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## U.S. Trade Law and Policy at a Crossroads

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# U.S. TRADE LAW AND POLICY AT A CROSSROADS

John K. Veroneau

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# U.S. TRADE LAW AND POLICY AT A CROSSROADS

John K. Veroneau\*

## INTRODUCTION

The past decade has witnessed significant changes in U.S. international trade policy. In his first presidential term, Donald J. Trump moved the United States away from long-standing policies of lowering trade barriers to facilitate global commerce and replaced them with a more restrictive version not seen since the early twentieth century. President Trump's more trade-restrictive policies were largely extended by his successor, President Joseph R. Biden. The first year of President Trump's second term has indicated a strong desire to restrict imports further in an attempt to create U.S. manufacturing jobs and reduce reliance on Chinese imports.<sup>1</sup>

This Article seeks to (a) situate recent changes in U.S. trade law and policy in a historical context, (b) argue that free trade policies are more consistent with America's traditions of individual liberty than protectionist ones, (c) argue that free trade policies *on balance* better serve U.S. economic interests, (d) recommend changes to U.S. trade policies to enable their benefits to be more broadly shared, and (e) argue that changes in certain non-trade policies are needed to address real and perceived problems with post-World War II trade policies.

## I. BACKGROUND

Section A describes the constitutional roles of Congress and the President with regard to international trade matters, and Section B outlines the three eras of U.S. trade policy preceding the first Trump Administration. Section C discusses changes to U.S. trade policy since the first Trump Administration.

### *A. The Roles of Congress and the President Regarding Trade Law and Policy*

The U.S. Constitution provides the federal government, rather than the states, with exclusive jurisdiction over matters of trade law and policy.<sup>2</sup> Absent statutory delegations, states are unable to regulate or tax foreign commerce.<sup>3</sup> Within the federal government, authority over trade matters is shared unevenly between the legislative and the executive branches.

Congress enjoys vastly more constitutional authority on trade matters than the President. The Constitution empowers Congress to impose import duties<sup>4</sup> and, more

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1. See *America First Trade Policy*, 90 Fed. Reg. 8471 (Jan. 30, 2025).

2. U.S. CONST., art. I, § 8, cl. 1.

3. *Cf. id.* (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . .”).

4. *Id.*, art. I, § 8, cl. 1.

broadly, to “regulate commerce with foreign nations.”<sup>5</sup> The President’s authority on trade matters, on the other hand, is more derivative. The President has explicit authority to negotiate treaties, including those regarding international trade.<sup>6</sup> The President is the “sole organ” of the federal government in the field of international relations,<sup>7</sup> and has sole authority to make treaty commitments, subject to the advice and consent of the Senate.<sup>8</sup> The President also has the authority to commit the United States to non-treaty executive agreements, which are not subject to the advice and consent of the U.S. Senate.<sup>9</sup> Almost all modern era U.S. trade agreements have taken the form of “executive agreements” negotiated by the executive branch<sup>10</sup> and, when requiring changes to U.S. tariffs or other statutory law, submitted to Congress for approval.<sup>11</sup>

The President has no independent constitutional authority to alter tariff levels. Any such authority derives from statutory delegations by Congress.<sup>12</sup> Congress has made various such delegations, allowing the President to impose tariffs to respond to “unfair” trade actions,<sup>13</sup> to protect national security,<sup>14</sup> and to assist U.S. firms harmed by imports.<sup>15</sup>

In his second term, President Trump has based many new tariffs on his delegated authorities under the International Emergency Economic Powers Act (IEEPA).<sup>16</sup> Although IEEPA does not grant the President explicit authority to impose tariffs, it does provide the President with fairly broad authorities to respond to international emergencies. The President’s use of IEEPA to impose broad tariffs has been challenged in court by several plaintiffs, including the State of California, arguing, *inter alia*, that Congress did not intend for IEEPA to be used to make comprehensive and semi-permanent changes to the U.S. tariff schedule.<sup>17</sup>

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5. *Id.*, art. I, § 8, cl. 3.

6. *Id.*, art. II, § 2, cl. 2.

7. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

8. U.S. CONST., art. II, § 2, cl. 2.

9. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

10. See generally *International Agreements Without Senate Approval*, JUSTIA, <https://law.justia.com/constitution/us/article-2/20-international-agreements-without-senate-approval.html> (on file with the Maine Law Review) (last visited Oct. 26, 2025) (describing how ninety percent of international agreements were executive agreements).

11. See CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., R47679, CONGRESSIONAL AND EXECUTIVE AUTHORITY OVER FOREIGN TRADE AGREEMENTS 1 (2025).

12. *United States v. Yoshida Int’l, Inc.*, 526 F.2d 560, 571 (1975) (“The people of the new United States, in adopting the Constitution, granted the power to ‘lay and collect duties’ and to ‘regulate commerce’ to the Congress, not to the Executive.”).

13. 19 U.S.C. § 2411(d)(3)(A).

14. 19 U.S.C. § 1862.

15. 19 U.S.C. § 2251.

16. International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1626, (enacted Oct. 28, 1977, codified as amended at 50 U.S.C. §§ 1701–1710).

17. See, e.g., Complaint at 12, *California v. Trump*, No. 25-cv-03372 (N.D. Cal. Apr. 16, 2025).

*B. Overview of U.S. Trade Policy (1787–2017)*

Prior to President Trump’s first term, U.S. trade policy could be divided into three relatively distinct eras. The first era stretched from the country’s founding until around the Civil War. During this era, tariff rates were applied to a wide range of imports but at relatively low rates.<sup>18</sup> The nearly exclusive purpose of tariffs during this era was to provide revenue to operate the federal government. Tariffs accounted for more than half of federal revenue during this era, but, importantly, the size of the federal government was quite modest.<sup>19</sup>

With the exception of a handful of protective tariffs to encourage the development of a manufacturing sector to compete with British manufacturers, U.S. tariffs initially were not used to restrict imports.<sup>20</sup> American policymakers at the time of the country’s founding generally favored free trade and bristled at trade restrictions imposed by the British, citing them unfavorably in the Declaration of Rights and Grievances.<sup>21</sup>

In the second era of U.S. trade policy, there was a growing view that high tariffs also could be used to protect American industries from foreign competition.<sup>22</sup> Indeed, over the course of the 19th century, Congress steadily raised tariffs to shield U.S. producers from imports.<sup>23</sup>

During much of this era, Democrats tended to favor free trade and Republicans generally supported more protectionist trade policies.<sup>24</sup> Two prominent Maine Republican politicians of that era were staunch defenders of protectionism: James G. Blaine, who served as Speaker of the House of Representatives (1869–1875), and Nelson Dingley, Jr., who served as Chairman of the Ways and Means Committee (1895–1899) in the U.S. House of Representatives.

Blaine was a fierce protectionist for most of his political career in Congress<sup>25</sup> and only moderated his views when later serving as U.S. Secretary of State.<sup>26</sup> As the opportunity grew for U.S. manufacturers to export their goods, Blaine became more interested in dismantling foreign trade barriers. He sought to promote exports through reciprocity agreements whereby the U.S. would lower tariffs on certain imports from a particular country in exchange for lowered tariffs on certain U.S. exports.<sup>27</sup>

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18. See DOUGLAS A. IRWIN, *CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY* 73–80 (Univ. of Chi. Press 2017).

19. See *id.*

20. See *id.* at 80–87 (indicating that Alexander Hamilton favored tariffs as a means to increase revenue that would support domestic manufacturing while maintaining imports, rather than restricting them).

21. *Id.* at 44.

22. Cf. *id.* at 7 (explaining that higher protective tariffs were seen as “promot[ing] the nation’s growth and industrial development”).

23. See *id.* at 236–49 (“By the 1880s, about a quarter of the labor force was employed in manufacturing. The Republicans argued that protective tariffs were needed to safeguard the high wages of American labor from the competition of low-wage foreign workers.”).

24. *Id.* at 244–45.

25. See *id.* at 303.

26. See *id.* at 304–05 (explaining that Blaine moderated his stance on tariffs while serving as Secretary of State to support lowering duties on non-competing imports).

27. *Id.* at 304.

Despite limited efforts to lower U.S. and foreign tariffs through reciprocity agreements, U.S. tariff levels remained high throughout the 19th century.<sup>28</sup> As Chairman of the powerful Ways and Means Committee, Dingley passed new tariff legislation that raised average tariffs to fifty-two percent, the highest in U.S. history.<sup>29</sup> Throughout this time, Congress continued to periodically adjust tariff levels, often in response to pressure from constituents seeking protection from imports.<sup>30</sup> These pressures led to passage of the infamous Smoot-Hawley tariff bill,<sup>31</sup> the last tariff-raising bill to pass Congress before the Great Depression.<sup>32</sup>

As countries responded to high U.S. tariffs by imposing their own protective tariffs, global trade slowed dramatically, exacerbating the global economic depression.<sup>33</sup> As economists and policymakers came to appreciate the adverse role of tariffs on the U.S. and global economy, sentiments shifted away from protectionist trade policies.<sup>34</sup>

The third era of U.S. trade policy was marked by growing beliefs that protective tariffs were in fact harmful to U.S. interests at home and abroad. A view emerged that high U.S. tariffs encouraged other countries to impose similarly high tariffs and worsened the global economic depression of the 1930s.<sup>35</sup> In the aftermath of two world wars, sentiments grew that global peace and prosperity were better advanced through economic and diplomatic cooperation rather than beggar-thy-neighbor protectionism.<sup>36</sup> These views were reflected in the creation of the Bretton Woods agreements, including the General Agreement on Tariffs and Trade (GATT).<sup>37</sup>

From the GATT's founding in 1947 to the creation of the World Trade Organization (WTO) in 1997, U.S. and global tariffs dropped dramatically through a series of global trade negotiations.<sup>38</sup> Tariffs dropped further through a series of bilateral trade agreements negotiated under Presidents George H.W. Bush, Bill Clinton, and George W. Bush.<sup>39</sup> As a result of these trade liberalizing efforts, the

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28. *See id.* at 222 (“By leaving high import duties untouched for so long, manufacturers received an unprecedented degree of nominal protections.”).

29. *See id.* at 296.

30. *See id.* at 236.

31. Tariff Act of 1930, Pub. L. No. 71–361, 46 Stat. 590 (1930) (current version at 19 U.S.C. § 1202).

32. *See* IRWIN, *supra* note 18, at 371.

33. *See id.* at 400–01.

34. *See id.* at 413.

35. *See id.* at 423.

36. *Id.* at 423–24.

37. *Id.* at 455, 462–73; *see* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

38. *See* IRWIN, *supra* note 18, at 6; *see also* Michael J. Trebilcock, *On the Virtues of Dreaming Big but Thinking Small: Comments on the World Trading System After the Uruguay Round*, 8 B.U. INT'L L.J. 291, 292 (1990).

39. *See* LAEL BRAINARD, BROOKINGS INST., TRADE POLICY IN THE 1990S 3, 10 (2001) (describing trade deals negotiated by Presidents George H.W. Bush and Bill Clinton); *International Trade*, GEORGE W. BUSH PRESIDENTIAL LIBRARY, <https://www.georgewbushlibrary.gov/research/topic-guides/international-trade> [<https://perma.cc/JUL2-3R3L>] (last visited Dec. 27, 2025) (discussing trade agreements negotiated under President George W. Bush). Under these Presidents, the United States

average U.S. tariff in 2015 was 1.7 percent *ad valorem*<sup>40</sup> on a trade-weighted basis.<sup>41</sup> President Barack Obama likewise generally supported efforts to reduce trade barriers and negotiated a broad trade agreement among twelve Asia-Pacific countries.<sup>42</sup> The agreement was intended to counterbalance China's regional leverage on trade matters.<sup>43</sup> President Obama did not pursue congressional approval of the agreement before his term expired. President Trump withdrew U.S. support for the agreement and did not submit the agreement to Congress for approval.<sup>44</sup>

### *C. Trade Policy in Transition (2017-present)*

President Trump's election in 2016 marked the beginning of a new era of U.S. trade policy. Unlike his post-World War II predecessors, President Trump entered office highly suspicious of trade liberalization and promised to reform U.S. trade policy as part of a broader strategy to re-industrialize the U.S. economy.<sup>45</sup> In his first term, President Trump imposed new tariffs on a broad range of steel<sup>46</sup> and aluminum<sup>47</sup> products and a wide variety of goods from China.<sup>48</sup> He also replaced the North American Free Trade Agreement (NAFTA) with a slightly more restrictive

entered into comprehensive trade agreements with twenty countries. *See Free Trade Agreements*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements> [<https://perma.cc/V6Y3-2US4>] (last visited Dec. 27, 2025). Each agreement eliminated all or nearly all bilateral tariffs. *Id.*

40. An *ad valorem* tax is a tax based on the value of the property. *Ad Valorem Tax*, THOMSON REUTERS: TAX & ACCOUNTING GLOSSARY (Oct. 9, 2024), <https://tax.thomsonreuters.com/en/glossary/ad-valorem-tax> [<https://perma.cc/VRY6-AWRK>].

41. *Tariff Rate, Applied, Weighted Mean, All Products (%) – United States*, WORLD BANK GRP., <https://data.worldbank.org/indicator/TM.TAX.MRCH.WM.AR.ZS?locations=US> [<https://perma.cc/F3TD-7RGK>] (last visited Dec. 27, 2025).

42. *Statement by the President on the Signing of the Trans-Pacific Partnership*, THE WHITE HOUSE PRESIDENT BARACK OBAMA: OFF. OF THE PRESS SEC'Y (Feb. 3, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/03/statement-president-signing-trans-pacific-partnership> [<https://perma.cc/25TV-WUM9>].

43. *See Statement from United States Trade Representative Michael Froman on USITC Report on TPP*, OFF. OF THE U.S. TRADE REPRESENTATIVE (May 18, 2016), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/may/statement-us-trade-representative> [<https://perma.cc/TGK6-YVZT>] (“What cannot be quantified in this study or any other is the cost to American leadership if we fail to pass [the Trans-Pacific Partnership] and allow China to carve up the Asia-Pacific through their own trade agreement.”).

44. *Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, U.S. DEP'T OF STATE (Jan. 23, 2017), <https://2017-2021.state.gov/us-TPP-withdrawal/> [<https://perma.cc/QB9K-ZBMR>].

45. *See OFF. OF THE U.S. TRADE REPRESENTATIVE, THE PRESIDENT'S 2017 TRADE POLICY AGENDA 1–2* (2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf> [<https://perma.cc/D2BT-K549>] (last visited Dec. 27, 2025).

46. Proclamation No. 9705, 83 Fed. Reg. 11625, 11627 (Mar. 15, 2018).

47. Proclamation No. 9704, 83 Fed. Reg. 11619, 11621 (Mar. 15, 2018).

48. Memorandum on Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13099, 13100 (Mar. 27, 2018).

United States-Mexico-Canada Agreement (USMCA).<sup>49</sup> While the net economic benefits of these higher tariffs are disputed,<sup>50</sup> President Trump clearly marked a new approach to U.S. trade policy that was largely maintained under President Biden, particularly regarding China.<sup>51</sup>

In his campaign for a second term in office, President Trump pledged to use tariffs aggressively to advance his goals of creating U.S. manufacturing jobs, raising revenue, and establishing more reciprocal terms of trade.<sup>52</sup> Early in his second term, President Trump followed through on these pledges by imposing new tariffs on goods from Mexico<sup>53</sup> and Canada;<sup>54</sup> goods from China;<sup>55</sup> steel<sup>56</sup> and aluminum<sup>57</sup> products; automobiles and automobile parts;<sup>58</sup> and reciprocal tariffs<sup>59</sup> on nearly all goods from all countries.<sup>60</sup> Together, these tariffs represent the largest tariff increase since 1934.<sup>61</sup>

While many tariffs imposed by President Trump in 2025 relied on statutory authority used in his first term,<sup>62</sup> many new tariffs imposed in 2025 relied on IEEPA.<sup>63</sup> When the President declares a national emergency pursuant to the National Emergencies Act with respect to an “unusual and extraordinary threat” that has its

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49. Press Release, The White House, President Donald J. Trump’s United States-Mexico-Canada Agreement Delivers a Historic Win for American Workers (Jan. 29, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-united-states-mexico-canada-agreement-delivers-historic-win-american-workers/> [<https://perma.cc/KE7D-RCFF>].

50. See FELIPE BENGURIA & FELIPE SAFFIE, *DISSECTING THE IMPACT OF THE 2018-2019 TRADE WAR ON U.S. EXPORTS* 2, 28 (2019).

51. OFF. OF THE U.S. TRADE REPRESENTATIVE, *2020 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 2–5* (2021), <https://ustr.gov/sites/default/files/files/reports/2020/2020USTRReportCongressChinaWTOCompliance.pdf> [<https://perma.cc/S882-QMUH>].

52. Memorandum on Reciprocal Trade and Tariffs, 90 Fed. Reg. 9837, 9837–38 (Feb. 19, 2025).

53. Exec. Order No. 14198, 90 Fed. Reg. 9185, 9185 (Feb. 10, 2025).

54. Exec. Order No. 14197, 90 Fed. Reg. 9183, 9183 (Feb. 10, 2025).

55. Exec. Order No. 14259, 90 Fed. Reg. 15509, 15509–10 (Apr. 14, 2025).

56. See Proclamation No. 10896, 90 Fed. Reg. 9817, 9820–26 (Feb. 18, 2025).

57. See Proclamation No. 10895, 90 Fed. Reg. 9807, 9810–13 (Feb. 18, 2025).

58. See *Fact Sheet: President Donald J. Trump Adjusts Imports of Automobile and Automobile Parts into the United States*, THE WHITE HOUSE (Mar. 26, 2025), <https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-adjusts-imports-of-automobiles-and-automobile-parts-into-the-united-states/> [<https://perma.cc/UBY7-A2BH>].

59. See Exec. Order No. 14257, 90 Fed. Reg. 15041, 15045 (Apr. 7, 2025).

60. See Memorandum on Reciprocal Trade and Tariffs, 90 Fed. Reg. 9837 (Feb. 13, 2025).

61. See *State of U.S. Tariffs: August 7, 2025*, THE BUDGET LAB AT YALE (Aug. 7, 2025), <https://budgetlab.yale.edu/research/state-us-tariffs-august-7-2025> [<https://perma.cc/A7KV-MGFN>]; see also Kimberly Clausing & Mary E. Lovely, *Trump’s tariffs on Canada, Mexico, and China would cost the typical US household over \$1,200 a year*, PETERSON INST. FOR INT’L ECON. (Feb. 3, 2025), <https://www.piie.com/research/piie-charts/2025/trumps-tariffs-canada-mexico-and-china-would-cost-typical-us-household> (on file with the Maine Law Review).

62. Trade Act of 1974, 19 U.S.C. § 2411; Trade Expansion Act of 1962, 19 U.S.C. § 1862.

63. 50 U.S.C. § 1701 *et seq.* For examples of tariffs relying on IEEPA, see, e.g., Exec. Order No. 14195, 90 Fed. Reg. 9121, 9121 (Feb. 7, 2025) (“By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act . . .”); Exec. Order No. 14257, 90 Fed. Reg. 15041, 15041 (Apr. 7, 2025) (same).

source outside the United States, IEEPA provides the President the power to “deal with” that threat.<sup>64</sup> To “deal with” the threat, the president may:

investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.<sup>65</sup>

This law grants presidents broad authority to respond to international economic emergencies, but in its nearly fifty-year history, no President had ever used IEEPA to impose tariffs.<sup>66</sup> The use of IEEPA in this way raised immediate questions about the scope of the President’s authority to unilaterally impose tariffs and whether Congress intended to delegate this significant power through ostensibly constrained emergency powers legislation. The use of IEEPA to impose tariffs was challenged in both U.S. district court and the U.S. Court of International Trade (CIT).<sup>67</sup>

In May 2025, the CIT granted Petitioners’ Motion for Summary Judgment, concluding that tariffs imposed by President Trump pursuant to IEEPA were unlawful.<sup>68</sup> The CIT reasoned that IEEPA’s authority to regulate importation does not grant the president “unbounded” authority to impose tariffs.<sup>69</sup> The CIT further stated that insofar as the tariffs did not “deal with” the emergency declared by the President, such tariffs did not meet IEEPA’s statutory requirements to address “unusual and extraordinary threat[s],” but instead sought to create leverage in international negotiations.<sup>70</sup> In August 2025, the United States Court of Appeals for the Federal Circuit affirmed the CIT’s holding that President Trump’s IEEPA-based tariffs were unlawful.<sup>71</sup> The court reasoned that IEEPA neither explicitly nor implicitly permits “unbounded” refashioning of the U.S. tariff code.<sup>72</sup>

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64. 50 U.S.C. § 1701(a)§ 1703(a).

65. 50 U.S.C. § 1702(a)(1)(B).

66. See William A. Galson, *Are President Trump’s Tariffs Legal?*, BROOKINGS INST. (Sep. 12, 2025), <https://www.brookings.edu/articles/are-president-trumps-tariffs-legal/> [https://perma.cc/3F8S-ANDU] (discussing the legal history and use of IEEPA to impose tariffs).

67. See *Learning Res., Inc. v. Trump*, No. 25-CV-1248, 2025 WL 1525376 (D.D.C. May 9, 2025), *appeal docketed*, No. 2-5202 (D.C. Cir. May 30, 2025); *V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1358 (Ct. Int’l Trade 2025).

68. See *V.O.S. Selections, Inc.*, 772 F. Supp. 3d at 1383. The CIT concluded that assuming IEEPA authorizes *some* tariffs, it does not authorize *these* tariffs. *Id.* at 1373. Specifically, the court reasoned that IEEPA does not authorize the President’s reciprocal tariffs because IEEPA does not permit the imposition of tariffs to address balance-of-payments deficits outside the limits of Section 122 of the Trade Act and that IEEPA does not authorize the President’s trafficking tariffs because those tariffs do not directly address the problem identified and instead aim only to gain leverage over other countries. *Id.* at 1374–77.

69. *Id.* at 1358.

70. *Id.* at 1381.

71. *V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312, 1340 (Fed. Cir. 2025), *cert. granted*, No. 25-250, 2025 WL 2601020 (U.S. Sept. 9, 2025).

72. *Id.* at 1341.

Meanwhile, in May 2025, the United States District Court for the District of Columbia ruled in a separate matter that tariffs imposed by President Trump under IEEPA were unlawful.<sup>73</sup> The court concluded that “the power to regulate is not the power to tax”<sup>74</sup> and categorically rejected that IEEPA could serve as a basis for the imposition of tariffs by a President.<sup>75</sup>

In September 2025, the Supreme Court of the United States granted the government’s Petition for a Writ of Certiorari, consolidating both the U.S. District Court for the District of Columbia and Federal Circuit cases.<sup>76</sup> The Court heard oral arguments on the matter in early November.<sup>77</sup> The Government argued that while IEEPA does not explicitly authorize the imposition of tariffs, the law provides broad authority for the President to respond to international emergencies,<sup>78</sup> including the implicit authority to impose tariffs.<sup>79</sup> The Government also argued that since IEEPA allows the President to block imports altogether, the law permits the President to take the less severe action of merely tariffing imports.<sup>80</sup> To advance this argument, the Government asserted that because IEEPA’s predecessor statute was used by President Nixon to impose broad tariffs and survived judicial review, the Court should similarly uphold the Administration’s actions in this matter.<sup>81</sup>

Challengers to President Trump’s tariffs argued that IEEPA could not reasonably be interpreted as implicitly delegating tariff authority to the President.<sup>82</sup> Challengers asserted that Congress zealously guards its exclusive constitutional tariff authority and has delegated such authority to Presidents only explicitly and under well-defined circumstances.<sup>83</sup> Challengers also advanced three arguments for why President Nixon’s use of IEEPA’s predecessor statute provides no support for claims that IEEPA authorizes tariffs.<sup>84</sup> First, unlike President Nixon’s imposition of limited short-term tariffs to mitigate the risk of a monetary crisis as the United States moved away from the gold standard, President Trump is using IEEPA to overhaul U.S. tariff policy on a comprehensive and unlimited basis.<sup>85</sup> Second, in response to President Nixon’s tariff actions, Congress constrained the President’s “emergency” powers and enacted a new law specifically enabling the president to impose temporary tariffs

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73. See *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 233 (D.D.C. 2025), *cert. granted before judgment*, No. 24-1287, 2025 WL 2601021 (U.S. Sept. 9, 2025).

74. *Id.* at 223.

75. *Id.* at 223, 232–33.

76. *Trump v. V.O.S. Selections, Inc.*, No. 25-250, 2025 WL 2601020, at \*1 (U.S. Sept. 9, 2025).

77. See Transcript of Oral Argument, *Learning Res., Inc. v. Trump*, No. 24-1287 (U.S. argued Nov. 5, 2025), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2025/24-1287\\_b07d.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2025/24-1287_b07d.pdf) [https://perma.cc/DVU3-KHHE].

78. *Id.* at 6–9, 15–19, 81–82.

79. Reply Brief for Respondents in No. 24-1287 and the Petitioners in No. 25-250 at 15–16, *Learning Res., Inc. v. Trump*, No. 24-1287 (U.S. argued Nov. 5, 2025).

80. *Id.* at 17–18.

81. *Id.* at 5, 11–12, 21.

82. Response Brief for Petitioners *Learning Resources, Inc. and Hand2mind, Inc.* at 21–26, *Learning Res., Inc. v. Trump*, No. 24-1287 (U.S. argued Nov. 5, 2025).

83. *Id.* at 22.

84. *Id.* at 39.

85. *Id.* at 39–42.

in response to monetary risks.<sup>86</sup> And third, rather than endorsing President Nixon's tariff authority, the intermediate court hearing the matter took notice of recent actions by Congress to restrict future presidents from using "emergency" powers to impose tariffs.<sup>87</sup>

In making arguments that IEEPA cannot be read reasonably to include broad tariff authority, challengers invoked the Major Questions Doctrine.<sup>88</sup> This is a canon of statutory interpretation based on the view that Congress would not ambiguously delegate authority on a major question.<sup>89</sup> As Justice Scalia famously put it, Congress does not "hide elephants in mouseholes."<sup>90</sup> Challengers argued that Congress would not hide unbound tariff authority in IEEPA as doing so would render superfluous all other carefully crafted delegations of tariff authority.<sup>91</sup>

The Government and challengers disagreed about whether IEEPA, if interpreted to permit tariffs as imposed by President Trump, would represent an unconstitutional delegation of legislative power.<sup>92</sup> The Government argued that it would not because IEEPA has been used to impose "regulatory" rather than "revenue" tariffs.<sup>93</sup> In making this argument, the Government seemed to appreciate that interpreting IEEPA as an unbound grant of tariff authority could run afoul of the non-delegation doctrine.

Challengers rejected the Government's distinction between regulatory and revenue tariffs.<sup>94</sup> Challengers also argued that the lack of guidance in IEEPA regarding tariffs causes it to fail the Court's "intelligible principles" test, rendering any tariff authority under IEEPA so broad that it represents an unconstitutional grant of legislative authority.<sup>95</sup>

At the time of this writing, the Court has issued no opinion on this matter. However, based on the oral argument, it seems likely that the Court will conclude that IEEPA does not permit some or all of the tariffs imposed by President Trump.

## II. POLICY CONSIDERATIONS REGARDING INTERNATIONAL TRADE POLICY

This Section argues that, while free trade policies generally best serve U.S. interests, certain trade restrictions are appropriate insofar as they advance well-

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86. *Id.* at 43.

87. *Id.* at 43.

88. *Id.* at 44.

89. *Id.* at 44–49.

90. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

91. Brief for Petitioners at 44–49, *Learning Res., Inc. v. Trump*, No. 24-1287 (U.S. argued Nov. 5, 2025).

92. U.S. CONST., art. I, § 1 states: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The nondelegation doctrine is rooted in certain separation of powers principles. *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

In limiting Congress's power to delegate, the nondelegation doctrine exists primarily to prevent Congress from ceding its legislative power to other entities not vested with legislative authority under the Constitution. *Id.*

93. Transcript of Oral Argument at 189, *Learning Res., Inc. v. Trump*, No. 24-1287 (U.S. argued Nov. 5, 2025), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2025/24-1287\\_b07d.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2025/24-1287_b07d.pdf) [<https://perma.cc/DVU3-KHHE>].

94. *Id.* at 113.

95. Brief for Petitioners at 48, *Learning Res., Inc. v. Trump*, No. 24-1287 (U.S. argued Nov. 5, 2025).

defined U.S. economic and security interests. This Section also responds to common criticisms of free trade.

*A. Trade Restrictions Are Sometimes Prudent*

Even the most committed free traders acknowledge that trade restrictions are sometimes prudent, if not necessary, to advance broader public interests. Eighteenth century economist and moral philosopher Adam Smith was an early and staunch advocate of free trade who also recognized that national security interests must prevail over mere economic ones.<sup>96</sup> The legitimacy of national security claims, of course, must be well-founded and not merely pretext for otherwise protectionist measures.

Exports of militarily-sensitive goods are routinely and appropriately restricted under U.S. law.<sup>97</sup> For example, these laws have been used to restrict exports to China of certain leading-edge technologies.<sup>98</sup> Imports of defense-related goods have also been restricted to assure that U.S. capacity to produce these goods is not lost due to an over-reliance on imports.<sup>99</sup> The priority of security over merely economic interests is now well-established. All international trade agreements involving the United States recognize the right to subordinate any obligations that may conflict with U.S. national security interests.<sup>100</sup>

Beyond national security, other public interests like protecting the environment or assuring domestic supplies of critical goods may justify trade restrictions.<sup>101</sup> The WTO agreements preserve the right of the United States to restrict trade under these circumstances.<sup>102</sup> Trade restrictions have been justified to assure domestic supplies of certain foods, manufactured goods, or medicines.<sup>103</sup> So long as these justifications are merit-based and not thinly-veiled measures to shield domestic producers from competition, trade restrictions are compatible with policies generally favoring free trade.

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96. See 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. IV, at 30 (Edwin Cannan ed. 1904, Univ. of Chi. Press 1976) (1776) (“As defence [sic], however, is of much more importance than opulence . . .”).

97. See Arms Export Control Act of 1976, Pub. L. 94–329, § 202, 90 Stat. 729, 734–35 (1976) (codified at 22 U.S.C. § 2778).

98. See Press Release, Bureau of Industry & Security, Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People’s Republic of China (PRC) (Oct. 7, 2022) (on file with the Maine Law Review).

99. See Proclamation No. 10895, 90 Fed. Reg. 9807, 9809–10 (Feb. 18, 2025).

100. See Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1097, 1104, 1134 (2020).

101. See, e.g., GATT, *supra* note 37, art. XX(g) (regarding exhaustible natural resources); Agreement Between the United States of America, the United Mexican States, and Canada, art. 32.1.3, Nov. 30, 2018 (regarding environmental measures).

102. See Timothy Meyer, *The Political Economy of WTO Exceptions*, 99 WASH. U. L. REV. 1299, 1302–03 (2022).

103. *Id.* at 1303.

*B. Arguments Against Free Trade Are Often Based on Faulty Premises*

Of course, any particular set of trade policies will favor some stakeholders more than others. The task of political leaders is to discern what policies *on balance* will best serve public interests. While the overwhelming collective weight of actions taken by Americans suggests they endorse free trade, political support for these policies has varied over time.<sup>104</sup> A host of arguments against free trade have long endured and continue to enjoy intuitive appeal.<sup>105</sup> For the most part, concerns about free trade stem from concerns for the welfare of workers and communities most adversely affected by imports.<sup>106</sup> This Section addresses common arguments against free trade that, despite their intuitive appeal, do not stand up to scrutiny.

*1. Exports should be promoted, but imports should be discouraged*

In political debates, exports are celebrated while imports are often denigrated. Yet, it is not possible for a country to solely export goods. Exports and imports are inextricably linked as they are two sides of the same coin. There cannot be exports without imports. As David Hume put it succinctly more than two hundred years ago, if “[t]hey could send us no commodities: [t]hey could take none from us.”<sup>107</sup> Many U.S. jobs rely on exports.<sup>108</sup> The loss of these jobs must be taken into account by policymakers considering restricting imports. All else being equal, declines in imported goods will lead to commensurate declines in exports.<sup>109</sup>

*2. International trade is not zero-sum*

Free trade is often mischaracterized as a zero-sum proposition, suggesting that one country’s gains come at the expense of another’s loss.<sup>110</sup> In fact, free trade is positive sum and generates mutual gains for all parties involved.<sup>111</sup> This is best revealed by the fact that the global economy has grown enormously over the past two centuries, enabling the global economic pie *and* those of individual countries to

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104. See IRWIN, *supra* note 18, at 9.

105. *Id.*

106. *Id.*

107. DAVID HUME, *Of the Jealousy of Trade*, in *ESSAYS MORAL, POLITICAL, & LITERARY* 327, 331 (Eugene F. Miller ed., Liberty Fund 1987) (1777).

108. *Jobs Supported by Exports – National*, INT’L TRADE ADMIN., <https://www.trade.gov/jobs-supported-exports-home-page> [<https://perma.cc/6TD8-SZ2G>] (last visited Dec. 28, 2025).

109. See, e.g., Richard K. Anderson & Akira Takayama, *Tariffs, Balance of Payments, and the Lerner Symmetry Relation in a Monetary Economy*, 139 J. INSTITUTIONAL & THEORETICAL ECON. 1, 1 (1983).

110. See Scott Lincicome, *He Just Likes Tariffs*, CATO INST. (Apr. 9, 2025), <https://www.cato.org/commentary/he-just-likes-tariffs> [<https://perma.cc/2U7L-Y9NP>].

111. Scott A. Wolla & Anna Esenther, *Does International Trade Create Winners and Losers*, FED. RSRV. BANK OF ST. LOUIS (Nov. 1, 2017), <https://www.stlouisfed.org/publications/page-one-economics/2017/11/01/does-international-trade-create-winners-and-losers> [<https://perma.cc/XD7U-BTXY>] (“Economists find that—after taking both the winners and losers into account—trade has net benefits for society.”).

grow simultaneously.<sup>112</sup> This could not happen if global economic growth were a zero-sum phenomenon.

It is important to keep in mind that, although governments maintain trade *statistics*, trade occurs between people and firms rather than countries per se. People trade because they see value in doing so. Such voluntary exchanges reflect the views of the parties that the exchange is mutually beneficial. Since trade statistics simply aggregate the sum of these positive-sum voluntary exchanges, there is no basis for characterizing the aggregate as anything but positive-sum.

Global supply chains are elaborate webs of cooperation and competition. Only hubris could allow governments to believe that hundreds of millions of exchanges that citizens view as mutually beneficial (i.e., positive-sum) in fact are not. Only hubris could explain the view that government occupies a unique perch high above the global supply chain to be able to understand it and steer it to outcomes that would be more optimal than those emerging from countless decisions by countless people engaged in these day-to-day transactions. The global supply chain is beyond top-down comprehension or control. The positive-sum nature of trade emerges from millions of transactions undertaken daily by millions of people. The net result is one of human choice, not human design.

### 3. Trade deficits do not reflect unfair trade policies

To understand trade dynamics, it is essential to differentiate between two types of deficits: *bilateral* trade deficits (between two specific countries) and *overall* trade deficits (across all trading partners). A bilateral deficit arises when consumers in Country B purchase more goods from Country A than vice versa at a given time, reflecting temporary preferences rather than trade policies.<sup>113</sup> While persistent overall trade deficits may signal broader economic policy issues, they do not inherently indicate unfair trade practices.<sup>114</sup>

National trade balances, like household budgets, must align over time. Households can temporarily spend beyond their means, but eventually, income must cover expenses. Similarly, nations cannot indefinitely import more than they export.

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112. See Jeff Desjardins, *Over 2000 years of economic history, in one chart*, WORLD ECON. F. (Sep. 15, 2017), <https://www.weforum.org/stories/2017/09/over-2000-years-of-economic-history-in-one-chart/> [https://perma.cc/83N4-T34S]. See generally RONDO E. CAMERON, *A CONCISE ECONOMIC HISTORY OF THE WORLD: FROM PALEOLITHIC TIMES TO THE PRESENT 165–90* (2d ed. 1993) (discussing industrialization).

113. Laura Taylor, *5 Things to Know About the U.S. Trade Deficit*, FED. RSRV. BANK OF ST. LOUIS (Sep. 25, 2019), <https://www.stlouisfed.org/open-vault/2019/september/five-things-to-know-united-stat-es-trade-deficit> [https://perma.cc/HX3L-D3KZ].

114. Enrique Martínez García & Kei-Mu Yi, *Are Trade Deficits Good or Bad, and Can Tariffs Reduce Them?*, FED. RSRV. BANK OF DALLAS (Sep. 4, 2025), <https://www.dallasfed.org/research/economics/2025/0904> [https://perma.cc/DR95-ADN2].

Data show that imports and exports, as a share of a country's economy, typically converge over the long term.<sup>115</sup>

For twenty-five years, the U.S. has run consistent goods trade deficits, offset by surpluses in services trade and foreign investment inflows.<sup>116</sup> This equilibrium is dictated by the balance of payments—an accounting principle ensuring that cross-border flows of goods, services, and capital balance out. The U.S. goods deficit stems not from foreign import barriers but from attractiveness of the U.S. economy to global investors.<sup>117</sup>

The U.S. attracts significant foreign investment due to the U.S. dollar's role as the global reserve currency (required for many international transactions) and its reliance on foreign lenders to finance federal budget deficits.<sup>118</sup> As long as the U.S. borrows heavily to fund public debt, its goods deficit will persist.<sup>119</sup>

Tariffs may curb imports from specific countries but fail to reduce the overall trade deficit. Reducing imports from one nation often shifts sourcing to others. Moreover, tariffs suppress exports by limiting foreign access to dollars needed to buy U.S. goods. As economist Paul Krugman notes, “tariffs eventually reduce exports as well as imports.”<sup>120</sup>

In summary, trade deficits are neither measures of economic health nor indicators of corporate competitiveness. U.S. deficits show no correlation with unemployment or GDP growth.<sup>121</sup> They reflect structural factors—like currency demand, investment flows, and savings rates—rather than “winning” or “losing” in global trade.<sup>122</sup>

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115. See *List of Countries by Trade-to-GDP Ratio*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_trade-to-GDP\\_ratio](https://en.wikipedia.org/wiki/List_of_countries_by_trade-to-GDP_ratio) [<https://perma.cc/2NYU-ZULM>] (last visited Dec. 28, 2025); see also *Imports of Goods and Services (% of GDP)*, WORLD BANK GRP., [https://data.worldbank.org/indicator/NE.IMP.GNFS.ZS?name\\_desc=false](https://data.worldbank.org/indicator/NE.IMP.GNFS.ZS?name_desc=false) [<https://perma.cc/U58N-VDBU>] (last visited Dec. 28, 2025) (indicating that import and export levels are comparable for most countries); *Trade as a Share of GDP*, OUR WORLD IN DATA, <https://ourworldindata.org/grapher/trade-as-share-of-gdp> [<https://perma.cc/A8VF-XM45>] (last visited Dec. 28, 2025) (indicating that import and export levels are comparable for most countries).

116. See Scott Lincicome, *Things Everyone Should Know about Trade Deficits*, CATO INST. (Mar. 12, 2025), <https://www.cato.org/commentary/things-everyone-should-know-about-trade-deficits> (on file with the Maine Law Review).

117. *Id.*

118. *Id.*

119. *Cf. id.* (demonstrating that inbound capital flows are financed by U.S. dollars generated through imports).

120. Paul Krugman, *Honey, Who Shrank the World?*, N.Y. TIMES (Aug. 20, 2021), <https://www.nytimes.com/2021/08/20/opinion/us-globalization-tariffs.html> (on file with the Maine Law Review); *cf.* Paul Krugman, *The Dollar and the Trade Deficit*, SUBSTACK (Jan. 2, 2025), <https://paulkrugman.substack.com/p/the-dollar-and-the-trade-deficit> [<https://perma.cc/9YV5-HWMD>] (Discussing how import tariffs lead to higher dollar valuations which, in turn, makes U.S. exports more expensive, reducing foreign demand).

121. See Lincicome, *supra* note 116.

122. See *id.*

4. *Technology, rather than imports, is primarily responsible for declining manufacturing jobs*

America today remains a leading global manufacturer with near historic levels of output.<sup>123</sup> Because fewer workers today can produce comparable amounts of goods,<sup>124</sup> however, the number of U.S. manufacturing *jobs* declined by about one-third over the past forty years.<sup>125</sup> The trend of fewer workers producing more goods is a global phenomenon<sup>126</sup> and mirrors a similar trend that occurred in U.S. agriculture.<sup>127</sup> Jobs can decline even when output rises. For example, machinery, fertilizers, and other enhancements have enabled U.S. agriculture to become immensely productive with fewer workers.<sup>128</sup> Less than two percent of the U.S. workforce in 2005 was engaged in farming, yet output far exceeds the amount of food American farms used to produce.<sup>129</sup>

Since the 1980s, manufacturing jobs as a share of total U.S. private-sector employment have been declining.<sup>130</sup> Rising exports from China somewhat accelerated this trend.<sup>131</sup> Nonetheless, labor-saving technologies—not imports—were responsible for the vast majority of losses of U.S. manufacturing jobs.<sup>132</sup> According to one study, the number of manufacturing jobs lost over a *decade* due to

123. See *Manufacturing Sector: Real Sectoral Output for All Workers*, FED. RSRV. BANK OF ST. LOUIS (Sep. 4, 2025, at 07:37 CT), <https://fred.stlouisfed.org/series/OUTMS/> [<https://perma.cc/7KYP-ETGT>].

124. See *Manufacturing Sector: Labor Productivity*, FED. RSRV. BANK OF ST. LOUIS (Dec. 19, 2025, at 16:27 CT), <https://fred.stlouisfed.org/series/MFGOPH> [<https://perma.cc/77K4-C44A>].

125. See *All Employees, Manufacturing*, FED. RSRV. BANK OF ST. LOUIS (Dec. 16, 2025, at 08:20 CT), <https://fred.stlouisfed.org/series/manemp> [<https://perma.cc/5KC5-2FNE>].

126. See Esteban Ortiz-Ospina, *Manufacturing Accounts for a Relatively Small and Declining Share of Total Employment in Rich Countries*, OUR WORLD IN DATA (Nov. 5, 2024), <https://ourworldindata.org/data-insights/manufacturing-accounts-for-a-relatively-small-and-declining-share-of-total-employment-in-rich-countries> [<https://perma.cc/CP7J-NBJR>] (“Across all countries, manufacturing employment has declined.”).

127. Andrew Dumont, *Changes in the U.S. Economy and Rural-Urban Employment Disparities*, FED. RSRV. (Jan. 19, 2024), <https://www.federalreserve.gov/econres/notes/feds-notes/changes-in-the-us-economy-and-rural-urban-employment-disparities-20240119.html> [<https://perma.cc/7AZD-K5YK>].

128. Eric Njuki et al., *U.S. Agriculture Production Grew Steadily from 1948 to 2021 as Productivity Increased*, AMBER WAVES (Sep. 10, 2024), <https://www.ers.usda.gov/amber-waves/2024/september/u-s-agriculture-production-grew-steadily-from-1948-to-2021-as-productivity-increased> [<https://perma.cc/4H3X-UNVT>].

129. See CAROLYN DIMITRI, ANNE EFFLAND & NEILSON CONKLIN, U.S. DEP’T OF AGRIC., *THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY* 6 (2005).

130. Katelynn Harris, *Forty Years of Falling Manufacturing Employment*, U.S. BUREAU OF LAB. STAT. (Nov. 20, 2020), <https://www.bls.gov/opub/btn/volume-9/forty-years-of-falling-manufacturing-employment.htm> [<https://perma.cc/T2UB-G8T9>].

131. David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205, 208 (2016) (explaining the impact of imported goods from China on U.S. manufacturing jobs).

132. Scott Lincicome & Arjun Anand, *The “China Shock” Demystified: Its Origins, Effects, and Lessons for Today*, CATO INST. (Dec. 12, 2023), <https://www.cato.org/publications/china-shock#what-do-china-shock-papers-say-what-dont-they-say> [<https://perma.cc/2XM6-XQPB>] (explaining that “[t]he China Shock’s 1 million lost manufacturing jobs, meanwhile, accounted for less than 20 percent of the total manufacturing job losses”).

Chinese imports was comparable to the number of jobs lost (and created) every month in America.<sup>133</sup> Also, contrary to popular belief, U.S. manufacturing jobs were not dramatically impacted by lowering trade barriers over the last thirty years between the U.S., Canada, and Mexico. The impact of NAFTA on U.S. manufacturing jobs was not significant relative to labor-saving technology and was far less significant than Chinese imports.<sup>134</sup>

Few politicians criticize labor-saving technologies, such as industrial robots or automated conveyors, even though they accounts for the lion's share of job losses in the manufacturing sector.<sup>135</sup> Perhaps because it taps into us-versus-them sentiments, politicians have found international trade to be a more politically effective target to decry manufacturing job losses. No doubt, more should be done to help workers and communities facing major job losses, and such help should be extended without regard to whether jobs are lost due to technology, trade, or shifts in the consumer demand.<sup>136</sup> In any event, restricting trade is a notoriously ineffective way to help people or communities adjust to long-running declines in manufacturing jobs.<sup>137</sup>

While particular U.S. jobs can in theory be maintained or created by blocking imports, the question is whether, *on balance*, the costs of doing so outweigh the benefits.<sup>138</sup> Import restrictions raise the prices of the goods at issue. This leaves households with fewer dollars to spend on other goods and services that also support U.S. jobs.<sup>139</sup> Import restrictions also lead to an offsetting decline in exports, which represent other U.S. jobs.<sup>140</sup> Multiple economic studies of recent trade restrictions intended to create U.S. jobs have shown the costs to consumers massively exceed the benefits relative to the number of jobs created. For instance, the cost to consumers for each U.S. job saved by President Obama's restrictions on imports of

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133. Scott Sumner, *Automation Destroyed 20 Million Manufacturing Jobs*, ECONLOG (Dec. 7, 2016), [https://www.econlib.org/archives/2016/12/its\\_the\\_automat.html](https://www.econlib.org/archives/2016/12/its_the_automat.html) [<https://perma.cc/8LVZ-LT26>].

134. See Mary E. Burfisher, Sherman Robinson & Karen Thierfelder, *The Impact of NAFTA on the United States*, 15 J. ECON. PERSPS. 125, 128, 130, 138 (2001); see also Gary Clyde Hufbauer, Cathleen Cimino & Tyler Moran, *NAFTA at 20: Misleading Charges and Positive Achievements*, PETERSON INST. FOR INT'L ECON. 1, 3, 11 (May 2014), <https://www.piie.com/sites/default/files/publications/pb/pb14-13.pdf> [<https://perma.cc/3H86-ELWT>] (explaining that NAFTA had little impact on U.S. employment, wages, or trade deficits).

135. Sumner, *supra* note 133.

136. See discussion *infra* Section III.

137. Sumner, *supra* note 133.

138. It should also be noted that those who support high U.S. tariffs to encourage U.S. companies to repatriate manufacturing plants rarely acknowledge that the number of jobs these new plants would create would be far less than the plants that left and won't necessarily come back to the same towns from which they departed. See generally Michael R. Strain, *The (Non) Effect of Tariffs on Manufacturing Employment*, CTR. FOR ECON. & POL'Y RSCH. (Aug. 26, 2025), <https://cepr.org/voxeu/columns/non-effect-tariffs-manufacturing-employment> [<https://perma.cc/C347-43QH>] (explaining the negative impact of tariffs on U.S. manufacturing); Gary Clyde Hufbauer & Ye Zhang, *How Many Manufacturing Jobs Will Trump's Tariffs Create? And at What Cost?*, AM. ENTER. INST. (Sep. 24, 2025), <https://www.aei.org/research-products/report/how-many-manufacturing-jobs-will-trumps-tariffs-create-and-at-what-cost/> (on file with the Maine Law Review) (explaining the negative impact of tariffs on U.S. manufacturing sector employment).

139. See Scott Lincicome, *Busting 'Manufacturing Jobs' Myths*, CATO INST. (Apr. 30, 2025) <https://www.cato.org/commentary/busting-manufacturing-jobs-myths> [<https://perma.cc/82X8-JVNB>].

140. See *id.*

tires from China exceeded \$900,000 per job.<sup>141</sup> Similarly, the cost to consumers for every U.S. job saved by President Trump's restrictions on washing machine imports amounted to \$650,000 per job.<sup>142</sup>

International trade changes the *mix* of U.S. jobs but does not change the overall employment levels.<sup>143</sup> Over the past fifty years, there is no evidence linking higher levels of U.S. imports to higher levels of U.S. unemployment.<sup>144</sup> Median U.S. worker compensation has risen even as imports have grown.<sup>145</sup> Finally, it is worth noting that goods, as a share of the economy, are declining because households are spending more on services rather than on goods.<sup>146</sup>

### C. Policy Arguments Favoring Free Trade

Having addressed some of the common arguments against free trade, this Section offers an affirmative case that, on balance, free trade best serves American interests.

#### I. Free trade promotes fairness

As Abraham Lincoln observed in his Gettysburg Address, ours is a government “for the People.”<sup>147</sup> Government measures should be judged not whether they are good for the government or the nation in some abstract sense, but whether they are good for *the People*.<sup>148</sup> The impact of policies on people (now and in the future) is the most appropriate way of assessing public policy choices.

In a free society, the economy reflects countless voluntary exchanges taken by millions of people every day. The government's role in regulating these exchanges, absent market failures (such as those involving fraud or negative externalities like pollution), has been a topic of fierce debate since our nation's inception. Does the

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141. Gary Clyde Hufbauer & Sean Lowry, *US Tire Tariffs: Saving Few Jobs at High Cost*, PETERSON INST. FOR INT'L ECON. (Apr. 2012), <https://www.piie.com/sites/default/files/documents/pb12-9.pdf> [<https://perma.cc/XA3Q-7K3P>].

142. Gary Clyde Hufbauer & Euijin Jung, *Steel Profits Gain, but Steel Users Pay, Under Trump's Protectionism*, PETERSON INST. FOR INT'L ECON. (Dec. 20, 2018, at 05:45 ET), <https://www.piie.com/blogs/trade-and-investment-policy-watch/steel-profits-gain-steel-users-pay-under-trumps> (on file with the Maine Law Review).

143. See Kevin L. Kliesen & John A. Tatom, *U.S. Manufacturing and the Importance of International Trade: It's Not What You Think*, 95 FED. RES. BANK ST. LOUIS REV. 27, 46 (2013).

144. See *id.*

145. See Noah Smith, *Globalization Did Not Hollow Out the American Middle Class*, NOAH PINION (May 8, 2025), <https://www.noahpinion.blog/p/globalization-did-not-hollow-out> [<https://perma.cc/XF28-9LDZ>]; see also Jeremy Horpedahl, *The Middle/Working Class Has Not Been “Hollowed Out,”* ECONOMIST WRITING EVERY DAY (May 7, 2025), <https://economistwritingeveryday.com/2025/05/07/the-middle-working-class-has-not-been-hollowed-out/> [<https://perma.cc/3R6F-FK5Y>].

146. Mitchell Barnes, Lauren Bauer & Wendy Edelberg, *Nine Facts About the Service Sector in the United States*, THE HAMILTON PROJECT (Sep. 2022), [https://www.brookings.edu/wp-content/uploads/2022/09/20220928\\_THP\\_ServiceSectorFacts.pdf](https://www.brookings.edu/wp-content/uploads/2022/09/20220928_THP_ServiceSectorFacts.pdf) [<https://perma.cc/E2N6-DXAG>].

147. President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), in *The Gettysburg Address and Other Speeches* 82 (Penguin Books 1995).

148. *Id.*

government know better than individuals what consumer choices are best? Must the government demonstrate a credible and compelling public interest before overriding the consumer preferences of Americans? Is the government operating with legitimacy when it restricts consumer choice in a manner that merely picks winners and losers by favoring the private interests of one group of Americans at the expense of other Americans?

Imagine a food court where vendors compete for customers. Inevitably, such competition would yield winners and losers among the vendors. When would the government have legitimacy to re-shuffle the outcomes of this food-court competition?

If the outcomes of food-court competition emerge from consumers making merit-based decisions reflecting their preferences based on quality and costs, some producers will do better than others. This does not seem inherently unfair. On the contrary, the fairness of market outcomes re-arranged by politicians who substitute *their* judgments for those in the food-court is highly questionable. What criteria do politicians use to re-shuffle market outcomes? Are the winners and losers determined through a political process more just than the ones emerging from a free and open marketplace?

Government is expected to be fair and neutral, and laws should not favor one group of citizens over another. Crony capitalism, by definition, occurs when winners and losers are determined through political influence rather than through a competitive, merit-based market.<sup>149</sup> Trade flows are fair if determined by individuals making free choices. They are not fair if political favoritism overrides choices that individuals would otherwise make.

The regressive nature of tariffs is another aspect of fairness that is often overlooked. Because lower-income households tend to spend a higher share of their income than higher-income households, which are able to save a higher share of their income, the burden of tariffs falls more heavily on lower-income households.<sup>150</sup>

## 2. *Free trade promotes economic growth and innovation*

Trade has always been recognized as vital to America's economic well-being. One of the pre-Revolutionary War grievances against England was "[f]or cutting off our Trade with all parts of the world."<sup>151</sup>

Productivity is the primary driver of economic growth and rising standards of living.<sup>152</sup> In a competitive marketplace, productivity is raised by allocating limited resources more efficiently and effectively.<sup>153</sup> While market participants routinely err in their judgments, there is no evidence to suggest that government officials over time would err less in allocating economic resources. Trade restrictions, like many

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149. See Paul H. Rubin, *Crony Capitalism*, 23 SUP. CT. ECON. REV. 105, 105–06 (2016).

150. Ed Gresser, *Trade Policy, Equity, and the Working Poor*, PROGRESSIVE POL'Y INST. 7 (Apr. 2022), [https://www.progressivepolicy.org/wp-content/uploads/2024/09/Trade-Policy-Equity-and-the-Working-Poor-ITC-Report\\_FINAL.pdf](https://www.progressivepolicy.org/wp-content/uploads/2024/09/Trade-Policy-Equity-and-the-Working-Poor-ITC-Report_FINAL.pdf) [<https://perma.cc/B7M8-VZCD>].

151. THE DECLARATION OF INDEPENDENCE para. 18 (U.S. 1776).

152. See BRIAN W. CASHILL, CONG. RSCH. SERV., RL34073, PRODUCTIVITY AND NATIONAL STANDARDS OF LIVING 1 (2007).

153. See *id.* at 3.

other government interventions in the market, distort allocation decisions that individuals would otherwise make.<sup>154</sup> These distortions reduce productivity and economic growth.<sup>155</sup>

Open markets and productivity are directly linked. Countries that have more open trade practices consistently enjoy higher rates of economic growth.<sup>156</sup> A recent prominent example is China, which saw its economy grow in direct relation to the extent to which it opened its economy to the world.<sup>157</sup> In fact, many of China's current economic challenges are directly attributable to more recent government actions to override normal market processes. For example, the current overinvestment in real estate that has destabilized China's banking system stems from government policies that pushed in this direction.<sup>158</sup>

Finally, free trade policies allow markets to grow beyond their domestic limits. This promotes more innovation since rates of innovation are directly related to market size.<sup>159</sup>

### 3. Free trade aligns with broader notions of freedom

As John F. Kennedy said, the “philosophy of the free market—the wider economic choice for men and nations—is as old as freedom itself.”<sup>160</sup> The government may restrict individual freedom when clearly defined and important public interests are at stake. For instance, economic interests are routinely subordinated to national security interests.<sup>161</sup> But the burden of proof should be high. Freedom to decide whether to buy goods made across the street or across the border

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154. See Rubin, *supra* note 149, at 108.

155. See generally Lorenzo Caliendo, Esteban Rossi-Hansberg, *The Impact of Trade Organization and Productivity*, Q. J. OF ECON. 1393 (2012) (discussing how increased trade liberalization leads to increased firm productivity, while trade restrictions reduce productivity).

156. See *Trade: Overview*, WORLD BANK GRP., <https://www.worldbank.org/en/topic/trade/overview> [<https://perma.cc/SZ4N-XH5Y>] (last visited Dec. 28, 2025).

157. *The U.S.-China Trade Relationship*, COUNCIL ON FOREIGN RELS. (Oct. 31, 2025, at 10:41 ET), <https://www.cfr.org/background/contentious-us-china-trade-relationship> [<https://perma.cc/372B-V94B>] (“For China, the gains from trade with the United States and the rest of the world have been tremendous. Since 2001, China’s economy has grown more than five-fold, adjusted for inflation, and it is now the world’s second largest, behind only the United States. (By some measures, it is the largest.) Hundreds of millions of people have escaped extreme poverty as a result of this growth.”).

158. See Kenneth Rogoff & Yuanchen Yang, *China’s Real Estate Challenge*, FIN. & DEV. MAG., Dec. 2024, at 31 (asserting that “since 2010 . . . China’s much-lauded stimulus plan to counter the global financial crisis turbocharged the construction sector”).

159. See Paul M. Romer, *Endogenous Technological Change 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 3210, 1989) (concluding that “increases in the size of the market have effects . . . on the rate of growth . . . [and] [l]arger markets induce more research and faster growth”).

160. John F. Kennedy, President of the U.S., Special Message to the Congress on Foreign Trade Policy (Jan. 25, 1962).

161. For example, Section 232 of the Trade Expansion Act of 1962 permits the restriction of imports as necessary to preserve America’s defense-related industrial capacity. See Trade Expansion Act of 1962, 19 U.S.C. § 1862(a). International trade agreements also recognize the preeminence of national security interests over mere economic ones. See Jacob Gladysz, *The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction*, 52 GEO. J. INT’L L. 835, 842–48 (2021).

should be understood as part of a broader suite of freedoms enjoyed by Americans. This freedom should be restricted only when credible public interests are at issue.<sup>162</sup>

While economic freedoms often seem secondary to other individual freedoms, economic liberties were core to the Magna Carta, providing that “[a]ll merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs.”<sup>163</sup>

#### 4. *Free trade promotes human cooperation*

Beyond other human traits, our ability to cooperate in pursuit of common projects best explains the story of human progress. While conflict may dominate the news, our propensity to cooperate in complex ways distinguishes us most dramatically from other animals.<sup>164</sup>

Modern society relies heavily on immense levels of coordination and cooperation among countless strangers. The power of what economists call “impersonal exchange”<sup>165</sup> allows for transactions such as homebuyers borrowing money from complete strangers and buyers and sellers of manufactured goods who live thousands of miles apart.<sup>166</sup> The modern economy is based on a cooperative ballet among people who offer specialized labor and then trade their own output for the output of others.<sup>167</sup>

Governments should seek to leverage human cooperation rather than hinder it. Trade among people across national borders is an important source of cooperation.

162. As William Wilson, former chairman of the House Ways & Means Committee, reminds us, trade policy is never just a fight over “this or that tariff schedule; it is a battle for human freedom.” IRWIN, *supra* note 18, at 291.

163. Magna Carta Art. 30.

164. See, e.g., EDWARD O. WILSON, *THE SOCIAL CONQUEST OF EARTH* 224, 247 (2012).

165. Avner Greif, *History Lessons: The Birth of Impersonal Exchange: The Community Responsibility System and Impartial Justice*, 20 J. ECON. PERSPS. 221, 222 (2006).

166. Cf. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 55 (Black Swan 2001) (“The lack of legal property thus explains why citizens in developing and former communist nations cannot make profitable contracts with strangers, cannot get credit, insurance or utilities services: they have no property to lose. Because they have no property to lose, they are taken seriously as contracting parties only by their immediate family and neighbours [sic]. People with nothing to lose are trapped in the grubby basement of the pre-capitalist world. Meanwhile, citizens of advanced nations can contract for practically anything that is reasonable, but the entry price is commitment. And commitment is better understood when backed up by a pledge of property, whether it be a mortgage, a lien or any other form of security that protects the other contracting party.”).

167. A great example of this is the humble pencil. When one thinks of a pencil, they likely don’t consider the item to be a feat of complex supply chains, sourcing, and manufacturing prowess. Nor do they likely see a pencil as a testament to the marvel of human collaboration. But, even something as simple and commonplace as a pencil is the product of intense coordination and cooperation. This point is brought to life in Leonard Read’s essay, “I, Pencil,” cataloguing the scores of people required to make a pencil. Despite how common and inexpensive pencils are, no one person alone has the know-how, resources or skills to mass produce pencils. Making pencils requires experts in sourcing wood, lead, rubber; experts in assembling these components; and still other experts in distributing goods. Leonard E. Read, I, PENCIL: MY FAMILY TREE (1958), available at <https://fee.org/ebooks/i-pencil/> [<https://perma.cc/4VVB-DTF3>].

Only for the clearest and most compelling reasons should the government override these cooperative patterns.

The allure of a country being completely self-sufficient is appealing but misleading. While the United States, unlike smaller countries, could be self-sufficient to a large degree, Americans would not be better off as a whole.<sup>168</sup> Imports and exports reflect millions of voluntary exchanges by millions of firms and households that they believe to be beneficial. It is nonsensical to think that restricting the opportunity for voluntary exchange could lead to better outcomes for most.

### 5. *Free trade aligns with state capacity*

As a general matter, governments should not undertake tasks for which they lack competence to perform reasonably well. In the context of regulating international trade, we might ask: can the government do a better job of allocating resources and matching buyers and sellers than the private sector and free market? Can the government understand and account for the unintended consequences of intervening in the market? Can the government even aspire to undertake such interventions without drifting towards corruption?

A “knowledge problem” arises from the difficulty central authorities experience when attempting to efficiently allocate resources. This problem arises due to the dispersed and often tacit nature of knowledge across individuals in society.<sup>169</sup> Since no single planner can access or process all this localized information, central planning inevitably leads to inefficiencies. Friedrich Hayek argued that market prices serve as a decentralized communication system, allowing individuals to coordinate their actions based on local knowledge.<sup>170</sup> It is highly unlikely that the government, through tariffs and other tools, has the capacity to design a global supply chain superior to the one that emerged over many years through countless decisions by local buyers and sellers.

Beyond the knowledge problem, a major challenge to state capacity is its inability to resist a drift towards favoritism and political corruption. When governments impose their will on international trade flows, it is almost always on behalf of producers who enjoy political favor.<sup>171</sup> The knowledge problem calls into question the state’s ability to allocate resources more efficiently than market forces. The drift towards political corruption calls into question the state’s capacity to allocate these resources more justly than market forces.

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168. See Martin Reguli, *The Myth of Autarky and Self-Sufficiency from Mercantilism to Present Day: Why Do We Still Fall for the Idea When Dependent on Export for Survival?*, 15 *4*LIBERTY.EU REV. 4, 15–16 (2021).

169. See F.A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519, 519–20 (Sep. 1945).

170. See *id.* at 526–27.

171. See, e.g., Veljko Fotak et al., *The Political Economy of Tariff Exemption Grants*, 60 *J. FIN. & QUANTITATIVE ANALYSIS* 2678, 2682, 2701 (2025) (discussing how firm-level political connections in the form of lobbyists and campaign contributions increase the likelihood of firms receiving trade-tariff exemptions imposed on Chinese imports since 2018).

6. *Free trade promotes “general Welfare” as envisioned in the U.S. Constitution*

Among the goals set forth in the Preamble of the United States Constitution is the goal of promoting the general welfare of the American people.<sup>172</sup> Expanding on this, the Equal Protection clause instructs against favoring one faction or group of people over a similarly situated faction or group of people.<sup>173</sup> Applying these constitutional principles to international trade policy invites the following questions: When does the government have legitimate authority to restrict citizens’ prerogatives to purchase (lawful) items based solely on where these items are produced? Absent national security or other *public* national interests, can the government restrict a citizen’s choice simply to serve the *private* interests of another citizen?

Clearly, the government possesses legitimate authority to impose *broad* tariffs to raise revenue to fund the government, as was done in the early days of the republic.<sup>174</sup> And the government has legitimate authority to restrict trade to advance clearly defined public interests, such as protecting national security.<sup>175</sup>

But the government does not have legitimate authority to favor the private interests of one faction over another. Yet, despite the veneer of public interest, many trade restrictions are actually thinly veiled measures to advance the *private* interests of some Americans over others.<sup>176</sup> This is an old insight, having been expressed more than two hundred years ago by Benjamin Franklin who said plainly that “[m]ost of the restraints put upon [trade] in different countries seem to have been the projects of the particulars for their private interest, under the pretense of public good.”<sup>177</sup>

The founders of our country embraced a limited, constitutional form of government. Citizens were free to conduct their lives as they saw fit, absent laws to the contrary that served an identifiable public purpose. Moreover, the Constitution was designed to promote liberty by *inter alia* limiting government authority. For instance, the Preamble’s “general Welfare” clause is best understood as a limiting principle, calling into question government measures that serve private, not public, interests.<sup>178</sup> In this vein, import restrictions that advance only the special interests of private companies or sectors, but not credibly defined public interests, should be regarded as illegitimate.

If the logic and moral authority of blocking imports to support domestic suppliers were applied to tourism, for example, would constraining Americans’

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172. See U.S. CONST. pmb1.

173. U.S. Const. amend. XIV, § 1.

174. See IRWIN, *supra* note 18, at 73–80 (discussing how among the first issues the U.S. Congress considered was a proposal by James Madison to levy duties on imports to raise revenue and fund the new government).

175. For example, Section 232 of the Trade Expansion Act of 1962 permits restricting imports to preserve defense-related industrial capacity. See Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862.

176. See, e.g., Wilson Sinclair & Amanda M. Countryman, *Not So Sweet: Economic Implications of Restricting U.S. Sugar Imports from Mexico*, 51 J. AGRIC. & APPLIED ECON. 368, 383 (2019) (concluding that restricting United States sugar imports “harms domestic consumers and benefits producers to a lesser extent . . . [and that] further trade restrictions are likely to have similar impacts”).

177. Irwin, *supra* note 18, at 69.

178. John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63, 72–87 (2001).

ability to take foreign vacations be legitimate?<sup>179</sup> After all, domestic suppliers are denied sales whether Americans buy imported goods or take foreign vacations. In both instances, U.S. consumers are choosing foreign goods over domestic ones. Yet people would be shocked at the notion of the government limiting the ability of Americans to take foreign vacations, absent some compelling public interest like national security. Only complacency prevents us from being equally shocked when the government restricts our ability to buy foreign goods, even when such restrictions only serve private interests which, as Benjamin Franklin noted, is very often the case.<sup>180</sup>

Consumer interests offer the best proxy for assessing the constitutionally proscribed general welfare. Virtually every household is a consumer, and many imports serve as inputs for downstream U.S. manufacturers.<sup>181</sup> While the federal government should certainly embrace policies conducive to a strong manufacturing sector, trade restrictions that favor a relative handful of U.S. producers at the expense of consumers run afoul of the Constitution's general welfare standard. Federal efforts to promote manufacturing should utilize tools that benefit this sector broadly rather than import restrictions that favor a subset of industry.

### III. RECOMMENDATIONS

In his book, *Global Capitalism*, economic historian Jeffrey A. Frieden offers the following counsel: “The history of the modern world economy illustrates two points. First, economies work best when they are open to the world. Second, open economies work best when their governments address the sources of dissatisfaction with global capitalism.”<sup>182</sup>

Heeding Frieden's advice, this Section offers recommendations to address real and perceived concerns with global trade. After identifying principles used to formulate these recommendations, this Section suggests changes to U.S. law and policy as they relate to both trade and non-trade matters.

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179. While such a limitation would be unconstitutional, the economic arguments for restricting Americans' ability to purchase foreign goods apply equally whether those goods are purchased by Americans at home or when travelling in a foreign country. *E.g.*, *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964) (holding that the Fifth Amendment's Due Process Clause protects a citizen's right to travel abroad free from indiscriminate government restrictions); *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (holding that the Secretary of State could not deny passports to citizens for declining to answer a survey on their beliefs and associations). *But see Zemel v. Rusk*, 381 U.S. 1, 14–16 (1965) (holding that the government may restrict citizens from traveling abroad to particular areas based on national security concerns).

180. *See IRWIN, supra* note 18, at 69 (“Most of the restraints put upon it in different countries seem to have been the projects of particulars for their private interest, under the pretense of public good.”).

181. *A Sourcing Risk Index for U.S. Manufacturing Industries, Accessible Data*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Sep. 8, 2023), <https://www.federalreserve.gov/econres/notes/feds-notes/a-sourcing-risk-index-for-u-s-manufacturing-industries-accessible-20230908.htm> [<https://perma.cc/EU5L-VM55>] (“Just under 30% of intermediate inputs in the manufacturing sector are imported . . .”).

182. JEFFREY A. FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* 476 (W.W. Norton & Company 2006).

### A. Guiding Principles

Sound trade law and policy should be guided by several key principles.

First, national security interests should prevail over merely economic ones so long as such claims are factually grounded and not simply thinly-veiled protectionist measures.

Second, consumer welfare should take precedence over producer welfare. As with antitrust law, the consumer interests provide a more reliable guide than producer interests for discerning public interests when formulating trade law and policy.<sup>183</sup> With some exceptions,<sup>184</sup> a focus on producer interests will lead to policies that favor special interests over general ones.

Third, while tariff levels among the United States and its major trading partners are generally balanced and reciprocal on a trade-weighted basis,<sup>185</sup> heightened attention to reciprocity is appropriate. When establishing rules among trading partners, the United States should seek more reciprocity. The reciprocal nature of a trade relationship should be determined on the basis of the overall market access to a full range of goods and services, rather than on the basis of a handful of tradeable goods and services.

Fourth, we need better policies and institutions to address problems related to the modern economy.

Some of the backlash against trade is due to a sense that the American workers and communities most adversely affected by foreign imports have either not been sufficiently supported by the federal government for job losses or have been “left behind” from the benefits of free trade.<sup>186</sup> To some extent, this criticism is well founded.<sup>187</sup> An important way to ensure that the benefits of free trade are broadly shared is to assist those who face the brunt of global competition. Better tools and institutions are needed to help workers and communities adjust to changes endemic to a fast-paced modern economy, regardless of whether those changes are due to trade, technology, or other causes.

A more reliable and effective safety net is essential to help workers navigate a churning labor force. Because unemployment imposes heavy economic and psychological tolls, portable health insurance, and other policies are crucial in a

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183. See Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 *FORDHAM L. REV.* 2471, 2476 (2013) (noting that “courts almost invariably apply a consumer welfare test” when assessing challenged practices in antitrust cases).

184. Laws enabling producers to respond to certain unfair trade practices, such as dumping, are an example of one such exception. See, e.g., 19 U.S.C. § 1673 (1994) (detailing duties imposed for antidumping); see also CHRISTOPHER A. CASEY, CONG. RSCH. SERV., R46296, *TRADE REMEDIES: ANTIDUMPING & COUNTERVAILING DUTIES 2–6* (2020) (explaining laws that address unfair trade practices).

185. See generally *Tariff Profiles*, WORLD TRADE ORG., [https://www.wto.org/english/res\\_e/statis\\_e/tariff\\_profiles\\_list\\_e.htm](https://www.wto.org/english/res_e/statis_e/tariff_profiles_list_e.htm) [<https://perma.cc/P57H-S3QU>] (last visited Dec. 28, 2025) (detailing comprehensive information on the tariffs imposed by over 170 nations, including average tariff rates, tariffs on specific product groups, and tariffs faced by nations in major export markets).

186. Edward Alden, *Failure to Adjust: How Americans Got Left Behind in the Global Economy*, COUNCIL ON FOREIGN RELS. (Nov. 2, 2016, at 12:28 ET), <https://www.cfr.org/blog/failure-adjust-how-americans-got-left-behind-global-economy> (on file with the Maine Law Review).

187. See generally Autor, Dorn & Hanson, *supra* note 131, at 217, 232 (discussing the impact of China's economic rise on American workers).

modern economy. Helping people navigate a fast-flowing river will be more successful than vainly trying to control the river through tariffs.

Helping American communities hardest hit by import competition is a worthy goal, but not one well served through tariffs. While open trade generally benefits United States workers, consumers, and exporters, the costs of import competition can fall disproportionately on particular towns or regions.<sup>188</sup> Since World War II, United States job growth has declined in some geographic regions and expanded in others.<sup>189</sup> For example, throughout the 1960s, mill towns in New England declined as job growth shifted to Southern states.<sup>190</sup> At the same time, however, Americans have become less inclined to relocate to areas with growing employment opportunities.<sup>191</sup> If United States policymakers are serious about bringing jobs to the people and maintaining the economic viability of every United States town, a broad suite of place-based subsidies—far beyond tariffs—will be needed to accomplish this immense goal.

### *B. Trade-Related Reforms*

This section proposes various reforms to global trade rules and United States trade laws and policies.

#### *1. World Trade Organization (WTO) Rules*

##### *a. Market access should be established bilaterally rather than through the WTO*

While trade-weighted tariff levels among the United States and its major trading partners are generally balanced, it is reasonable to expect more reciprocity from many of our trading partners.<sup>192</sup> The WTO is unlikely to deliver such reciprocity in the near future. The Doha trade negotiations failed and will not be revived in the foreseeable future.<sup>193</sup> Because WTO rules already lock in low United States tariffs, the United States has no leverage in WTO negotiations to pressure other countries to

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188. See *id.* at 232–34.

189. Akbar Sadeghi, Kevin Cooksey & Anthony Colavito, *Firm Migrations in the United States: Magnitude and Trends*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV. (June 2023), <https://www.bls.gov/opub/mlr/2023/article/firm-migrations-in-the-united-states-magnitude-and-trends.htm> [<https://perma.cc/QME3-DFC8>].

190. See David Koistinen, *The Causes of Deindustrialization: The Migration of the Cotton Textile Industry from New England to the South*, 3 ENTER. & SOC'Y 482, 485 (2002).

191. Yoni Appelbaum, *How Progressives Froze the American Dream*, THE ATLANTIC (Feb. 10, 2025, at 05:59 ET), <https://www.theatlantic.com/magazine/archive/2025/03/american-geographic-social-mobility/681439/> (on file with the Maine Law Review).

192. See *WTO Tariff & Trade Data*, WORLD TRADE ORG., <https://ttd.wto.org/en/profiles> [<https://perma.cc/N2BQ-99DC>] (last visited Dec. 28, 2025) (Stating, in 2024, average trade-weighted tariffs: United States: 2.2%; European Union: 3.0%; China: 3.0%; Japan: 2.7%).

193. See Antoine Martin & Bryan Mercurio, *Doha Dead and Buried in Nairobi: Lessons for the WTO*, 16 J. INT'L TRADE L. & POL'Y 49, 50 (2017) (discussing the collapse of trade negotiations known as the “Doha Round” during the Nairobi Ministerial Conference of 2015 and analyzing the implications on international trade in the future).

lower their tariffs.<sup>194</sup> While the United States should maintain strong support for the WTO as the cornerstone of the global trading system, tariff levels should be established bilaterally rather than globally.

Rather than relying on WTO negotiations to establish tariff levels, the access to the U.S. market could be leveraged to negotiate trade agreements that would have three core features. First, each country would commit to not discriminating against goods from the other country through tariffs or other measures. The terms of such a commitment could be so straightforward and transparent as to fit on a postcard. Second, attached to this simple agreement would be a transparent and balanced list of exceptions to the non-discrimination pledge. Ideally, there would be no or very few exceptions. Third, as with actions to combat subsidized imports, U.S. workers and companies would be able to bring U.S. legal actions when harmed by failures of other countries to comply with obligations to not discriminate against U.S. goods.

*b. The WTO's legalistic approach to trade enforcement should be replaced*

WTO trade agreements are enforceable through a government-to-government dispute settlement regime.<sup>195</sup> The WTO model has proven ineffective because trade agreements lack the granularity necessary for a legalistic enforcement approach. Unlike commercial contracts that are sufficiently detailed to enable enforcement under a legalistic approach, trade agreements cannot anticipate every contingency that might arise with regard to actions a WTO member might take that could be inconsistent with the letter, if not the spirit, of an agreement.<sup>196</sup>

This problem could be overcome if WTO enforcement panels were authorized to “fill gaps” in treaty text or to apply equitable principles to reach “just” results. For good reason, however, WTO members have been very reluctant to extend such broad discretion to enforcement panels.<sup>197</sup>

Since WTO texts lack the level of detail necessary for a legalistic model to work and WTO panels lack the authority necessary for an equitable model to work, a new model that could be described as an “enhanced diplomatic model” offers the best way forward for enforcing WTO obligations. Under this approach, the role of WTO panels would simply be to offer an advisory report on the alleged claims that the WTO members would then use to inform their bilateral efforts to resolve the dispute. Since WTO panels would not be tasked with issuing definitive determinations

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194. See Susan C. Schwab, *After Doha: Why the Negotiations Are Doomed and What We Should Do About It*, 90 FOREIGN AFFS. 104, 109, 111 (2011) (explaining that the Doha round failed, in part, due to outsized leverage for developing economies, overly rigid WTO formulas that have limited the maneuverability of both sides, and an expectation that the United States and other developed countries will take the lead in offering concessions).

195. See *Dispute Settlement*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) [<https://perma.cc/7TBZ-9TWX>] (last visited Dec. 28, 2025).

196. See Jawad Ullah & Shaista Gohar, *From Strengths to Shortcomings: A Comprehensive Analysis of the WTO Dispute Settlement System and the Need for Systemic Reforms*, 3 COMPETITIVE RSCH. J. ARCHIVE 30, 34 (2025).

197. Jennifer Hillman, *A Reset of the World Trade Organization's Appellate Body*, COUNCIL ON FOREIGN RELS. (Jan. 2020), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body> (on file with the Maine Law Review) (explaining U.S. objections to overstepping by WTO enforcement panels and Appellate Body).

regarding whether a WTO obligation was met, panels would have the freedom to opine more broadly on whether the measures at hand were consistent with the spirit and letter of the WTO obligation at issue. The parties to the dispute would then engage in direct diplomatic efforts to resolve the dispute. These diplomatic efforts would be enhanced by the advisory opinion, which would provide one side with the moral authority to press for a reasonable solution.

Respondents to the dispute would retain their sovereign right to continue to act in ways seemingly inconsistent with the letter or spirit of their obligations, but petitioners would of course retain their rights to retaliate against respondents if diplomatic efforts failed to resolve the matter. Under this enhanced diplomatic model, the WTO could still play a constructive refereeing role, but the false promise of WTO panels formally adjudicating and enforcing trade agreements would be abandoned.

## 2. U.S. Law

### *a. Enable private parties to enforce trade agreements*

Federal law permits U.S. stakeholders to bring actions against imports that are alleged to be unfairly subsidized or sold at prices below the cost of production.<sup>198</sup> Allowing private parties to bring these actions assures that these laws are vigorously enforced. Unfortunately, U.S. workers and companies are not allowed to bring private actions alleging noncompliance with U.S. trade agreements.<sup>199</sup> Such claims can only be brought by the U.S. government against other governments.<sup>200</sup>

U.S. law should be changed to allow private claims alleging harm due to noncompliance with U.S. trade agreements. Important elements of such claims, such as remedies that would be available, would need to be worked out by Congress. Government-to-government enforcement mechanisms, such as the WTO's formal dispute-settlement regime, are too slow, costly, and complicated.<sup>201</sup> Allowing U.S. stakeholders, including small businesses and workers, to bring claims directly would improve both the reality and appearance of effective trade enforcement.

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198. See *U.S. Antidumping & Countervailing Duties*, INT'L TRADE ADMIN., <https://www.trade.gov/us-antidumping-and-countervailing-duties-home-page> [<https://perma.cc/4LU7-VQ7E>] (last visited Dec. 29, 2025).

199. See, e.g., Trade Promotion Agreement, art. 21.20, U.S.-Colom., Nov. 22, 2006, Pub. L. No. 112-42 (entered into force May 15, 2012) ("No Party may provide for a right of action under its law against any other Party on the ground that the other Party has failed to conform with its obligations under this Agreement.").

200. See, e.g., *id.* art. 21.

201. Avtandil Sofromadze, *The World Trade Organization's Dispute Settlement System Is Not Equally Available to All Member States*, KING'S STUDENT L. REV. (Nov. 30, 2022), <https://blogs.kcl.ac.uk/kslr/2022/11/30/the-world-trade-organizations-dispute-settlement-system-is-not-equally-available-to-all-member-states/> [<https://perma.cc/6K37-JEWE>].

*b. Enable U.S. stakeholders to issue advisory opinions regarding noncompliance of foreign sovereigns with trade obligations made to the U.S.*

Congress should expand its use of Section 1332 of the Tariff Act of 1930<sup>202</sup> beyond general investigations by enabling the International Trade Commission (ITC) to issue trade enforcement advisory opinions regarding specific allegations of trade violations. The process would work like this: A qualified U.S. stakeholder would file a detailed petition with the Senate Finance Committee and the House Ways and Means Committee, requesting the ITC to determine whether a foreign country has violated a trade agreement in a specific way. The committees would review the petition and, upon agreement between the chairs and ranking members, send the petition to the ITC to determine whether there is a “reasonable basis” to conclude that such a violation occurred. The ITC would then review the claim, providing opportunity for comment by the foreign government and other stakeholders, and issue a determination within 120 days. All submitted materials and ITC determinations would be public, and the ITC’s determination would be advisory only. Thus, it would not obligate the administration to initiate an enforcement action against a trading partner.

Enabling the ITC to issue trade enforcement advisory opinions would serve several purposes. First, it would provide Congress with an enhanced, but still appropriately limited, role in trade enforcement. Lawmakers would still not be able to force the administration to undertake enforcement proceedings,<sup>203</sup> but they would be able to petition the ITC to investigate specific allegations of trade violations. Since the ITC is an independent agency that would conduct its proceedings in a transparent manner, any finding of a “reasonable basis” for asserting a trade violation would pressure the U.S. Trade Representative (USTR) to take action, even if it is politically damaging to the administration.<sup>204</sup> Furthermore, the ITC’s standing as an independent agency would enhance USTR’s authority to press U.S. trading partners over alleged trade violations.

Second, it would provide U.S. companies with an opportunity to obtain timely and independent assessments of whether there is a credible claim of a trade violation, so that they can make more informed decisions about how to respond to trade problems. Finally, even if the ITC found no reasonable basis to support a trade violation claim, such findings would help identify where trade agreements could be strengthened. For instance, if a foreign country denies U.S. companies access to its market in ways that are discriminatory but not in violation of an existing trade obligation, an ITC finding could help identify a hole in the current agreement to be addressed in future negotiations.

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202. See 19 U.S.C. § 1332.

203. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (holding that an agency’s decision not to take enforcement action should be immune from judicial review).

204. John Veroneau & Shara Aranoff, *How To Stop Our Partners’ Unfair Trade Practices*, POLITICO (Apr. 6, 2016, at 05:22 ET), <https://www.politico.com/agenda/story/2016/04/how-to-stop-our-partners-unfair-trade-practices-000084/> (on file with the Maine Law Review).

### 3. China

On balance, China's decision in the early 1980s to liberalize its domestic economy and participate in the global economy was good for both the U.S. and China, as demonstrated by the country's unprecedented decline in poverty.<sup>205</sup> While Chinese imports have greatly benefited U.S. consumers and downstream manufacturers, these imports also have placed immense competitive pressures on some U.S. manufacturers.<sup>206</sup> And although China has abided by many of its WTO obligations, it has failed in important ways with regard to protecting intellectual property and eschewing unfair subsidies.<sup>207</sup> These failings were not new to the global trading system, but the immense scale of China made these failings particularly consequential and unsustainable. Several steps are warranted to account for the unique challenges China poses for the U.S. and the global trading system.

Viewing China as a strategic competitor but not necessarily a military adversary, the following steps are advisable.

#### *a. Apply across-the-board tariffs on all Chinese goods*

Notwithstanding strong evidence that U.S. consumers tend to pay for most tariffs through higher prices,<sup>208</sup> it may be prudent to maintain an across-the-board tariff on all goods from China so long as they operate as a "nonmarket economy."<sup>209</sup> The rate would vary depending on the extent to which China is deemed to be operating as a non-market economy. An initial rate of ten percent or so seems reasonable. Such a tariff would encourage supply chains to develop outside of China and would also provide a revenue source to assist U.S. workers and communities most adversely impacted by imports from China.

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205. See THE WORLD BANK & DEV. RSCH. CTR. OF THE STATE COUNCIL, CHINA, *FOUR DECADES OF POVERTY REDUCTION IN CHINA: DRIVERS, INSIGHTS FOR THE WORLD, AND THE WAY AHEAD 1* (2022); see also Graham Boden, Comment, *China's Accession to the WTO: Economic Benefits*, 20 THE PARK PL. ECONOMIST 13, 15 (2012).

206. See Scott Lincicome, *Testing the "China Shock": Was Normalizing Trade with China a Mistake?*, CATO INST. (July 8, 2020), <https://www.cato.org/policy-analysis/testing-china-shock-was-normalizing-trade-china-mistake> [<https://perma.cc/RDY5-S2TW>].

207. See generally OFF. OF THE U.S. TRADE REPRESENTATIVE, *2024 REPORT TO CONG. ON CHINA'S WTO COMPLIANCE* (2024); James Bacchus et al., *Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented*, CATO INST. (Nov. 15, 2018), <https://www.cato.org/policy-analysis/disciplining-chinas-trade-practices-wto-how-wto-complaints-can-help-make-china-more> (on file with the Maine Law Review).

208. See Asher Rose, *Americans Have Been Paying Tariffs on Imports from China for Decades*, PETERSON INST. FOR INT'L ECON. (Sept. 11, 2024), <https://www.piie.com/research/piie-charts/2024/americans-have-been-paying-tariffs-imports-china-decades> (on file with the Maine Law Review).

209. KAREN M. SUTTER, CONG. RSCH. SERV., *IF10385, CHINA'S STATUS AS A NONMARKET ECONOMY (NME) 1* (2019).

*b. Vigorously enforce U.S. trade laws*

Various laws authorize the president to impose tariffs on imports that are “unfairly” traded in some fashion.<sup>210</sup> These laws should be vigorously enforced against Chinese goods.

More effective remedies are necessary to respond to the harm done to U.S. exporters in third-country markets. When China floods the world with over-produced goods, U.S. exporters are adversely affected because prices in those markets fall excessively in response to the glut of Chinese goods.<sup>211</sup> Countries without domestic competitors that would be harmed by Chinese over-production may welcome underpriced goods,<sup>212</sup> but U.S. producers should have means under U.S. law to remedy harms caused by China in third countries. Such remedies are available regarding harms suffered by domestic industries in third countries under U.S. antidumping laws.<sup>213</sup> Remedies for harm in third countries are permissible under the WTO Anti-Dumping Agreement.<sup>214</sup>

*c. Restrict leading-edge technologies*

It is also appropriate to restrict exports of scarce commodities or sensitive technologies credibly related to U.S. national security. The U.S. has imposed such restrictions through various statutory and regulatory measures.<sup>215</sup> When considering such measures, however, U.S. policymakers should consider the extent to which such restrictions may incentivize China to accelerate its own production of sensitive technologies. For instance, the CHIPS Act, designed to support domestic U.S. advanced semi-conductors, seems to have also caused China to accelerate

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210. See *U.S. Antidumping & Countervailing Duties*, INT’L TRADE ADMIN., <https://www.trade.gov/us-antidumping-and-countervailing-duties-home-page> [<https://perma.cc/4LU7-VQ7E>] (last visited Dec. 29, 2025) (describing U.S. antidumping and countervailing duties laws); see also CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF10018, *TRADE REMEDIES: ANTIDUMPING AND COUNTERVAILING DUTIES 1* (2024).

211. One example of this is the impact of expanding exports of steel products from China. See, e.g., Proclamation No. 10896, 90 Fed. Reg. 9817, 9820–26 (Feb. 18, 2025).

212. Ilaria Mazzocco, *Electric Vehicles, China, and the Industrial Strategies Reshaping Mobility in Emerging Economies*, CTR. FOR STRATEGIC & INT’L STUDS. (July 24, 2025), <https://www.csis.org/analysis/electric-vehicles-china-and-industrial-strategies-reshaping-mobility-emerging-economies> [<https://perma.cc/YC3S-8BYQ>].

213. See 19 U.S.C. § 1677k.

214. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201; see also Dukgeun Ahn, *Third Country Dumping: Origin, Evolution and Prospect*, 46 J. OF WORLD TRADE 635, 635 (2012) (noting that parties to the GATT have “permit[ted anti-dumping] actions for importing countries to protect their domestic industries”).

215. See Arms Export Control Act, 22 U.S.C. § 2778 (prohibiting the export, manufacture, or brokering of United States defense articles or articles using United States technology without a government export license); Export Control Reform Act, Pub. L. No. 115–232 (2018) (permitting the Department of Commerce to establish export controls based on national security and foreign policy objectives). For a general description of such laws, see *China Country Commercial Guide - U.S. Export Controls*, INT’L TRADE ADMIN. (Sept. 25, 2025), <https://www.trade.gov/country-commercial-guides/china-us-export-controls> [<https://perma.cc/86UZ-W3KT>].

development of its own semi-conductor industry.<sup>216</sup> If not carefully designed and committed to between administrations, such policies may ultimately undermine their intended strategic advantage by accelerating the very capabilities they aim to constrain.

*d. Vigorously respond to economic espionage*

Nations inevitably spy on each other to the extent their capabilities and interests permit.<sup>217</sup> Efforts to bar security-related espionage seem doomed to fail, though some restrictions apply.<sup>218</sup> Economic espionage, on the other hand, represents an extreme form of unfair trade and was the subject of a 2015 agreement between the U.S. and China aimed at ending China's economic espionage activities with regard to U.S. firms.<sup>219</sup> Punitive steps should be taken against Chinese stakeholders that engage in, or benefit from, economic espionage.

*e. Expand U.S. trade agreements with other Asian countries*

Efforts to counter unfair trade actions by China would be more effective if pursued through a coalition of like-minded countries. In this spirit, the United States has considered regional trade agreements with other Asian countries as a way of strengthening rules-based trade. President George W. Bush pursued a regional agreement with New Zealand, Japan, Vietnam, and others.<sup>220</sup> These efforts were continued by the Obama Administration, culminating in the successful negotiation of the Trans-Pacific Partnership Agreement (TPP).<sup>221</sup> Unfortunately, President Obama did not pursue Congressional approval of TPP before his term expired, and President Trump withdrew U.S. support for TPP.<sup>222</sup> Going forward, the U.S. should re-engage with Asian countries to establish trade rules that will pressure China to adopt them as well.

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216. See Sujai Shivakumar, Charles Wessner & Thomas Howell, *The Limits of Chip Export Controls in Meeting the China Challenge*, CTR. FOR STRATEGIC AND INT'L STUDS. (Apr. 14, 2025), <https://www.csis.org/analysis/limits-chip-export-controls-meeting-china-challenge> [<https://perma.cc/THP8-6GVA>].

217. See, e.g., TERRY CROWDY, *THE ENEMY WITHIN: A HISTORY OF SPIES, SPYMASTERS AND ESPIONAGE* 328 (2006).

218. The Vienna Convention on Diplomatic Relations effectively prohibits embassies from being used as a source or target of espionage. E.g., Nathaniel P. Ward, *Espionage and the Forfeiture of Diplomatic Immunity*, 11 INT'L L. 657, 666–67 (1977).

219. See Kim Zetter, *US and China Reach Historic Agreement on Economic Espionage*, WIRED (Sep. 25, 2015, at 15:16 ET), <https://www.wired.com/2015/09/us-china-reach-historic-agreement-economic-espionage> (on file with the Maine Law Review).

220. See OFF. OF THE U.S. TRADE REPRESENTATIVE, *THE PRESIDENT'S TRADE POLICY AGENDA* 10 (2008).

221. See *Statement by the President on the Signing of the Trans-Pacific Partnership*, THE WHITE HOUSE: PRES. BARACK OBAMA (Feb. 3, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/03/statement-president-signing-trans-pacific-partnership> [<https://perma.cc/F6BS-D9TG>].

222. See *Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, U.S. DEP'T OF STATE (Jan. 23, 2017), <https://2017-2021.state.gov/us-TPP-withdrawal/> [<https://perma.cc/R7XL-5H79>].

Beyond formal trade agreements like TPP, the U.S. should build goodwill with trading partners who share our interests in pressuring China to be a responsible stakeholder in the global trading system.

### *C. Non-Trade-Related Reforms*

While detailed treatment of U.S. domestic policies is beyond the scope of this paper, some consideration is necessary to fully address the crossroads now faced by U.S. trade policymakers. The appeal of protectionist trade policies partly reflects a sense that the interests of U.S. stakeholders adversely affected by global trade have not been adequately addressed. This paper argues that non-trade policies are key to addressing these concerns. If adopted, free trade policies likely would reflect a political commitment to economic freedom more broadly. This section recommends policies designed to promote and complement economic freedom.

#### *1. Sustain political support for modern (fast-churning) economy*

The modern economy entails a high rate of change. Dynamism that makes the modern economy so productive can also be disconcerting. A threshold question for policymakers is how to respond to the unsettling aspects of “creative destruction,” the term used to describe the continual process in free markets where innovation leads to jobs being lost and created.<sup>223</sup>

Top-down efforts to slow the pace of economic change are rarely successful. It seems more prudent and doable to allow emergent forces to proceed but better equip people to respond to these forces. Put another way, better policies and institutions to help people navigate a fast-moving river will prove more effective than trying to control the river itself.

Following are several such policy and institutional reforms.

##### *a. An “industrial policy” that enables nimble reallocation of labor and capital*

The term “industrial policy” can have many different meanings, though it often refers to government subsidies and other programs that promote a particular sector of the economy.<sup>224</sup> Opponents of sector-specific government interventions are characterized as opposing industrial policy, but this is misleading. A more accurate way to distinguish industrial policy views is by focusing on how, rather than whether, to use government economic policies to promote economic growth. The invisible hand of the market requires the visible hand of government to establish an ordered

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223. See RICHARD J. CABALLERO, ECONOMIC GROWTH 24 (Steven N. Durlauf & Lawrence E. Blume eds., Palgrave Macmillan 2010) (“Creative destruction refers to the incessant product and process innovation mechanism by which new production units replace outdated ones. It was coined by Joseph Schumpeter (1942), who considered it ‘the essential fact about capitalism.’”).

224. See generally Scott Lincicome, *Industrial Policy: A Bad Idea is Back*, CATO INST. (July/Aug. 2021), <https://www.cato.org/policy-report/july/august-2021/industrial-policy-bad-idea-back> [<https://perma.cc/GR6U-7DCF>]; Damien Ma & Lizzi C. Lee, *An Industrial Policy With American Characteristics*, FOREIGN AFFS. (July 1, 2025), <https://www.foreignaffairs.com/united-states/industrial-policy-american-characteristics> (on file with the Maine Law Review).

and competitive market.<sup>225</sup> Importantly, government policies should aim to be pro-market, rather than pro-business per se. If markets are working properly and not unduly favoring capital over labor, or certain sectors or firms over others, governments should tolerate market outcomes.<sup>226</sup>

Investors with skin in the game have a far better sense of where to invest than government officials do. Private sector investors routinely make mistakes, but there is no reason (or evidence) to suggest that government officials would make fewer mistakes.<sup>227</sup> An industrial policy proposing to steer public and private resources to particular companies or sectors begs the question of why private sector investors are not making these investments already. In rare circumstances, a market failure may explain the lack of private sector interest. But, for the most part, government subsidies and other favors for particular sectors simply reflect the political power of those sectors rather than a bona fide market failure.

The optimal industrial policy would help producers by promoting economic growth on a neutral basis—rather than through crony capitalism favoring some companies or sectors over others—and would have the following four components:

- Maintaining critical infrastructures (e.g., financial, legal, transportation, communications) that allow companies to form and grow in a relatively stable environment.
- Assuring access to good K-12 schools and post-secondary education and skills-building opportunities.

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225. Ben S. Bernanke, Chairman, Fed. Rsv., Financial Regulation and the Invisible Hand, Speech at the New York University Law School (Apr. 11, 2007), <https://www.federalreserve.gov/news-events/speech/bernanke20070411a.htm> [<https://perma.cc/2UBX-7JBB>] (“Although the market system is the principal source of America’s economic dynamism, economic theory and practice both suggest that targeted government regulation and intervention can sometimes benefit the economy. In the particular case of financial markets, for example, government regulation helps to promote general financial stability and to protect investors and consumers against fraud.”).

226. Deirdre Nansen McCloskey, *Equality of Permission*, INSOMNIA Q., <https://isonomiaquarterly.com/archive/volume-3-issue-1/equality-of-permission/> [<https://perma.cc/BU5Z-UU2J>] (last visited Dec. 29, 2025) (“Competition is not, as imagined by many non-economists, a terrifying struggle red in tooth and claw, or even the zero-sum of a footrace or a cricket match, but the positive sum so spectacularly achieved 1776 to the present of the permission to enter the race and to offer what you imagine is a better good or better service to customers, or the better thought or music or painting. As the German philosopher of money, Georg Simmel, put it in 1900, economic competition is not a coercion but a seduction. And it results of course in improvement for the customers in *their* race of life, as does equality of permission in speech or music or painting does. In a liberal society, ‘fair goes’ enriches less like a zero-sum footrace and more like a win-win square dance, the explosion over the past two centuries of average real income per person in the world by 3,000 percent, and the cultural explosion accompanying it.”).

227. Michael Munger, *A “Good” Industrial Policy Is Impossible: With An Application to AB5 and Contractors*, 17 J. L. ECON. & POL’Y, 517, 518 (2021) (explaining that “while emergent market orders organized by the profit test fail to implement conceptually ideal social outcomes, the alternative of top-down planned industrial policies cannot reliably do better and may do much worse, either because (1) government officials cannot access the dispersed knowledge that would be required, or (2) because the incentives and collective action costs that face state actors prevent the implementation of the ideal policy if it could be identified”).

- On a neutral basis, providing tax incentives or direct funding for broad-based scientific and technological research.
- Eliminating industrial policy measures, such as import tariffs and restrictions, that constrain consumer choices.

In rare instances, sector-specific subsidies or protections from foreign competition may be warranted if a broader public interest is at issue. For instance, it is prudent to assure domestic production of certain essential goods and not be completely reliant on imports. Such subsidies or protections, however, should be provided only if absolutely necessary and only after rigorous examination.

*b. Better social safety net, portable health care insurance, and wage subsidies*

Life involves risks: economic, health, and others. While government helps manage some risks through public goods like keeping the peace, protecting the environment, and enforcing property rights, individuals are largely responsible for managing risk in their own lives through their fortitude, income, social networks, and other arrangements.

The balance between public risk management and personal responsibility has changed over time, and the federal government's role in managing risks changed dramatically during Franklin Delano Roosevelt's presidency.<sup>228</sup> The Great Depression paved the way for the federal government to become much more actively engaged in mitigating people's personal risks.<sup>229</sup> Social Security and later Medicare were established to address income- and health-related risks among the elderly.<sup>230</sup> Other income-support programs were created to help displaced workers and those with dependent children.<sup>231</sup>

Nearly a century later, these New Deal-era programs remain pillars of the United States' social policy. A reliable social safety net is vital to help individuals and, more broadly, to maintain public support for an open, dynamic economy that unavoidably entails certain risks. However, this safety net should not invite "moral hazards" where imprudent or risky behavior is made more likely because individuals are held harmless against such imprudence.

In order for the social safety net to be effective and promote innovation, it should be adaptable to local and individual needs. One-size-fits-all federal regimes should

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228. See John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 210 (2018) ("FDR led the nation through a frenzy of experimentation in policies and government structure without parallel in American history.").

229. BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* 170 (2005) ("Other measures, some taken during the Hundred Days and some later on, likewise had the goal of advancing the business recovery while protecting individuals and families whose recent experience had all too forcefully demonstrated their vulnerability to the vicissitudes of an economy gone out of control.").

230. See, e.g., Martha A. McSteen, *Fifty Years of Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/50mm2.html> (last visited Dec. 29, 2025); *Medicare and Medicaid Act (1965)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/medicare-and-medicaid-act> [<https://perma.cc/5CPY-LGAK>] (last updated Feb. 8, 2022).

231. See, e.g., Daniel N. Price, *Unemployment Insurance, Then and Now, 1935–85*, 48 SOC. SEC. BULL. 22 (1985); *A Short History of SNAP*, U.S. DEP'T OF AGRIC. (Aug. 25, 2025), <https://www.fns.usda.gov/snap/history> [<https://perma.cc/ML5E-BBTN>].

be replaced with voucher regimes that can leverage a more bottom-up approach while still assuring a reliable safety net.

While there has been tremendous innovation in health care services, there has been little innovation in the *financing* of health care.<sup>232</sup> This gap has created the major unaddressed public policy matter regarding health care: how to ensure access while controlling costs. If access is unlimited, costs explode. Yet, controlling costs by denying access is unacceptable.

The market for healthcare goods is unlike most markets. When you need care, you need care. Also, patients rarely have enough information to question the advice of providers. The market is further distorted because most healthcare is financed through employer- or government-provided insurance. The lack of a robust healthcare market has caused U.S. per capita spending on health to be the highest in the world, even though much of this spending is wasteful.

Providing all Americans with vouchers to purchase health insurance *and* eliminating the many anticompetitive practices in the industry offer the best hope of giving patients more control over healthcare spending while encouraging them to spend wisely. Vouchers would need to be sufficient to assure access to quality care while incentivizing patients to avoid expensive care with little record of improving health. Insurance companies must be given the freedom to offer different types of products, so long as innovative models are not thinly veiled strategies to simply cherry-pick healthy people, as this would undermine the risk-sharing elements of health insurance. Anticompetitive practices might include preventing certain low-risk medical services from being done without medical doctors or allowing existing healthcare providers to block new entrants into the market. Insurance models should innovate to encourage healthy lifestyles that reduce the need for expensive medical interventions.

Vouchers would promote more innovative insurance models, more competition among providers, and better incentives for patients to focus on *being* healthy rather than simply paying for expensive medical interventions. De-linking health insurance from employment would also enable people to switch jobs more easily and reduce the stress of potential unemployment.<sup>233</sup>

Besides portable health insurance, a fast-churning labor market may also warrant experimenting with some form of wage subsidy. Through the earned-income tax credit (EITC), the wages of low-income families are raised.<sup>234</sup> It may be prudent to consider broadening this policy tool such that the first \$5,000 to \$10,000 of income is matched. Because all wage-earners would be eligible, it would not

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232. ARNOLD KLING, CRISIS OF ABUNDANCE: RETHINKING HOW WE PAY FOR HEALTH CARE 51–61 (CATO INST. 2006), <https://www.cato.org/sites/cato.org/files/pubs/pdf/crisis-of-abundance.pdf>.

233. Linking health insurance to employment also hurts U.S. companies that compete with European and other firms that do not have to account for health insurance costs.

234. See *Earned Income Tax Credit (EITC)*, INTERNAL REVENUE SERV., <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit-eitc> [<https://perma.cc/WP29-SDKD>] (last updated Dec. 4, 2025).

create the disincentives identified with the EITC.<sup>235</sup> At the same time, a universal wage match would be effectively progressive since this income would be taxed at marginal tax rates.

A slew of current government measures—from labor laws to tariff protection—are designed to put money into the pockets of lower-income workers. While well-intentioned, the existing web of programs is difficult for low-income families to access, provides only watered-down benefits, and greatly distorts the economy. It would be far better to help workers *directly* by replacing these programs with a program to match the first \$5,000 to \$10,000 of annual earned income.

A wage match offers a much better way to address income inequality than Universal Basic Income, which would undermine the dignity of work.<sup>236</sup> For simplicity, all wage earners would be eligible for the monthly wage match. Because it would be financed largely through marginal tax rates on higher incomes, however, the benefits would go to lower-income households. The wage match could be funded partially through existing federal programs aimed at increasing income for low-wage earners.

For those not in the paid work sector, other forms of income assistance may be warranted. For instance, parents caring for at-home children could receive comparable benefits through increased tax credits. The federal wage match would not replace disability or unemployment payments, though these programs would be most effectively implemented at the state and local levels, where individual circumstances can be more accurately assessed.

Because many labor, trade, and other laws that distort the economy would be repealed under this proposal, a wage match would foster economic growth and job creation. In this sense, a wage subsidy would be unique in its ability to both grow the economy and reduce income inequality.

Finally, to the extent that a dynamic U.S. economy involves employment declining in some areas while increasing in others, federal assistance to defer relocation costs may be prudent.<sup>237</sup>

## CONCLUSION

Economic change—due to trade, technology, or other forces—is inevitable in a free society. Even changes that are generally positive can entail adverse effects, however. Political leaders face pressure to respond to these adversities, either by deterring change or by mitigating its adverse effects.

Free trade policies are consistent with American notions of limited government and individual freedom. Free trade tends to promote consumer welfare in ways that favor general interests over special ones. Nonetheless, free trade policies have always been vulnerable to claims that they hurt American workers. In a static and

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235. See Paul Trampe, *The EITC Disincentive: The Effects on Hours Worked from the Phase-out of the Earned Income Tax Credit*, 4 *ECON J. WATCH* 308, 308 (2007) (noting that “the program has been receiving a great deal of attention recently, particularly its incentives and disincentives to work”).

236. Jonathan D. Grossberg, *Something for Nothing: Universal Basic Income and the Value of Work Beyond Incentives*, 26 *WASH. & LEE J. CIV. RTS. & SOC. JUST.* 1, 2 (2019).

237. See Ning Jia et al., *The Economics of Internal Migration: Advances and Policy Questions*, 61(1) *J. ECON. LITERATURE* 144, 170 (2023) (citing costs of housing as a major barrier to relocation).

isolated sense, imports certainly can harm particular workers or firms. But in a more dynamic and broader sense, free trade policies are merely part of a larger commitment to free markets where the mix of jobs is constantly in flux through bottom-up and emergent processes.

Absent compelling *public* interest, restricting the dynamic process of voluntary exchange—regardless of whether that exchange occurs across municipal, state, or national borders—risks hurting Americans while inviting the political corruption that is endemic whenever the government assumes the mantle of choosing winners and losers.

While the government should rarely override the voluntary exchanges of American citizens, the government can play an important role in helping citizens manage the challenges of the modern economy. A more reliable safety net, portable health insurance, and other policy reforms offer more relief than trade restrictions. Helping people navigate a fast-changing river will prove far more effective than vainly trying to control the river's flow.

