

EDITORIAL COMMENT

WHAT IS INTERNATIONAL TRADE LAW FOR?

*By Harlan Grant Cohen**

I. INTRODUCTION

Events of the past few years, including the Brexit vote in the United Kingdom and the demise of the Trans-Pacific Partnership (TPP) and election of Donald Trump as president in the United States, have reignited debates about the global trade regime. With anti-trade populism seemingly on the rise in Europe and the United States, many have begun to question whether the trade regime has done enough for those who feel left behind by globalization.¹ While some have held fast to the view that redistribution of trade's gains is primarily a matter of domestic policy,² others have suggested tweaks to international trade agreements aimed at better spreading the wealth.³

But what if the problem is not policy, but principle? The major international economic institutions of the last few decades have been based on and around a normative principle of "growing the pie" and "raising all boats."⁴ Free-trade will make every state better off, we explain and are told. Most policy tweaks that have been suggested assume this neoliberal principle, even while trying to soften its harder edges.⁵ But it is not clear that those in the United States and Europe voting against trade agreements agree.

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¹ See, e.g., Betsy Cooper, Daniel Cox, E.J. Dionne Jr., Rachel Lienesch, Robert P. Jones & William A. Galston, *How Immigration and Concerns About Cultural Change Are Shaping the 2016 Election*, PRRI/BROOKINGS INST. 2016 IMMIGRATION SURVEY (June 23, 2016), at <https://www.prii.org/research/prii-brookings-poll-immigration-economy-trade-terrorism-presidential-race> ("A majority (52%) of the public says that free trade agreements with other countries are mostly harmful because they send U.S. jobs overseas and drive down wages.").

² See, e.g., generally, International Monetary Fund, World Bank & World Trade Organization, *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment* (Apr. 10, 2017), available at https://www.wto.org/english/news_e/news17_e/wto_imf_report_07042017.pdf.

³ See, e.g., Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 1014–20 (2017).

⁴ The two formulations are different. The first makes no assumption about how benefits will be distributed, but the second suggests that everyone benefits. The latter may thus be more pernicious as it hides inherent distributional questions. While both are used in debates over trade, I will use the first going forward for simplicity.

⁵ See, e.g., David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205, 235 (2016) (arguing that to realize the "ultimate

This Essay reconsiders the normative narrative underlying international trade law. The prevailing narrative of “growing the pie” plays a key role. It explains why free trade should be pursued and justifies the existing multilateral trading system. It directs interpretations of existing trade rules and guides negotiations toward deeper liberalization. It justifies why some benefit and others may not. Most of all, the prevailing neoliberal narrative structures trade politics, dictating which topics are debated, by which actors, in which fora, and according to what logics. As will be explained, it separates trade policy from questions of fair distribution and domestic social welfare.

But there is nothing inherent about the prevailing normative narrative. Over time, other stories have been told about trade’s purpose, producing different policies and encouraging different politics. And with many voters questioning the normative force of simply growing the pie, it is fair to ask whether a different narrative, with a different normative vision might better balance the benefits of trade with the demands of trade law’s discontents.

After describing the current neoliberal narrative, its role in structuring the trade regime, and the various critiques it faces, this Essay surveys various competing narratives, present and past. Considering demands for a trade law more attuned to questions of distribution, more sensitive to regulatory concerns, and more responsive to the broader public, the Essay reconsiders the narratives of embedded liberalism and economic rights that emerged following World War II and found form in the original Bretton Woods institutions and human rights treaties, respectively. Distilling from those institutions a narrative structured around a state’s obligations to provide for the welfare of its people, the Essay imagines a restructured politics of trade that would tie trade policy to domestic policy goals, rather than the other way around. It would re-embed trade policy within domestic political decisions about labor policy, redistribution, consumer protection, the digital economy, and the environment, integrating trade into broader policy debates and yoking trade’s benefits to those policy ends.

In its final part, this Essay imagines how international negotiations based on such a narrative—negotiations toward “cooperative capability promotion”—might look. Among other things, it suggests that in a world of complex transnational supply chains, an international economic order built around a state’s obligations to provide for the welfare of its people should reorient around other policy issues like tax and regulations, shifting trade from the driver to passenger in international negotiations.⁶ It might also focus as much on trading policy flexibilities as on deeper liberalization.⁷ Although this part highlights policy ideas, the goal is not to promote specific outcomes, but to instead suggest new directions for debate for a reoriented and reinvigorated trade politics.

and sizeable net gain[]” from trade, new ideas must be set forth to hasten “the speed of regional labor-market adjustment”). An important exception is Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 ILL. L. REV. 1 (2019).

⁶ See Bernard Hoekman & Douglas Nelson, *21st Century Trade Agreements and the Owl of Minerva*, at 12 (European University Institute Robert Schuman Centre for Advanced Studies Global Governance Programme Working Paper RSCAS 2018/04).

⁷ See DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* 253 (2011).

Many changes to trade policy are currently on the table, some economically and/or politically sound, some not. What is required is a normative narrative capable of directing and justifying choices between and among them. That is where this Essay hopes to intervene.

II. THE MIRAGE OF CONSENSUS

For many who had become complacent in a narrative of ever-increasing trade liberalization through broader agreements and deeper integration, the apparent victory of trade liberalization's opponents came as a surprise. While the victories of Trump and the Brexit movement were shocking, the death of American support for TPP was more telling. In less than a year, TPP had gone from a key Obama administration objective barreling toward ratification, to a political outcast, disavowed by presidential candidates of both major parties.⁸ Few politicians seemed willing to argue for it;⁹ too few Americans were swayed by traditional justifications for liberalizing trade, like growing the economic pie to everyone's advantage.¹⁰ The arguments for liberalized trade simply were not resonating.

And why would they? Certainly, there were sectors that would benefit, like dairy farmers and finance, but for many, the promised economic benefits were no more than ideas, difficult to translate into pocketbook benefits or increased opportunities. And for those who had already seen jobs and opportunities disappear in the wake of prior trade deals, those abstract ideas were more false promises. Previous promises that they would share in the benefits of trade liberalization had not been fulfilled; why should they believe that these new ones would?

In some sense, this should not have been surprising. Since the massive protests surrounding the World Trade Organization (WTO) Ministerial Conference of 1999, the "Battle of Seattle," it had become clear that a wide range of groups—organized labor, environmentalists, etc.—are skeptical of the neoliberal consensus. Arguments that liberalization grows the global pie fall short in their view.¹¹ The neoliberal agenda is blind to the other interests that were being trampled in the rush toward faster and deeper globalization.

For the past decade and a half, the response of trade liberalization's proponents has been to sand down its harshest edges and make space for legitimate efforts to achieve other goals. This might mean loosening WTO rules to allow space for environmental policies that restricted trade.¹² It might alternatively mean adding various additional side agreements or chapters to trade agreements on development, labor, or the environment.¹³

This new, modified consensus, a sort-of neoliberalism-lite, came with a couple of serious caveats. First, efforts to achieve other goals had to be neutral regarding trade. Trade could be

⁸ See *Read Donald Trump's Speech on Trade*, TIME (June 28, 2016), at <http://time.com/4386335/donald-trump-trade-speech-transcript>; Russell Berman, *Hillary Clinton Abandons Obama on Trade*, ATLANTIC (Oct. 7, 2015), at <https://www.theatlantic.com/politics/archive/2015/10/hillary-clinton-abandons-obama-on-trade/409546>.

⁹ See Jackie Calmes, *T.P.P. Faces Rough Road in Congress*, N.Y. TIMES (Sept. 1, 2016), at <https://www.nytimes.com/2016/09/02/business/international/pacific-trade-pact-faces-rough-road-in-congress.html>.

¹⁰ See Pew Research Ctr., *Clinton, Trump Supporters Have Starkly Different Views of a Changing Nation*, at 27–30 (Aug. 2016).

¹¹ See AFL-CIO, Joint Statement by the AFL-CIO and ETUC on Fair Trade Practices (June 15, 2018), at <https://aflcio.org/2018/6/15/afl-cio-and-etuc-support-fair-trade-practices>.

¹² Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia), paras. 135–38, 153–54, WT/DS58/AB/RW (Oct. 22, 2001).

¹³ See Meyer, *supra* note 3, at 1002–08; Kathleen Claussen, *Reimagining Trade+ Enforcement Institutions* (unpublished paper on file with author).

affected by those efforts, but it could not be the target of those efforts. Protectionism was unacceptable. This is most visible in Appellate Body jurisprudence on the scope of exceptions to General Agreement on Tariffs and Trade (GATT) rules. Second, by simply making space, the new consensus left it to others to enact policies that would forward other goals, including the promised redistribution of trade's gains.

The result of this neoliberalism-lite consensus has been, at best, a half-hearted pluralism, at worst, a nonchalant disregard. What has become clear though is that there is no guarantee that that domestic redistribution will happen. Structural features of current politics, including its treatment of international trade as a topic separate from domestic economic welfare, play a key role.¹⁴ This has led to a variety of proposals to shake up those political structures to put those domestic concerns on more even footing with the advocates of expanding trade.¹⁵

Nonetheless, these suggestions always fall back on the existing logic. The objective is “saving trade”—thus accepting and forwarding the neoliberal normative consensus that growing the pie is a global and local good, one worth pursuing, the goal of international economic policy.

But for those who disagree, or fall outside this supposed consensus, these efforts will always fall short. What is needed is a new consensus, a different normative justification for international trade law that can better capture the demands of those who have felt ignored and left behind.

III. TRADE LAW'S NORMATIVE NARRATIVE

Policies and legal regimes depend on normative narratives.¹⁶ Shared narratives help justify the legal regime to those who live with and under it, embedding the rules within a particular society and its politics.¹⁷ They provide principles that guide practitioners in their interpretation of that regime's rules, suggesting answers that better fit the goals or values that rules are meant to achieve.¹⁸ As such, shared normative narratives also support the coherence of the rules in a particular regime,¹⁹ stringing them together as part of a logical whole.²⁰ By providing coherence and distinguishing rules from arbitrary exercises of sovereign authority, these narratives also contribute to the perceived legitimacy of the regime.²¹

These shared normative narratives exist at the nexus between moral theory and politics. While they draw from theories of justice to develop a political justification for a particular set of rules, they may only loosely follow those theories, oftentimes finding common tropes, a type of normative consensus, across a number of contested ideas about what just policies might require. And although threads might be traced back to specific authors, successful narratives will be organic products of a multi-voice conversation across media over time.

¹⁴ See *infra* notes 50–62 and accompanying text.

¹⁵ See Timothy Meyer, *Misaligned Lawmaking*, 73 V and L. Rev. (forthcoming 2020).

¹⁶ See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

¹⁷ See Hoekman and Nelson, *supra* note 6, at 14–18.

¹⁸ See RONALD DWORKIN, *LAW'S EMPIRE* 254–58 (1986).

¹⁹ See Thomas M Franck, *Legitimacy in the International System*, 82 AJIL 705, 712 (1988).

²⁰ See DWORKIN, *supra* note 18, at 176–224.

²¹ See LON L. FULLER, *THE MORALITY OF LAW* (1964).

Put another way, normative narratives present a type of political-moral conventional wisdom. These narratives capture the basic, shared understanding of why a policy is worthwhile. In the case of trade, these narratives help explain why in a political-moral sense, trade liberalization is worth pursuing. They provide a political-moral story of what trade law and policy should look like and why. And when effective, these narratives help tether or embed the global economy within civil society or politics, resolving the tensions between state, economy, and civil society noted by Jürgen Habermas or between nation state, hyper-globalization, and democratic politics described by Dani Rodrik.²²

Over the past few decades, neoliberal ideas have provided the shared normative narrative supporting free trade agreements. The starting point of that story is the accepted wisdom within economics that free trade makes all parties better off. Protectionism, the narrative argues, is usually misguided. It may be aimed at helping domestic workers, but it actually has the opposite effect, raising prices, stifling growth, and shrinking the domestic economy.²³ The Great Depression, is, in this narrative, the cautionary tale—the exemplar of what happens when states turn to protectionism.²⁴ Trade liberalization, on the other hand, while perhaps causing transitional pain to domestic industries and workers, encourages growth, and through the magic of comparative advantage, increases the overall welfare of all states, giving each more wealth to allocate among its population.²⁵ Free-trade grows the global and national pie and can make everyone better off.

This narrative, of course, recognizes that trade liberalization will not in and of itself better the lives or fortunes of everyone.²⁶ It assumes, however, that questions about the redistribution of trade's welfare gains are best (from a political legitimacy standpoint) and most efficiently (from an economics standpoint) answered through domestic, rather than international, policymaking.²⁷ Moreover, suggests this narrative, to the extent that liberalized trade does redistribute domestic wealth in its own right, it often redistributes it to the least well off, who have the most welfare to gain from lower-priced goods.²⁸ "Trade grows the overall pie" is a shorthand for this narrative.

As a political-moral narrative it is neither fully a matter of economics, nor of political philosophy, even as it draws from both. This narrative draws heavily from accepted wisdom with regard to economic efficiency and reflects much of the neoliberal consensus about market governance that emerged in the early 1980s and came to dominate international economic policy over the past few decades.²⁹ But it is neither co-terminus with it, nor entirely

²² See Hoekman and Nelson, *supra* note 6.

²³ See Robert Z. Lawrence & Robert E. Litan, *Why Protectionism Doesn't Pay*, HARV. BUS. REV. 60, 61, *passim* (May 1987).

²⁴ See Barry Eichengreen & Douglas Irwin, *The Protectionist Temptation: Lessons from the Great Depression for Today*, Vox (Mar. 17, 2009), at <https://voxeu.org/article/protectionist-temptation-lessons-great-depression-today>.

²⁵ See INTERNATIONAL TRADE LAW 11–19 (Joost Pauwelyn, Andrew Guzman & Jennifer Hillman eds., 3d ed. 2016).

²⁶ See *Making Trade an Engine of Growth for All*, *supra* note 2, at 24.

²⁷ See PAUL KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY & POLICY 214–17 (7th ed. 2005).

²⁸ See Pablo D. Fajgelbaum & Amit K. Khandelwal, *Measuring the Unequal Gains from Trade*, 131 Q. J. ECON. 1113 (2016).

²⁹ RODRIK, *supra* note 7, at 163–74.

dependent on it. The neoliberal consensus involves a suite of ideas about trade, investment, monetary, competition, and regulatory policies.³⁰ One need not accept all of those to accept the rough-and-ready narrative that free-trade grows the pie.

Of course, liberalized trade is often justified on other bases. Bringing China into the WTO may encourage rule of law or make future political or military conflict less likely by enmeshing that regime in global prosperity.³¹ TPP would anchor the United States in the Asia-Pacific, guaranteeing that it could continue to compete there against China.³² TPP would allow the United States, rather than China, to set the regulatory ground-rules for twenty-first century trade.³³ More broadly, the rules and institutions of international trade lower the likelihood of trade wars by ensuring predictability, fostering transparency, promoting cooperation and consultations, and encouraging rule-based dispute settlement.³⁴ These narratives though generally play a secondary role in justifying trade liberalization and are much more powerful among policymakers and trade specialists than among the public at large.

Nor is trade law's normative narrative just a matter of political messaging. The normative narrative directs trade law policy, putting a thumb on the scales in favor of certain types of agreements, covering certain subjects, and using specific rules. The grow-the-pie narrative, for example, explains why major international economic agreements are, first and foremost, "trade" agreements, handed principally to trade bureaucrats to negotiate and draft. Particularly now that such agreements contain provisions on investment, regulation, the environment, and labor, others have a voice, but trade diplomats and lawyers hold the pen. The grow-the-pie narrative also defines the *policy* and the *exception*. For all the space that has been opened in more recent trade agreements for development, human rights, and the environment, that space is always designed as exceptional. And the narrative guarantees that such exceptions are seen with a skeptical eye; every exception might be protectionism in disguise and each exception must be balanced against the cost to the overall pie of throwing up barriers. The current normative narrative thus helps explain why many of the exceptions in the WTO agreements have been construed narrowly.³⁵

But the normative narrative also constructs the political space in which trade law policy is made and debated. It defines who is interested and who has a voice in the development of the rules. It constructs economists and business leaders as policy-insiders; if the goal is economic growth, who would have more expertise? To the extent various policies that have been proposed over the years to help rebalance trade's benefits, for example, robust job search assistance and training programs, income support and social insurance,³⁶ seem politically

³⁰ *Id.*

³¹ See *No Change: Chinese Politics and the WTO*, ECONOMIST (Dec. 10, 2011) (quoting President Clinton's prediction China's WTO admission "was likely to have 'a profound impact on human rights and political liberty'").

³² See Mireya Solis, *The Case for Trade and the Trans-Pacific Partnership*, BROOKINGS INST. (Oct. 4, 2016), at <https://www.brookings.edu/research/the-trans-pacific-partnership-the-politics-of-openness-and-leadership-in-the-asia-pacific>.

³³ See *id.*

³⁴ See generally Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004). See also Shaffer, *supra* note 5, at 5–8.

³⁵ See, e.g., Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2 WORLD TRADE REV. 261 (2003).

³⁶ See *Making Trade an Engine of Growth for All*, *supra* note 2, at 27–36.

infeasible, it is because of this structure of trade politics. Making those policies possible cannot just be a function of fear or politically necessary accommodation—“saving trade”;³⁷ it will need to be the product of a different type of political debate that rebalances the interests and values in play, and with them, the players negotiating the terms of their accommodation. A new politics of the possible requires a new narrative of international economic law’s purpose.

Many describe the current consensus as involving a two-step process.³⁸ In step one, overall global welfare is grown through international trade agreements. In step two, the distributional effects of liberalizing trade are dealt with through domestic policymaking. This two-step description recognizes that liberalizing trade redistributes wealth, favoring some in each state over others, perhaps in ways that are normatively unfair. It assumes, however, that decisions about redistribution are best made domestically, either because those mechanisms do so more efficiently or because they require tradeoffs between groups that are best left to domestic politics.³⁹

While many hold this two-step view, it misconstrues the actual consensus. The current normative narrative treats growth through trade as a truism, while remaining agnostic about redistributive policies. While some say that the latter are matters for internal policy, others may be skeptical of government intervention. Part of what has made the current consensus so durable is that it could be adopted regardless of one’s theory of domestic distributive justice. Everyone could agree to grow the global and domestic pies, even as they disagreed vehemently on logics of domestic redistribution.

This, however, creates a political dynamic in which the two “steps” are debated in different political spaces.⁴⁰ Reflecting a truism, the first step, trade policy, is debated around the edges, focusing on the shape of deals and specific concessions or commitments. The second step, facing no consensus about the role of government or redistribution, is subject to full political debate. It is thus unsurprising that trade deals move forward even as promises of redistribution do not. A pointed example of this disconnect in the United States has been the fate of Trade Adjustment Assistance (TAA). Since 1962, Congress has packaged new trade deals with TAA, which provides financial aid to workers, farmers, and firms hurt by competition from imports.⁴¹ As Tim Meyer describes, however, TAA has had none of the durability of the trade deals it shadowed.⁴² Seemingly always under threat, TAA’s funding has been allowed to lapse, consistently scaled back, and over time, become more difficult to access.⁴³

³⁷ See Meyer, *supra* note 3; *Making Trade an Engine of Growth for All*, *supra* note 2, at 4.

³⁸ See Shaffer, *supra* note 5, at 8, 11.

³⁹ See Dani Rodrik, *How to Save Globalization from its Cheerleaders*, at *21 (John F. Kennedy School of Government Faculty Working Paper Series), available at <https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/how-to-save-globalization-from-cheerleaders.pdf> (“The appropriate locus for their discussion and resolution is most likely the national polity, given the wide variety of standard and norms that prevail across the globe.”); KRUGMAN & OBSTFELD, *supra* note 27, at 221 (“It is always preferable to deal with market failures as directly as possible.”).

⁴⁰ Cf. Kerry Rittich, *Enchantments of Reason/Coercions of Law*, 57 U. MIAMI L. REV. 727, 734 (2003) (“[T]he result is the separation of social and distributional concerns from the rules governing the economy.”).

⁴¹ See Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT’L L. 797, 799 (2012).

⁴² See Meyer, *Misaligned Lawmaking*, *supra* note 15.

⁴³ *Id.*

IV. "LET THEM EAT PIE"

The triumph of anti-trade politics in various countries over the past few years suggests though that the "grow the pie" narrative is no longer as widely shared as it once might have been. States' failure to live up to the promises of redistribution associated with the second step (discussed above) have certainly contributed to this frayed consensus. Although the connection between populist politics and displacement is uncertain, there is evidence that states that "retained the capacity/willingness to respond to labor market adjustment problems have had less problems with anti-globalist populism."⁴⁴

But there are problems with the first step as well that the consensus has masked. While the basic economic truths of comparative advantage remain uncontested, there are questions about how they map onto the partially liberalized trade which current agreements produce.

For one thing, the narrative underlying the grow-the-pie consensus glosses over the differential speed of liberalization. As is oft-repeated, the WTO does not call for free trade, but for liberalized trade. Members progressively, through negotiations, lower tariffs and eliminate trade barriers. The choice is not between protectionism and free trade, but over the pace and scope of liberalization. That variably paced liberalization though increases the distributional effects of trade agreements, guaranteeing that certain industries are helped or hurt by further agreements and in patterns not necessarily dictated by pure economics. A particular industry, for example, shoemakers, may see its tariff protection lowered,⁴⁵ while another industry's, say sugar, remains in place. That first industry may also see its protections removed at a rate or pace that its foreign competitors do not. Whether or not these complaints sound in macroeconomics—the overall deal still likely benefits both states—it becomes harder to argue that international economic deals need not worry about redistribution. International economic deals are involved in redistribution.

The current narrative also largely ignores the different effects liberalization has on economies that are already more or less open. As Dani Rodrik observes, the redistributive impact of lowering tariffs is much more dramatic at lower starting tariff rates than higher ones.⁴⁶ Such an effect though is highly unlikely to register in the domestic politics of trade, where the change is likely to look insignificant compared to preexisting policy. The effects are difficult to explain without a deep dive into economics and would be counterintuitive to most voters. As public choice theory predicts, the broad range of voters interested in domestic economic welfare will be at a severe disadvantage in the lobbying and electioneering space compared to the sophisticated financial and corporate backers of liberalized trade. To assert that domestic policy should deal with these effects, particularly when these effects are so difficult to link to trade policies, seems implausible at best. Instead, the effect is likely to go unanswered, leading to resentment and support for anti-trade populism.

Further, as traditional trade barriers come down, trade agreements have moved into new areas like intellectual property and investment protection, where the grow-the-pie narrative is

⁴⁴ Hoekman and Nelson, *supra* note 6, at 20 (citing Duane Swank & Hans-Georg Betz, *Globalization, the Welfare State and Right-Wing Populism in Western Europe*, 1 SOCIO-ECONOMIC REV. 215 (2003)).

⁴⁵ See Tran Thu, *U.S. To Lift Most Tariffs on Vietnam Footwear*, SAIGON TIMES (Nov. 11, 2015), at <http://english.thesaigontimes.vn/44022/US-to-lift-most-tariffs-on-Vietnam-footwear.html>.

⁴⁶ Dani Rodrik, *Populism and the Economics of Globalization*, J. INT'L BUS. POL'Y 4 (June 2018).

harder to tell.⁴⁷ Business interests have always been present in the mind of trade negotiators, but in these new areas, they seem dominant.⁴⁸ The resulting agreements look to many more like attempts at industry rent-seeking than the shared growth and benefits associated with prior agreements.⁴⁹

And finally, the “policy space” strategy of the past two decades has not fully answered the concerns of those who fought in the Battle of Seattle. Some still question the basic moral positions embedded in the neoliberal narrative, refusing to accept that economic efficiency should take priority over protecting the environment, promoting basic human rights, adopting democratically legitimate health and safety regulations, or achieving greater equity across countries. Their problem is not with the economic truth of comparative advantage, but with whether that truth should trump all other priorities.

V. ALTERNATIVE NORMATIVITIES?

But what are the alternatives? The neoliberal “grow-the-pie” narrative has come over the past few decades to seem almost a truism. (A colleague, responding to the central question of this Essay, described the current narrative as “physics.”) But that narrative is not eternal nor has it been uncontested. Various scholars have over the decades attempted to develop theories of justice that might guide international trade agreements, with more or less radical conclusions on how trade law might be reorganized.⁵⁰ And Samuel Moyn has richly described the varied narratives of social welfare and economic rights that vied for acceptance from the French revolution until the ascendancy of neoliberalism.⁵¹ The New International Economic Order (NIEO)—the 1970s campaign by non-aligned movement and developing countries to argue for a more equitable distribution of global wealth across countries⁵²—is only the most remembered of the many normative narratives that have been tried out over time.

The anti-trade campaigns of the past few years seem to be groping toward their own alternative narratives.⁵³ On one side, idealized, might be a type of neo-mercantilism associated most closely with Donald Trump and the populist right.⁵⁴ In this view, trade is a zero-sum competition for resources, in which global, multilateral rules unfairly shackle entrepreneurial and enterprising states. States should be free to make the best deals they can (or to act unilaterally if need be) to maximize their own share of the spoils. One might term this alternative, the “you get what you *take*” theory of trade, a normative belief that the best

⁴⁷ See Dani Rodrik, *What Do Trade Agreements Really Do?*, 32 J. ECON. PERSP. 73, 82–88 (2018).

⁴⁸ See *id.* at 84.

⁴⁹ See generally *id.*

⁵⁰ See, e.g., OISIN SUTTLE, *DISTRIBUTIVE JUSTICE AND WORLD TRADE LAW* 37–48 (2018) (describing theories).

⁵¹ See generally SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018).

⁵² See ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* 44–52 (2011); Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 INT’L J. LEGAL INFO. 387, 402–05 (2008).

⁵³ See Nicolas Lamp, *How Should We Think About the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements* (Queen’s University Legal Research Paper No. 2018-102, Nov. 26, 2018).

⁵⁴ See Binyamin Appelbaum, *On Trade, Donald Trump Breaks With 200 Years of Economic Orthodoxy*, N.Y. Times (Mar. 10, 2016) (“Mr. Trump’s mercantilism is among his oldest and steadiest public positions.”).

competitors (not in the market, but in trade warfare) should be rewarded with the greatest share of the spoils.⁵⁵ Nicolas Lamp, in a subtle reading of President Trump's rhetoric, finds a story of jobs as property, earned by, stolen from, and soon to be recaptured by American workers.⁵⁶ On the populist left, a different theory of fairness emerges, one focused more on the distribution of wealth between labor and capital and worried about regulatory leakage.⁵⁷ On the one hand, "fair trade," should guarantee benefits not only to corporations and bankers, but workers as well.⁵⁸ On the other hand, it should guarantee against a race-to-the-bottom, where progressive regulations with regard to labor and the environment put workers at a competitive disadvantage.⁵⁹

While the first alternative vision may resonate with disaffected voters, it is unlikely to achieve their goals; following through on its mercantilist instincts may benefit a few well-placed businesses, but only at the expense of the broader economy and its participants. The second alternative remains difficult to judge. Couched in vague "fairness" terms, it can sound either like a more robust version of post-1999 neoliberalism-lite, already rejected by many as too meek, or like a rejection of all future trade agreements. Framed mostly as a critique of current policy, it lacks a positive normative vision of its own.

Traditional advocates of liberalized trade have mostly responded by doubling down on the grow-the-pie narrative, arguing that simmering discontent is a result of step-two domestic political failures⁶⁰ and politicians' failures to properly communicate free trade's benefits.⁶¹ Some though have grasped for alternative narratives that might support the system, leaning into secondary arguments for free trade—that free trade encourages peace, security, and alliances by enmeshing like-minded states and encouraging rules-based dispute settlement or that free trade encourages transnational solidarity by creating points of contact and cultural exchange. The allure of these narratives is that they make now-contested economic arguments beside the point. Support trade to protect national security! Support trade to protect the post-war liberal, rules-based order! Support trade to maintain the European project! In the past, when concerns about war and peace dominated concerns about economics, these narratives have had significant appeal. The problem with these narratives is that they make now-contested economics beside the point at a time when contested economics seem more salient to voters than these other concerns. Politics in the United States, the United Kingdom, and the rest of Europe hardly suggest that these narratives are resonating beyond the foreign policy and intellectual elite.

⁵⁵ Cf. Lamp, *supra* note 53, 4–13.

⁵⁶ See *id.* at 4–10.

⁵⁷ See Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT'L ECON. L. 43, 49 (2000).

⁵⁸ Cf. Antonia Eliason, *Development and Regional Trade Agreements: Entrenching Structural Inequities*, 46 GA. J. INT'L & COMP. L. 635, 646 (2018) ("Using this framing, the division becomes . . . one between the transnational capitalist class and those that do not benefit from the financial gains of late capitalism.").

⁵⁹ See Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy that Reflects American Values*, 45 HARV. J. LEGIS. 377, 394 (2008).

⁶⁰ See, e.g., N. Gregory Mankiw, *Why Economists Are Worried About International Trade*, N.Y. TIMES (Feb. 16, 2018) ("[E]xpanding trade hurts some people in the short run. . . . That fact may call for a robust safety net and effective retraining. But it does not undermine the conclusion that free trade raises average living standards.").

⁶¹ See *Making Trade an Engine of Growth for All*, *supra* note 2, at 4 ("[G20 leaders] called for action to better communicate the benefits of open trade to a public that may have become more skeptical, especially in advanced economies.").

VI. EMBEDDED LIBERALISM AND HUMAN RIGHTS

Among the few alternative narratives for international trade to have garnered the type of consensus enjoyed today by “growing the pie” is the narrative John Ruggie described as “embedded liberalism.”⁶² Ruggie built off the work of Karl Polyani, who famously explained how the market, long embedded within society, culture, and politics, had, over the course of the nineteenth century’s first wave of globalization, become disembedded from them.⁶³ The sudden ease with which capital and goods flowed around the world combined with the laissez-faire logic of free markets overwhelmed existing social welfare mechanisms, leading to massive dislocations of labor and near constant crises.⁶⁴ With the onset of the global Great Depression, states felt they had to throw up barriers to bring their individual economies and social welfare systems under control.⁶⁵ The result was a contagious spread of beggar-thy-neighbor policies that deepened rather than alleviated the Depression and helped set the stage for World War II.⁶⁶

The new consensus that emerged from the period, exemplified in the thinking of John Maynard Keynes, and reflected in the postwar Bretton Woods international economic institutions, was that the reopening of global trade (and the growth necessary for rebuilding) would need to be reconciled with the state’s ability to develop its social welfare state.⁶⁷ Re-embedding trade within society and politics meant limiting the scope of liberalization, both by allowing capital controls and ample space for social welfare policies.⁶⁸ It also made trade liberalization decidedly secondary to domestic economic policies. Rather than judging domestic policies by whether they were impermissibly protectionist, trade policies were judged by whether they allowed for or forwarded domestic social welfare.⁶⁹

This consensus provided the normative foundation for the liberalized trading regime of the General Agreement on Tariffs and Trade. Embedded liberalism began to break down though during the 1970s, as global recessions and stagflation convinced policymakers (and voters) that the postwar accommodation of trade and social welfare policies was no longer workable.⁷⁰ Instead, the neoliberal consensus that still dominates began to take hold, and with it, the view that global growth through liberalization should be the primary goal of international economic policy.⁷¹

⁶² See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982).

⁶³ KARL POLANYI, *THE GREAT TRANSFORMATION* (1944).

⁶⁴ See generally *id.*

⁶⁵ See Eichengreen & Irwin, *supra* note 24.

⁶⁶ See *id.*

⁶⁷ See Ruggie, *supra* note 62, at 393.

⁶⁸ See *id.* at 396.

⁶⁹ See Robert Howse, *From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime*, 96 AJIL 94 (2002).

⁷⁰ See *id.* at 101.

⁷¹ See *id.* at 104.

Embedded liberalism was a fraternal twin of the human rights embodied in the Four Freedoms,⁷² the Universal Declaration of Human Rights,⁷³ and the two International Covenants.⁷⁴ The worldwide Depression and World War II had encouraged a rethinking of the role of government in economic policymaking. Laissez-faire views had fallen out of favor, replaced by beliefs that governments had an obligation to protect the welfare of their citizens.⁷⁵ While embedded liberalism sought to create space for those government policies, the human rights movement sought to require it, proclaiming the rights of individuals to employment, social welfare, and health, among others. The core of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) is the obligation on “[e]ach State . . . individually and through international assistance and co-operation,”⁷⁶ to provide for the welfare of its people. The ICESCR Committee, together with human rights advocates and scholars, have spent the past few decades developing the meaning and substance of those obligations. Many, more recently, have drawn on the work of Amartya Sen and Martha Nussbaum to develop an approach focused on the states’ obligations to help individual realize their “capabilities”—to enable their citizens to live lives they value.⁷⁷

But although born together, international human rights law and the Bretton Woods institutions, embedded in their own parallel institutions, quickly diverged.⁷⁸ While the international economic law machinery was picking up steam, the economic rights embodied in the Universal Declaration and ICESCR became politicized in East-West and North-South fights and struggled to gain traction. Advocates for economic and social rights did eventually have some success in promoting states’ obligations to provide basic minimum rights. By that point though, their focus on state-level policies and judicial enforcement of constitutional economic rights stood in stark contrast to the interstate globalism by-then-embraced by international trade. The two models seemed to have become completely inapposite. To the extent that one was paying attention to developments in both areas, the divergence may actually have reinforced the two-step consensus that free trade would define interstate policy and human rights would define domestic.

Moreover, prior attempts to bridge this gap and to bring the human rights vision to bear on international economic law were largely driven by developing states. Associated with efforts to develop an NIEO or a trade and development agenda, such calls put developed states on the defensive.

Now may be the time to seek reconciliation between these estranged siblings. Neither calls for a renewed focus on social welfare and the state’s obligations to its people nor a skepticism

⁷² See Franklin D. Roosevelt, State of the Union Address (Jan. 6, 1941), available at <https://fdrlibrary.org/four-freedoms>.

⁷³ Universal Declaration of Human Rights, Dec. 10, 1948, available at <http://www.un.org/en/universal-declaration-human-rights>.

⁷⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3, available at <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> [hereinafter ICESCR].

⁷⁵ See *supra* notes 67–69 and accompanying text.

⁷⁶ ICESCR, *supra* note 74, Art. 2.1.

⁷⁷ See MARTHA NUSSBAUM & AMARTYA SEN, *THE QUALITY OF LIFE* (1993).

⁷⁸ See Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse*, 23 B.C. THIRD WORLD L.J. 57, 58–59 (2003).

about the benefits of unfettered liberalization are now limited to the developing world. In fact, it is traditionally developing states like China and India who now seem most enthusiastic about global international economic institutions⁷⁹ (even as they bend the rules in their favor). This geopolitical reality reflects the massive growth in real incomes in the new economic powerhouses of Asia and the relative stagnation of the older developed states' middle classes of the past few decades.⁸⁰ It may be time for the developed world to rediscover the normative vision of international human rights law and make it its own. Moreover, as populist politics gain new force among developed state electorates, the human rights vision may become an attractive way to ground international economic policy within domestic social welfare needs. Tying international trade law to states' human rights obligations to provide for the welfare of their people may be a narrative through which international economic policy can become "re-embedded."

Attempts to translate between human rights and international economic law carry a lot of baggage, and wholesale import from one to the other may not make sense. The best plan may be to develop parallel, complementary discourses, rather than a single one. The key is to develop a shared normative narrative for international trade and economic law that can justify and guide international trade agreements going forward, while responding to the concerns that have led some to abandon the current one. Most importantly, a new shared narrative needs to encourage a more inclusive politics, one that engages a broader range of policy topics and a broader swathe of the public. A re-embedded liberalism, built on states' obligations to their people might be just such a narrative.

There is a significant cost in refocusing international trade law on states' domestic obligations. Arguably lost in this narrative is a concern for global justice.⁸¹ Focusing on states' obligations to their citizens risks brushing aside the obligations each state has toward others.⁸² From the standpoint of developing states and their advocates, witnesses to the continuing inequality in wealth distribution around the world, this normative narrative likely looks like a reification of the status quo in favor of whiny developed states. But a focus on states' obligations to provide for its people also raises serious questions about how much harm the domestic policies of one state can cause to others and what sorts of policy externalities should be internalized by each state.

At the very least, though a narrative focused on states' obligations to provide for their people puts all states' domestic policy concerns on equal ground. Under the neoliberal model, principles of economic efficiency reign supreme, and developing states are precluded from adopting certain types of industrial policies, even if they deem them in their citizens' best interests. Focusing on states' obligations to provide for their people, however, provides as much justification for China's interests in raising its people's welfares as the United States'

⁷⁹ See, e.g., Rachel Brewster, *Trump Is Breaking the WTO. Will China Want to Save It?*, WASH. POST (May 2, 2018), at https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/02/trump-is-breaking-the-wto-will-china-want-to-save-it/?utm_term=.04c861af032b.

⁸⁰ Branko Milanović, *The Greatest Reshuffle of Individual Incomes Since the Industrial Revolution*, VOX (July 1, 2016), at <http://voxeu.org/article/greatest-reshuffle-individual-incomes-industrial-revolution> (describing the now famous "elephant graph").

⁸¹ See generally SUTTLE, *supra* note 50.

⁸² The struggle to reconcile domestic and international obligations in theories of justice is well-known, and exemplified in JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

or United Kingdom's and, as will be discussed, creates a logic for trades in policy flexibility—as matters of principle rather than exceptions for politics.

Moreover, notions of efficiency, transparency, and even-handedness that undergird and guide trade regulation today need not be thrown out. Even as they are pushed aside as primary determinants of state policy, they may remain standards for judging good or bad trade arrangements. As in the era of embedded liberalism, they can serve as secondary principles that help judge the various alternative policies that might be used to achieve states' welfarist goals. And they can and should continue to be the focus of the WTO and other international agreements. Guaranteeing that states do not callously or unnecessarily harm each other through their policies has long been an object of international trade law. Under this new narrative, they become the *primary* object. Rather than a means of achieving maximally efficient trade, the rules of the WTO and other international agreements remain as backstops, sources of discipline, protecting each state's ability to make decisions in its people's interests from the encroaching actions of others.

VII. RE-EMBEDDING LIBERALISM FOR AN ERA OF GLOBAL SUPPLY CHAINS

Revising embedded liberalism and adopting a normative narrative based on states' obligations to provide for their people's welfare does not dictate a particular theory of local or global economic justice. Instead, it shifts the terms of and locations where debates between those theories will take place. International trade law, currently untethered from debates about domestic economic policy and redistribution, becomes subject to (and a subject of) them. By emphasizing trade's embeddedness within a broader welfare-enhancing project, it shifts the locus of decision making about international economic policy from the interstate negotiating table to the domestic one. It provides a justification for embedding discussions about trade within discussions about domestic economic policy, eliminating the two-step approach in favor of a single step. Purposely open-ended, this draft narrative provides themes from which a new politics can hash out a richer story.

The point is not to reject liberalizing trade or to embrace protectionism, but to embed discussions about the pace, scope, and terms of liberalized trade within discussions about domestic economics. Imagining trade liberalization as part of a larger economic welfare policy shifts trade out of the driver's seat of domestic economic policy and international cooperation.⁸³ Liberalized trade brings a variety of economic and non-economic welfare benefits, including growing the overall pie, but the question becomes how those tools serve the broader social welfare goal, rather than how those goals might temper the hard-driving logic of trade.⁸⁴ The pace and shape of liberalization are dictated by domestic welfare goals, not the other way around.

And this shift in policy polarity from the international to the domestic seems all the more important as new, complicated policy issues like climate change mitigation and adaptation, regulation of the data economy, and deployment of artificial intelligence (AI) emerge. Under the prevailing neoliberal model, negotiations to liberalize trade in these areas run apace, led by

⁸³ Cf. Shaffer, *supra* note 5, at 5 (“[T]rade officials . . . can lose sight of these goals by narrowing the operational goal of trade agreements to that of trade liberalization.”).

⁸⁴ See *id.*

the interests of domestic industries. The hard policy questions involving tradeoffs between climate change mitigation and trade liberalization,⁸⁵ over ownership of data, privacy, and consumer protection in the digital economy, and over the future of work in an AI-driven economy are left in their wake, forced to operate against the rules and economic realities international agreements produce. While these issues need not be resolved before trade negotiations can take place, they should at least be part of the same conversation.

But it is not just the policy issues that are changing. The structure of the entire economy has changed since the Bretton Woods institutions were first imagined. Cheap, rapid transit of raw materials, components, goods, and information have made complex global value chains possible. The process of production can be unbundled and located in a variety of different countries, as corporations seek the most efficient producers of each part of the process. While this can lead to better, cheaper products, it also makes capital incredibly mobile, allowing capitalists to scour the world for opportunities that maximize profits and minimize inputs, allowing capital to increase its gains at the expense of labor. It also disembods capital completely from the state: Not only can capital wriggle free from taxes and regulations by strategically locating production and finances, but it can use its mobility to force states to compete for its presence, starting a regulatory and tax race to the bottom. At the same time that economists are increasingly worrying that the gains to capital are significantly outpacing the gains to labor⁸⁶ states are losing the tools needed to rebalance the relationship.

As such, the most pressing needs of a state looking to provide for the welfare of its own people may not be trade agreements, but agreements to coordinate and collect taxes and to stanch regulatory leakage. In a normative narrative focused on states' domestic obligations, the role of international negotiations shifts. As states seek to promote the capabilities of their inhabitants,⁸⁷ negotiations become ways for states to cooperate in achieving those goals. Trade negotiations might be replaced by negotiations over "cooperative capability promotion." Lowering trade barriers to produce greater wealth for each state would undoubtedly remain an aim, but it may now come second to other issues like: (1) tax coordination and collection, (2) regulatory convergence, and (3) trades in policy flexibility.

Tax Coordination and Collection

Before a state can redistribute the gains of trade, it must capture the gains of trade. Global value chains and the extreme mobility of capital have made that extraordinarily difficult.⁸⁸ The example of Apple—a company that can invest its profits anywhere along its global supply chain or park them in the country offering the lowest taxes, all while it waits for a tax holiday in the United States—has become almost a cliché.⁸⁹ It nonetheless well-captures the problem for many developed states today.

⁸⁵ Timothy Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 B.U. L. REV. 1937 (2015).

⁸⁶ See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

⁸⁷ See *supra* note 77 and accompanying text.

⁸⁸ See Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1575–76 (2000).

⁸⁹ See John Gapper, *Apple, Keep Your Cool Over Global Tax*, FIN. TIMES (Aug. 31, 2016), at <https://www.ft.com/content/de2cbd7c-6f5e-11e6-a0c9-1365ce54b926>.

The recent corporate tax cuts in the United States demonstrate the pathologies of the current situation.⁹⁰ Given the extreme mobility of capital that comes with complex value chains, multinational corporations can force states to bid for their presence. States who want to capture any of the value of the corporation's economic activity, whether through taxes or jobs (or taxes on jobs) are forced to promise lower corporate taxes.⁹¹ As they do so, those same states have no choice but to make up that revenue by taxing less mobile wealth—income taxes, property taxes, and sales taxes.⁹² Together these two forces squeeze the same workers who have grown skeptical of trade's benefits. The AFL-CIO, for example, has highlighted how the loss of state revenues due to trade deals and tax competition has starved states of the funds necessary for economic projects like investments in infrastructure.⁹³

What then can be done at the international level? A starting point for an international economic policy built around a state's obligation to provide for the welfare of its people might be transnational tax coordination. States would want to negotiate both an end to tax competition and a fair division of tax receipts along the value chain. They would seek to use international cooperation to diminish the distortive influence of big corporatist interests in tax policy. Negotiations along these lines have occurred through the Organization for Economic Cooperation and Development (OECD), which has sought coordinated action through a list of measures states can take together and individually to prevent "base erosion and profit shifting" (BEPS) by multinational corporations.⁹⁴ Even as states adopt measures along those lines, however, corporations and wealthy individuals continue to find loopholes in the system⁹⁵ that end up shielding their income from taxation.⁹⁶

A commitment to re-embedding trade in a state welfare narrative might mean moving these goals from the periphery of international economic agreements to the center. Trade liberalization and regulatory convergence might become carrots held out to both states and corporations in order to achieve more effective tax coordination. States could be offered lowered tariff and regulatory barriers in return for tax coordination. Policies desired by multinational corporations like free data mobility might be offered to secure their support.

While tax coordination would be a first step, more ambitious tax negotiation policies might be imagined.⁹⁷ Specific new taxes, like a tax on financial transaction suggested by Tim Meyer and Frank Garcia might be negotiated.⁹⁸ Tax revenue from the value chain might be partially invested in a development bank that would support jobs-producing projects in member

⁹⁰ See Tax Cuts and Jobs Act, Pub. Law No. 115-97, § 13001 (Dec. 22, 2017) (lowering the corporate tax rate to 21%).

⁹¹ See Avi-Yonah, *supra* note 88, at 1575.

⁹² See *id.* at 1624; Allison Christians, *How Nations Share*, 87 INDIANA L.J. 1407, 1408 (2012).

⁹³ AFL-CIO, *Making NAFTA Work for Working People*, at 22–25 (2017), at <https://aflcio.org/statements/written-comments-how-make-nafta-work-working-people>.

⁹⁴ OECD, *Action Plan on Base Erosion and Profit Shifting* (2013).

⁹⁵ . . . partly, by shifting income from corporations to individuals.

⁹⁶ See Shaffer, *supra* note 5, at 20–21. See also Brad Setser, *The Global Con Hidden in Trump's Tax Reform Law, Revealed*, N.Y. TIMES (Feb. 6, 2019), at <https://www.nytimes.com/2019/02/06/opinion/business-economics/trump-tax-reform-state-of-the-union-2019.html>.

⁹⁷ Cf. Carol C. Gould, *Approaching Global Justice Through Human Rights*, in GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: OPPORTUNITIES AND PROSPECTS 41 (Chios Carmody, Frank J. Garcia & John Linarelli eds., 2012).

⁹⁸ See Frank J. Garcia & Timothy Meyer, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE 78, 93–100 (2018).

countries. More radical, states could require corporations to pay a fee for access to certain free trade benefits, as suggested by Thomas Streinz.⁹⁹

It might seem naïve to suggest that states better coordinate to tax global value chains so soon after the passage of large corporate tax cuts in the United States. Proponents of lower corporate taxes, including corporate interests themselves, seem to be in political ascendancy. But it is for precisely this reason that a new normative vision of trade and economic law is needed. Only a new vision can reorder current politics, creating the space to make arguments linking higher corporate taxes and liberalized trade and granting successful politicians some measure of leverage with corporations. In turn, those politicians may become more credible dealmakers, able to offer corporations trade policies they want in return for a higher tax burden. Corporate acquiescence to tax coordination could be a condition of greater regulatory convergence or digital liberalization.

A focus on tax policy has the advantage too of dovetailing with other current concerns, including the concern that gains to capital are outpacing gains to labor and that automation may be a bigger structural threat to labor than trade. As AI continues to take jobs once reliably performed by human workers—on help-desks, in sales, as drivers—the pressure on states to provide a safety net, whether in the form of a guaranteed basic income or something else will only grow. At the very least, the policy flexibility demanded by these coming changes requires a fiscally flexible state.

Regulatory Convergence for Policy Rather than Efficiency

An international economic policy built around protecting the welfare of a state's people would have to defend domestic environmental and worker protections from outside threats. Supporters of progressive labor and environmental policies have long worried that liberalized trade can undermine their goals.¹⁰⁰ Higher minimum wages, protections for workers, and environmental protection raise the costs of doing business in a state, putting that state's workers at a comparative disadvantage compared to workers in less regulated states. At the same time, liberalized trade with less regulated states risks regulatory leakage, diluting policy successes by simply moving undesirable behaviors elsewhere. The rise of complex supply chains only exacerbates the problem, making movement of tasks to cheaper production locales extraordinarily easy.

These concerns have led to labor and environmental side agreements to the North American Free Trade Agreement (NAFTA)¹⁰¹ and labor and environmental chapters in later free trade agreements.¹⁰² The TPP took this logic even farther. Not only did the agreement require states to abide by specific minimum internationally agreed labor standards,¹⁰³ but the United States required Vietnam, Brunei, and Malaysia to sign more stringent side

⁹⁹ Thomas Streinz, *Re-embedding Liberalism: Introducing "Passporting Fees" for Free Trade* (unpublished manuscript, on file with author).

¹⁰⁰ See Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719 (1993).

¹⁰¹ North American Agreement on Environmental Cooperation, *opened for signature* Sept. 8, 1993, 32 ILM 1480; North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 ILM 1499.

¹⁰² See Meyer, *Saving the Political Consensus*, *supra* note 3, at 1002–08 (discussing examples).

¹⁰³ See Trans-Pacific Partnership, Art. 19.3 ("Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration. . . .").

agreements.¹⁰⁴ The side agreement with Vietnam, for example, required specific legislative changes aimed at guaranteeing an effective right to organize unions.¹⁰⁵ Both the labor standard commitments in TPP and the side agreements would have been subject to the TPP's dispute settlement mechanism.¹⁰⁶

Focusing on the state's obligation to its people and negotiating cooperative capacity promotion would suggest continuing down this path, tying minimum labor and environmental standards to regulatory convergence along the supply chain. Trade liberalization and regulatory convergence should be held out not as the goal, but as carrots offered in return for transnational labor and environmental protection. In other words, labor and environmental agreements should offer up trade incentives, not the other way around. From a structural standpoint, this might mean turning the negotiating lead and pen over to human rights, labor, or environmental specialists, rather than trade negotiators.

Beyond the protections themselves, a refocused economic policy would grant labor more of a role in enforcing agreements.¹⁰⁷ One way to do so might be to shift labor and environmental compliance into trade remedies. While states must normally use the WTO's dispute settlement system to raise complaints,¹⁰⁸ the WTO agreements create an exception for complaints regarding improper subsidies, the dumping of imports below normal price, or the sudden, massive influx of competing products. In those cases, states are allowed to respond with tariffs or other trade barriers after following domestic processes meeting standards laid out in the relevant agreements.¹⁰⁹ Those responses are then subject to review under the WTO's dispute settlement system. Subjecting unfair competition based on violations of labor and/or environmental rules to such a process, by giving states initial control over sanctions, would increase the credibility of enforcement threats. Even more significantly, labor and environmental groups could be allowed to initiate domestic enforcement hearings, gaining a voice in ongoing trade policy and the enforcement of trade deals. Gregory Shaffer, for example, has developed a mechanism states might use to assess social dumping duties that combines elements of existing anti-dumping and safeguards procedures.¹¹⁰ His carefully designed mechanism would protect workers from competition violating internationally recognized labor rights without becoming a mere mask for protectionism.¹¹¹

Labor and environmental advocates might also be given access to regulatory decisions in states parties. TPP included a regulatory chapter that encouraged convergence by specifying

¹⁰⁴ See Brunei Darussalam – United States Labour Consistency Plan, Feb. 4, 2016, available at <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-BN-Labour-Consistency-Plan.pdf>; Malaysia – United States Labour Consistency Plan, Feb. 4, 2016, available at <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labour-Consistency-Plan.pdf>; United States – Viet Nam Plan for the Enhancement of Trade and Labour Relations, Feb. 4, 2016, available at <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf>.

¹⁰⁵ United States – Viet Nam Plan for the Enhancement of Trade and Labour Relations, *supra* note 104.

¹⁰⁶ See Trans-Pacific Partnership, Art. 19.15.12.

¹⁰⁷ See Claussen, *supra* note 13 (detailing how these agreements currently work and the role granted to labor and other private parties).

¹⁰⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 23, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401.

¹⁰⁹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 201.

¹¹⁰ Shaffer, *supra* note 5, at 34–43.

¹¹¹ *Id.*

regulatory tools like cost-benefit analysis,¹¹² encouraging regulatory coordination between states parties,¹¹³ and guaranteeing corporations access to state regulatory processes.¹¹⁴ New agreements could offer stronger guarantees of access for all stakeholders.

Offers might also be made to multinational corporations. Multinational corporations want regulatory convergence; it allows them to move tasks along their supply chains more efficiently.¹¹⁵ States could offer multinational corporations streamlined regulatory access, perhaps through safe harbors, in return for guarantees regarding labor and environmental standards along the supply chain.

Trading Flexibility

Dani Rodrik has suggested shifting from trading barrier reductions to trading policy space.¹¹⁶ An assumption built into the current grow-the-pie narrative is that liberalization is unidirectional. Liberalizing trade produces welfare gains for all states; protectionism leaves everyone with less. Accordingly, states should always be seeking further liberalization.

That consensus obscures many of the questions that remain about liberalizing trade. While few disagree with the abstract logic of comparative advantage, questions remain about the pace and trajectory of liberalization. States do not enter trade negotiations at the same point in their economic development. Specific forms of liberalization, undertaken at particular times, will affect states differently, fixing certain advantages and disadvantages in places. As Dani Rodrik notes, for example, eliminating export subsidies may freeze developing states' advantages where they are, granting access to their raw materials, but making the development of higher-tech, value-added industries unlikely.¹¹⁷

Moreover, the past has shown that untamed liberalization can make other economic policy goals more difficult, undermining the state's ability to make effective policies.¹¹⁸ Even if liberalization is a generally desirable goal, flexibility may be necessary to marry overall growth with specific socioeconomic policies.

Perhaps states should be negotiating divergences from the liberalization norm rather than further liberalization. Developing states might negotiate for space to enact export subsidies (now banned under the Agreement on Subsidies and Countervailing Measures¹¹⁹) to help build up domestic industries; developed states might demand in return the ability to enact labor or environmental safeguards. Such negotiated divergences would have to be limited lest they unravel the rules of international trade entirely. Gregory Shaffer has done the most advanced work translating Rodrik's suggestion into legal rules compatible with the WTO's obligations and goals, suggesting substantive and procedural limits for the subsidies and safeguards available in such deals that could then be reviewed through WTO (or alternative)

¹¹² Trans-Pacific Partnership, Art. 25.5.2(b).

¹¹³ *See id.* Art. 25.4.1.

¹¹⁴ *See id.* Art. 25.8.

¹¹⁵ *See* Hoekman & Nelson, *supra* note 6, at 9–10.

¹¹⁶ *See* RODRIK, *supra* note 7, at 253.

¹¹⁷ To be fair, the poorest developing countries do retain considerable flexibility in this regard under the Agreement on Subsidies and Countervailing Measures.

¹¹⁸ *See* RODRIK, *supra* note 7, at 135–83.

¹¹⁹ *See* Agreement on Subsidies and Countervailing Measures, Art 3.1(a), available at https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm.

procedures.¹²⁰ A different or further limitation might be to limit the number or value of flexibilities that could be bargained for. States could be forced to choose one (or another number) strategic program to subsidize or industry to protect. Such would be to force states to justify the need for flexibility, not only to their negotiating partner, but their domestic populaces as well. Flexibilities might also be time-limited. Subsidies or safeguards might have such limits and/or the agreements allowing them might be sunsetted altogether. Both would help guarantee that such trades reflect each state's current policy needs and help limit their use to entrench benefits for particular interests.

One complaint about safeguards is that they tend to hurt a state's consumers more than they help specific industries. Many noted, for example, that safeguards on solar panels in the United States, by raising the price of solar panels beyond what many homeowners can afford, would cost far more American panel installer jobs than the panel manufacturing jobs it might save.¹²¹ But in a sense, that may be exactly the point. Safeguards have rarely been used, in part, because they pit one group within a state against another, with uncertain consequences for both. To the extent the current normative narrative establishes a stale politics, which excludes many voices from active involvement in trade policies, potential labor or environmental safeguards might open trade politics up, both during negotiation and application.

A different form of flexibility might be negotiated into interpretations of current trade agreements' policy exceptions. Current doctrine leaves little room for domestic political realities.¹²² Politics rarely allow policies to be adopted in pristine forms. Instead, the need to build coalitions and assemble votes often requires policies to be watered down or exceptions granted for particular interests. For the policies' proponents, the hope is that even with exceptions, meaningful progress can be made. Under current WTO doctrine, however, those exceptions undercut arguments for the policies' necessity, suggesting that a policy's application is unacceptably arbitrary or unjustifiably discriminatory, or that the enacted measure is not the least trade restrictive means of achieving the policy goals.¹²³ Political feasibility is not an acceptable justification. A trade policy built upon a state's obligation to provide for its people's welfare would need to protect genuine domestic political settlements. Administering a political policy exception would be very difficult, but it might reflect the sort of flexibility a re-centered economic policy might demand. One possibility would be a more deferential stance to legislative bargains that aim toward acceptable policy goals. Deference could be contingent on compliance with procedural rules including timelines, transparency, and due process. Another option might be to require only proof that a less-than-ideal policy would be marginally more effective in achieving stated goals.

¹²⁰ Shaffer, *supra* note 5, at 34–43.

¹²¹ See Nichola Groom, *Billions in U.S. Solar Projects Shelved After Trump Panel Tariff*, REUTERS (June 7, 2018).

¹²² Cf. Meyer, *supra* note 85.

¹²³ See, e.g., Appellate Body Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) (seeing exceptions as undercutting argument for seal fur ban); Panel Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/R (Sept. 2, 2011) (rejecting market realities as justification for clove cigarette exclusion).

VIII. SHIFTING NARRATIVES

The normative consensus around the “grow the pie” narrative is fraying, and with it, norms about acceptable and unacceptable trade policies. The United States has raised tariffs to protect certain industries and gain leverage to negotiate “better” deals.¹²⁴ To justify these moves, the United States has questionably invoked the GATT’s national security exception,¹²⁵ violating a longstanding taboo that may encourage aggressive trade actions by others. In the resulting trade skirmishes, its partners have responded either with questionably legal Voluntary Export Restraints (VERs)¹²⁶ or questionably legal retaliatory tariffs of their own.¹²⁷ These partners have also used the mechanisms available through the WTO to challenge U.S. actions. Those challenges fall under the shadow though of the United States’ continued assault on the WTO Appellate Body.¹²⁸ There is a serious risk that without a new shared narrative to direct trade policy going forward the system could unravel.

A re-embedded liberalism based around a state’s obligation to provide for its own people is a normative narrative that might be able to capture current discontent with international trade and direct trade negotiations going forward. It is not an attempt to “save” the current system, but to justify a modified system going forward. Many of the policies floated here are likely infeasible in the near political future. Some of these proposals may be hard to square with current WTO obligations. The goal though is not to prescribe articles for current negotiations but to imagine how alternative negotiations might look when directed by a different normative narrative. To the extent that such a narrative is possible, it will require an active effort to re-center the discourse within international economic law, in international organizations, and domestic politics.

¹²⁴ See Kellie Ell, *Former Office Depot CEO: Using Tariffs to Bolster Trade Leverage Is Working for Trump*, CNBC (May 31, 2018), at <https://www.cnbc.com/2018/05/31/trump-uses-tariffs-to-bolster-trade-leverage-and-its-working-ceo.html>.

¹²⁵ See Krzysztof J. Pelc, *The U.S. Broke a Huge Global Trade Taboo. Here’s Why Trump’s Move Might Be Legal*, WASH. POST (June 7, 2018), at https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/07/the-u-s-broke-a-huge-global-trade-taboo-heres-why-trumps-move-might-be-legal/?noredirect=on&utm_term=.cd95c5062647.

¹²⁶ See, e.g., Ryohei Yasoshima, *US-South Korea Steel Deal Tests WTO Rules*, NIKKEI ASIAN REV. (Mar. 27, 2018), at <https://asia.nikkei.com/Economy/US-South-Korea-steel-deal-tests-WTO-rules>.

¹²⁷ See generally Joseph H. H. Weiler, *Editorial: Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System*, 29 EUR. J. INT’L L. 339 (2018).

¹²⁸ See, e.g., Brewster, *supra* note 79.