

Global Economic Constitutionalism and the Future of Global Trade

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Introduction.

The post-World War II liberalized trade order that enjoyed widespread acceptance for sixty years³ is now under attack and at risk of losing its legitimacy. Movements calling themselves “populist” or “economically nationalist” have become major political forces in the very Western democracies that invented trade and that now wish to retreat from globalized markets.⁴ Why have elections in major Member States of the European Union, such as Britain and France, become referenda on the very existence of the European

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³ See William L. Clayton, *GATT, the Marshall Plan, and OECD*, 78 POL. SCI. Q. 493 (1963) (describing the role of the Marshall Plan in global trade liberalization); J. Bradford De Long & Barry J. Eichengreen, *The Marshall Plan: History's Most Successful Structural Adjustment Program*, NAT'L BUREAU OF ECON. RESEARCH, Working Paper No. 3899 (1991), (<https://ideas.repec.org/p/nbr/nberwo/3899.html>) (last visited January 8, 2018); Matthew Joseph Gabel, INTERESTS AND INTEGRATION: MARKET LIBERALIZATION, PUBLIC OPINION AND EUROPEAN UNION 42-49 (2009) (describing the trade liberalization process in Europe after World War II).

⁴ See JOHN B. JUDIS, THE POPULIST EXPLOSION (2016); JAN-WERNER MULLER, WHAT IS POPULISM? (2016).

enterprise?⁵ Why does the term “globalist” elicit derision from a wide segment of the general public?⁶ Why do pillars of the international investment system, including financial centers like the United States and the United Kingdom, consider revoking investment treaties that, for decades, have signaled their commitment to liberalized capital markets?⁷

⁵ Candidates in the 2016 elections in France and the Netherlands who garnered a substantial portion of the votes called for a referendum on EU membership. See Kate Lyons & Gordon Darroch, *Frexit, Nexit or Oexit? Who Will Be next to Leave the EU*, THE GUARDIAN (June 27, 2016), <http://www.theguardian.com/politics/2016/jun/27/frexit-nexit-or-oexit-who-will-be-next-to-leave-the-eu> (last visited October 6, 2017). Although there has always been opposition to trade, it traditionally was the domain of unions, environmental and other groups representing interests adverse to market liberalization, or nationalists like Ross Perot, a 1992 U.S. Presidential candidate. Those critiques of trade had a much narrower impact than today’s populist movement, which stakes a claim to mainstream legitimacy. See RONALD R. RAPOPORT & WALTER J. STONE, *THREE’S A CROWD: THE DYNAMIC OF THIRD PARTIES, ROSS PEROT, AND REPUBLICAN RESURGENCE* (2008).

⁶ The term “globalist,” has entered the mainstream to become a slur denouncing advocates of the liberalized trade philosophy and open immigration policies that were once endorsed by all but fringe groups. It is used regularly by supporters of President Trump: “[Today,] globalism’ has become just a slur for Trump’s opponents, just as ‘neocon’ was disconnected by the left from its roots in the left-to-right transitional figures like Irving Kristol and used as a club against anyone who supported the Iraq war...” Ben Shapiro, *Why Trump Fans Keep Using The Slur ‘Globalist.’* DAILY WIRE (Aug. 2, 2016), <http://www.dailywire.com/news/8024/why-trump-fans-keep-using-slur-globalist-ben-shapiro> (last visited January 22, 2018).

⁷ See, e.g., Bob Davis, *U.S. Bid to Exit Nafta Arbitration Panels Draws Ire From Businesses*, WALL ST. J. (Aug. 22, 2017), <https://www.wsj.com/articles/u-s-bid-to-exit-nafta-arbitration-panels-draws-ire-from-businesses-1503423680>; Eric Martin, *Trump’s Impatience Emerging as Biggest Threat to Nafta Agreement*, BLOOMBERG POL. (Aug. 31, 2017), <https://www.bloomberg.com/news/articles/2017-08-31/trump-s-impatience-emerging-as-biggest-threat-to-nafta-agreement>; Martin Pengelly, *Trump Threatens to Terminate Nafta, Renews Calls for Mexico to Pay for Wall*, THE GUARDIAN (Aug. 27, 2017), <http://www.theguardian.com/us-news/2017/aug/27/donald-trump-camp-david-nafta-mexico-wall-canada>. See, also, Joel P. Trachtman, *Terminating Trade Agreements: The Presidential Dormant Commerce Clause versus a Constitutional Gloss Half Empty* (Oct. 16, 2017) (unpublished manuscript), <https://papers.ssrn.com/abstract=3015981>.

In this Article we will answer these and other questions as we ponder the future of global trade.

Our analysis focuses on the constitutional architecture of the international trade system and the nature of the basic norms animating its relationship with the domestic State. In order to secure legitimacy and function effectively, the international trade order must reflect the dominant constitutional order of the State at a particular time in history.⁸ By way of illustration, a trade system based on comparative advantage and liberalized cross-border commerce reflects a society of trading States dedicated to maximizing collective resources while maintaining effective internal regulatory power to redistribute wealth. For its part, the domestic State must continuously adjust its foundational construct to address a wide array of factors including, among other things, competition on the international markets, technological advances, changes in the nature of work or of the ethos of corporations. When the State evolves to a new “socio-legal paradigm,”⁹ trade governance and institutions may become obsolete and ineffectual.

Today the rise of economic nationalism and the related crisis of legitimacy regarding Statecraft and trade governance stem from the unacknowledged disconnect

⁸ See Dani Rodrik, *Feasible Globalizations* NBER WORKING PAPER No. 9129 (2002), <http://www.nber.org/papers/w9129.pdf> (last visited May 6, 2017).

⁹ Sonia E. Rolland, *Towards Post-Modern Trade Relations? a review of Dennis Patterson and Ari Afilalo, The New Global Trading Order: The Evolving State and the Future of Trade*, 5 JURIS. 173 (2014).

between the transformation of the global marketplace and the present *de jure* status quo of domestic and international policies. The domestic State continues to rely on policies and programs that were developed for the pre-globalization, 20th century national markets. Because its basic animating principles are also a reflection of the 20th century markets and geopolitics, the international trade system perpetuates the paralysis. As was the case before World War II, we find ourselves at a crossroads. It is essential for policy makers to recognize the need for reform before the system becomes obsolete. Otherwise, without a proper foundation, the system crumbles.

In this Article, we will articulate the contours of the new socio-legal paradigm that we believe should govern the State's basic construct today, and we will advance policy proposals for a reformed international economic order. In Part I, we set forth our understanding of constitutionalism in the global context. We argue that a "global economic constitution" governs the international markets and defines the basic components of the relationships among commercial actors. We call it the "GEC." We distinguish the GEC from domestic constitutions in particular because the GEC is not supreme, immutable and superordinate. Rather, it is in the nature of the general architecture of the international order, embodying foundational norms that evolve through successive iterations that remain

in effect only for discrete periods of time, and do not apply equally to all groups of actors.¹⁰ In Part II, we will review the history of the GEC, starting with the Industrial Revolution and continuing through the rise of today's globalized, integrated markets. We divide the GEC into three periods, which we call GEC 1.0, 2.0, and 3.0. For each we focus on the evolution of its basic norms and institutions, the relationship between the international and domestic realms, the economic and social actors to whom alternate norms apply, and the hallmarks of the legitimacy of the system.

In Part III, we analyze the factors that explain the current crisis of legitimacy of the international economic order and require a transition from GEC 2.0 to GEC 3.0. In Part IV, we expand on our understanding of what confers "legitimacy" on any given constitutional order, and we identify the basic norms that need to be overhauled in today's rising GEC 3.0 order. We propose policy and institutional reforms, accounting for changes in the nature of work, the corporation, the scope of governmental regulation, in addition to transformed international markets and institutions.

¹⁰ See JAMES N. ROSENAU & ERNST-OTTO CZEMPIEL, GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (1992).

Part I. What is Global Economic Constitutionalism?

Is there a global economic constitution? If so, what is it? The idea of a constitution¹¹ is so familiar, it may strike the reader as unnecessary of explication. For Americans, the idea of a constitution is bound up with a written document executed at the nation's founding.¹² Stating basic principles of liberty and individual rights, and articulating a structure of government, a constitution of this sort is essential to the cultural understanding of a polity and a constitutive feature of its political institutions. The foundations of American constitutionalism are fixed at a core and timeless level where all recognized constitutionalists, whatever their political or legal philosophy, will converge and share common ground.

When we refer to a global economic constitution, on the other hand, we are not thinking about a projection on a global scale of the American or other Western constitutional model. Rather, we have in mind a set of evolving, interlocking and mutually reinforcing principles adhered to by a diverse group of sovereign states and capable of applying different norms to different groups of actors. The global economic constitution of

¹¹ As we will argue, by "constitution" we mean a set of animating principles wedded to norms and institutions that evolve dynamically.

¹² See Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551 (1985).

which we speak is no mere congeries of rules, treaties, and laws. To be sure, global economic constitutionalism is built on principles and institutions that are both widely shared and, to various degrees, mutually obligatory. But the main feature of global constitutionalism is the integration of an economic ethos with a set of institutions, patterns of inter-state relations, and legal regimes that are more—or-less all of a piece.¹³

The global economic constitution differs from the domestic constitution in three fundamental respects that are pertinent to our analysis. First, the domestic constitution is always supreme in the hierarchy of laws.¹⁴ The global economic constitution, on the other hand, does not displace inconsistent domestic measures unless a complex set of conditions obtains.¹⁵ Those conditions evolve over time, but not until the recent past did international

¹³ See James Tully et al., *Introducing global integral constitutionalism*, 5 GLOBAL CONST. (2016).

¹⁴ See HANS KELSEN, *PURE THEORY OF LAW* (1967).

¹⁵ See, e.g., Antonis Antoniadis, *The European Union and WTO Law: A Nexus of Reactive, Coactive, and Proactive Approaches*, 6 WORLD TRADE REV. 45 (2007); Armin Von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 404 (2008). Indeed, the extent to which international law displaces domestic law is one of the most sensitive constitutive questions of any international regime. The legitimacy of the system and its acceptance by the partner States depends on whether the system sufficiently shelters domestic legal sovereignty. The European Community, by way of example, came close to disintegrating because France feared that, after the planned transition from unanimity to majority voting, the jurisprudence of the European Court of Justice that gave direct effect to European law and implied a preemption clause, would unduly expose France to the imposition of European norms. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

law acquire limited supremacy, with built-in mechanisms allowing States to suspend compliance with their treaty obligations on a selective basis.¹⁶

Second, the domestic constitution speaks to all citizens and cannot have contradictory constitutional norms for different actors.¹⁷ It would be unthinkable to grant Texans the right to freely practice religion while restricting New Yorkers to Christianity. The global economic constitution, on the other hand, can legitimately impose fundamental norms, such as its anti-discrimination principles, on one set of actors while exempting others. In fact, the very survival of the global economic constitution depends on its ability to operate as a multipolar constitution.¹⁸ GEC 2.0, for example, recognized that emerging economies needed protection to consolidate.¹⁹ The anti-discrimination principles of GEC

¹⁶ Until the establishment of the World Trade Organization in 1995, GATT panel decisions were not binding unless all Contracting Parties, including the losing State, accepted the decision. *See* William J. Davey, *The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges*, 17 J. INT'L ECON. L. 679 (2014) (discussing the historical evolution of the WTO dispute settlement system); Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 479-480 (1994). This was consistent with other institutions like the International Court of Justice, which could not acquire jurisdiction without the consent of all parties, and which did not allow individual access to international justice. *See* SHABTAI ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE: AN ESSAY IN POLITICAL AND LEGAL THEORY* (1957).

¹⁷ *See, e.g.*, John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989).

¹⁸ *See* ERNST-ULRICH PETERSMAN, *INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY* (2012).

¹⁹ *See* Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When, and How?*, in *ECONOMIC DEVELOPMENT & MULTILATERAL TRADE COOPERATION* 147 (Simon J. Evenett & Bernard M. Hoekman eds., 2005).

2.0, which enshrined comparative advantage in the basic law of the trade order, applied to the industrialized economies of the Western modern liberal democracies.²⁰ The “infant industries” of newly-independent States, on the other hand, continued to be governed by the protectionist norms of GEC 1.0, which GEC 2.0 had rejected.²¹

The third difference between the domestic constitution and the GEC is that the international constitution evolves in successive epochal iterations that, of necessity, must reject the fundamental tenets of their predecessor.²² The pattern of evolution of the global economic constitution follows the same course across each epochal iteration. The constitutional architecture starts with building blocks defined by the “inner voice” of the

²⁰ See Uche Ewelukwa, *Special and Differential Treatment in International Trade Law: A Concept in Search of Content*, 79 N.D. L. REV. 831 (2003).

²¹ See SVEN BECKERT, *EMPIRE OF COTTON, A NEW HISTORY OF GLOBAL CAPITALISM* (2014). Beckert argued that what he called “war capitalism,” and the resulting accumulation of capital and currency, were directly responsible for the industrial revolution and the agrarian economy's eventual decline in the West. For a superb historical account of protectionism, with special attention to the US context, see DOUGLAS A. IRWIN, *CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY* 221-410 (2018).

²² We first advanced the idea of epochal transformation of States in DENNIS M. PATTERSON & AFILALO, *THE NEW GLOBAL TRADING ORDER* (2006). In this Article, we use digital numbering to identify each epoch of global economic constitutionalism. In using this numbering, we follow the lead of Alexander Somek who uses this approach to great effect in ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* (2015). For a review of that work, see Dennis Patterson, *The Dark Future of Constitutionalism*, 30 CONST. COMMENT 667 (2015) (review essay).

individual States that dominate the system, their basic law.²³ The GEC then coalesces around a set of principles that operates consistently with domestic Statecraft.²⁴ Over time, the domestic principles evolve, and the GEC must also transform itself to adjust. In between constitutional epochs, the international system often traverses a perilous time where, almost of necessity, its operative norms conflict with domestic law and expose the system to an economic crisis.

Understanding the constitutional architecture of trade and its evolution is essential to maintaining domestic and international economic policies that are consistent with one another. The failure to upgrade economic regimes in a timely fashion creates structural breakdowns that tend to affect the most vulnerable actors in the markets. The vulnerable actors of today's market form the backbone of the populist, anti-trade movement. The global economic order is on the cusp of an epochal change and in the midst of a transitional and perilous period. The basic norms and assumptions that have animated the trading world since World War II are undergoing a radical transformation. In the next two Parts of this Article, we briefly review how the GEC evolved through three distinct epochal iterations,

²³ See KELSEN, *supra* note 14.

²⁴ See, e.g., Rodrik, *Feasible Globalizations*, *supra* note 8.

from the Industrial Revolution to date, which we will call GEC 1.0, GEC 2.0 and GEC 3.0. In addition to the constitutional architectural rules of the international system and its relationship to domestic law, we focus on the economic actors that are the principal interlocutors of the international system, which we will also define.

Part II. The Historical Evolution of GEC: From the Industrial Revolution to the Fall of the Berlin Wall.

We identify three successive iterations of the international economic systems that can be distinguished from one another based on their constitutive features. Those we call GEC 1.0, “pre-modern state-nation,” 2.0, “modern welfare nation-state,” and 3.0, “postmodern globalized nation-state.” We differ from the prevailing narratives about the evolution of Statecraft and trade in that we reject both what we call the “positive evolutionary account” of trade history, and its counterpart, advocated most powerfully by the prominent economist Dani Rodrik, that there are inherent flaws in the trade system that make it inconsistent with a democratic, welfare-promoting State.²⁵ In our narrative, trade and Statecraft have not evolved towards an optimal system that we must defend as the best

²⁵ See, e.g., Rodrik, *Feasible Globalizations*, *supra* note 8, at 13 (“the nation-state system, deep economic integration, and democracy are mutually incompatible”).

possible structural option. In addition, trade and Statecraft have the capacity, in any given epoch, to enable the welfare of market actors on a widespread basis if the right policy choices are made. In this Part II, we outline the historical evolution of Statecraft and trade with a view to illustrating our thesis.

A. GEC 1.0: From the Industrial Revolution to World War I: State-Centric Growth.

GEC 1.0 spans the period starting with the Industrial Revolution and ending with World War I. The principal constitutional feature of GEC 1.0 is what we call a “Union of Delinked States.” The trading partners and dominating powers in GEC 1.0 included principally European States and the United States of America.²⁶ GEC 1.0 States followed an economic ethos, internationally and domestically, intended to foster and consolidate their internal markets.²⁷ Although some international agreements were signed to enable trading, “trade was consistently regarded as a form of warfare, as a vast game of beggary-neighbor, rather than as a collaborative activity from the extension of which all stood

²⁶ Of course, active trade outside the Western world predated GEC 1.0. The Silk Road trade and the Arabian sheikdom, for example, commerce predate Europe. *See*, Rolland, *supra* note 9 at 179. However, we focus on the powers that led to the establishment of the modern trade system.

²⁷ *See* MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 10-14 (1997); ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER (2011).

to benefit.”²⁸ The global architecture of GEC 1.0 enabled State-centric policies to operate virtually free of enforceable international obligations and International Institutions’ oversight, and reflected the trading States’ view of the global markets as competitive fields from which to draw resources to support their internal consolidation enterprise.²⁹

In GEC 1.0, the foundational domestic law of each State (“State Law”) was also designed to foster concentration of capital towards industrialization and massive urbanization goals. States solidified legal codes protecting contracts and property rights. They tolerated periods of “boom-and-bust” with little in the way of a social safety net. They did not feature an evolved system of protection of workers’ economic security.³⁰ The overall effect and purpose of these policies was the solidification of an internal market within each trading State, a project which partially explained (if not justified) the relative paucity of regulation, welfare and administrative control of the market for the purpose of

²⁸ John Linarelli, *How Trade Law Changed: Why It Should Change Again*, 65 *MERCER L. REV.* 621 (2004). (citing League of Nations report looking back at inter-war trade system and reviewing prior history of short-lived commercial treaties during the Industrial Revolution).

²⁹ See Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of NeoLiberalism*, 17 *NW. J. INT’L L & BUS* 1014, 1022-23 (1997).

³⁰ See, generally, JOHN KENNETH GALBRAITH, *THE GREAT CRASH* (1954) (arguing that the leading causes of the 1929 crash, high speculation and high optimism, are intrinsic to America’s economic psychology. Galbraith critiques income inequality and wealth hoarding, poor or nonexistent leveraging in the banking system to prevent loss of savings, and inflexibility in government regulation as contributors of the economic crash).

helping Labor. The nature of the Industrial Revolution was consistent with, and shaped, the architecture of Statecraft. The economies of the emerging Western liberal democracies shifted rapidly from an agrarian model to an urban and manufacturing base. Railroads, waterways, ocean and other means of transportation of industrial output required Capital concentration and a large labor force.³¹ The manufacturing concerns supported this infrastructure-creation effort and began to organize into factory networks that launched the era of production for gradually expanding consumer societies.³² The seeds of a Middle Class which, today, exceeds three billion people worldwide were planted.³³ The building effort was assisted by the relatively *laissez-faire* policies of the State and its mercantilist approach.³⁴

The international order reflected the domestic architecture and did not necessitate complex rules of trade.³⁵ Instead, the GEC essentially delinked markets so as to enable

³¹ See SAMUEL P. HAYS, *THE RESPONSE TO INDUSTRIALISM 1885-1914* (2nd ed. 1995).

³² See TYLER STOVALL, *TRANSNATIONAL FRANCE: THE MODERN HISTORY OF A UNIVERSAL NATION* (2015).

³³ See STEARNS HINSHAW & PETER N. STEARNS, *INDUSTRIALIZATION THE MODERN WORLD: FROM THE INDUSTRIAL REVOLUTION TO THE INTERNET* (2013).

³⁴ See BLAUG, *supra* note 27, at 10–14.

³⁵ See Picciotto, *supra* note 29.

them to consolidate free of international regulation.³⁶ The constitutional order was characterized by a mercantilist economic norm.³⁷ Mercantilism was an unambiguous corollary of a state-centric view of sovereignty, and the economic norm for a power-based system of international relations.³⁸ States allocated their resources to industrialize and build internal markets and industries, and GEC 1.0 created an international system with relatively few cooperative frameworks, and no multilateral International Institutions of the type that arose in GEC 2.0.³⁹ The colonialist policies of Europe and, to a much lesser extent, the United States, complemented economic protectionism and the understanding of trade as a form of war served to solidify the homeland. The “periphery” was viewed as a competitive field from which to draw resources.⁴⁰ As the major European States carved out Africa,

³⁶ *Id.* at 1022-1031.

³⁷ See GILPIN, *supra* note 27 at 196-197; Peter A. Gourevitch, *International Trade, Domestic Coalitions, and Liberty: Comparative Responses to the Crisis of 1873-1896*, 8 J. INTERDISC. HIST. 281 (1977).

³⁸ See ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2004).

³⁹ See Picciotto, *supra* note 29, at 1029-32.

⁴⁰ See Fazlollah Bonakdar Shirazi, *An Empirical Assessment of the Center-Periphery Hypothesis in International Economic Relations* (1988) (Unpublished Ph.D. Dissertation, Portland State University), http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=2205&context=open_access_etds (last visited January 14, 2017).

Asia, and South America, they played another zero-sum game where their relative power defined the outcome.⁴¹

Each GEC contains the seeds of its own demise and, over time, GEC 1.0 fueled and fostered a constitutional architecture that made it unwise to continue to operate the international economic order as a Union of Delinked States with common policies allowing their internal markets to solidify free of interventionist policies.⁴² GEC 1.0 resulted in the creation of relatively well-defined nations, and the consolidation of an internal market delineated by national boundaries. By 1918 and the adoption of the Treaty of Versailles, the GEC 1.0 State-Nation had morphed into a collective of Nation-States that formed the League of Nations and launched a new era of international collaboration.⁴³ Internally, those States witnessed the rise of a new Middle Class, with a large Labor component as the backbone of industrialized manufacturing. This Middle Class coalesced into the principal interlocutor of the State, and the ethos of Statecraft shifted from market consolidation to

⁴¹ See BLAUG, *supra* note 27, at 17–18.

⁴² See Picciotto, *supra* note 29, at 1032-38.

⁴³ The Treaty of Versailles itself contained many economic legal provisions that set forth principles that advanced the global economic regime in the following decades. See BEATRIZ HUARTE MELGAR, *THE TRANSIT OF GOODS IN PUBLIC INTERNATIONAL LAW* (2015).

ensuring the welfare of the Middle Class.⁴⁴ Given that transformational shift, the delinked, State-centric nature of GEC 1.0 was no longer consistent with the ethos of the evolved Statecraft.

In the next Section, we discuss the transition from GEC 1.0 to GEC 2.0, and the principal features of the constitutional order that arose after World War II.

B. GEC 2.0: The Rise of the Western Middle Class and the Administrative State.

A common trope of trade history holds that the modern liberal democracies erred when they adhered to mercantilism in the first place, and that they corrected this historical mistake when they moved after World War II towards liberalized trade.⁴⁵ The corollary of this account is that comparative advantage, the economic basis for liberalized trade, is a timeless truth that should always inform economic and trade policy.⁴⁶ That is the essence of the “positive evolutionary account” of trade history that we referenced in the introduction. We disagree. Until the conditions for comparative advantage were ripe, including in particular the consolidation of a Middle Class-backed internal market coextensive with national borders, States were simply not ready to transition to GEC2.0.

⁴⁴ See MARK WALSH, PAUL STEPHENS & STEPHEN MOORE, SOCIAL POLICY AND WELFARE (2000).

⁴⁵ See N. GREGORY MANKIW, PRINCIPLES OF MACROECONOMICS 182-183 (8TH ED. 2018).

⁴⁶ *Id.* at 183.

The tragedy of the post-World War I period is not that States failed to correct a historical mistake, but that they did not recognize in time that by 1918 the GEC had evolved over time and that its foundational principles needed adjustment. There is nothing timeless about comparative advantage, any more than there was anything timeless about GEC 1.0. Comparative advantage is simply an economic ethos appropriate for a specific set of market circumstances and market actors, in a discrete historical time period. In fact, the modern liberal democracies were late in recognizing the need to overhaul the system because they suffered from the same reflex of familiarity that fuels the claim that comparative advantage is timeless.

As we explained above, the GEC reflects the integration of an economic ethos with a set of institutions, patterns of inter-state relations, and legal regimes that are more—or-less all of a piece. The economic ethos of GEC 2.0, liberalized trade through comparative advantage, was an unequivocal rejection of mercantilism. It was not enough, however, for the founders of GEC 2.0 to reject protectionist policy from the standpoint of economics. As a condition to acceptance of the system by the founding Western liberal democracies, the GEC 2.0 framers also had to craft a legal regime that would not interfere with the sovereign regulatory power of the Administrative Nation-State.⁴⁷ The International

⁴⁷ See Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT'L ECON. L. 575 (2008).

Institutions, and their relationship to the domestic State, had to be such as not to impose redistributive choices on the Contracting Parties. Tariffs would go down. Taxation and regulation would not be allowed to discriminate against foreign goods, but at least in theory international law would allow the Contracting Parties complete freedom to redistribute the expanded global pool of assets, based on unimpeded domestic choices. This was the Bretton Woods compromise, which we describe in salient parts below. This institutional arrangement, which was at the heart of GEC 2.0, led to 40 years of growth and general constitutional balance in trade and Statecraft.

GEC 2.0 was built from the bottom up, starting with the transformed nature of State Law. The competing ideologies of Statecraft after World War I sought to capture the support of the newly coalesced Middle Class. Their legitimacy came to depend on that wide base, rather than the narrower coalition of Capital and ruling classes that drove GEC 1.0. The 20th century modern liberal democratic model offered to a wide segment of the Middle Class a system of economic security and potential upward mobility revolving around a powerful Administrative State. Extending economic opportunities such as those widely available to the Middle Class in the 20th century was revolutionary.⁴⁸ The preceding

⁴⁸ *See, generally*, PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY 144-145.

economic orders granted this level of wealth only to an exceedingly small segment of society.⁴⁹

To accomplish this goal, for the modern liberal democracies, State Law in the age of GEC 2.0 focused on the delivery of welfare to the Middle Class via a massive bureaucracy comprising the Administrative State. Welfare included a social safety net and tools for equalizing opportunities (unemployment, disability, health care, education etc.)⁵⁰ Governments utilized Keynesian and other interventionist policies to regulate economic cycles and avert boom-and-bust swings. They adopted economic and social measures of general applicability intended to protect the Middle Class. Those included investor and consumer protection, health and occupational safety, and environmental conservation, in addition to a wide and sophisticated social safety net.⁵¹ Each major State followed a road

⁴⁹ See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014). Piketty argues that wealth is often accumulated in capitalistic societies by whole classes of people that can bring generational defects. When r (rate of return on capital) is greater than g (rate of economic growth) then wealth becomes accumulated overtime - leading to inequality and social distress. Piketty calls for interventionist policies to address the issues that he identifies.

⁵⁰ See PETER FLORA AND ARNOLD J. HEIDENHEIMNER, *DEVELOPMENT OF WELFARE STATES INM EUROPE AND AMERICA* (1982).

⁵¹ See Sar A. Levitan, *How the Welfare System Promotes Economic Security*, 100 *POL. SCI. Q.* 447 (1985).

to welfare that, while using different means (e.g., indicative planning and tax-and-spend), was designed to provide the nation with a minimum of economic security.⁵²

GEC 2.0 has aptly been described as the “corporate welfare state.”⁵³ Policymakers grounded the delivery of welfare on a stable base of corporations with large balance sheets and payrolls, whose mission was to supply career jobs to the Middle Class as much as to generate profits for Capital. After World War II, Capital joined with the State to establish “full employment” as the foundational goal for the American economy. The Roosevelt Administration had convened the Committee for Economic Development (CED) during the War.⁵⁴ It was comprised of a group of executives of large corporations who were dedicated to structuring their activities so as to give employment to the 58 million war workers.⁵⁵ Its platform became the animating principle of economic policy after World

⁵² See GOSTA ESPING-ANDERSON, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990)

⁵³ See STEVEN MAY, GEORGE CHENEY & JULIET ROPER, *THE DEVATE OVER CORPORATE SOCIAL RESPONSIBILITY* 4-6 (2007)

⁵⁴ See Marc Linder, *Eisenhower-era Marxist-Confiscatory Taxation: Requiem for the Rhetoric of Rate Reduction for the Rich*, 70 *TULANE L. REV.* 905 (1996) ; COMMITTEE FOR ECONOMIC DEVELOPMENT, *FEDERAL TAX ISSUES FOR 1955* (1955) 6-7; *Report Urges April 1 Tax Drop if Spending is Cut By 5 Billion*, *N.Y. TIMES* (Jan. 1, 1954).

⁵⁵ See Gerald F. Davis, *Capital Markets and Job Creation in the 21st Century*, *BROOKINGS* (Dec. 30, 2015), <https://www.brookings.edu/research/capital-markets-and-job-creation-in-the-21st-century> (last visited January 2, 2018) [hereinafer Davis, *Capital Markets*].

War II, through a continued public-private partnership.⁵⁶

With this welfare structure in place, the State could focus on the regulation of its interlocutors: the corporations that succeeded GEC 1.0 Capital as drivers of growth and continued industrialization. Whereas the previous economic order allowed Capital to privilege growth free of structural obligations towards Labor, the new order assumed that the corporations would deliver health benefits, retirement plans, corporate gyms, annual picnics, and other hallmarks of a satisfactory and well-planned career.⁵⁷ The corporation was the interface for Labor and the party responsible for first-line delivery of the welfare basket. The State could lean on the corporation to respect minimum welfare standards, including conditions of employment. It could regulate the commons to limit market failures, externalities, and other harms to the socio-economic expectations of the Middle Class.⁵⁸ And it could legislate protection for those who fell out of the corporate welfare net, employing programs of general applicability such as unemployment, disability

⁵⁶ See Robert M. Collins, *Positive Business Responses to the New Deal: The Roots of the Committee for Economic Development 1933-1942*, 52 BUS. HIST. REV. 369 (1978).

⁵⁷ See DAVID FAIRRIS, SHOPFLOOR MATTERS: LABOR MANAGEMENT RELATIONS IN TWENTIETH CENTURY MANUFACTURING 12-13 (2016).

⁵⁸ See Gerald F. Davis, Kristina A. Diekmann & Catherin H. Tinsley, *The decline and fall of the conglomerate firm in the 1980s: The deinstitutionalization of an organizational form*, 59 AM. SOC. REV. 547 (1994).

benefits, and of course retirement benefits.

The Bretton Woods treaties of international trade that dominated GEC 2.0 crafted norms protective of the States' ability to administer and deliver welfare while expanding the collective resources through free trade (embedded liberalism).⁵⁹ Comparative advantage as an economic principle joined with a legal system protective of regulatory autonomy to replace the mercantilist/protectionist model. As Keynes put it, the lawyers were the “poets of trade” in that they invented norms and institutions that would at once liberalize the movement of goods across borders and shelter national welfare. This replaced the institutions-free, zero-sum game of GEC 1.0. The Middle Class, as the principal interlocutor and protected subject of State Law, was sheltered from the International Institutions by a system that essentially allowed the States to veto conflicting norms of international law when it deemed its Middle Class to be threatened.⁶⁰

Additionally, and in the same spirit, while the treaties established International Institutions to manage and regulate trade, the regime was minimally intrusive on national

⁵⁹See John Gerard Ruggie, *Embedded Liberalism Revisited: Institutions and Progress in International Economic Relations*, in PROGRESS IN POSTWAR INTERNATIONAL RELATIONS 201 (1991). See also DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2011).

⁶⁰ See IVAN KRASSTEV, *DEMOCRACY DISRUPTED: THE POLITICS OF GLOBAL PROTEST* (2014).

sovereign regulatory space. The GATT was firmly grounded in the international legal tradition of highly limited, State-to-State enforcement. Unlike the European system, it gave each Contracting Party ample discretion to “selectively exit” the norms of the system. For example, the “positive consensus rule” required that all Contracting Parties approve a judicial determination that a violation had occurred before the applicable GATT Panel decision could become binding. States also routinely made rational choices, mindful of their own violations, to select carefully which regulation to challenge and which to let stand.

The foundational trade norms were also designed to shelter the national regulatory space. The GATT, and later the WTO, accomplished the work of trade liberalization through decades of tariff reduction, elimination of non-tariff barriers to trade, and other gradual liberalizations of cross-border commerce.⁶¹ The principal constitutional norms effectuating comparative advantage were tariff reduction, anti-discrimination (“national treatment”), and the ban on measures having an effect equivalent to a quantitative restriction.⁶² This construct was intended to relegate all non-tariff barriers to trade to

⁶¹ See, e.g., *Understanding the WTO: Basics - The Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Feb. 2, 2018); *Understanding the WTO: The Agreements - Tariffs: more bindings and closer to zero*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm (last visited Feb. 2, 2018).

⁶² See, e.g., Kyle Bagwell & Robert W. Staiger, *Erratum to Multilateral trade negotiations, bilateral opportunism and the rules of GATT/WTO*, 67 J. INT'L ECON. 268 (2005).

transparent tariffs, which themselves were subject to successive rounds of negotiation. GEC 2.0, then, was designed to enable global growth while leaving the States free to maintain redistributive policies of their choice.

Parallel to the global integrationist project, regional economic communities began to integrate into trading blocs.⁶³ For those blocs, regional political objectives customarily worked hand-in-hand with economic objectives.⁶⁴ The European Communities, and later the European Union, sought to end the catastrophic wars of European enmity, in particular those between France and Germany.⁶⁵ The North American Free Trade Agreement aimed at providing Mexican laborers with domestic opportunity motivated, in part, to stem the flow of illegal immigration into the United States.⁶⁶ The political goals of the system defined the extent to which constituent States retained their sovereignty; for example, more

⁶³ See Gordon M. Gough & Sivakumar Venkataramany, *Regional Economic Cooperation*, 5 INT'L BUS. & ECON. RES. J. 49, 52-53 (2006).

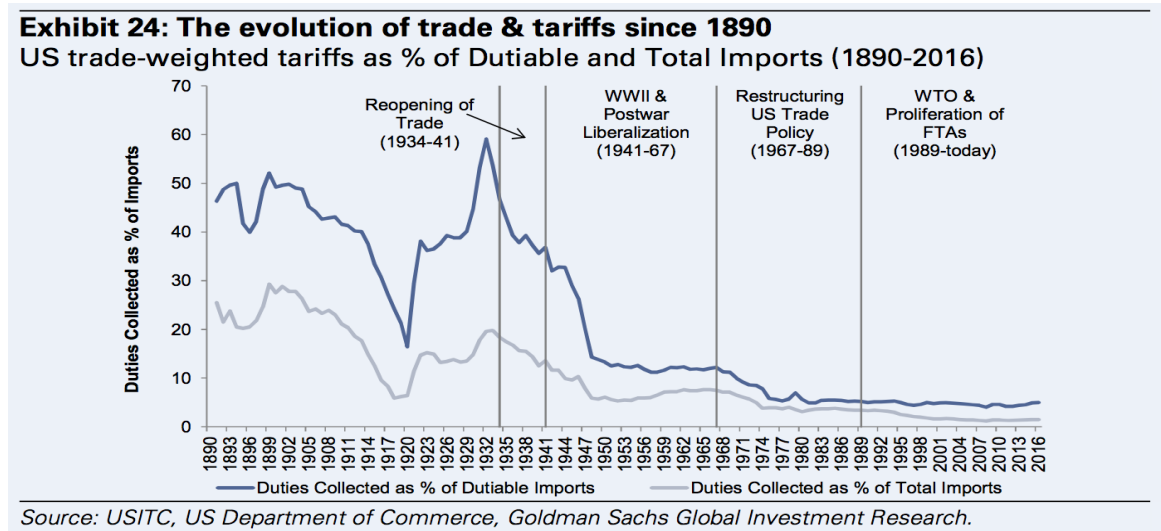
⁶⁴ See APARAJITA ENDOW, *FRANCE, GERMANY AND THE EUROPEAN UNION: MAASTRICHT AND AFTER* 1-3 (2003); ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003).

⁶⁵ See, generally, Robert Schuman, *The Schuman Declaration - 9, May 1950*, EUR. UNION https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en (last visited Feb. 3, 2018).

⁶⁶ See SUBHRENDU BHATTCHARYA, *GLOBALIZATION AND A SHRUNKEN WORLD* 130 (2008).

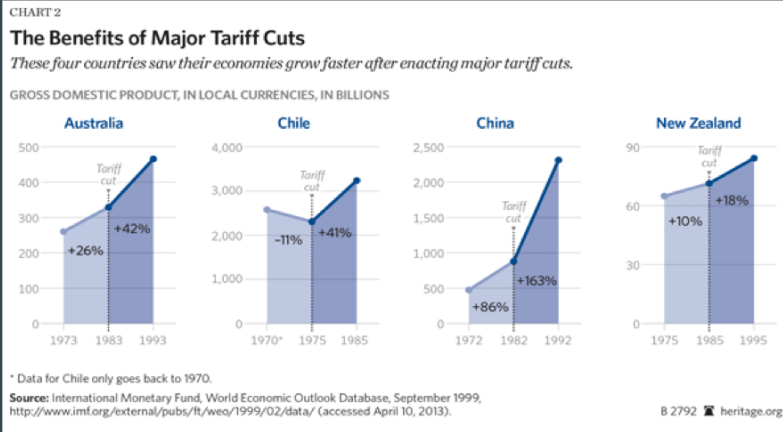
in North America than in Europe. In all instances, however, sovereignty occupied a central role in the design of the international regime.

The tariff reduction work of the GATT was extremely successful. Witness the drop in the average tariff on United States import that took place during GEC 2.0 as compared to GEC 1.0:



The growth function of liberalized trade for national economies was also achieved. States experienced greater growth after cutting their own tariffs and participating meaningfully in the globalized markets. The figures below, showing the drastically improved growth rates of four States in the years following their undertaking massive tariff reduction, are representative of the generally positive impact of liberalized trade on the growth of the States practicing it:

ECONOMIC GROWTH?



By 1990, and the fall of the Berlin Wall, it was widely accepted that trade was a core component of the Western liberal democratic system that prevailed over Fascism and Communism. Democracies could effectively redistribute resources and protect their most vulnerable. The trade system was successfully structured to enable the Administrative State to accomplish that goal.

Nevertheless, we posit that after 1990, the global markets and market actors entered into an age of “high-gear globalized integration,” which drastically changed the nature of the GEC 2.0 globalized markets, and gradually made it essential to begin a transition from

GEC 2.0 to GEC 3.0. This phenomenon had several manifestations, which included, but also went well beyond, the integration of markets:

- (i) A shift of economic power from the virtually exclusive province of the Western liberal democracies that founded the GATT towards emerging economies, and the correlated gradual erosion of the Western Middle Class;
- (ii) The expansion of trade to new areas of commerce, in particular services, and the rise of a sophisticated network of investment treaties that, together with the information revolution, enabled capital to follow rapidly new opportunities on the globalized markets;
- (iii) The rise in the West of a large class, which we call the Chronically Excluded, that lost the ability to compete in the globalized economy, and the concurrent rise of a Middle Class located in the emerging economies that were not taken into account when the GEC 2.0 constitution was created.
- (iv) Growing lack of effectiveness of the GEC 2.0 welfare system and Administrative State, in the face of the changed market conditions;
- (v) Resulting failure of the international trade order, which relies on effective national economic policies to address the inequalities created by the globalization of markets;
- (vi) Changes in the nature of work, and in the make-up of the corporate base for the administration of welfare;
- (vii) Technological breakthroughs that create uncertainty as to the nature of the skills needed to compete for future jobs.

In the next Part of this Article, we explore the transformational shifts and explain why they mark the dawn of a new GEC and make it necessary to overhaul GEC 2.0.

Part III: High-Gear Globalized Integration and the Rise of GEC 3.0.

A. Rise of the Global Middle Class: The American Chronically Excluded.

GEC 2.0 initially was an enterprise launched by and for Western liberal democracies that, although by different means and priorities, generally pursued similar objectives through their respective version of the Administrative State. The entry of emerging economies into the global market resulted, in the natural course of the Bretton Woods enablement of global commerce, in the rise of a new and vast global supply chain. For the first time in literally hundreds of years, the locus of economic power started to shift back from the West to the Far East. We will analyze the impact of this and other transformative patterns from a U.S.-centric standpoint.

The shift in economic power generated a massive transfer of employment opportunities from the United States to the emerging economies. The first wave of “tradable” American jobs was principally in the manufacturing sector. In 1970, the highest global exporters of goods - measured by aggregate value added for exports - were: the United States at \$290 billion, Asia, including China, at \$155 billion and Europe, at \$140 billion. China itself only reported \$34 billion annually. The trend began to change in the mid-1990s when East Asia experienced a major upswing in manufacturing. By 2015, the global total value added of Asia in the manufacturing sector was worth \$759 trillion, with \$377 trillion allocated to China alone. The United States and Europe were at \$282 trillion and \$147 trillion, respectively.

The gradual transformation of national markets into an integrated global market resulted in the rise of what we call the “Global Middle Class,” a central feature of GEC 3.0. The correlative outcome, on the domestic level, was the erosion of the welfare and economic security of the national Middle Class of the modern liberal democracies that created and was the base of the Bretton Woods system.⁶⁷ Consider the following figures:⁶⁸ In 1950, the worldwide Middle Class numbered approximately 250 million people, most of whom were located in Western Europe, the United States, and Japan. In 1985, approximately 150 years after the start of the Industrial Revolution, the Global Middle Class had reached 1 billion people. By the end of 2016, the Global Middle Class - defined as households of four earning from \$14,600 to \$146,000 - numbered 3.2 billion. 140 million people join the Global Middle Class annually, and the figure is expected to reach 170 million in five years.

The overwhelming majority of the new members joining the Global Middle Class annually -- by one count as many as 88% -- are based in Asia. The Middle Class in the liberal democracies who won the War, including prominently the United States, is stagnant

⁶⁷ See Nouriel Roubini, *The Political Left and Right Are Being Upended by Globalization Politics*, HUFFINGTON POST (Aug. 23, 2016), http://www.huffingtonpost.com/nouriel-roubini/globalization-politics_b_11655494.html (last visited May 1, 2017).

⁶⁸ See June Zaccone, *Has Globalization Destroyed the American Middle Class?* 2-6 (June 2012) (unpublished manuscript), <http://njfac.org/wp-content/uploads/2015/07/GloblMClass.pdf>.

or slow-growing at best. Significantly, the “most dynamic segment of the global middle-class market is at the lower end of the scale, among new entrants with comparatively low per capita spending.”⁶⁹ In the rest of the world, primarily the jurisdiction that joined the global markets in the wake of their liberalization, it is fast growing.⁷⁰

At the same time, as we will explain in greater detail below, the Middle Class of the founding States of the GATT, like the United States, split into distinct sub-classes:

- (i) Capital, made up of entrepreneurs, investors, and other holders of equity in the transformed companies driving the economy and more traditional industries, together with their top executives. This Capital class amassed a disproportionately higher amount of resources than it had in GEC 2.0;
- (ii) a mid-level and upper Middle Class, usually urban-based, for whom economic security and social mobility remained at levels above the average of the global Middle Class; and
- (iii) a new and growing Class, which we will call the Chronically Excluded,

⁶⁹ Homi Kharas, *The Unprecedented Expansion of the Global Middle Class: an Update*, (Brookings Global Econ. & Dev. Working Paper No. 100, 2017), https://www.brookings.edu/wp-content/uploads/2017/02/global_20170228_global-middle-class.pdf.

⁷⁰ *Id.* at 10–13. For economic models anticipating this as a result of free trade, see: Emily Blanchard & Gerald Willmann, *Trade, Education, and the Shrinking Middle Class*, 99 J. INT’L ECON. 263 (2016); Ferdinando Monte, *Skill Bias, Trade, and Wage Dispersion*, 83 J. INT’L ECON. 202 (2011). See also Milanovic, *supra* note 66.

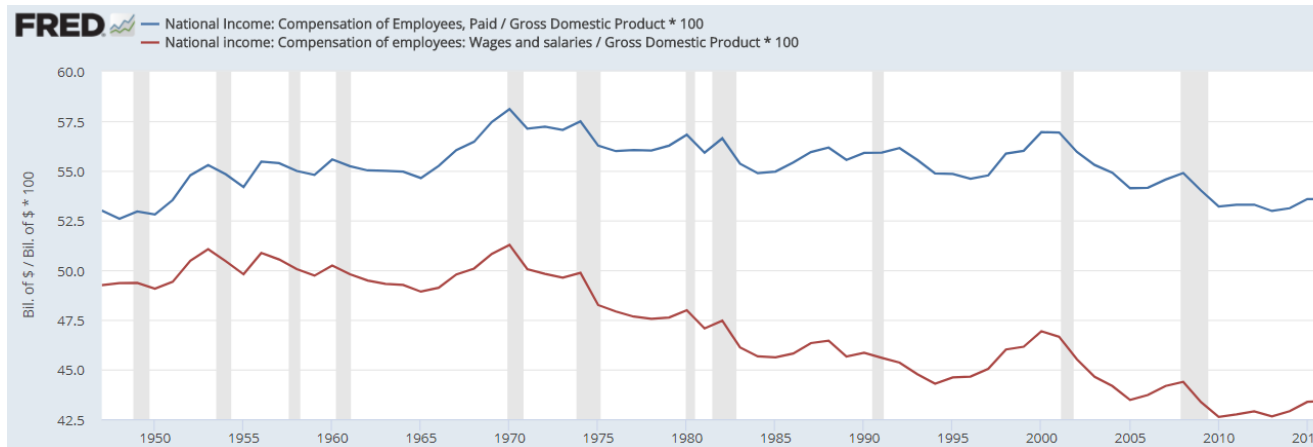
that is significantly worse off than it was in GEC 2.0 and is in decline rather than aspiring to upward mobility.

The Chronically Excluded comprise the stagnant Middle Class of the United States, as well as other modern liberal democracies, and the base of economic populism. The emergence of the Chronically Excluded is a crucial component of our story. We distinguish them from the rest of the Middle Class for the following reasons: neither the State nor the International Institutions, which are for the most part still following the GEC 2.0 model, are designed to foster their economic and social security.⁷¹ The welfare system in countries like the United States was built for GEC 2.0, when the State relied on a corporate base of employers that no longer exists or has been substantially eroded.⁷² Even if the income of the Chronically Excluded is comparable to that of the lower rungs of the rising Middle Class in emerging economies, the Chronically Excluded are not similarly situated because their prospects for upward mobility and meaningful, secure employment are dimmed by the relocation of industries that are natural outlets for their skills. In emerging markets, on the other hand, this trend is reversed and the lower rung of the Middle Class have access to opportunities for upward mobility relative to their current economic status.

⁷¹ See Zaccone, *supra* note 71.

⁷² See Davis, *Capital Markets*, *supra* note 58, at, 3-4.

In the next Sections, as we review the other transformative changes that are marking the dawn of GEC 3.0, we will discuss further how they impact the Chronically Excluded. At the outset, however, we need to address the claim that full employment in the American economy as of this writing negates the argument that international trade, coupled with the other transformative patterns that we have identified, has created a Chronically Excluded class. In other words, is there really a socio-economic problem, or are we perhaps dealing with other causes for disenchantment, such as immigration, cultural warfare, or another less tangible cause? Our first response is based on current data. While unemployment is at an historic low, wages have stagnated in the United States. The economic turnaround since the Great Recession has seen a decrease in the quality of jobs available in the labor market. While employment has gone back up, the wages prevailing in the marketplace have stagnated. Workers are often employed in jobs that do not match their previous skill set, which they had used in tradable jobs. To illustrate the decrease in wage levels, consider the chart below, which shows the total compensation share of GDP being on an overall declining curve, from 1970 to 2016:



Second, employment data does not include the workers who have completely dropped out of the labor market, or who are marginally attached to one or more tenuous jobs. People who had reliable, consistent employment fell out of the labor force, or switched to part time, low paid, or home care work.⁷³ Regional disparities are also stark.

⁷³ See Megan Dunn, Steven E. Haugen, and Janie-Lynn Kang, *The Current Population Survey—tracking unemployment in the United States for over 75 years*, *Monthly Labor Review*, U.S. Bureau of Labor Statistics, January 2018, <https://doi.org/10.21916/mlr.2018.4> (last visited January 28, 2018) (“Although the number of people unemployed and the unemployment rate had dropped below levels experienced before the recession,..[m]ore than 8 years after the end of the recession, about one-quarter of the unemployed were looking for work for 6 months or longer, still high by historical standards, and about 5 million people who wanted full-time work had to settle for part-time work. This, coupled with a prolonged period of low labor force participation rates, resulted in continued interest in alternative measures of labor underutilization, since the broader measures were associated with larger groups of people experiencing labor market difficulties.”)

The Chronically Excluded tend to be located in former manufacturing regions, and overall data tends to obscure the numbers that accurately measure their conditions. When the data is analyzed not only per State rather than nationally, but county by county within States, the lack of upward mobility and meaningful employment faced by the Chronically Excluded becomes undeniable.⁷⁴

Our next claim involves a prediction for the future, grounded in the current patterns that we have identified. In the next sections of this Article, we will explain our rationale for predicting that the Chronically Excluded will face an ever-narrowing spectrum of opportunities. The trends in the evolution of the globalized marketplace leave them increasingly vulnerable to economic insecurity and inability to compete. Further, the number of Chronically Excluded is bound to expand drastically, because of the current structural inability of the system to address the changes associated with the rise of GEC 3.0. Whether it be tradability of retail and other services jobs to which the Chronically Excluded have flocked, technological advances that require skills to which the Chronically Excluded do not have access, or regional paralysis, the trend is not in favor of a rebound unless appropriate policy changes are made. Another recession would

⁷⁴ See, e.g., Brian Thiede and Shannon Monnat, *The Great Recession and America's Geography of Unemployment*, 35 DEMOGRAPHIC RES. 891 (2016).

also have a devastating effect on the Chronically Excluded and those who will join their ranks, without a panoply of government tools ready to be deployed.

B. Regional Conglomeration vs. Regional Decline.

The geopolitical map of the international trade system on which GEC 2.0 was predicated upon distinguished Nation-States. The boundaries of the decolonized States of the second half of the 20th century were often co-extensive with the less privileged economic zones. Those States were described successively as “less developed countries,” “developing countries,” and as they began to compete meaningfully in the global markets, “emerging economies.”⁷⁵ Today, the more accurate map of the globalized markets would focus on regions, industries, and economic sub-groups within States. Emerging economies are fueled by regional manufacturing powerhouses that have secured large shares of the global supply chain. In the United States, the opposite trend obtains. Declining regions within the United States are home to the Chronically Excluded. Especially in the lower-skilled sectors, entrants to the Global Middle Class from emerging economies are gradually conquering the markets. The upshot is that, in the emerging East, powerful economic zones drive growth, whereas in the United States and other Western liberal democracies,

⁷⁵ See generally, Nicholas Lamp, *The “Development” Discourse in Multilateral Trade Lawmaking*, 16 *WORLD TRADE REV.* 475 (2017).

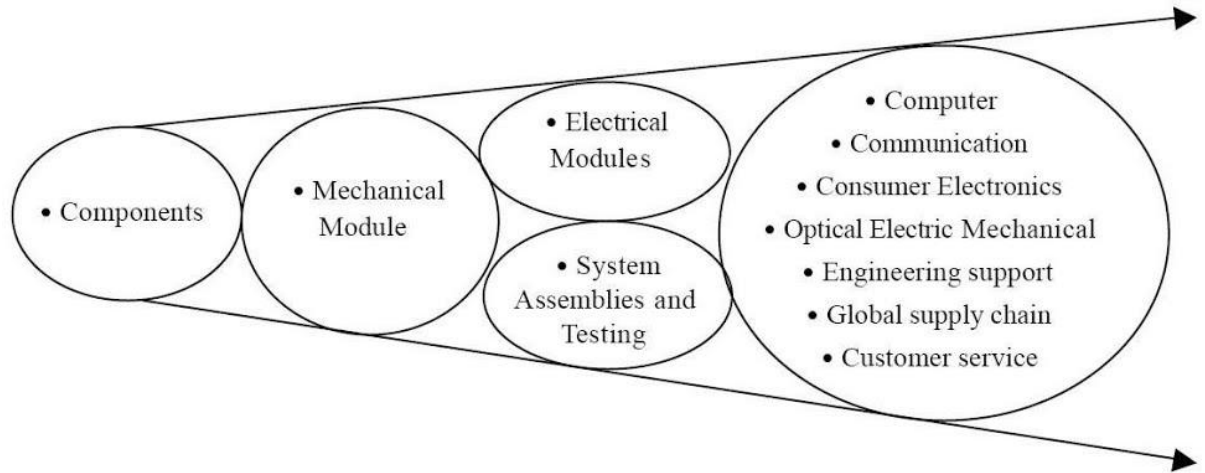
declining regions that have lost manufacturing bases to the globalized markets lead the decline.

A common myth about trade is that the principal comparative advantage that allowed countries like China to become manufacturing powerhouses is a low-wage base of workers. While labor is obviously an extremely important component of the cost of goods, carefully crafted State policies and programs were the drive behind growth. Policies enabling regional conglomeration illustrate this proposition.⁷⁶ In emerging economies, regional conglomeration was the result of export-oriented and indicative policies that created integrated economic zones designed to respond to identified needs of the global markets. Those policies enabled the growth of industry by subsidizing and enabling the establishment of industry concentrations.⁷⁷ For example, China's "Foxconn cities" are conglomerates built as a concentrated, massive network of factory and support services to manufacture Apple's (and other large companies') electronic goods, by Foxconn Technology Group, a Taiwanese multinational electronics. Foxconn cities established their own eCMMS business model of e-enabled components, modules, moves and services - a

⁷⁶ See, e.g., ASEAN Secretariat, *ASEAN Investment Report 2016: Foreign Direct Investment and MSME Linkages*, <http://asean.org/storage/2016/09/ASEAN-Investment-Report-2016.pdf> (last visited January 2, 2018) (arguing that regional production networks are backbone of Asian manufacturing base and likely to provide the basis for a future \$2.5TN single market of over 600 million people).

⁷⁷ See DANI RODRIK, *STRAIGHT TALK ON TRADE: IDEAS FOR A SANE ECONOMY* (2017).

vertically integrated one-stop shop that is considered one of the shortest supply chains globally.⁷⁸



This all-inclusive manufacturing model, enabled by years of official export-promoting policies, has made Foxconn extremely desirable as a contract manufacturer for companies like Apple, Nintendo, and Microsoft.⁷⁹ These “one-stop shop” supply chains were built in China and around the world.⁸⁰ They are sometimes referred to as

⁷⁸ See, generally, Hon Hai Precision Industry Co., *2015 Annual Report* (2016), http://www.foxconn.com/Files/annual_rpt_e/2015_annual_rpt_e.pdf (last visited November 2, 2017); *Business Philosophy*, HON HAI FOXCONN TECH. GROUP, http://www.foxconn.com/GroupProfile_En/BusinessPhilosophy.html (last visited November 3, 2017).

⁷⁹ See Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work* N.Y. TIMES (Jan. 21, 2011), <http://www.nytimes.com/2012/01/22/business/apple-america-and-a-squeezed-middle-class.html>.

⁸⁰ See Dawn Chmielewski, *Where Apple Products Are Born: A Rare Glimpse Inside Foxconn's Factory Gates*, RECODE (Apr. 6, 2015), <https://www.recode.net/2015/4/6/11561130/where-apple-products-are-born-a-rare-glimpse-inside-foxconn-factory> (last visited June 3, 2017).

“campuses” and can be found throughout the world (Brazil, India, Japan, Slovakia).⁸¹

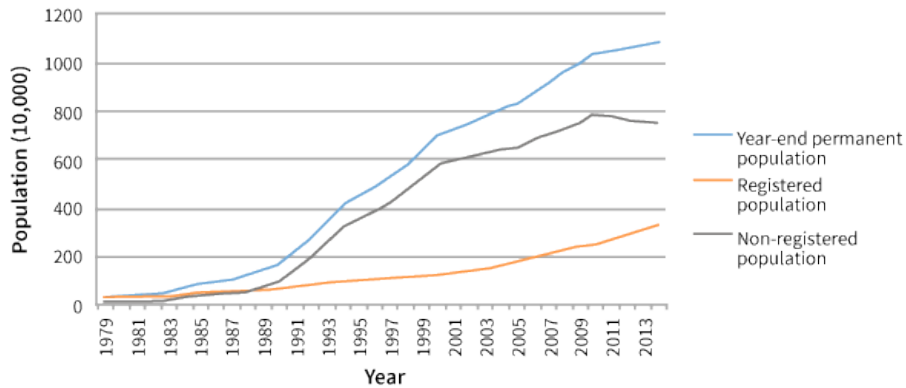
The rise of regional conglomeration is a telling example of the success of deliberate indicative and export-promoting policies of the emerging economies, in contrast to the failure of U.S. policies to stem the regional dislocation and inequalities that this country has experienced over the past couple of decades.

The developmental impact can be illustrated by the growth of manufacturing in Shenzhen, China, which was designated a special economic zone by the Chinese government in 1980. It immediately began attracting business investment and corporations seeking bases of operations. The government massively subsidized and enabled the growth of related industries that benefited from their proximity to one another. Now, a city that was a fishing village of 30,000 in the late 1970s, is a 10-million strong, major special economic zone⁸²:

⁸¹ See Foxconn, SPJ PARTNERS, http://www.spjintl.com/spj_foxconn.html (last visited May 2, 2017).

⁸² See Gar-On Antony Yeh, *Development of the Special Economic Zone in Shenzhen, The People's Republic of China*, 52 EKISTICS 154 (1985).

FIGURE 1. Shenzhen's Population Growth, 1979-2014



Source: Graphed from various Shenzhen Statistical Yearbooks

On the other hand, U.S. industries already dislocated by national trends and technological changes are being completely wiped out by their inability to compete in the global supply chain. In the apparel/textiles industry, for example, the combination of these factors resulted in an almost total loss of manufacturing market share for United States concerns. Employment in the industry, in 1948, was about 1.1 million. At that time, the United States produced about 95% of its apparel.⁸³ Employment peaked in 1973 at 1.4 million. From 1994 to 2005, the United States lost about 900,000 textile and

⁸³ See Lauren A. Murray, *Unraveling Employment Trends in Textiles and Apparel*, 118 MONTHLY LAB. REV. 62 (1995).

apparel jobs.⁸⁴ According to recent Department of Labor Statistics, apparel manufacturing employed about 109,000 people as of June 2017.⁸⁵ Virtually all of the manufacturing of U.S. apparel is now done abroad.

Textile mills were previously substantial employers nationwide, with concentration in regions like New England. Since the beginning of the Industrial Revolution, “mill towns” had become centers of employment and production in textiles. The economic activities of those New England towns first shifted down South to the Carolinas and other regions, where they became viable industries in the 1950s, 1960s, and 1970s.⁸⁶ The continued decline of the American textile mills was caused both by technological innovation and the tradability of jobs. From the 1950s to 1990s, technology allowed production to increase while employment decreased. Tradability of jobs, and the

⁸⁴ See US TEXTILE AND APPAREL INDUSTRIES IN RURAL AMERICA, US DEP’T AGRIC ECON. RES. SERV. (Oct. 10, 2017), <https://www.ers.usda.gov/topics/crops/cotton-wool/background/us-textile-and-apparel-industries-and-rural-america.aspx> (last visited December 12, 2017).

⁸⁵ See *Industries at a Glance: Apparel Manufacturing: NAICS 315*, BUREAU LAB. STAT., <https://www.bls.gov/iag/tgs/iag315.htm>, (last visited Dec. 9, 2017).

⁸⁶ See John F. Kennedy, *New England and the South*, THE ATLANTIC (Jan. 1954), <https://www.theatlantic.com/magazine/archive/1954/01/new-england-and-the-south/376244/> (last visited Feb. 4, 2018) (publishing three incisive speeches by then Junior Senator from Massachusetts John F. Kennedy). Not surprisingly, the migration of textile mills and jobs to the South was also negatively regarded by the newly unemployed in the North. The movement of jobs to the South was partially due to Federal tax exemption programs and cheaper operations costs.

cheaper wages in the Far East, completed the demise of the American apparel manufacturing industry.⁸⁷

The steel industry tells a similar story of regional dislocation, technological inroads causing lesser demand for labor, and ultimate transplantation of the industry abroad. This story, however, also features the United States' failure to promote and foster the infrastructural developments that would have been necessary for U.S. steel to complete. The decline of employment in steel mills began with the growing reliance on centralized production with blast furnaces, Bessemer converters, and open-hearth furnaces.⁸⁸ Better technology meant fewer workers were needed to run plants. As production increased in the late twentieth century, employment rolls declined. Then, as a result of both wage competition and failure to invest in infrastructure, the steel industry went through a substantial dislocation overseas.

In 2017, the largest global producer of steel was China at 808 million metric tons. The United States produced about 78 million metric tons. U.S. Steel Corporation,

⁸⁷ See Justin Fox, *Manufacturing Moved South, Then It Moved Out*, BLOOMBERG VIEW (Oct. 7, 2015), <https://www.bloomberg.com/view/articles/2015-10-07/manufacturing-moved-south-then-it-moved-to-china> (last visited Nov. 3, 2017). See generally H. Peter Gray, *East Asia: The Growth Center of the Late Twentieth Century*, in GLOBALIZATION AND EAST ASIA: OPPORTUNITIES AND CHALLENGES 15 (2006).

⁸⁸ See Toshihiko Emi, *Steelmaking Technology for the Past 100 Years - Towards Highly Efficient Systems for High Quality Steel*, 55 ISIJ INT'L 36 (2015).

America's largest steel manufacturer, produced only about 14 million metric tons of steel in 2016 - compared to Luxembourg's ArcelorMittal at 95 million.⁸⁹ Contrast, Gary, Indiana, formerly known as "Magic City," with the rising Chinese steel manufacturer. Gary was previously a company town for U.S. Steel until its production plant began cutting back on employment. The mill had employed 100,000 before cutting back to 20,000 in the early 1980s. Now, the city is plagued by unemployment or underemployment, crime, poverty, and untreated drug addiction.⁹⁰ China's largest steel manufacturer, Baowu Steel, on the other hand, currently employs about 230,000 people - mainly in rural, semi-industrialized areas.⁹¹

These developments are major contributors to the economic insecurity of the American Chronically Excluded. Following the loss of manufacturing jobs, the services industry provided a natural outlet for the Chronically Excluded. In the next Section we

⁸⁹ See WORLD STEEL ASSOCIATION, WORLD STEEL IN FIGURES 2016 (2016), <https://www.worldsteel.org/en/dam/jcr:1568363d-f735-4c2c-a1da-e5172d8341dd/World+Steel+in+Figures+2016.pdf> (last visited October 22, 2017).

⁹⁰ See Don Terry, *Where Work Disappears and Dreams Die*, AM. PROSPECT (July 2, 2012), <http://prospect.org/article/where-work-disappears-and-dreams-die> (last visited December 8, 2017); Urban Exploration: Gary, Indiana, Ghost Town, FORBIDDEN PLACES, http://www.forbidden-places.net/urban-exploration-gary-indiana-ghost-town?cmtx_page=77#1 (last visited Feb. 5, 2018).

⁹¹ See *China Baowu Steel Group officially established*, STEEL ORBIS (Dec. 1, 2016) STEELORBIS (December 1, 2016), <https://www.steelorbis.com/steel-news/latest-news/china-baowu-steel-group-officially-established-961443.htm> (last visited March 3, 2017).

discuss how high-gear globalized integration is on the verge of displacing opportunities provided by the services industry and shifting them to the Global Middle Class.

C. The Globalization of Services

Until 1995, the liberalization of the global markets, except in the case of regional economic arrangements like the European common market, only affected goods. In 1995, the General Agreement on Trade in Services (GATS) was implemented as a result of the Uruguay Round.⁹² This launched a round of outsourcing of services in several industries. Industries with the highest rate of outsourcing have been informational technology, banking and financial services, and life sciences and health care. In the field of medical transcription services, for example, the value of globalized services was \$41.4 billion in 2012 and it is expected to reach \$60.6 billion in 2019.⁹³ Countries like India and the Philippines are widely viewed as reliable places to outsource services. The medical transcription industry is closely related to the growth of the health-care market.

⁹² See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1994).

⁹³ See *Global Medical Transcription Services Market to be Driven by Developing Healthcare IT Industry*, TRANSPARENCY MKT. RES. (Jan. 29, 2016), <https://www.transparencymarketresearch.com/pressrelease/medical-transcription-services.htm> (last visited Feb. 5, 2018).

The passage of the ACA and the Patient Protection Act increased the incentives to outsource. In 2012, about 60% of all medical transcription services were outsourced.⁹⁴

The gradual increase in outsourcing of services affects the United States markets in three major respects that are relevant to our analysis. First, there is a substantial body of research showing that outsourcing impacts mainly lower-skilled services jobs. Here again, technological advancement combines with lower wages to displace American opportunities. In addition, the evidence supports the conclusion that outsourcing suppresses wages for the jobs that remain in the United States. The upshot is the outsourcing of services that came in the wake of the GATS has a disparate impact on the Chronically Excluded. The lower-waged jobs that they transitioned to are structurally bound to become as tradable as the manufacturing jobs.

The third and potentially most harmful impact of the tradability of services jobs is that, combined with the technology revolution, the next frontier in the tradability of American jobs will, by most accounts, involve the retail services industry. For the Chronically Excluded, economic opportunity in the retail services industry has been an essential component of financial survival. Beyond providing a lifeline to former

⁹⁴ See *Global Medical Transcription Services Market*, CISION PR NEWSWIRE (Feb. 9, 2015), <https://www.prnewswire.com/news-releases/global-medical-transcription-services-market-300032951.html> (last visited Feb. 5, 2018).

manufacturing communities in the heartland, retail has also sheltered urban areas from the kind of economic stagnation and lack of security that has plagued manufacturing. However, the decline of the services industry is highly likely to impact substantially this retail services fallback options.

For example, in early 2017 retail stores began a major wave of closures.⁹⁵ The rise of e-commerce joins extraordinary advances in information technology, individualized delivery and shipping, and the diversification of an American corporation dedicated to the maximization of Capital.⁹⁶ More Americans are shopping on e-retailers like Amazon for an increasingly wide array of products.⁹⁷ Amazon is investing in delivery technology, such as drones, that “Wal-Martize” the individual consumer.⁹⁸ No longer is a retailer’s economy of scale, and a visit to a physical store, necessary to import a Chinese product into the American living room. Leveraging profits from its streaming services and other cash-

⁹⁵ See Suzanne Kapner, *Brick-and-Mortar Stores Are Shuttering at a Record Pace*, WALL ST. J. (Apr. 21, 2017), <https://www.wsj.com/articles/brick-and-mortar-stores-are-shuttering-at-a-record-pace-1492818818>.

⁹⁶ See JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967).

⁹⁷ See Tracey Wallace, *The Complete Omni-Channel Retail Report: What Brands Need to Know About Modern Consumer Shopping Habits in 2018*, BIGCOMMERCE, <https://www.bigcommerce.com/blog/omni-channel-retail/> (last visited Feb. 5, 2018).

⁹⁸ See Michael Lierow, *Amazon is Using Logistics to Lead a Retail Revolution*, FORBES (Feb. 18, 2016), <https://www.forbes.com/sites/oliverwyman/2016/02/18/amazon-is-using-logistics-to-lead-a-retail-revolution/#2c7132aa4e43> (last visited December 1, 2017).

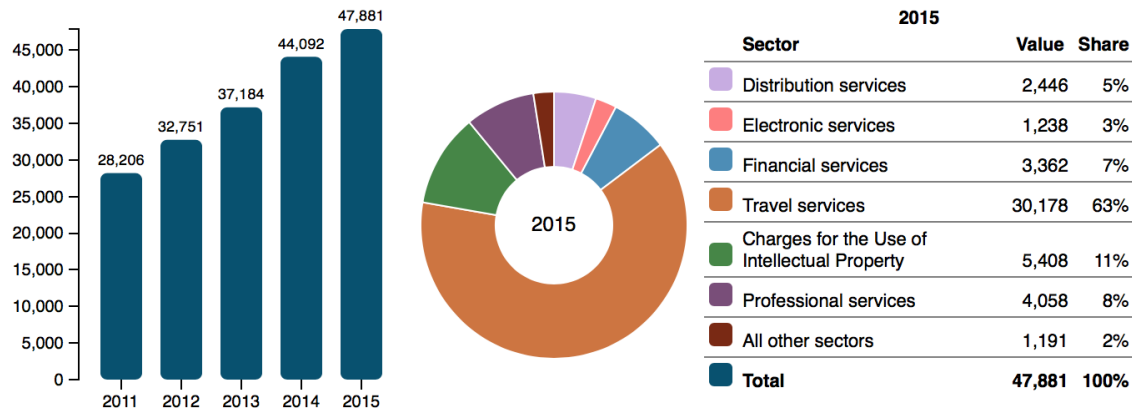
earning divisions, Amazon can invest in distribution centers that, in time, will make each American consumer an import enterprise with an almost unfettered capacity to shop China's factors.⁹⁹

The globalized marketplace in services provides opportunities for American businesses. Those opportunities tend to be at the higher end of the spectrum, where the U.S. has been a successful exporter. The Chronically Excluded, however, are generally ill-equipped to compete in high-skilled services sectors. Consider, by way of example, the breakdown of the export of U.S. services to China:

⁹⁹ See Ben Fractenberg, *Amazon Distribution Center on Staten Island to Bring 2,250 Full-Time Jobs.*, DNAINFO.COM (Sep. 6, 2017), <https://www.dnainfo.com/new-york/20170906/bloomfield/amazon-facility-staten-island>.

Exports Imports

Figure CH.1 China: U.S. cross-border exports of private services, by sector, 2011–15 (million \$)



Note: Data on U.S. exports is underreported due to suppression for electronic services in 2011. Data on U.S. imports is underreported due to suppression for electronic services from 2012-15, and for charges for the use of intellectual property from 2011-15.

Source: U.S. Department of Commerce, Bureau of Economic Analysis, International Services, Interactive data, Table 2.3 (accessed March 16, 2017).

Not only do the bulk of the economic opportunities involve higher-skilled services, but they tend to be based in major metropolitan areas. This exacerbates the regional imbalances that the tradability of jobs in the manufacturing sector has caused, and the attendant impact on the Chronically Excluded.¹⁰⁰

¹⁰⁰ For discussion and analysis of regional imbalances, see ENRICO MORETTI, THE NEW GEOGRAPHY OF JOBS (2012).

As we explained above, the high-gear globalized integration manifest itself not only in the transformed nature of the global markets. In the next sections of this Article, we will explore the changes in the nature of work and the corporation that characterize the rising GEC 3.0 economic order. Here as well, we will not only explore the impact of the changes on the place of the American economy in the GEC, but focus in particular on their negative adverse effect on the Chronically Excluded.

D. Changes in the Nature of Work and the Corporation.

The economic model for the nature of work and the role of the corporation in labor markets has shifted, in the early stages of GEC 3.0.¹⁰¹ The relationship of mutual dependence between Labor and Capital that characterized GEC 2.0 has eroded. Economists like Gerald Davis of the University of Michigan have identified salient changes in the nature of the corporation and work that are pertinent to our analysis. During the first half-century of trade after World War II, the government partnered up with corporations with large workforces. Substantial revenues and a rich balance sheet went hand-in-hand with a need for a stable staff. The middle class thrived with this system. The government

¹⁰¹ See Davis, *Capital Markets*, *supra* note 54. For an analysis of the emergence of the "sharing economy" which allows individuals to profit from tasks that were done voluntarily for friends in the past, and its possible positive effects on the equal distribution of wealth in society see ARUN SUNDARAJAN, THE SHARING ECONOMY, THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM.

regulated the market, the corporations, and provided a safety net for those who fell off the grid.¹⁰²

The entrepreneurial Middle Class of GEC 3.0, including the high-tech platform economy,¹⁰³ does not create jobs on a scale comparable to the dominant enterprises of the 20th century, in particular those involved in the manufacturing and sale of goods.¹⁰⁴ Kodak and other companies with a high-value balance sheet and assets would employ hundreds of thousands of workers and rely on the stability of a career workforce.¹⁰⁵ Today, a company like Uber is valued at tens of billions of dollars, while creating no more than 10,000 jobs.¹⁰⁶ Trade-dependent companies such as Walmart have grown to be the principal mass suppliers

¹⁰² See Davis, *Capital Markets*, *supra* note 56.

¹⁰³ See Antonio Davila et al., *The Rise and Fall of Startups: Creation and Destruction of Revenue and Jobs by Young Companies*, 40 AUST. J. MGM'T 6 (2015)..

¹⁰⁴ See Michael Spence, *The Impact of Globalization on Income and Employment*, 90 FOREIGN AFF. 28, 30 (2011).

¹⁰⁵ See GERALD F. DAVIS, *THE VANISHING AMERICAN CORPORATION: NAVIGATING THE HAZARDS OF A NEW ECONOMY* (2016). Corporations were once healthily melded to American middle-class life - many Americans were securely employed with large companies. Modern day corporations like Facebook and Zulily are different than Walmart and McDonalds, for example. They employ fewer people in fewer locations around the United States and require a very particular skill set for employment.

¹⁰⁶ See Samantha Kelly, *Inside Uber: How the Company Attracts Top Talent Despite Its Reputation*, CNNTECH <http://money.cnn.com/2017/02/14/technology/uber-corporate-culture/index.html>. David Lee, *Uber Fires 20 Staff After Harassment Investigation*, BBC NEWS, <http://www.bbc.com/news/business-40179472>; See writing on “gig economy”, Davis, *Capital Markets*, *supra* note 56, at 1-2.

of jobs in the United States, even as traditional employers in the services or manufacturing sectors (such as General Electric) are shrinking.¹⁰⁷

In addition, we are moving increasingly from a career to a job - or task (gig-based) economy, and automation is further displacing the opportunities that have been natural outlets for dislocated manufacturing actors. The national constitutional structure, in particular the welfare system at the disposal of the national government, does not adequately address the transformation of the market. The welfare system is constructed on a career-based model of employment.¹⁰⁸ Consider, for example, the unemployment and minimum wage schemes. The welfare system recognizes that unemployment may occur in between stable jobs. In the absence of income from the career job, the State will provide a substitute source of income.¹⁰⁹ Virtually all welfare schemes can be explained and understood in relation to this model of work. Disability insurance presupposes the existence of adequate jobs which the worker has become unable to perform by reason of

¹⁰⁷ *Id.*

¹⁰⁸ See RICK WARTZMAN, *THE END OF LOYALTY: THE RISE AND FALL OF GOOD JOBS IN AMERICA* (2017); PETER SAUNDERS, *THE ENDS AND MEANS OF WELFARE WITH ECONOMIC AND SOCIAL CHANGE IN AUSTRALIA* (2002).

¹⁰⁹ See Kenneth Casebeer, *Unemployment Insurance, American Social Wage, Labor Organization, and Legal Ideology*, 35 B.C.L. REV. 259 (1994).

physical or mental illness.¹¹⁰ Retirement funds assume a steady career-worth of contributions to a social scheme that is responsible for payouts to workers concluding their careers.¹¹¹

Notwithstanding those structural changes, neither national governments like the United States Federal government, nor the International Institutions of trade, have upgraded their basic norms and institutional frameworks to adjust to the GEC 3.0 reality. This is the root of the current crisis of legitimacy. In Part IV, we will start by outlining our understanding of what gives a GEC legitimacy, and then move on to proposing reforms for both the International Institutions and State Law.

Part IV. Where Do We Go From Here?

What gives an international legal system its legitimacy? Is it principally its formal acceptance after a national constitutional process, such as the ratification of a treaty by a national assembly with the requisite vote? To what extent does the system require social

¹¹⁰ See Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 U.C.L. REV. 361 (1996).

¹¹¹ In countries like France where a minimum guaranteed income exists, the State also recognizes that in extreme cases some market actors fall completely off the social grid. For them, a small monthly handout (approximately 500 euros in France) ensures some form of survival. For many of the young unemployed in France, this universal income is the means to survive with a minimum amount of dignity: they typically live with their parents in public housing, and that income allows them the means to buy cigarettes.

acceptance by the national constituents of its member States?¹¹² And what happens when the public mood shifts? Can the existence of the international system be conditioned on its continued acceptance by the national constituents? Can an international system “pause” during a period of crisis to allow the participating States to rethink basic norms and to restructure and reclaim eroding legitimacy? If that is the case, at what point does a sufficiently pronounced decrease in the popularity of a system become cause for declaring it illegitimate? And what is a State to do about it: unilaterally dissolve, restructure, or attempt to renegotiate a treaty?

These questions lie at the core of the challenges that international trade and international economic integration regimes across the modern liberal democratic world are facing today. Whether we view legitimacy from a formal or social acceptance point of view, it is undeniable that the international economic system is going through a crisis of legitimacy. Our claim is that the crisis of legitimacy, and the rise of economic nationalism, is a direct result of the rise of a new Class of interlocutors of the State and of the GEC, which we have identified as the Chronically Excluded.¹¹³ Our theory of legitimacy

¹¹² See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379 (1999); Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137 (2008).

¹¹³ This is not simply a matter of “populism,”; See Duane Swank & Hans-Georg Betz, *Globalization, the Welfare State and Right-Wing Populism in Western Europe*, 1 SOCIO-ECONOMIC REV. 215 (2003) (presenting

hearkens back to the relationship between the Global Economic Constitution and the State's internal constitutional construct. In order to understand this relationship, we must first identify those interlocutors of the State whose collective acceptance of the international system translates into its legitimacy. Who are the people whose opinions matter so much that, as a group, they can confer legitimacy on the international regime? Our claim is that, in GEC 1.0, Capital and the limited, nascent Middle Class that collaborated with it to industrialize were the Stakeholders whose acceptance of the system was necessary for it to achieve legitimacy. In GEC 2.0, the expanded, large Middle Class, including Labor and Capital with constitutionally aligned interests, comprised the Stakeholders.¹¹⁴

In GEC 3.0, two related phenomena have developed: First, Labor and Capital have become misaligned. Capital is once again a Class of its own with interests in globalized markets at odds with those of Labor. Second, the Chronically Excluded have broken away from the Middle Class. This means that the Middle Class base of interlocutors who conferred legitimacy on GEC 2.0 now includes a large and growing segment that does not accept the system as it currently stands. Meanwhile, as we have explained above, the State

empirical evidence implying that the social legitimacy of international trade is affected by national systems of social protection).

¹¹⁴ See GERALD F. DAVIS, *MANAGED BY THE MARKETS: HOW TO FINANCE RE-SHAPED AMERICA* (2009).

and the International Institutions have continued to operate based on a system designed for GEC 2.0. Furthermore, all of the GEC 3.0 economic trends that we have identified show that the increasingly greater numbers of Middle Class members in the United States will be excluded from the integration enterprise. As tradability takes on new forms, fueled by technological advances and transformation of the nature of jobs and Capital, the ranks of the Chronically Excluded and their insecurity are bound to deepen.¹¹⁵

In this Part of this Article, we outline, in broad terms, the reforms that GEC should undertake nationally and internationally in order to upgrade to its 3.0 version.

A. The Temptation of Protectionism.

Economic nationalism and populism call for a return to the policies of protectionism that have characterized GEC 1.0. While we argue below for a certain measure of protection for the most vulnerable segments of the U.S. markets, we categorically reject the notion that a return to protectionism would be beneficial for the U.S. economy (or the global markets). Those measures would constitute a return to policies that ceased making sense about a century ago. As we have argued, the tradability of jobs is not simply a matter of lower labor costs or access to resources, which can be offset by tariffs. Instead, the liberalization of the globalized markets is the product of regional conglomeration, long-

¹¹⁵ See Dani Rodrik, *After Neoliberalism What?* (Aug. 2002) (unpublished manuscript), <http://cemi.ehess.fr/docannexe/file/2787/rodrik2002.pdf>.

standing export-promotion policies, changes in the nature of work and the corporation, historical levels of national investment, automation, and other complex mechanisms which can no longer be reversed. If the United States sought to gain an advantage in the global markets by imposing tariffs or other old-fashioned forms of protectionism, it would simply create a vacuum that would be filled by other trading States.

We also believe that it is possible to maintain an international trade system that fosters growth while preserving national democratic mechanisms and achieving adequate levels of redistributive justice, provided that reforms are implemented to upgrade the United States welfare system to GEC 3.0 levels. Professor Rodrik, one of the most thoughtful economic voices commenting on economic nationalism, developed an “impossibility theorem” to make sense of the global economy. He sees it defined by three components: the Nation State, democracy and deep global economic integration. In the tension between the Nation State and democracy, Rodrik believes that “hyper-globalization” undermines democracy.¹¹⁶

In fact, Rodrik speculates that the global surge in populism is the “nation” pushing back against loss of control over the domestic economy. He speaks of a “trilemma,” which makes it impossible to maintain Nation State, democracy, and globalization all at

¹¹⁶ See DANI RODRIK, *THE GLOBALIZATION PARADOX* 184-207 (2011).

once. In his construct, only a combination of two of the three structures can be maintained. Rodrik sees the Nation State as indispensable to economic prosperity. The reason the Nation State is so essential to the global economy is that it is only in virtue of the institutional structures found in Nation States that the economy can be viable not just for the wealthy one percent but for everyone. Of course, democratic governance is an indispensable component of the Nation States. The upshot is that globalization must be stopped in order for a democratic Nation State to remain viable. Populism is a reaction to globalization's undermining of the domestic infrastructure that delivers economic prosperity to the nation.¹¹⁷

The Nation State is important both to the global economy and to the people of the nations that have pushed back against the expansion of cosmopolitanism and global trade. But we think that Rodrik's account of why the Nation State is important is misguided in several important ways. Most importantly, we think that Rodrik misunderstands and thus mischaracterizes how the Nation State can prosper in an age of expanding globalization. First, the economic ills, present and future, of the United States and the other wealthy nations of the world cannot be cured unless these States upgrade their policy and regulatory tools. The displaced coal worker in West Virginia or the auto worker in Detroit

¹¹⁷ *Id.* at 207-233.

will not find any relief from their economic distress through anything the Nation State might do for them with its existing regulatory tools. What is needed above all else is a shift from a welfare model to one where the State's basic obligation to the nation is to increase the availability of economic opportunity. Second, the United States should not reject globalization but, instead, couple the necessary overhaul of the welfare regime with upgraded trade policies designed to turn the global supply chain to its benefit.

We take on these policy proposals *seriatim* below, starting with the overhaul of the welfare-delivery system.

B. Rethinking Economic Security and Opportunity: the DIP.

The government exists to deliver order to an otherwise Hobbesian universe.¹¹⁸ Since GEC 2.0 became the global economic constitution, the government's legitimacy depends on its success in delivering welfare to the Middle Class. Today, as detailed above, the policy tools of GEC 2.0 are no longer effective. The corporate welfare platform has significantly eroded and can no longer be counted on by the government to provide front-line delivery to a significant segment of the Middle Class.¹¹⁹ The technological revolution, the rise of the Global Middle Class, changes in the nature of work, and the globalization

¹¹⁸ See, generally, Robert Nozick, *ANARCHY, STATE AND UTOPIA* (1974).

¹¹⁹ See Francis Fukuyama, *The Future of History: Can Liberal Democracy Survive the Decline of the Middle Class?*, 91 *FOREIGN AFF.* 53 (2012).

of markets into regional and industrial overlapping associations, have also hindered the government's ability to deliver welfare using GEC 2.0 tools.

Instead of regulating the corporate base, and providing a social safety net assuming its existence, the government must become a nimble, proactive, partner with the individual citizen.¹²⁰ We call the shift in regulatory focus "person-centered welfare." Its gist is to remove obstacles to economic opportunity, whether they be lack of skills, geographical immobility, or inability to compete in a platform market, and to create a branch of government that would become "the address" for the Chronically Excluded to maintain economic security, and for the Middle Class generally to have access to meaningful economic security programs consistent with GEC 3.0.

The Administrative State regulating the market, its corporations, and actors, does not disappear in our model. We still need a Securities and Exchange Commission to protect investors and promote disclosure. Environmental and labor agencies are still needed, and so are banking and other regulators whose jobs are to protect the economy against market failures. However, in order to successfully address the early challenges of GEC 3.0, the State must adopt a role closer to an indicative planner, provider of necessary resources, and

¹²⁰ Some characteristics of the system we propose could be found in the Danish welfare system. *See, e.g.,* Per Kongshøj Madsen, *The Danish model of flexicurity: A paradise-with some snakes*, in *LABOUR MARKET AND SOCIAL PROTECTION REFORMS IN INTERNATIONAL PERSPECTIVE: PARALLE OR CONVERVING TRACKS* 243, 244-57 (2002).

general source of support for the Middle Class and, in particular, the growing class of people who have been falling through the GEC 2.0 regulatory net.¹²¹

Reforms could start with the establishment of an institution dedicated to planning and enabling economic opportunity. For purposes of developing a plausible scenario, we will make this institution a new cabinet-level department, which we will call Department of Indicative Planning and Economic Security (the DIP). The job of the DIP would be to devise and manage, from a macro-economic standpoint, programs that assist the Chronically Excluded, but also (as described in greater detail below) devise and implement policies and programs for maximizing national engagement with the global supply chain.

The DIP would operate Employment and Economic Security Centers (EECs) across the United States. The DIP would be charged with ensuring that there is a sufficient pool of national jobs and economic opportunity to provide for the economic welfare of the Middle Class, and in identifying broadly the obstacles to individual access to opportunity. The EECs would operate on a micro level to implement and administer programs devised by the DIP.

The job of these institutions goes well beyond the retraining of Chronically Excluded workers or assistance with identifying and securing economic opportunities,

¹²¹ See MIKIO SUMIYA, A HISTORY OF JAPANESE TRADE AND INDUSTRY POLICY 47-49 (2000).

although those would also important functions. The DIP's fundamental goal would be indicative: to identify and structure the programs necessary to maximize individual ability to compete in uncertain and rapidly changing markets. By way of example: The World Economic Forum is predicting that 65% of today's elementary school children will work in jobs that do not exist yet.¹²² This raises a significant question with deep consequences for the future economic health of the U.S.: How do we educate a workforce for future markets and competition that we have yet to identify? The DIP and EECs will be charged with that task. This might include coordination with the Department of Education and local agencies to, for example, provide coding and other skills training for their students.

Likewise, the DIP and the EECs would be tasked with devising programs to correct the regional disparities that we have identified. Expensive programs including subsidies and other expenditures have been tried in regions like coal county in Pennsylvania, as well as other countries that went through similar declines such as France's Pas-de-Calais.¹²³ Those programs have been met with limited success, in part because of the need to maintain them in place in order to sustain the relief that they provide. The DIP would be tasked with

¹²² See WORLD ECON. FORUM, THE FUTURE OF JOBS: EMPLOYMENT, SKILLS AND WORKFORCE STRATEGY (2016), http://www3.weforum.org/docs/WEF_Future_of_Jobs.pdf.

¹²³ See *Globalization Has Marginalized Many Regions in the World: What Can be Done to Help Them*, THE ECONOMIST, Oct. 21, 2017.

devising innovative programs consistent with the GEC 3.0 economic structure. For example, the DIP could enable the establishment of “economic clusters” in affected regions. Legislation is currently pending for the creation of region-specific investment funds designed to enable the aggregation of manufacturing, customers, and developments. Public-private partnerships, as well as grants to research institutions, provide promising prospects to establish successful counterparts to the special economic zones that have fueled exports abroad. The DIP, assisted by the EECs, will have jurisdiction over management of projects of this type.

On a related front, one of the comparative disadvantages of the United States, and cause for the rise of the Chronically Excluded, is rising geographic immobility. This is caused by several factors: retirement systems that do not provide for transferability of benefits, high cost of housing making moves to cities for lesser-skilled jobs economically infeasible, or simply the aging of the population and the need for elder care. One additional concern is that, if those able to move to pursue opportunities do so, the problem of regional disparities will become even more acute because the older and/or less skilled population segments will be left behind. Geographic mobility still makes sense for some population groups, but it is made difficult by structural and economic limitations such as those

mentioned above.¹²⁴ One of the jobs of the DIP and the EECs would be to assist relocation, whether by way of training, linking with existing opportunities, or removing regulatory disincentives.

The EECs would also operate what we conceptualize as comprehensive support services for the unemployed and marginally employed (“Employment Poles”). The Employment Poles would serve as a job search center, a training school and a coaching program. The job search center would identify available opportunities, whether jobs or gig. The training school would, wherever possible, coordinate with potential employers the level of skills that displaced workers need to achieve to be placed. The coaching center would assist them in applying for the job, in coordinating the portable social protection system work described below, and in retaining employment.

C. Portable Social Protection System.

Person-Centered Welfare should also include a portable social protection system that will account for the changing nature of our economy, including the part-time nature of gigs and business cycles that may include high-revenue periods and slumps as well. Here

¹²⁴ *Id. See, also*, Maria L La Ganga, *Ordinary people can't afford a home in San Francisco: How did it come to this?*, GUARDIAN (Aug. 5, 2016), <https://www.theguardian.com/business/2016/aug/05/high-house-prices-san-francisco-tech-boom-inequality>

as well, the DIP and the EEC would have primary responsibility for developing and overseeing the operations of the portable social protection system. For purposes of developing a scenario that illustrates the general direction that we advocate, we will discuss a hypothetical new government tool, a “social account” that would accompany citizens through their working life.¹²⁵

The social account would both be an instrument of economic security and a way for the government to stimulate economic activity. For economic security, social accounts would operate as a form of person-centered taxation. Account holders would contribute to it while working or in business. They would have the right to withdraw from it, in the form of a tax-free loan, in periods of low business. The social account would be the repository of retirement savings and the link to stable, uninterrupted health care.¹²⁶ For economic opportunity, the social account would be an access tool. For example, the EECs would be the vehicle to apply for entrepreneurial loans or tuition aid. Likewise, if opportunity seeking requires a geographical relocation, then the social account could be used for that

¹²⁵ See David Rolf & Nick Hanauer, *Portable Benefits for an Insecure Workforce*, AM. PROSPECT (Feb. 23, 2017), <http://prospect.org/article/portable-benefits-insecure-workforce>.

¹²⁶ See Glenn Beamer, *The Steelworkers Retirement Security System: A Worker-based Model for Community Investment* 30-33 (2016); Monica Rondon, *Policies to Protect Workers in the Patchwork Economy: Portable Benefits*, CENTURY FOUND. (Aug. 22, 2017), <https://tcf.org/content/commentary/policies-protect-workers-patchwork-economy-portable-benefits/>.

purpose. Portable social accounts have been discussed in the private and public sectors, and in scholarship. A tool of that nature, in the government's panoply, would gradually evolve and be refined in light of continuing experience.

D. Support for Life-Long Gig Worker.

The DIP would be the government's address for the "life-long entrepreneur" creating and managing ongoing business in the new economy. The State could tap into the social conscience of educated Americans, and create a Small Business Corps of young graduates of professional schools.¹²⁷ Those professionals would be assigned to EECs, and tasked with teaching, coaching, and assisting entrepreneurs and gig workers with the management of their economic activity. Whether it be resume writing or crafting an application for funding the social account, the Small Business Corps would be deployed throughout the United States to assist. Creative ways, consistent with the GEC 3.0, could be devised to raise the funds necessary for such a grand project. For example, the government could give companies that do not repatriate profits because of the associated corporate tax a one-time opportunity to do so at a very low tax rate, say 10%. This has

¹²⁷ See DAVID P. SEARLES, *THE PEACE CORPS EXPERIENCE: CHALLENGE AND CHANGE, 1969-1976* (1997).

been done in other countries to raise revenues.¹²⁸

F. Turning the Global Supply Chain To Our Benefit: Regional Agreements.

The DIP's indicative planning functions would include devising and implementing trade policies intended to turn the global supply chain to the benefit of U.S. business. Regional agreements are a powerful tool to accomplish this goal in that they can be used to identify export-promoting policies and lingering tariffs that hinder market access, such as the ones that have helped Asian manufacturing centers to thrive. Although comprehensive agreements like the Trans-Pacific Partnership are most effective, regional agreements can be reached for limited periods of times to deal with discrete issues. We call those "regional small-scale contracts."

As trading partners acquire ever-increasing market shares, their access to U.S. markets should be conditioned on the lowering of tariffs that today still reflect the preferential treatment given to them after decolonization enterprise. For example, in Japan and Vietnam, import tariffs are 19% and 16%, respectively. The TPP that the Trump Administration rejected included a drastic reduction of these tariffs.¹²⁹ A small-scale

¹²⁸ See ANNE-MARIE SLAUGHTER, *THE CHESSBOARD AND THE WEB: STRATEGIES OF CONNECTION IN A NETWORKED WORLD* (2017).

¹²⁹ See Trans-Pacific Partnership Agreement, Annex 2-D, Feb. 4, 2016 (signed, not ratified), <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Feb. 6, 2018).

contract should be negotiated with those countries to accomplish this tariff-reduction goal, outside the scope of the TPP, failing which access to the U.S. markets will be limited for other goods. This is necessary to prevent agricultural exporters like Brazil and Russia to take over markets that would be natural outlets for U.S. goods. Known as “breadbaskets”, these countries already take up a sizeable share of the global wheat, soybean, and corn marketplace. Soybean and corn were exported out of Brazil at values of \$19 billion¹³⁰ and \$3.5 billion¹³¹ annually. These exports make their way to Japan and Singapore - markets the United States would have had access to. Brazil’s corn exports to Japan were worth about \$455 million in 2016.¹³² Russia’s corn exports to Japan are currently worth \$40 million¹³³ and would have been threatened by U.S. farms’ entry into the Asian market. As discussed below, we believe that the GEC 3.0 international rule of law should permit such

¹³⁰ See *Soybeans*, OEC, <https://atlas.media.mit.edu/en/profile/hs92/1201/> (last visited Feb. 6, 2018).

¹³¹ See *Corn*, OEC, <https://atlas.media.mit.edu/en/profile/hs92/1005/> (last visited Feb. 6, 2018).

¹³² See *What Does Brazil Export to Japan?*, OEC, https://atlas.media.mit.edu/en/visualize/tree_map/hs92/export/bra/jpn/show/2016/ (last visited Feb. 6, 2018).

¹³³ See *What Does Russia Export to Japan?*, OEC, https://atlas.media.mit.edu/en/visualize/tree_map/hs92/export/rus/jpn/show/2016/ (last visited Feb. 6, 2018).

negotiations and the suspension of market access benefits if post-colonization level tariffs are not redressed.

E. Turning the Global Supply Chain to Our Benefit: BITs.

After literally decades of international lobbying by the United States, an international investment framework comprised of thousands of bilateral investment treaties (BITs) has finally taken shape. The BITs offer private parties the right to challenge foreign measures that impede market access. Unlike the State-to-State system of the WTO, those BITs are available to businesses and their attorneys, who can act as “private attorneys general” as was done in Europe.¹³⁴ The DIP would, in addition and as an auxiliary to its pursuit of regional agreements to maximize global supply chain opportunities, assist private parties in leveraging those BITs to identify and challenge barriers to market access. Our trade policy could, for instance, give loans for legal fees in meritorious cases, act as a clearinghouse to pool similarly situated companies, and otherwise provide the resources of the government to assist in the litigation objectives.

F. International Transitioning.

Effective measures to upgrade domestic and international trade policy to GEC 3.0, such as those described above, will in some circumstances run afoul of core principles of

¹³⁴ See ANDREW PAUL NEWCOMBE & LUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 1-2 (2009).

GEC 2.0 like the national treatment, anti-discrimination principle. As we explained in Part I, the GEC is a constitutional construct that does not require timeless application of equally applied norms across generations. For example, distinguishing among economic actors based on their historical circumstances has been at the root of the trade provisions protecting industries in early stages of development in emerging economies. The rationale is simple. In order to meaningfully participate in the globalized markets, an industry must have reached a sufficiently advanced stage of development. Otherwise, it will not be able to compete with foreign actors. In other words, in order to consolidate the national base necessary to be a competitive GEC 2.0 actor, States that did not have a meaningful opportunity to develop during GEC 1.0, primarily because of colonization, could legitimately claim the right to apply provisions that would otherwise be trade-violative.

The same rationale obtains today. Entire regions and categories of individuals like the Chronically Excluded Classes cannot meaningfully compete in GEC 3.0. Bringing them into the playing field will, inevitably, entail a suspension of some foundational principles. An American worker who learns automation skills in an EEC program with a view to participating in an infrastructure project managed by the Federal government should be allowed to bid free of competition from foreign competitors. In this instance, a “Buy American” domestic program specifically designed to benefit a class of people that has not become a Stakeholder in the trade system should be excluded from the prohibition

against protectionism.¹³⁵ Likewise, a pause is needed to enable the United States to negotiate the discrete and focused tariff reduction agreements described above.

Trade evolves, as Robert Schuman famously declared in his 1950 Declaration, in “leaps and bounds.”¹³⁶ The rule of international law consistently applied to all WTO members is a relatively recent phenomenon. The international commercial system has more often than not been a Hobbesian world where power drove outcomes. The United States historically exercised its power to enable free movement of goods and services and create a globalized market for decades, starting most significantly with the massive investment in Europe’s reconstruction through the Marshall Plan. Today, the system may be saved again if power is respected for the rule of law to continue to prevail.

CONCLUSION:

Explaining the causes of the challenges to the legitimacy of the international economic order and the rise of what has been called economic nationalism obviously falls beyond the scope of a single project. As we explained in the Introduction, we confine ourselves in this article to the foundational architecture of the international trade norms and institutions. Other projects, of course, look to other facets of this problematic, including

¹³⁵ See Spence, *supra* note 103, at 38–39.

¹³⁶ Schuman, *supra* note 66.

the cultural alienation that we believe the Chronically Excluded and other groups have been experiencing. Our intention here is to steer the current course towards a reform of domestic and economic policy to adjust to the new GEC 3.0 conditions. Once in motion, GEC 3.0 will grow and find its way to stability, like its predecessor did. There is no alternative. History teaches that failure to begin to upgrade will result in a systemic failure. Now is the time to take action and avoid the mistakes of the past.