United States).

trade and the procedural rules of the WTO Appellate Body that govern trade disputes. But dismantling the multilateral rules-based system in an effort to return to unilateralism will bring neither fairness nor freedom in trade.

B. Multilateral Trade in a Unilateral World

I have suggested in this paper that the GATT rules-based world trade system has been the most effective tool in maintaining peaceful trade relations and facilitating economic growth for the past 75 years. And I have also suggested that recent actions by the Trump Administration and some other countries have challenged the value of that system as compared to unilateralism and nationalism. But to fully understand what a return to unilateralism would mean, we should recall the world in trade before the GATT.

Prior to 1948, when the GATT took effect, trade relations were managed on a mostly bilateral basis through treaty law. The first United States trade agreement in the modern sense of the term was the U.S.-Cuba Reciprocal Trade Agreement in 1934.¹⁹⁵ This followed on the heels of new executive authority to negotiate such trade agreements, which was given to President Roosevelt through the Reciprocal Trade Agreements Act of 1934.¹⁹⁶ That Act is considered the precursor to modern trade law and the impetus for negotiating the GATT and the stillborn International Trade Organization.¹⁹⁷

The nascent multilateral system that emerged in the 1930s was built upon the many failures of unilateral and nationalist economic and trade policies of the past. For instance, the RTAA was in large part a response to the protectionist Smoot-Hawley Tariff Act of 1930, which imposed high tariffs as a means to protect domestic industry against imports, without taking into account the retaliatory

¹⁹⁵ Reciprocal Trade Agreement, Cuba-U.S., Aug. 24, 1934, 49 Stat. 3559 (entered into force Sept. 3, 1934; terminated Oct. 30, 1947).

¹⁹⁶ U.S. Reciprocal Trade Agreements Act of 1934, ch. 474, 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. § 1351 (1988)).

¹⁹⁷ See Peter M. Gerhart, *The World Trade Organization and Participatory Democracy: The Historical Evidence*, 37 VAND. J. TRANSNAT'L L. 897, 903 (2004) (implying that the RTAA signified an ideological change that opened the door to the negotiation of a multilateral agreement).

consequences.¹⁹⁸ “The RTAA transformed U.S. trade policy by reflecting a new understanding—that tariffs have external, international implications. Tariffs invite or encourage retaliation; they are a source of friction between countries; and they are bad for U.S. citizens because they are bad for foreigners. This transformation is the foundational story behind the establishment of GATT.”¹⁹⁹

Prior periods in history are filled with examples of both liberal and protectionist trade policies. But in nearly every case, those policies are shaped by the needs of domestic industries rather than the potential (though unrealized) gains from liberal trade. A recent in-depth book by trade scholar Doug Irwin provided a comprehensive historical analysis of tariffs and trade policy.²⁰⁰ For our purposes, I will focus on a few key examples of pre-GATT trade conflicts to exemplify the superiority of special interests and politics over shared economic growth.

i. Italy’s Integration

In the mid-1800s, continental European countries were pursuing liberal trade policies through what was known as the “European Network of Treaties,” a system that applied MFN status to members of the network.²⁰¹ Already with some of the lowest tariff levels in Europe, Italy joined this network by signing a trade treaty with France in 1863.²⁰² Further economic liberalization in Italy happened quickly, causing surges of imports that weakened the competitiveness of Italian textile and heavy industries, especially in

¹⁹⁸ Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930).

¹⁹⁹ Gerhart, *supra* note 197 at 910 (writing that the RTAA shifted America from an isolationist country to an internationalist country).

²⁰⁰ DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY (Univ. of Chicago Press ed., 2017).

²⁰¹ Harold James & Kevin O’Rourke, *Italy and the First Age of Globalization, 1861-1940* (Banca D’Italia Euro Sistema, Working Paper No. 16, 2011) (describing Italy’s experimentation with liberal trade policies and its move toward protectionism).

²⁰² *Id.*

the South of the country.²⁰³ By 1878, domestic industry convinced Italy to reverse course and reimpose protective tariffs.²⁰⁴

France quickly retaliated against Italy's move toward protectionism, despite their trade treaty. Protectionist tariffs in France devastated the Italian silk and wine industries and caused a decline in Italian exports to France of 57% between 1887 and 1897.²⁰⁵ Ultimately, Italy backed down from their high tariffs and France reciprocated. The Italy-France case demonstrates the effects of unilateral action on tariffs without regard for extraterritorial effects.

ii. Canada's Confederacy

The second example involves a case eerily similar to the one that occurred in mid-2020.²⁰⁶ In 1854, the United States entered into a reciprocity treaty with Canada, which was a British colony at the time. The Canadians had been pushing the Crown for more control over their economy since the early 1800s. After the British Corn Laws and Navigation Acts were repealed²⁰⁷ in 1846 and 1849, respectively, Canada was given autonomy to set its own tariff levels.²⁰⁸ In addition to those changes in Britain, Canadians were increasingly envious of the economic growth being enjoyed by their southern neighbor. "The people of Canada saw, with increasing discontent, the rapid strides of the United States in wealth."²⁰⁹

²⁰³ *Id.* (describing the Commission established to evaluate the impact of trade liberalization on Italian industries).

²⁰⁴ *Id.* (explaining that tariffs on yarn rose to 27%, wheat to 25%, and similarly large increases in steel and iron).

²⁰⁵ *Id.* at 8.

²⁰⁶ See Jeanne Whalen & Amanda Coletta, *Trump Re-Imposes Tariffs on Canadian Aluminum, Prompting Trudeau to Vow Retaliation*, WASH. POST (Aug. 6, 2020, 8:08 PM), <https://www.washingtonpost.com/business/2020/08/06/trump-canada-aluminum-tariffs/> (describing the President's decision to impose tariffs on steel and aluminum imports from Canada despite the recent signing of a new trade deal with that country).

²⁰⁷ Fandl, *supra* note 80.

²⁰⁸ Frederick E. Haynes, *The Reciprocity Treaty with Canada of 1854*, 7 PUBLICATIONS OF THE AM. ECON. ASSOC. 7, 9–10 (1892) (describing the push for Canadian economic independence).

²⁰⁹ *Id.* at 10.

Accordingly, in 1847, Canada lowered its tariff on U.S. goods from 12.5% to 7.5% (and raised tariffs on British imports from 5% to 7.5%).²¹⁰ That step led to the formal signing of the Reciprocal Treaty in 1854, eliminating tariffs on most goods between the United States and Canada.²¹¹ Trade during the period 1851 to 1861 grew at its fastest pace ever, increasing from \$19 million in 1851 to \$51 million in 1861.²¹² However, that shared economic prosperity would be short-lived.

In the midst of the U.S. Civil War, the United States became aggravated that Canada had been building coastal vessels used by the Confederacy to raid Union commerce, and thus it abrogated the treaty in 1866—the one and only time in United States history that it has abrogated a trade treaty.²¹³ The period between 1861 and 1871, accordingly, saw the smallest increase in cross-border trade since the parties began trading in the 1830s.²¹⁴ It is useful to consider that a conflict such as this would be capable of resolution in the context of the WTO. It may have been an ideal case for the invocation of the national security exemption, which allows a country to temporarily suspend trade concessions in the event of war or threat to national security.²¹⁵ Because these were, after all, “the inevitable commercial disturbances of a time of war.”²¹⁶ The two countries ended the

²¹⁰ *Id.* at 12 (describing the desire to match the rates between the UK and the United States).

²¹¹ *Id.* at 17–18 (explaining that the treaty took effect in 1855, after the United States was convinced of Canada’s changes to its economy).

²¹² *Id.* at 31.

²¹³ Lawrence Herman et al., *Panel Discussion—The Current State of NAFTA*, 43 CAN.-U.S. L.J. 57, 78 (2019).

²¹⁴ Haynes, *supra* note 208, at 31–32 (describing a total trade increase of only \$8 million).

²¹⁵ Marrakesh Agreement Establishing the World Trade Organization art. XXI, Apr. 15, 1994, 1867 U.N.T.S. 154; *see also* Kevin J. Fandl, *National Security Tariffs: A Threat to Effective Trade Policy*, 23 U. PA. J. BUS. L. (forthcoming 2021) (providing a comprehensive analysis of the national security exception in GATT law).

²¹⁶ Haynes, *supra* note 208, at 19 (explaining that the onset of the Civil War doomed the Treaty).

century with back and forth retaliatory tariffs that would continue for decades.²¹⁷

iii. Last Call for Protectionism

The final example I will provide of trade disputes prior to the modern liberal world order is more widely known among Americans, perhaps due to its infamous reference in the 1980s cult classic film, *Ferris Bueller's Day Off*. The Smoot-Hawley Tariff Act of 1930 is an iconic piece of ill-timed legislation that was meant to bring prosperity through protection to the United States.²¹⁸ Leading up to the 1930 Tariff Act, import duties were largely in the hands of congressmen who, by and large, sought protection for industries in their districts and used a process of “log-rolling” to trade votes for similar protection in other districts.²¹⁹ Prior to passage of the Sixteenth Amendment in 1913, which established the federal income tax, tariffs were the main source of revenue for the federal government and thus were a critical component of congressional authority.²²⁰ Yet the progressives in the early twentieth century saw a need to reign in corruption and defer tariff policy to experts.

²¹⁷ See, e.g., McKinley Tariff Act, ch. 1244, No. 567 (1890); Dingley Tariff Act, ch. 10-11, No. 151. (1897).

²¹⁸ Tariff Act of 1930, ch. 497, § 338(a), 46 Stat. 704 (codified at 19 U.S.C. § 1338(a)) (“The President when he finds that the public interest will be served shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of, or imported in a vessel of, any foreign country whenever he shall find as a fact that such country—(1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or (2) Discriminates in fact against the commerce of the United States . . .”).

²¹⁹ Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 296–97 (1986) (describing the corrupt politics involved in trading votes for protective tariffs).

²²⁰ U.S. Const. amend. XVI (1913); Joseph R. Fishkin et al., *Common Interpretation: The Sixteenth Amendment*, INTERACTIVE CONSTITUTION (2020), <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xvi/interps/139>).

To achieve this goal, Congress first established the Tariff Commission, an independent agency meant to provide expert advice on reasonable levels of tariffs.²²¹ And second, six years later, Congress passed the “flexible tariff provision” (“FTP”) as part of the Fordney-McCumber Tariff Act of 1922, which enabled the President to adjust tariffs in accordance with a standard set by Congress.²²² That provision was upheld by the United States Supreme Court as a viable delegation of power given the intelligible principle in place for determining the appropriate tariff level.²²³ However, these new constraints were not enough to keep politics out of trade policy.

When Republican Herbert Hoover came to office in 1928, he fought to keep his promise to protect farmers and other industries hurt by recent changes in the global economy.²²⁴ In April 1929, Hoover asked Congress for a new tariff bill that would protect agricultural interests and that would also revise the FTP to strengthen the President’s power to adjust tariff rates as he saw fit, effectively taking away congressional power over tariff rates.²²⁵ Democrats attempted to stop this expansion in power, but Hoover insisted, “No provision for the FTP, then no tariff bill.”²²⁶ Ultimately, in June 1930, the Tariff Act, better known as the Smoot-Hawley Tariff Act, was enacted, giving Hoover expanded FTP powers, including the ability to raise or lower tariffs by as much as

²²¹ 19 U.S.C. § 2231 (2016); William S. Culbertson, *The Tariff Commission and Its Work*, THE NORTH AMERICAN REVIEW, 57–65 (Jan. 1918). Established September 8, 1916 and renamed the “United States International Trade Commission” by § 171 of the Trade Act of 1974, 19 U.S.C. § 2231.

²²² Tariff Act of 1922, Pub. L. No. 67-318, § 315, 42 Stat. 858, 942-43 (1922); SIXTH ANNUAL REPORT OF THE UNITED STATES TARIFF COMMISSION, Washington Government Printing Office, 1-99 at 2 (1922).

²²³ J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 404, 413 (1928) (“It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible.”).

²²⁴ Kumiko Koyama, *The Passage of the Smoot-Hawley Tariff Act: Why Did the President Sign the Bill?*, 21 J. OF POL’Y HIST. 163, 172 (2009).

²²⁵ *Id.* at 172–73.

²²⁶ *Id.* at 173 (describing the back and forth between congress and Hoover over the tariff act).

50% of their current value.²²⁷ The Act also raised tariffs on over 20,000 different imports.

Just prior to signing the bill, Hoover was urged by a vocal opposition group to veto the significant increases in tariffs that were included. That opposition included the American economists, bankers and other business professionals who were concerned about likely retaliation by the United States' trade partners.²²⁸ However, given the fact that Hoover got what he wanted with the expanded FTP powers, and considering that the economy was in freefall and this would likely be his last chance to secure those tariff powers, Hoover signed the bill.²²⁹

Some historians believe that passage of the Smoot-Hawley Tariff Act may have had the unintended consequence of buoying Adolf Hitler's rise to power and Japan's incursion into China at the onset of World War II.²³⁰ And while the Great Depression can be tied to the stock market crash in October 1929, many economists point to the proposed Smoot-Hawley tariffs earlier in 1929 as cause to frighten the market toward a crash.²³¹ But one thing is certain—the unilateral actions of the Hoover Administration and the protectionist Republican Congress in 1930 stifled world trade and deepened the economic fallout from the stock market collapse.

This final protectionist act immediately preceded the establishment of the multilateral rules-based system that we know today.²³² Hoover and the Republican majority in Congress were

²²⁷ *Id.* at 174 (describing the provisions of the Tariff Act of 1930 affecting the FTP).

²²⁸ *Id.* at 178 (highlighting the domestic battle to scale back the tariffs in the midst of a collapsing economy).

²²⁹ *Id.* (noting that, at this point in history, Republicans were more trade protectionist than Democrats).

²³⁰ See Andrew Glass, *Hoover Signs Smoot-Hawley Act, June 17, 1930*, POLITICO (June 17, 2014, 12:01 AM), <https://www.politico.com/story/2014/06/this-day-in-politics-herbert-hoover-smoot-hawley-act-107908>.

²³¹ See Alan Reynolds, *What Do We Know About the Great Crash?*, NAT'L REV., (Nov. 9, 1979) (arguing that the proposed Tariff Act of 1930 likely set off alarm bells in stock markets, setting course for an economic collapse).

²³² See Douglas A. Irwin, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s*, in MICHAEL D. BORDO, CLAUDIA GOLDEN & EUGENE N. WHITE, *THE DEFINING MOMENT: THE*

replaced by the progressive Democrat Franklin Delano Roosevelt and a new slate of progressive Democrats in Congress.²³³ Roosevelt won the support of Congress to enact the Reciprocal Trade Agreements Act in 1934 (“RTAA”),²³⁴ which largely replaced the hard-fought FTP.²³⁵ The main distinction between the two was that Roosevelt was expected and empowered to negotiate tariff reductions on a reciprocal basis with trade partners, laying the groundwork for a multilateral framework that would be negotiated a few years later, the GATT.

The RTAA’s constitutionality rests on the foundations established in the *Hampton* challenge to the FTP in 1928. The first case to question the validity of the delegation of congressional trade authority to the Executive was in the 1959 *Starkist* case, which upheld the validity of the delegation.²³⁶ Trade scholar Douglas Irwin concluded that, “[t]he RTAA fundamentally transformed not only the process but also the course of U.S. trade policy.”²³⁷ Irwin made the case that the consolidation of tariff power—central to trade policy—in a single Executive laid the ground work for what would ultimately convert Republicans from a protectionist party to a free trade party.²³⁸

What we learn from these case studies is that politics have historically superseded wise trade policy decisions. And while we may never eliminate politics from effective trade policy, we can mitigate its influence with good governance and rules that constrain

GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 325 (1998).

²³³ See William E. Leuchtenburg, *Franklin D. Roosevelt: Campaigns and Elections*, UVA MILLER CTR., <https://millercenter.org/president/fdroosevelt/campaigns-and-elections> (last visited Nov. 10, 2020).

²³⁴ Reciprocal Trade Agreements Act, ch. 474, 48 Stat. 943 (1934), adding sec. 350 to Tariff Act of 1930 (current version at 19 U.S.C. § 1351 (1982)).

²³⁵ For a complete comparative analysis of the FTP and the RTAA, see Tarullo, *supra* note 212, at 347–58.

²³⁶ *Star-Kist Foods, Inc. v. United States*, 275 F.2d 472, 484 (C.C.P.A. 1959).

²³⁷ Douglas A. Irwin & Randall S. Kroszner, *Interests, Institutions, and Ideology in Securing Policy Change: The Republican Conversion to Trade Liberalization After Smoot-Hawley*, 42 J. L. & ECON. 643, 644 (1999) (suggesting that the broader executive power granted by the RTAA garnered republican support for free trade, including the GATT).

²³⁸ *Id.* at 648–49.

all players equally. “[T]he history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, towards a rules-oriented approach.”²³⁹

Economist Paul Krugman famously quipped, “[i]f economists ruled the world, there would be no need for a World Trade Organization.”²⁴⁰ The basic theorem of economics posits that liberal trade will benefit all participants and maximize efficiency in the global economy. Of course, economists do not rule the world—politicians do, with their own unique interests.²⁴¹ Thus, if our goal is the best possible trade policy for shared global economic growth, the best possible tool to get us there is a global system of governance and rules that constrain politicians.

That sentiment was widely agreed upon throughout the Cold War and even in the decades after, despite the push for more narrow bilateral agreements, often with political ends in mind. Trade disputes have continued to arise, but these disputes have been resolved peacefully through the former GATT and now WTO dispute settlement system. Even the current trade war between the United States and China is being fought both within and outside of the WTO.

The concern today is not that China’s rise will destroy trade institutions. In fact, their economic growth quickly led to their desire to join that very system. Rather, it is our faith in those institutions and their relevance to trade relations that is in doubt. The cooperative, multilateral approach of past (pre-Trump) administrations set politics aside in the interest of maintaining the system that we built.²⁴² Yet during the Trump Administration, politics have been front and center in the development of trade

²³⁹ John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 99 (1978).

²⁴⁰ Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LITERATURE 113, 113 (1997).

²⁴¹ See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 10–11 (2005) (showing how politics and economics impact the global trading system).

²⁴² See, e.g., Martin Crutsinger, *Bush Decides to Lift Steep Steel Tariffs*, ASSOCIATED PRESS (Dec. 4, 2003), <https://www.iatp.org/news/bush-decides-to-lift-steep-steel-tariffs> (explaining that then President George W. Bush wanted to avoid a trade war when lifting foreign steel tariffs).

policy; whether it is the trade deficit with China, the “lost” cases at the WTO, or the ineffective trade agreements previous administrations signed, there is a clear movement away from multilateralism and toward nationalism.

Has the United States already left behind the liberal multilateral approach to trade? One author recently suggested that “[t]he rule-based system of the WTO still exists in name, but, for relations with the United States, it is largely irrelevant in practice.”²⁴³ Others have claimed that the Trump Administration’s actions toward the WTO suggest a desire to move back to a pre-GATT world in which nationalism and protectionism rule the global trading system.²⁴⁴ In the next section, I will discuss the current state of affairs with respect to trade.

V. WHERE ARE WE NOW?

When Frank Fukuyama boldly declared at the end of the Cold War that we were at the end of history,²⁴⁵ perhaps what was really happening was that we were opening a new chapter in history—one that has become ambivalent toward the institutions that sustained the peace for much of the twentieth century. In the three decades since, we have seen deeper regional integration in Europe and Asia,²⁴⁶

²⁴³ Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. OF INT’L L. ONLINE 37, 42 (2019), https://cpb-us-e1.wpmucdn.com/campuspress-test.yale.edu/dist/8/1581/files/2019/02/5_Shaffer_YJIL-Symposium_A-Tragedy-in-the-Making_12.07.18-23keh7s.pdf (discussing the decline in rules-based dispute resolution following unilateral actions by the Trump Administration).

²⁴⁴ See, e.g., Daniel C.K. Chow, Ian M. Sheldon & William McGuire, *The Revival of Economic Nationalism and the Global Trading System*, 40 CARDOZO L. REV. 2133, 2168–69 (2019) (contending that the United States is moving towards a protectionist posture).

²⁴⁵ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

²⁴⁶ Consider the expansion of the European Union to include former Soviet states in Eastern Europe, and the Asia Pacific Economic Cooperation Agreement. Rikard Jozwiak, *EU, Ex-Soviet Republics to Extend Partnership Beyond 2020*, RADIO FREE EUROPE (Apr. 5, 2019, 12:39 PM), <https://www.rferl.org/a/eu-ex-soviet-republics-to-extend-partnership-beyond-2020/29863540.html>; Asia-Pacific Economic Cooperation (APEC), OFF. OF THE U.S. TRADE REP., <https://>

stronger trade ties in the Americas,²⁴⁷ and of course the establishment of the WTO, the crowning achievement of the global economic system. The combination of regional integration and global governance in trade have helped to fight back the nationalist tendencies of individual states. Cooperative action among countries to facilitate economic opportunity, even if some sectors are more exposed to foreign competition than before, became acceptable as the cost of aggregate economic growth. Trade policy was set to cruise control for much of the last two decades.

This ambivalence toward maintaining institutions of global trade is evident in the naïve approach that American and European leaders took to the changes occurring in the 1990s. “When we talk about foreign policy, I think we too often overlook the fact that many of the negative trends we see today are the direct result of our choices during the 1990s and early 2000s.”²⁴⁸ For instance, the end of the Cold War left former Soviet republics out in the cold with no plan to transition to peaceful democracy. Those problems have festered into crises like the ones we see today in Belarus.²⁴⁹ China told the West that it was committed to democratizing from “the bottom up,” blinding Western leaders to the possibility that a rising economic power could make false promises in exchange for desired outcomes. And the war on terror, launched in 2001, was the result of overly optimistic and naïve expectations that democracy would take hold

ustr.gov/issue-areas/trade-organizations/asia-pacific-economic-cooperation-apec (last visited Nov. 21, 2020).

²⁴⁷ Consider, for instance, the North American Free Trade Agreement and the Central America-Dominican Republic Free Trade Agreement. *North American Free Trade Agreement (NAFTA)*, INT’L TRADE ADMIN., <https://www.trade.gov/north-american-free-trade-agreement-nafta> (last visited Nov. 21, 2020); *CAFTA-DR (Dominican Republic-Central America FTA)*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last visited Nov. 21, 2020).

²⁴⁸ Tom McTague, *Remember the ‘90s, Don’t Long for a Return*, THE ATLANTIC (Aug. 20, 2020), <https://www.theatlantic.com/international/archive/2020/08/brexit-trump-china-90s-golden-era/615406/>.

²⁴⁹ See Frederik Pleitgen et al., *Belarus Opposition Protests Begin Amid Heavy Police Presence*, CNN (Aug. 23, 2020, 2:33 PM), <https://www.cnn.com/2020/08/23/europe/belarus-protest-sunday-intl/index.html> (describing protests in response to the disputed election of President Lukashenko).

in countries that lacked credible democratic institutions or experience with this type of governance.

These failures in foreign policy exposed the limits of the liberal world order. During this period, many leaders came to the conclusion that “multilateralism and liberal interventionism are merely convenient, not essential,”²⁵⁰ and not every state leader was ready to abandon their grip on power in order to fully integrate into the liberal order. Similarly, the 2008 financial crisis, the Greek debt default, Brexit, and the 2020 global health pandemic and economic crisis, among other things, exemplified the limits of the liberal economic order to maintain the stability that it promised. What had become apparent was that liberalism had limits.

The election of Donald Trump in 2016 and his subsequent actions to retract American leadership on the world stage led many commentators to suggest that the liberal world order had ended. Richard Haas at the Council on Foreign Relations likened this moment to the fall of the Holy Roman Empire:

After a run of nearly one thousand years, quipped the French philosopher and writer Voltaire, the fading Holy Roman Empire was neither holy nor Roman nor an empire. Today, some two and a half centuries later, the problem, to paraphrase Voltaire, is that the fading liberal world order is neither liberal nor worldwide nor orderly.²⁵¹

Neoconservative commentator Robert Kagan argued that the Trump Administration would pivot away from the United States’ prior role as a protector of the liberal economic order, instead returning to the narrow, realist approach of the pre-twentieth century.²⁵²

But perhaps Trump is only the latest leader to channel the frustration with past failures in foreign policy that have been growing since the 1990s. Tom McTague recently wrote in *The*

²⁵⁰ See McTague, *supra* note 248 (explaining that many of the challenges to liberalism in 2020 were seeded in the 1990s).

²⁵¹ Richard Haas, *Liberal World Order*, R.I.P., PROJECT SYNDICATE (Mar. 21, 2018), <https://www.project-syndicate.org/commentary/end-of-liberal-world-order-by-richard-n-haass-2018-03?barrier=accesspaylog>.

²⁵² Kagan, *supra* note 174 (positing that Russia and China pose the most significant threats to the liberal world order that the United States has maintained for decades).

Atlantic that “Trump is not the cause of the new world, but the consequence of the old one’s failures.”²⁵³ Others have suggested that we may be reverting back to a realist approach to foreign policy and trade. Princeton Scholar Stephen Kotkin argued that the rise and amazing success of liberalism last century may have been only an aberration to the default of nations—realism.²⁵⁴

Neorealist theory, the competitor to liberalism, is premised on two key facets: 1) balance of power and; 2) hegemony.²⁵⁵ During the Cold War, the balance of power was as simple and straightforward as the battle between the United States and the Soviet Union. And hegemony was sought by those great powers with incentives, such as financial support or trade.²⁵⁶ This theory also suggests that, in the absence of the American leadership that both created and maintained this world order, countries will return to a state of isolationism similar to that of the 1930s and early 1940s, fueled by “economic rivalry, security dilemmas, arms races, hyper-nationalism, balancing alliances, and ultimately the threat of war.”²⁵⁷ Thus, according to neorealism, the end of the Cold War should signal a return to the political anarchy of the past.

However, the origins of the liberal world order predate the onset of the Cold War and thus the order that prevailed during that period of time cannot be tied to a balance of power and hegemony alone. Scholar Thomas Wright advocated for a realignment of the liberal world order following the end of the Cold War. He said, “China and Russia are very different powers with different strategies, but they share the objective of targeting free and open societies to make the

²⁵³ McTague, *supra* note 248.

²⁵⁴ Stephen Kotkin, *Realist World: The Players Change, but the Game Remains*, 97 FOREIGN AFF. 10, 15 (2018) (contending that the rise and fall of powers is inevitable and that liberalism’s recent faltering has opened the door for realism on the global stage).

²⁵⁵ Deudney and Ikenberry, *supra* note 23 at 179–80.

²⁵⁶ See, e.g., Kosmas Tsokhas, *The Political Economy of Cuban Dependence on the Soviet Union*, 9 THEORY AND SOC’Y 319, 320–21 (1980) (discussing how the Soviet Union used trade to influence Cuba’s foreign policy).

²⁵⁷ Deudney and Ikenberry, *supra* note 23, at 180.

world a safer place for authoritarianism.”²⁵⁸ In that piece, Wright suggested that the liberal world order followed by President Obama and his predecessors was one that sought to accommodate and even open the door to the integration of Russia and China into that order.²⁵⁹ To the contrary, Wright argues that China and Russia are actively pursuing mechanisms, including through the use of monitoring technology, to control their populations in exchange for broad programs such as eliminating poverty and crime, and that they will try to export these ideas to other would-be authoritarians around the world.²⁶⁰ Reimagining the liberal world order as a global security apparatus that protects the ideas of democracy, capitalism, and freedom by unifying allies in a mutual accord similar to NATO may be the best way to protect against the illiberal rise of China and Russia.

What is clear today is that, in the face of a global health pandemic and economic catastrophe, countries are retreating to their corners and trying to keep their domestic economies from complete collapse. Protectionism in the form of both new trade restrictions²⁶¹ and military buildups²⁶² have replaced reliance on cooperative agendas. Much as nationalists in 1930 saw global integration as a threat to domestic economic growth and stability, many political leaders today—both liberal and conservative—go out of their way

²⁵⁸ Thomas Wright, *The Return to Great-Power Rivalry Was Inevitable*, THE ATLANTIC (Sept. 12, 2018), <https://www.theatlantic.com/international/archive/2018/09/liberal-international-order-free-world-trump-authoritarianism/569881/>.

²⁵⁹ *Id.*

²⁶⁰ *Id.* (using Turkey and Hungary as examples of where such technology might be capitalized upon).

²⁶¹ See, e.g., Ana Swanson & Ian Austen, *Trump Reinstates Tariff on Canadian Aluminum*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/business/economy/trump-canadian-aluminum-tariffs.html> (describing the reinstatement of tariffs even after recently concluding the USMCA agreement).

²⁶² See, e.g., Chun Han Wong & Joyu Wang, *Fearing Hong Kong's Fate, Taiwan Moves to Bolster its Military Against China*, WALL ST. J., (Aug. 30, 2020, 12:07 PM), <https://www.wsj.com/articles/fearing-hong-kongs-fate-taiwan-moves-to-bolster-its-military-against-china-11598803656>.

to promote nationalism as the cure for the failures of globalization.²⁶³

VI. WHERE ARE WE GOING NEXT?

One of the foremost international relations scholars of our time, G. John Ikenberry, who eloquently explained what the liberal world order was in the 1990s, examined the situation as of 2020 and concluded that this may be the year that brings an end to that order. “Not since the 1930s has the world been this bereft of even the most rudimentary forms of cooperation.”²⁶⁴ In that article, Ikenberry explains that the “liberal world order is collapsing because its leading patrons, starting with the United States, have given up on it.”²⁶⁵

This is an ideological challenge that dwarfs any the United States faced during the Cold War. Then, communism never had any real traction politically. Today’s neo-authoritarianism has gone viral. We should not overstate its foothold in America—the vast majority of Republicans do not share the president’s ideology even if they support him politically—but this challenge is not confined to the foreign-policy arena. Americans must figure out how to preserve liberty at home, amid political and technological shifts, while also pushing back against its great power rivals.²⁶⁶

²⁶³ See, e.g., Christina Pazzanese, *In Europe, Nationalism Rising*, HARV. GAZETTE (Feb. 27, 2017), <https://news.harvard.edu/gazette/story/2017/02/in-europe-nationalisms-rising/> (discussing the rise of political figures such as Marine le Pen in France, Geert Wilders in the Netherlands and Donald Trump in the United States as promoting nationalism); Jack Snyder, *The Broken Bargain: How Nationalism Came Back*, FOR. AFF., (March/April 2019), <https://www.foreignaffairs.com/articles/world/2019-02-12/broken-bargain>.

²⁶⁴ Ikenberry, *supra* note 72, at 133.

²⁶⁵ *Id.*

²⁶⁶ Wright, *supra* note 258 (arguing that the accommodating approach of the liberal world order should be set aside in favor of an alliance of allies who advocate for the values of democracy, trade, and freedom, and fight authoritarianism).

But there is hope for a change in course. The demise of the liberal world order that has carried the world forward and kept authoritarianism contained for nearly a century is not inevitable.

If Donald Trump is the executioner-in-waiting of the liberal world order, is Joe Biden its savior? It may be convenient to consider the 2020 election cycle as a decision between abandoning multilateralism and turning inward and saving the global system. But the approach of both Trump and Biden with respect to the liberal economic order may be more similar than some would like to recognize. Recall that Joe Biden had a hand in many of the failures of the post-Cold War era that I discussed above.²⁶⁷ His record on liberal trade is far more moderate than many of his former challengers for the presidential nomination.

As I write this article in the summer of 2020, any discussion of a President Biden's position on trade policy would be speculation. However, given Biden's long history in both the legislature and as Vice President, there are some macro ideas that we can use to assess his vision for future trade policy.

Candidate Biden's stated economic policy, "Made in All of America," includes many of the same elements found in Trump's policy, including incentivizing a return to stateside manufacturing and reinvestment in union-driven industries.²⁶⁸ His platform promises the creation of "millions of new manufacturing and innovation jobs throughout all of America."²⁶⁹ His approach, similar to the Trump Administration's, seeks to bring supply chains back to

²⁶⁷ See Dominic Tierney, *In Search of the Biden Doctrine*, FOR. POL'Y RES. INST. (Nov. 9, 2020), <https://www.fpri.org/article/2020/11/in-search-of-the-biden-doctrine/> (describing Biden as inconsistent in his post-Cold War foreign policy votes in the Senate). See also Thomas Wright, *The Quiet Reformation of Biden's Foreign Policy*, BROOKINGS (Mar. 20, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/03/20/the-quiet-reformation-of-bidens-foreign-policy/> (explaining that Biden is updating his foreign policy views since his role as Vice President).

²⁶⁸ *The Biden Plan to Ensure the Future Is "Made in All of America" by All of America's Workers*, BIDEN HARRIS, <https://joebiden.com/made-in-america/#> (last visited Aug. 27, 2020).

²⁶⁹ *Id.*

America.²⁷⁰ This promise, however, may conflict with the reality of global trade today.²⁷¹

When Biden takes office, the domestic economy will still be in recovery mode and may be for years to come. Admittedly, this will likely drive the Biden Administration to focus on investments in infrastructure, education and jobs at home. In his own words, “I won’t enter into any new trade agreements until we’ve made major investments here at home, in our workers and our communities—equipping them to compete and win in the global economy.”²⁷² But, as Center for Strategic and International Studies trade expert Bill Reinsch observed, “Trump is going to leave a lot of trade debris out there,” and Biden will need to address it quickly.²⁷³

CONCLUSION

The future of the liberal world order depends on the United States. Undoubtedly it requires the support and cooperation of many other countries as well; however, U.S. leadership has been indispensable in setting the moral compass for the liberal values that make the system so attractive. In the words of the World Economic Forum:

The present world order has been forged by many hands and peoples, but the role of the United States in both shaping and defending it has been critical. American military power, the dynamism of the U.S. economy and the great number of close alliances and friendships that the United States enjoys with other

²⁷⁰ *Id.*

²⁷¹ See Victoria Craig, *Why Bringing Manufacturing Jobs to the U.S. from China Is “Highly Unlikely”*, MARKETPLACE (Aug. 27, 2020), <https://www.marketplace.org/2020/08/27/trump-manufacturing-jobs-china-trade-war-deal/> (explaining how tariffs on China meant to shift supply chains to the United States have only shifted them to other low-labor cost countries).

²⁷² *Biden for President, Response to Questions from United Steelworkers*, UNITED STEEL WORKERS (May 17, 2020), <https://www.uswvoices.org/endorsed-candidates/biden/BidenUSWQuestionnaire.pdf>.

²⁷³ Gavin Bade, *For Biden, Untangling Trump’s Trade Wars Takes Backseat to Economy*, POLITICO (Aug. 20, 2020, 7:00 AM), <https://www.politico.com/news/2020/08/20/for-biden-untangling-trumps-trade-wars-takes-backseat-to-economy-398748>.

powers and peoples have provided the critical architecture in which this liberal world order has flourished. A weakening of America's commitment or its capabilities, or both, would invariably lead to its collapse.²⁷⁴

In that same report, the authors argued that Americans by and large support the fundamental ideas of the liberal world order—freedom, democracy, and free trade.²⁷⁵ But what they have lost since the end of the Cold War is “a sense of strategy and purpose” in foreign policy.²⁷⁶ The war on terror filled that gap for a period of time, but the poor strategic decisions and the minimal return on investment of American lives and funding diluted support for that purpose.

The “threat” on the horizon today is the economic and political rise of China. Though China has done little to merit the title of “threat,” it has quickly developed the economic and political clout to challenge the liberal world order's unitary status as the world's preferred system of governance. The “China Model” has proven effective in minimizing the losses of the 2008 and 2020 economic crises. And the less intrusive foreign policy approach of economic investment without political conditions may ultimately be an attractive model for other states that dislike the more intrusive American model.

Of course, there are those who believe that the liberal world order is not worth protecting. Some have called it “imperialism,”²⁷⁷ while others have argued that our nostalgia for this system ignores the many illiberal outcomes and failures that it entailed in its post-1945 existence.²⁷⁸ And some others argue that there is no such thing

²⁷⁴ *Strengthening the Liberal World Order*, WORLD ECON. FORUM 2 (Apr. 2016), http://www3.weforum.org/docs/WEF_US_GAC_Strengthening_Liberal_World_Order_White_Paper_US.pdf.

²⁷⁵ *Id.* at 2–3.

²⁷⁶ *Id.* at 3.

²⁷⁷ See Inderjeet Parmar, *The US-Led Liberal Order: Imperialism by Another Name?*, 94 INT'L AFF. 151 (2018) (suggesting that liberal internationalism is a means of justifying imperial conquest).

²⁷⁸ Patrick Porter, *A World Imagined: Nostalgia and Liberal Order*, CATO INST. POL'Y ANALYSIS NO. 843 (2018) (contending that the liberal world order conflates intentions with outcomes and is not truly a world ordering system).

as a liberal world order.²⁷⁹ There is reason to take these arguments seriously. But it would be a mistake to dismiss the value of the rules-based global institutions established last century in guiding, through both consent and at times coercion, the pursuit of liberal values. And it would be naïve to think that the removal of those rules would not cause a devolution into nationalism and conflict.

The United States took bold and decisive action following World War II to bring the world together under its own vision of stability and peace. That system proved its weight in gold by removing the incentives and increasing the costs of going to war, and by paving the way to global economic growth. Significant dust has accumulated on the institutions that we helped to build, and reform is necessary. But especially now—in the face of global crises such as climate change, health pandemics, and the resurgence of racism—it is those liberal institutions that will guide us toward effective resolutions with broad support and engagement. This is precisely the moment when the world needs leadership, and if the past is any guide, the United States must once again calibrate its moral compass and be the shining beacon on the hill to guide the world forward.

The economic power of the United States in the 1940s was unmatched and served both as an example of what other countries could become if they followed in American footsteps, as well as a powerful hammer to motivate compliance with the rules that we set in place. The Soviets never matched that economic power, thus relying on military and political strategy to secure their power. Today, that economic power is still unmatched, but China is catching up fast. If the United States expects to continue profiting from its prime position within the liberal world order, it will need to work cooperatively to contain China's acts that are outside of those rules. Failure to reign in those aberrations, from trade protectionism to human rights abuses, will further weaken support for the rules-based system and make such actions more justifiable by other authoritarian regimes.

²⁷⁹ Michael N. Barnett, *The End of a Liberal International Order that Never Existed*, THE GLOBAL BLOG (Apr. 16, 2019), <https://theglobal.blog/2019/04/16/the-end-of-a-liberal-international-order-that-never-existed/> (discussing the lack of liberal values within the global institutions built as part of this period in history).

If there is only one takeaway from this discussion, it should be that we are currently at a key moment in our history, which will determine the future of the world order as we know it. But with a better understanding of how we got here and the reasons that we built the liberal world order in the first place, we may just have a better appreciation for its essential nature. Because of our actions in the past, the future is in our hands. One day soon, it may not be.