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In 1989, Francis Fukuyama announced “the end of history.”1 Fukuyama was not the first to make this bold claim—Hegel had said as much about Napoleon’s victory at Jena in 1806.2 But, unlike Hegel’s, Fukuyama’s bold claim was not a declaration of the triumph of the state-nation;3 rather, he was declaring

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3 The state-nation is the constitutitional manifestation of a state characterized by a mobilization of a nation (a national, ethnicultural group) to benefit the State. (“State” as used herein is defined in note 4 below.) This form of the State, exemplified by Napoleonic France, dominated Europe and America in the nineteenth century and ultimately gave rise to the modern nation-state with the advent of World War I. For a general description, see Philip Bobbitt, The Shield of Achilles 144–204 (Knopf 2002). The classical definition of the nation-state, on the other hand, refers to “a relatively homogenous group of people with a feeling of common nationality living within the defined boundaries of an independent and sovereign state: a state containing one as opposed to several nationalities.” Webster’s Third New International Dictionary 1505 (1986). As explained throughout this Article, we use the term “nation-state,” at times interchangeably with “modern state,” to denote an era where the fundamental elements of Statecraft involved a State that harnessed itself to the nation, legitimized itself through the guarantee of the nation’s welfare, adhered to relatively strong hallmarks of sovereignty and operated in an international system that valued balance of powers. It is of course common for modern nation-states to include discrete minorities who are an integral part of the collectivity-state but do not necessarily belong to the dominant ethnicity. For our purposes, however, this nuance is irrelevant in that our use of the term nation-state is a shorthand
the end of the great struggle between democracy, fascism and communism. After the defeat of the Axis Powers in World War II, and following the fall of the Iron Curtain, Fukuyama believed that democracy had triumphed and would, henceforth, be the preferred model for State\textsuperscript{4} government.\textsuperscript{5}

It now appears that, like Hegel, Fukuyama was mistaken in his claim for the end of history. While it is true that democracy defeated fascism and communism in the ideological struggle for political dominance, the State as we know it continues to evolve. History has not ended. The story continues, and as has been the case before, it is the nature of the State\textsuperscript{6} that is changing.\textsuperscript{7} Identifying these changes, gauging their significance, and evaluating their relationship with respect to other features of the relations between states is central to understanding how and why the State continues to evolve.

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\textsuperscript{4} We use the word “state” in two different senses. When we write “State,” we are referring to the conceptual political entity that has evolved in the Western world over roughly the last five hundred years. See J.S. McClelland, \textit{A History of Western Political Thought} 280 (Routledge 1996) (dating the birth of the modern state at 1500). The State is manifested in many territorially and politically distinct “states,” like Italy or the Republic of Latvia. When we refer to these individual states, we refer to them as a “state.” For discussion of the various phases of the State’s development, and their relation to a variety of constitutional orders, see Bobbitt, \textit{The Shield of Achilles} at 69–347 (cited in note 3).

\textsuperscript{5} According to Fukuyama, the liberal democratic model soundly beat fascism and communism because, simply put, it was a better idea. The liberal democratic model had no problem besting the fascist ideology of expansionism and racial superiority. In time, it defeated the Marxist ideology—in part because the growth of a strong and expansive middle class, resulting from (among other factors) the welfare policies of the nation-state, had radically changed the social reality in which Marx wrote. In the end, Fukuyama argued, all good government would be organized along the lines of the liberal democratic model, which would be applied to govern an ethnic or otherwise discrete nation and would protect the rights of minorities. See Fukuyama, \textit{The End of History} at 3–18 (cited in note 1).

\textsuperscript{6} The State is both a political institution and an idea. Two of the defining features of the modern form of the State—sovereignty and control of power—are connected to two larger dimensions of the State, which we will call the internal and the external dimensions. The most obvious aspect of sovereignty is control over geography. Sovereignty is an attribute of states and sovereignty matters most in relations between states. See G.W.F. Hegel, \textit{The Philosophy of Right} § 331 (Oxford 1975) (T.M. Knox, trans) (“[E]very state is sovereign and autonomous against its neighbours.”).

\textsuperscript{7} Some see the “end” of the State marked by a transition to other, more complicated organizing forms. See Martin Van Creveld, \textit{The Rise and Decline of the State} vii (Cambridge 1999) (“Globally speaking, the international system is moving away from an assembly of distinct, territorial, sovereign, legally equal states toward different, more hierarchical, and in many ways more complicated structures.”). See also Anne-Marie Slaughter, \textit{A New World Order} 32 (Princeton 2004) (“The conception of the unitary state is a fiction.”).
Recent scholarship on the State has largely focused on foreign policy—in particular, the “strategic” aspects of relations between states. One of the more interesting claims in this regard is that the very nature of the State (what we call Statecraft) has evolved in response to developments unique to the twentieth century. These developments, which include the commodification of weapons of mass destruction (“WMD”), the diminished significance of sovereignty, and the globalization of health and environmental threats, have engendered a new approach to strategy. Many scholars have devoted their attention to changes in strategy and its relation to the continuing evolution of the State. We agree that the State is changing. We further agree that these changes require a rethinking of strategic defense in a world of asymmetric warfare and global networked terrorism. However, we do not intend to add to the literature on strategy. Our project draws upon this literature, but is distinctly different.

Our project examines the extent to which the global trade system should respond to fundamental shifts in the nature of the State and of international trade. For insightful works exploring the strategic dimensions of Statecraft, see Robert Cooper, The Breaking of Nations: Order and Chaos in the Twenty-first Century (Atlantic 2003); Robert Kagan, Of Paradise and Power: America and Europe in the New World Order (Atlantic 2003); Bobbitt, The Shield of Achilles at 5–17 (cited in note 3).


See Lee Feinstein and Anne-Marie Slaughter, A Duty to Prevent, 83 Foreign Aff 136–50 (Jan–Feb 2004) (arguing for pre-emptive military action in a world of global terrorism and WMD). See also Francis Fukuyama, State-Building: Governance and World Order in the 21st Century 98 (Cornell 2004) (“[T]he existence of WMD in the hands of non-state actors poses a new and extremely severe type of security problem that would almost certainly justify intervention on the part of a country threatened in that manner.”).

See Cooper, The Breaking of Nations at 3 (cited in note 8) (“What has been emerging into the daylight since 1989 is not a rearrangement of the old system but a new system. Behind this lies a new form of statehood.”).


By the “global trade system” we mean the structures and practices of the General Agreement on Tariffs and Trade and WTO. See generally <http://www.wto.org/english/thewto_e/thewto_e.htm> (visited Sept 18, 2005).
relations. Our thesis is that just as the strategic and foreign policies of states are linked to their internal constitutional order, the trade policy of states is another external dimension of the State also connected to the State’s internal order. The experience of the twentieth century shows that states must acknowledge overarching structural changes within their domestic spheres, then identify, in a timely fashion, how these shifts affect their interaction with the rest of the international economic community. In turn, states must adjust external trade policy objectives and strategies with respect to the international community to accord with their intrinsic political and ideological goals. The failure to do so at the appropriate time will hobble the internal economic health of states and may also hamper free states in struggles against totalitarian movements.

Our Article proceeds in three principal parts. In Part I, we explore the extent to which the State continues to evolve in the twenty-first century. We draw on the literature discussing strategy to identify the hallmarks of Statecraft among the states that dominated the trading world after World War I—in particular the modern liberal democracies of Europe, the United States, and Japan. Part II argues that, just as law and strategy evolve through an interdependent and dynamic relationship, Statecraft and the international commercial order of states engender each other’s evolution through an interactive process. The domestic constitutional architecture of the State—such as its organization around a nation and its legitimization through the promotion of that nation’s welfare—has a profound influence on the ordering of the international trade system and the type of fundamental questions (such as the “linkage” of trade and social regulation) that will face each generation. At the same time, gradual shifts in the foundational rules of the international trade system and in patterns of international economic activity (such as the rise of a new set of international economic actors or transformations in currency markets) affect the ability of the State to maintain its domestic Statecraft and

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16 The internal constitutional order is expressed through law, both public and private. Bobbitt, The Shield of Achilles at xxiii (cited in note 3).

17 While we do discuss both current and historical events, this essay is about ideas. Mindful that “[i]deas are always both lagging and leading indicators of reality,” we attempt to anticipate coming events with ideas that will accommodate a future toward which the states that comprise the world trading system are already moving. H.W. Brands, Ideas and Foreign Affairs, in Robert Schulzinger, ed, A Companion to American Foreign Relations 1, 9 (Blackwell 2002).

18 See Part II below for an explanation of the meaning of constitutional choices, as used in this context.
tend to transform the internal order of the State. We illustrate our theoretical argument with an analysis of the Bretton Woods order.

In Part III, we explain how comparative advantage as the animating principle of the General Agreement on Tariffs and Trade ("GATT")\(^\text{19}\) has set in motion fundamental shifts in Statecraft which, in turn, necessitate the introduction of new concepts and language into the international trade order. We argue that a new constitutional moment is needed—albeit one different in kind from Bretton Woods's drastic departure from past policies and wholesale adoption of comparative advantage as one of the foundational norms of the system—and, with it, a new trade norm for states, which we identify as "enablement of global economic opportunity." We complete our argument with a description of a new set of global institutional settings for world trade, institutions that will enable us to make sense of current changes as we approach an uncertain future.

The gravamen of our argument is three-fold: (i) History never ends, and the interdependent mechanics of Statecraft and the order of states will, in each generation, engender the need for revision of the international commercial order and necessitate a new constitutional moment; (ii) Theoreticians and planners of trade can predict not only the issues that a trade system will generate at any moment in history, but also decipher and anticipate the contours of the next generation—to do this, however, they must understand the mechanics of Statecraft and the order of states; (iii) The new order ushered in by each constitutional moment is bound to set in motion transformative mechanisms that plant the seeds of the succeeding generation. Our goal is to outline the contours of the new constitutional moment that we believe is needed, as well as the institutional and normative redirection of trade towards which we believe observers and drivers of trade should orient themselves.

I. THE END OF HISTORY . . . AND ITS CONTINUATION

The Second World War ended with the demise of fascism. The fall of the Berlin Wall in 1989 marked the end of communism and, with it, the triumph of democracy.\(^\text{20}\) Fukuyama's end of history begins in 1989 with the fall of the Berlin Wall. According to Robert Cooper, 1989 did not mark the end of history, but rather set the stage for the emergence of a new form of the State—the "post-

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\(^{20}\) For historical details, see François Furet, *The Passing of an Illusion* (Chicago 1999) (Deborah Furet, trans).
modern state.” Philip Bobbitt similarly rejects Fukuyama’s claim, and views 1989 as merely a step in the evolution of the State. He identifies the new form of the State as the “market-state” which, he argues, will succeed the nation-state. These two theorists of the State agree on a number of defining characteristics of the new form of State that, in their view, confirm the continuing evolution of the State. Further, their theories point to a nexus and an interplay between the inner face of the State (its constitutional order) and its strategic foreign policy and military objectives. Bobbitt and Cooper are right about the State, but the story they tell is incomplete.

The State has both internal and external dimensions. The external dimension of states—their relations with other states—is expressed in two aspects. The first is manifested through strategy, the most obvious example of which is war. The second expression of the external dimension of the State is through trade and commercial relations. The modern era of strategy, which ended around 1989, spanned the better part of the twentieth century—commencing with World War I, continuing through the defeat of fascism, and ending with the fall of communism. During that period, liberal democracies organized themselves as modern welfare nation-states. A commitment to sovereignty drove the internal and external dimensions of the modern state. Modern states adhered to absolutist notions of sovereignty in their internal policy choices and external policy and military objectives. The notion of sovereignty was intricately linked to the nation as a constitutive feature of the State, to welfare as the legitimating drive of the State, and to the balance of powers as a key component of the State’s external strategy.

Sovereignty was inextricably tied to the idea of the nation. The essential goal of the State was to protect the nation against external threats and to provide for its internal welfare. The nation was sovereign, and although it was largely ethnic, it defined itself by its physical borders and the population it inherited throughout centuries of evolution. Having grown and become more powerful,

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24 Strategic decisions are connected to the inner dimension of the State through law.

25 For ease of reference, we will refer to these as “modern states.”


27 Id.
the modern state underwent a metamorphosis from state-nation, a state supported by a nation, to nation-state, a state supporting its nation. The primary means of support was the notion of welfare—coupled with a system of protection of minority rights or rights deemed fundamental—as its legitimating objective. Welfare and the maintenance of the domestic order were the principal features of the internal dimension of the State. Europe and the United States differed in their domestic approach to providing welfare to the citizenry. Europe had a stronger set of social entitlements, such as unemployment benefits, large family allowances, strong employee protection, and early and generous retirement benefits. For several reasons, some historical and some structural, the United States did not adopt social entitlement packages to the same extent as Europe. Nevertheless, as in Europe, the legitimacy of the US government depended in substantial part on its promotion of the welfare of large middle and working classes.

Lastly, the notion of balance of powers was linked to the concepts of sovereignty and of the nation as the interlocutor of the state in its quest for legitimacy. In the modern system, nation-states with strong sovereign powers maintained international order by balancing each other's powers. Balance of powers, rather than the hegemonic domination of an empire or superpower, was the preferred method of achieving order. The modern world viewed states as equal citizens of a global society. The concept of hegemony was antithetical to this worldview, however fictional or detached from reality it might have been. Thus, it was the alternative, an order based on balance among equals (or a substantial group of equals), that came to dominate the Western world in the modern era.

The modern state is gradually declining in various parts of the world, particularly in Europe. To be sure, the nations of the world continue to substantially adhere to territorial and constitutional Statecraft of the kind that emerged in the twentieth century. However, a foundational transformative shift similar to the one that brought about the nation-state in the twentieth century is taking place. Notions of borders and sovereignty are gradually losing the central role they played in the modern era. We are witnessing a correlative diminution in the effectiveness and importance of maintaining balance among equals on the

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Increasingly, post-modern states accept, to various degrees, control-sharing over domestic matters with supranational or global regimes and institutions. Furthermore, states are experiencing a loss of domestic control because, as we will describe in more detail below, traditional tools for regulating social and economic life have been rendered less effective by increasingly scattered cross-border forces and the rise of environmental, health and security threats that are too diffuse to be controlled by domestic policy alone. The nation is declining as the basis for the State. Instead of a world subdivided into

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31 See Cooper, *The Breaking of Nations* at 65–69 (cited in note 8) (explaining that chaos and crime in the modern world are increasingly less localized and cannot be controlled through actions of individual states). Our argument on the changing nature of the relationship between states and “welfare” is in no way intended to imply that states are abandoning (or ought to abandon) policies intended to achieve the well-being of their people. Rather, we endorse the nuanced view that Statecraft, and the basis for legitimacy of the State in the post-modern era, are shifting and that, with that shift, comes a transformation of the fundamental goals and methods of the State in relation to its subjects’ well-being. As Professor Bobbitt stated:

> [the] nation-state undertook to be responsible for economic planning for the society, income redistribution, and democratic accountability, and it promised to underwrite (in varying degrees) employment, health care, education and old-age security. The nation-state is rightly thought of as a new constitutional order, for not only are these responsibilities a significant departure from those of the state-nation, they also reflect the unique source of the nation-state’s legitimacy, its promise to provide for the material well being of the nation.

Bobbitt, *The Shield of Achilles* at 240 (cited in note 3). The shift in Statecraft that Bobbitt identifies challenges these fundamentals of the nation-state and leads the State towards its next incarnation, where the enablement of opportunity (itself intended in a broad sense to further the people’s welfare) will be substituted for guarantees of a safety net with respect to the traditional components of the welfare package in the modern world that Bobbitt describes. We note that even popular journalists such as Thomas Friedman have noted this shift in the social contract among the governed and the State. Thus, in his most recent book, Friedman writes: “The social contract that progressives should try to enforce between government and workers, and companies and workers, is one in which government and companies say, ‘We cannot guarantee you any lifetime employment. But we can guarantee you that government and companies will focus on giving you the tools to make you more lifetime employable.’” In a flat world, “the individual worker is going to become more and more responsible for managing his or her own career, risks, and economic security, and the job of government and business is to help workers build the necessary muscles to do that.” Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* 284 (Farrar Straus 2005). In our view, Friedman makes both a normative argument as to what government “should do” and a descriptive argument as to what the government can or cannot do, which echo the themes sounded in Bobbitt’s *Shield of Achilles*, and these ideas are neither the exclusive province of a deregulating Right or a people-oriented Left. Rather, they provide an insight into the transformative movements that have affected modern states, and the adjustment to the fundamentals of Statecraft that should obtain as a result of the metamorphosis, upon which we build our theoretical discussions of this Article.

32 Cooper, *The Breaking of Nations* at 27 (cited in note 8) (“The legitimate monopoly on force that is the essence of statehood is thus subject to international—but self-imposed—constraints.”).

33 Id at 102–13. “The essence of globalization is that it erodes the distinction between domestic and foreign events.” Id at 110–11.
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discrete nation-states and national economies, the international landscape has become diffuse and the main interlocutors of the State and the order of states have become cross-border actors.

Welfare has also begun to fade as the legitimating basis for the State. The decline of welfare is taking two discrete forms: the strong strain in Continental Europe on the cradle-to-grave systems established in the twentieth century and, perhaps more significantly, the failure of the welfare state to take root in the South. With regard to welfare, Europe is witnessing a dual internal phenomenon. In part, the welfare system is viewed as an inalienable set of social rights, a core component of the acquis social set of progressive measures that should never be reversed. Britain, for example, is increasing its public spending on welfare. In France, any governmental attempt to decrease the level of benefits in a meaningful way is sure to be met with unrest and protest of the kind that paralyzed the country at various times in recent years. At the same time, the State by all accounts is rapidly losing its ability to sustain welfare programs. The aging of the European population endangers retirement schemes. The economic burdens placed on employers hinder employment, social mobility, and fluid growth, and such burdens consistently fall short of generating the income necessary to shore up the system, which is constantly running at a deficit.

The difficulty of achieving welfare will arguably lead governments to shift their focus towards the maximization of economic opportunity. Such policies could take many forms. In Japan, for example, the government may focus on subsidizing research and development to give domestic industries the best possible edge. Elsewhere, the emphasis may be on providing education and infrastructure while deregulating markets. Other societies may emphasize commercial structures that give workers ownership stakes, so as to maximize

34 See Bobbitt, The Shield of Achilles at 240–42 (cited in note 3).
35 The situation is particularly acute in Germany. See Mark Landler, German Joblessness Rises As Benefits Are Reduced, NY Times C5 (Feb 3, 2005). The complexities of the German context are discussed in Peter Bleses and Martin Seeleib-Kaier, The Dual Transformation of the German Welfare State (Palgrave Macmillan 2004). See also Gabor Steingart, Deutschland: Der Abstieg eines Superstars (2004) (the story of Germany’s rise and decline since 1945).
37 For data on European population issues, see United Nations Economic Commission for Europe Population Activities Unit, available online at <http://www.unece.org/ead/pau/pau_h.htm> (visited Nov 1, 2005).
38 Bobbitt, The Shield of Achilles at 284 (cited in note 3).
39 Id at 670–71.
their opportunity for economic advancement. In all events, instead of focusing on guaranteeing the welfare of everyone, the State will gradually shift its foundational approach towards maximizing the economic opportunity available to all. While welfare policies of course continue to obtain in Europe and throughout the world, the tide of history seems to be shifting away from welfare as the core element of Statecraft that was axiomatic in the modern world.

In sum, the developments described above have resulted in a trend towards the modern state’s loss of its ability to control the domestic arena and to enact policies that would protect the welfare of the nation. To be sure, the world is not completely post-modern; as Cooper notes, post-modern states live alongside modern and even pre-modern states. In addition, there are various pre-modern states in the international scene where the official organs of the State do not even enjoy exclusive use of force within their own borders. Nevertheless, we believe that the trend we are describing provides an accurate account of a transformational move in Statecraft and international relations.

II. JACOB’S LADDER: A THEORY OF INTERWOVEN MECHANICS

The foundational notions of the international trading system do not reflect the outcome of a material dialectic among states (such as the historical recognition of the damage that arose from the failure to follow a comparative advantage model), but arise from the interwoven architecture of the State, the international trade order of states, and the parallel yet connected evolution of both. Transformations in domestic Statecraft drive the evolution of the international trade order and, in turn, transformative shifts on the international commercial plane tend to change the domestic configuration of the State.

This relationship of interdependence and connectedness is dynamic and manifests itself on a foundational level. The domestic constitutional architecture

40 Id at 673.
41 Id at 672–76.
42 For an insightful analysis of the complex relation between states and transnational firms and control of the domestic arena, see Saskia Sassen, The State and Globalization, in Rodney B. Hall and Thomas J. Biersteker, eds, The Emergence of Private Authority in Global Governance 91–110 (Cambridge 2002).
44 Certain important players in the international scene, such as Indonesia and India, may still qualify as modern states. These states, while operating in an increasingly post-modern world, continue to adhere to notions of sovereignty and nation, and they are not characterized by the same degree of diffuseness that is increasingly apparent in post-modern states. But see, for example, Gurcharan Das, Is India Shining? Wall St J A20 (May 3, 2004) (discussing India’s drive to achieve “nation-building” through economic success).
of the State, such as its choice of a particular route to the nation's welfare through policies of indicative planning or cradle-to-grave social protection, has profound repercussions on the ordering of the international trade system. At the same time, shifts in the foundational rules of the international trade system and in patterns of international economic activity, such as the rise of a new set of international economic actors and transformations in currency markets, affect the ability of the State to maintain its domestic Statecraft and tend to transform the internal order of the State. Like Jacob's Ladder, the State and the order of states are animated by a constant interaction going from bottom to top, and vice versa, in a dynamic motion that shapes both spheres and, in turn, propels them forward through various stages of history. Just as Fukuyama and Hegel were lured into thinking that strategic and political history had ended, trade theorists might misinterpret a historical transformation of sufficient significance as sounding the end of trade history. Comparative advantage, for example, might acquire a semi-mythical status as a timeless value bound to animate the trade system on a foundational level. In truth, however, the story always continues:

45 See Part I above for an explanation of the meaning of constitutional architecture as used in this context.

46 We use the concept of welfare to capture the policies of a nation-state that foster a broad level of acceptance of modern liberal democracy by the different constituent elements of the nation-state. Western Europe, Asia and the United States were the most powerful players in the international order. In addition to its security and strategic functions, the State as experienced by all these players' redistributed wealth, provided a safety net for the nation, and protected economic and other rights for broad segments of the population. The policy choices and the law that sprung from this fundamental element of Statecraft spanned a substantial part of the inner order of the states (including labor laws, unemployment benefits, retirement rules, aid to families, taxation law, subsidies, public investment and other central components of the domestic legal and regulatory order). As discussed in the text accompanying notes 38-41, nation-states such as France, the United States, and Japan took different approaches to achieving welfare, but their inner orders shared the same essential hallmarks of legitimacy of the nation-state in relation to the nation.

47 As the twentieth century progressed, the association between the ethos of the nation-state and welfare policies deepened. See Michael Hart, Coercion or Cooperation: Social Policy and Future Trade Negotiations, 20 Can-US L J 351, 377 (1994). Over the course of the twentieth century, the attributes of the nation-state grew further to embrace the social welfare state. By the middle of the century, attributes of the nation-state included not only territorial and national integrity, but also the capacity to promote the economic and social well-being of its citizens. At the same time, the post-war system of multilateral rules and organizations became the latest expression of rules to govern inter-state relations. As with the expansion in the attributes of the nation-state, the range of issues addressed by the rules of inter-state relations had similarly expanded. Id.

48 Id. Today we face a new reality. Advances in transportation and communications technology have made it possible to breach the territorial, social, and cultural integrity of the nation-state on a daily basis. The convergence of popular cultures and the crisis of the welfare state all point to the need to develop a new definition of sovereignty as well as a new set of norms and rules for inter-state relations. In short, we need a new set of rules that recognizes that the realm of goods, services, capital, and technology has largely escaped from the effective regulation of the territorial nation-state, while its people remain largely attached to it. Id.
comparative advantage was clearly an appropriate foundational norm for a trade system dominated by modern liberal democracies organized in Statecraft form but, as explained below, it no longer provides a complete account of the trade story.

As detailed below, the dynamic relationship of interdependence and connectedness between the State and the order of states may be observed at a descriptive level. In addition, as a normative matter, states must acknowledge overarching structural changes within their domestic sphere as well as on the international plane, and quickly identify how these shifts affect their interaction with the rest of the international economic community. Trade policy must then be adjusted to accord with internal political and ideological goals and with the evolving international scene. To be sure, structural shifts do not happen overnight, however, there comes a point when a constitutional moment is needed. At that moment, states must come together and recognize that Statecraft and the order of states have undergone a metamorphosis of sufficient magnitude to warrant a new set of constitutional rules.

The constitutional moment is a rite of passage, in that it marks an international awareness that change has occurred. It is an important exercise in recognizing the nature of the change and in instilling throughout the system fundamental new norms that will develop throughout the new era. The states' failure to recognize the constitutional moment will not only prejudice them economically, but also possibly hamper the achievement of their non-trade strategic foreign policy objectives. Ending history, then, is not only an academic and intellectual mistake; it is as dangerous an illusion as believing that World War II invaders could be repelled with a Maginot Line born out of World War I. The human difficulty in stepping out of deeply rooted paradigms to look at the future is bound to generate defeat in the present.

We have selected the twentieth century as a historical prism from which to illustrate our theory, focusing on the GATT/WTO system. The twentieth century trade story, as classically told, is one of failure and redemption. In this instance, beginning the inquiry with an exploration of redemption, and telling the story with the voice of an economist, makes the contours of failure clearer.

We argue in Part III that such a constitutional moment has become necessary in the early part of the twenty-first century. As illustrated in various contexts below, we use the notion of constitutional moment as a conscious choice based on the interaction of Statecraft as inner law. It relates less to a change in the ordering of society that legitimizes the adoption of certain constitutional norms, than it does to the infusion of new norms to recognizing the interaction between inner state order and the international order of states. But see Bruce Ackerman, A Generation of Betrayal?, 65 Fordham L Rev 1519 (1997) (defining a constitutional moment as a moment that "occurs when a rising political movement succeeds in placing a new problematic at the center of American political life").
Redemption happens after World War II, with the incorporation into the GATT of the theories of absolute and comparative advantage developed by Adam Smith and David Ricardo. Both economists posited that states would maximize their wealth by unilaterally eliminating import restrictions. However, they did not address the use of law to erect an international system that would institutionalize their economic insights. The GATT did that. At its core, the GATT established three “disciplines” that removed states’ ability to discriminate against one another in an effort to protect the domestic economy: (i) tariff bindings; (ii) a non-discrimination norm applicable to internal taxation and regulation; and (iii) a prohibition of quotas and like measures.

The first trade liberalizing discipline created a framework for GATT Contracting Parties to bind the tariffs that they imposed on foreign products, the primary protectionist barrier of the first half of the twentieth century. In turn, each state committed, under the Most Favored Nation Clause of the GATT, to extend to all trading partners the lowest tariff concession chosen by the state with respect to any partner. This structure generated eight rounds of trade negotiations, and a drastic reduction of the global tariff barriers to trade that prevailed before Bretton Woods.

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51 See, for example, Willem Molle, The Economics of European Integration: Theory, Practice, Policy (Dartmouth 2d ed 1994).


53 The post-World War II project commonly referenced as the “Bretton Woods system” included three distinct parts: (i) the ordering of international trade through an International Trade Organization; (ii) the fostering of international development under the umbrella of the International Bank for Reconstruction and Development; and (iii) the administration of monetary and financial matters through the International Monetary Fund. The International Trade Organization did not pass Congressional muster, and the larger enterprise was reduced to the GATT, a core component aimed, in substantial part, at removing barriers to trade and adopting exceptions to the trade liberalization rules. See, for example, Sungjoon Cho, Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma, 5 Chi J Intl L 625 (2005).

54 This removal of barriers to trade spurred a sharp increase in cross-border economic activities among nation-states over the second half of the twentieth century. The GATT took off with 23 Contracting Parties, and gradually took hold in over 150 nations. It progressively expanded to new subject matter areas, such as intellectual property and trade in services. These developments are, in retrospect, what grant Bretton Woods its status as a constitutional moment.

55 GATT, art XXVIII bis (cited in note 19).

56 The GATT sought to “tariffy” barriers to trade so as to establish a transparent framework for tariff reduction negotiations in successive “rounds.” Over the course of the eight rounds that were completed since the GATT came into effect among its original twenty-three signatories, the
The second discipline required the Contracting Parties to respect a non-discrimination norm that guarantees all imported products the same treatment as “like” domestic products with respect to internal taxation and regulation. At its core, the “national treatment” discipline prevents the circumvention of a tariff binding through imposition of a discriminatory burden in the form of, for example, an internal sales tax. The concept of discrimination is of course laden with ambiguity and has generated substantial controversy. Controversy arises because the discrimination principle allows international challenges to national policies ostensibly unrelated to trade, but that nevertheless disparately impact foreign products on account of disparities in the regulatory levels of protection in various states—one of the facets of the “linkage” issue. However, putting aside interpretive difficulties, the national treatment component of the GATT is an indispensable element of any treaty of integration that includes a tariff reduction scheme. Without a national treatment discipline, a member state of such a treaty could impose discriminatory taxation or regulation on foreign products so as to avoid its tariff obligations.

average tariff among Contracting Parties has gone down from above 40 percent to less than 4 percent. See generally <http://www.wto.org> (visited Oct 6, 2005).

GATT, art III (cited in note 19).


See, for example, World Trade Organization, Report of the Panel, Japan—Taxes on Alcoholic Beverages, WTO Doc No WT DS-8-R (July 11, 1996). In this case, the WTO rejected the US argument to the effect that an aim and effect test should be applied to root out protectionism when determining whether the national treatment provisions of the GATT were violated. The literature and commentary on national treatment are voluminous and lie beyond the scope of this Article. Even with an explicit mandate to root out protectionism and to shelter national laws that furthers legitimate government purposes, national laws that involve both protectionist and legitimate purposes might be challenged. In Reformulated Gasoline, for example, the WTO was asked to evaluate the legality of a US regulation, promulgated pursuant to the Clean Air Act, which imposed more onerous requirements on foreign companies, ostensibly on the grounds that compliance with the substantive norm of the statute was difficult. While a protectionist purpose might be inferred from the record, it is also evident that the United States’ interest in protecting its environment was at stake. See World Trade Organization, Report of the Appellate Body, United States—Standards for Reformulated and Conventional Gasoline, WTO Doc No WT/DS2/AB/R (Apr 29, 1996).

To illustrate this point, imagine that State A agrees not to impose a tariff on State B’s cars in excess of 5 percent. If State A enacted a discriminatory sales tax, which burdens State B’s cars by, say, 10 percent, it would have achieved a functionally equivalent economic result as a 10 percent tariff would accomplish. The difficult questions of interpretation arise when, for example, the internal sales tax applies to cars that consume more than a specified level of gasoline per mile, and State A’s sales tax disproportionately burden State B’s cars because they tend to belong the category of products that is affected by the (ostensibly neutral) definition.
The third discipline prohibits the imposition of quantitative restrictions to trade and their functional equivalents. The purpose of this discipline, and the interpretive questions that it has generated, parallel the national treatment story. Here, too, the founders of the GATT evidently sought to deprive states of a weapon for circumvention of the tariff discipline. The GATT, then, gave multilateral, institutional expression to the classical economic theories of Ricardo and Smith. The orthodox economic account of the GATT speaks of redemption, because it contrasts the GATT with the economic failures that preceded World War II. The crux of the account is that, before World War II, the major trading partners failed to recognize that commerce should be based on comparative advantage and that states should remove artificial barriers to trade (principally tariffs). Worse still, not only did the Treaty of Versailles oppress Germany instead of bringing it into Europe's fold as a partner, but the liberal democracies stubbornly insisted on what economic theories would describe as a timeless notion of economic organization. Bretton Woods is the constitutional moment of this story in that it reflects the understanding of the historical mistakes made by the liberal democracies. The Book of Mistakes had to be rewritten into the Book of Redemption. Economic collapse caused by trade wars would not only be unthinkable, but made impossible by a trading system that adopted comparative advantage as its fundamental value.

All serious students of trade, however, have learned that the economic ideology of trade provides only a partial, and perhaps even misleading, account of the original intent of the framers of the GATT and the reasons for its general acceptance by the Contracting Parties. In order to understand the GATT, one must understand the internal foundational frameworks and constitutional rules.

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61 GATT, art XI (cited in note 19).
64 See Bretton Woods Project, Background to the Issues, available online at <http://www.brettonwoodsproject.org/background/index.shtml> (visited Nov 8, 2005) (stating that the forty-three countries that met at Bretton Woods created the World Bank and IMF in order to help rebuild Europe after World War II).
of the major players who brought about its formation. These constitutional rules help explain why the major economic powers that formed the GATT chose the legal structure that it embodied, and mustered the political willingness to accept the trade disciplines imposed under the GATT.

Our account complements the purely economic story. We essentially hold that the internal configuration of the states that formed the GATT needed to work in harmony with any international system put in place. States did not simply have an economic epiphany. They chose the framework underlying the GATT because it allowed them to maintain their domestic architecture as they entered into an international framework that expanded the global economic pie. The main players' commitment to an interventionist welfare state ensured that the economic project would be married to a political redistributive enterprise.

While this account goes deeper than the economic tale, it still speaks of the end of history. It starts with constitutional rules, which were fundamental to modern liberal democracies after World War II. These rules included the broad legal and policy schemes that embodied a given nation-state's wealth choices with respect to redistributive justice and the relationship between various economic segments of society. In Europe, these schemes took the shape of public enterprise, unemployment compensation, housing aid, assistance to large families, and other policies intended to transfer wealth from high-income segments of society to lower income workers and thus protect discrete classes deemed to be disadvantaged in the market. In the United States, the emphasis was more exclusively on tax and transfer policies. Japan, for its part, relied heavily on centralized planning of industrial activity and subsidies of research and development that would shore up enterprises housing a large part of the domestic workforce. Despite their different viewpoints, all major players shared a basic philosophy of domestic Statecraft that went hand-in-hand with liberalized trade. The Bretton Woods system married international economic policies (and an international order of states that tended to maximize wealth.

65 See Howse, 96 Am J Intl L at 95 (cited in note 52).
66 See id at 97 (describing the move towards the system that John Ruggie aptly labeled as "embedded liberalism").
creation) with a legal framework that protected the nation-states’ ability to control their domestic economies.69

The harmonious functioning of domestic constitutional rules and international law went hand-in-hand with historical tendencies that made comparative advantage a better foundational norm for the international trading system than the domestically-driven mercantilist policies that preceded World War II. The founders of the GATT believed that mercantilism, as embodied in statutes like the Hawley-Smoot Tariff Act of 1930,70 had contributed to the economic disaster of the 1930s and to the advent of fascism as a contender for a model of Statecraft.71 They thus bound the liberal democracies to a set of rules that would not only make such disasters legally impossible but would in no way threaten their perception of economic sovereignty; the GATT created a world trade system that accorded with their internal laws and politics.72

Our theory posits that the relationship between the domestic constitutional realm and the international trade order of states goes beyond the marriage of a good economic idea with a legal system that makes it politically feasible. We depart from the notion that Bretton Woods joined comparative advantage with a theory of modern liberal democracy as the highest expression of the State, thus achieving the ultimate trade order of states. Rather, we submit that Bretton Woods ushered in a crucial yet particular constitutional moment that acknowledged both the then-current evolutionary stage of the State and the new order of states generated by the metamorphosis in Statecraft. From its inception, then, the Bretton Woods system set in motion the seeds of a transformative

69 See Howse, 96 Am J Intl L at 95 (cited in note 52); Ruggie, Constructing the World Policy at 72–73 (cited in note 68).


71 See Howse, 96 Am J Intl L at 95 (cited in note 52).

72 As Professor Weiler has pointed out, the GATT’s economic ethos largely resulted from the creation of a professional trade elite. This elite created a set of norms intended to project the impression that the GATT was grounded in “economic science” and insulated from crass politics:

A dominant feature of GATT was its self-referential and even communitarian ethos explicable in constructivist terms. GATT successfully managed relative insulation from the “outside” world of international relations, and it established among its practitioners a closely knit environment revolving around shared normative values (of free trade) and shared institutional ambitions. GATT operatives became a classical “network” of first-name contacts and friendly relationships.

phenomenon that would ultimately necessitate another constitutional moment for the trade order of states.

Our starting point coincides with the analysis of Bretton Woods as a joint political and economic enterprise in that we agree that the Keynesian welfare state was particularly well-suited for the GATT framework and its introduction of comparative advantage and anti-protectionist rules. Keynes was right to call the lawyers, and the political theory that they wrote into the GATT, the “poets of Bretton Woods.”\textsuperscript{3} The GATT, as explained above, sheltered welfare policies and left its constituent states free to act as experimental laboratories for improvement of their peoples’ welfare.\textsuperscript{4} All in all, it is true that the GATT established a framework that insulated domestic politics and redistribution choices from international intervention, and to that extent accorded with the ethos of the welfare state.

However, in our account, Bretton Woods came (and, as discussed below, it came too late) to crystallize in a constitutional moment transformations that had previously taken place and to take one more constitutional snapshot in the story of human organizational evolution in relation to trade and the State. Recognizing Bretton Woods as such mandates inquiry into what the next constitutional stage should be, and when the rite of passage that will set it in motion should be held. That inquiry is our task in Part III. For the moment, let us explain the Bretton Woods that was (and the Bretton Woods that should have come earlier).

As discussed in Part I, the State may be understood as an enduring entity that undergoes successive constitutional cycles. During each cycle, the State exhibits relatively stable, yet slowly shifting, constitutional features on both the domestic and international planes. At the same time, often as a result of the operation of these constitutional features, new realities arise that force states to adjust their fundamental constitutional elements, and gradually usher in yet another cycle. Though theorists like Hegel or Fukuyama predict “the end of history” at these moments, they are not in fact signaling the beginning of a Kantian era of “perpetual peace,”\textsuperscript{75} nor an end to the evolution of Statecraft. Rather, those voices keenly reflect a sentiment of transformation, widely felt, that should prompt an inquiry into whether a new constitutional cycle may be at hand.

\textsuperscript{73} Howse, 96 Am J Intl L at 96 (cited in note 52).

\textsuperscript{74} Consider GATT, art VI (cited in note 19) (generally allowing anti-dumping practices even though they tend to be harmful to free trade); World Trade Organization, Agreement on Safeguards, WTO Doc No LT/UR/A-1A/8 (Apr 15, 1994).

The State that Bretton Woods faced arose from a period of solidification of the "nation" as its basis. At least in Europe, twentieth century states were founded upon nations that had come together under a State for the purpose of amassing resources and fighting wars that would further their goals of solidification. On the international scene, these states maintained complex colonizing enterprises with strong commercial motivations that by all accounts generated substantial economic benefits for the colonizers. This influenced the political and economic power of those nation-states that dominated the international scene. At the same time, the domestic process of building a nation generated a population comprised of various segments collectively affiliated with a single state; these segments included a large working class, a bourgeoisie, and upper classes or nobility. The State was then forced to contend with the newly-formed nation.

The focal point of our inquiry is not the organizational nature of the State as a modern liberal democracy, but rather the solidification process that it experienced, the attendant birth of a nation as its support, and the evolution in Statecraft that arose out of these phenomena. It is against this background that the competing theories of Marxism, fascism, and modern liberal democracy compete with one another for control of the State. Under each scenario envisaged by the models, whether a triumph of the workers, an eternal Reich, or Fukuyama’s "end of history," Statecraft history runs its course and ends in a particular form of organization in relation to the nation. In each case, the nation is the basis of the State, and the welfare of that nation is the state’s legitimating raison d’être. Hence, a shared objective is achieved by different routes. Without this evolution of Statecraft, the competing ideologies would not require the conquest of additional territory.

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76 Bobbitt, The Shield of Achilles at 144–45 (cited in note 3).
79 See generally Walker Connor, Ethnonationalism: The Quest for Understanding 89, 97–100 (Princeton 1994) (titling its chapter on the meaning of "nation" and related terms as "Terminological Chaos"); Yael Tamir, Liberal Nationalism 58–69 (Princeton 1993); E.J. Hobsbawm, Nations and Nationalism Since 1780: Programme, Myth, Reality 1–13 (Cambridge 1990); Hugh Seton-Watson, Nations and States: An Enquiry into the Origins of Nations and the Politics of Nationalism 3 (Westview 1977); Joseph Stalin, Marxism and the National and Colonial Question 8 (International 1934). This is true even though, under Marxist theory, the nation-state would ultimately wither away in favor of rule by international workers.
80 But see Ernest Gellner, Nations and Nationalism (Cornell 1983); Anthony D. Smith, Theories of Nationalism 8, 65 (Duckworth 1971).
The significance of the nature of Statecraft for Bretton Woods lies in the natural harmony between comparative advantage and a nation-state's Statecraft. We agree with scholars such as Ruggie that from a political standpoint, Bretton Woods worked well for modern liberal democracies. We agree with Keynes that, without the delicate poetry of Bretton Woods, the modern liberal democracies might not have accepted the GATT as they did. We accept the economists' account of comparative advantage as a better norm for the twentieth century trading world than mercantilism. However, our story focuses on Statecraft as an integrated set of ideas and concepts and as the concrete manifestation of those ideas in the domestic and international realms and in the ladder that links them. We submit that by 1917, the modern liberal democracies had sufficient evidence of the need for a trade constitutional moment in the realm of pure ideas and their manifestation in the economic reality of the states. Thus, Bretton Woods could have occurred then as the next stage in the evolution of Statecraft and ordering of states.

By 1917, the nation-state, and the internal economic order it generated, had resulted in an industrialized world subdivided into discrete national economies. The nation owned virtually all means of production within the territory governed by its state, the welfare of that nation provided the State with its legitimating drive, and states had the means and the incentive to regulate and control the domestic realm. The very elements that changed the nature of Statecraft, from a State supported by the nation to a State harnessing itself to the nation, were reflected in the domestic reality. The core assets of each state lay in the hands of the nation—one of the key assumptions of Bretton Woods that is gradually waning today. Industrial, agricultural, and other types of output could consistently be identified with the nation. The trading world could be subdivided into blocs, each of which was comprised of an aggregate of goods, capital, assets, currency, and other resources that in a real sense belonged to the nation. Nevertheless, the State had a sufficient degree of control over this “national”

81 See Ruggie, Constructing the World Polity at 76 (cited in note 68).
83 See, for example, Krugman, 83 Am Econ Rev at 362 (cited in note 63). See also Molle, Economics of European Integration at 47 (cited in note 51).
85 Id at 377. Today we face a new reality. Advances in transportation and communications technology have made it possible to breach the territorial, social, and cultural integrity of the nation-state on a daily basis. The convergence of popular cultures and the crisis of the welfare state all point to the need to develop a new definition of sovereignty as well as a new set of norms and rules for inter-state relations. In short, we need a new set of rules that recognizes that the realm of goods, services, capital and technology has largely escaped from the effective regulation of the territorial nation-state, while its people remain largely attached to it. Id.
economy, and a concrete bloc of resources associated with its nation, to implement welfare policies of the type contemplated by the economic and political bargain of Bretton Woods and to legitimize itself vis-à-vis the nation. Given the condition of Statecraft in 1917, the foundational norms of the trade order of states had to change, thus signaling that the time had been ripe for a constitutional moment by the time of Bretton Woods.

The last pieces of the Statecraft puzzle lie in the concept of balance of powers and in the connection between strategy, war, and the trade order of states. The modern world, as described by Robert Cooper, includes balance of powers as an essential feature. A multi-polar world of solidified nation-states rests on a balance of powers among its constituent entities. In the trade world, this phenomenon is replicated, and here again the Bretton Woods moment may be understood as recognizing that phenomenon, albeit too late. Bretton Woods joined the theory of comparative advantage with substantial cross-Atlantic investment into sovereign, democratic blocs in Western Europe (and Japan) as part of the Marshall Plan. The new trade system respected borders and sovereignty, and it allowed states to advance national welfare through internal policies. The Marshall Plan's infusion of capital into Europe created trading partners whose economic strengths would enable them to maintain the requisite balance of powers. In turn, the GATT as an institution followed the one-state, one-vote model of the United Nations (the very phrase connoting the prevalence of the nation-state as the model of Statecraft), and organized itself around succeeding rounds of negotiation that gradually reduced barriers to (and otherwise liberalized) trade.

III. TRADE AND THE NEEDS OF THE TWENTY-FIRST CENTURY

We submit that the GATT theoretical framework was a unique expression of Statecraft in the evolution of the nation-state. The State harnessed itself to the nation following an era during which it mustered the strength of the nation to solidify itself. Its legitimating raison d'être was the guarantee of the nation's welfare, which expressed itself through wealth redistribution and other interventionist policies that varied from state to state. Comparative advantage, as expressed through a trade-liberalizing order of states, complemented domestic control over these policies. Put otherwise, Bretton Woods established a

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86 Cooper, The Breaking of Nations at 23–26 (cited in note 8).
88 Bobbitt, The Shield of Achilles at 208 (cited in note 3).
89 As explained above, this allowed the constituent states to follow various policies intended to achieve the welfare of the nation, such as cradle-to-grave systems in France or indicative planning in Japan.
modern order of states consistent with the solidified State at the core of modern Statecraft. Our claim is that the international trade order generated by Bretton Woods was (ironically) bound to erode the nation-state, contribute to the arrival of post-modern Statecraft, and necessitate an adjustment to a new international order. The new order, we argue, calls for a set of norms and institutions that will complement those that Bretton Woods introduced to spread the gospel of comparative advantage. We identify the "enablement of global economic opportunity" as the new foundational norm for the system, and diffuse, interconnected institutional frameworks, charged with implementing discrete projects rather than comprehensively achieving a goal such as comparative advantage, and operating outside of the one-state, one vote model of the modern world, as the institutional setting to actuate such norm.

There are three corollaries to our argument: (i) History never ends because the interdependent mechanics of Statecraft and the order of states will, in each generation, usher in the need for revision of the international commercial order and hence a new constitutional moment; (ii) Theoreticians and planners of trade can predict not only the issues that a trade system will generate at any moment in history, but also decipher and anticipate the contours of the next generation, but only if they understand the mechanics of Statecraft and the order of states; (iii) Each constitutional moment is bound to set in motion transformative mechanisms that essentially plant the seeds of the succeeding generation. At present, we are witnessing the passage to the post-modern generation of trade.

A. THE TRANSFORMATION OF THE BRETON WOODS WORLD

Bretton Woods inherited and shaped a world subdivided into national economies coextensive with the nation-states that established the trade order of the GATT. Again, the theoretical foundation of the system respected sovereignty, left it to internal domestic policy to control the redistribution of wealth, and removed trade restrictions as protectionist tools from the panoply of government interventionist policies. Looking at the Bretton Woods order right after World War II through the lens of modern Statecraft, a theoretician of trade could have articulated the principal legal and structural issues that would face the system over the next decades. For instance, even though it was deflected by the

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90 This claim is both descriptive, in that (as described in Part I) the passage to post-modern Statecraft is gradually taking place in the field, and normative, in that (as described below) the Bretton Woods world was bound to erode the modern nation-state and contribute to the advent of post-modern Statecraft.

poets of Bretton Woods in the embedded liberalism bargain, was bound to become a core question facing the Bretton Woods generation because of the central place of sovereignty and control over the nation's welfare in the modern state. Further, as a matter of predictive history, a theoretician armed with the Statecraft lens could have foreseen that the Bretton Woods order would generate a transformed international economic landscape. In turn, as described below, the metamorphosis of the trading world was bound to contribute to the transformation of Statecraft and, in time, to generate the need for a revision of the international trade order. We will first outline the metamorphoses that we believe have brought us to the point of this new constitutional era. Then, in Part III.B, we will delineate the contours of the era and the foundational norms and institutional framework that we believe should be put in place.

As a result of Bretton Woods, it was inevitable that the subdivision of the world into economic units coextensive with nation-states would be eroded. The GATT and the WTO opened up borders to trade in goods and services; this openness lies at the heart of comparative advantage. In such a marketplace,
goods and services are exchanged across borders by consumers, distributors, and manufacturers. Manufacturers will purchase components necessary for their output, and distributors will purchase products for domestic resale, from jurisdictions that enjoy a comparative advantage. Importers will inevitably seek to acquire equity or other stakes in their suppliers, so as to increase profit margins. Conversely, exporters will seek to participate in the profits of the importing companies. Joint ventures and other cross-border partnerships will flourish. It is beyond the scope of this Article to describe exhaustively all patterns of economic activity that resulted from the opening up of borders to trade in goods and services, but the upshot is that the trading world that grew out of the Bretton Woods system gradually “flattened” the economic units that formed the core of that system (the nation-states).{96}

Interloping ownership and the spread of production units across nation-state borders has contributed to the replacement of national products with global, diffuse goods. Indeed, a handbag manufactured in China, designed in Italy, bearing a French brand, and marked as “Made in Italy” is not a product of any particular country, whatever the rules of origin might have to say about its classification for tariff purposes. For example, DaimlerChrysler manufactures cars that traditionally were viewed as quintessentially German (such as Mercedes-Benz) and American (such as Jeep). However, after entering into a strategic alliance with Mitsubishi Motors, it now also markets car brands commonly associated with Asia.{97} Its one billion shares are owned by investors from all continents. This phenomenon obtains even on a small scale: New York’s garment district has shifted its production en masse from Brooklyn to the Far East. These US garment manufacturers began the shift by shipping materials for fabrication, and later they came to acquire factories or enter into strategic alliances with their producers. Conversely, the Far East manufacturers are increasingly acquiring stakes in their clients.{98}

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{96} See Charles W.L. Hill, International Business: Competing in the Global Marketplace 366–67 (McGraw-Hill Higher Education 4th ed 2003) (finding that the floating exchange rate regime that resulted from the collapse of the Bretton Woods system encouraged companies to “dispers[e] production to different locations around the globe as a real hedge against currency fluctuations”).


The transformation of patterns of economic activity brought about by Bretton Woods has been compounded by the revolution in global communications. The steel mill, textiles plant, or agricultural field of the twentieth century has been replaced by computer workstations that can be run from virtually anywhere in the world. Microchips can now be manufactured in Silicon Valley from computer software using codes written in India that, in the aggregate, can be compared to a factory in terms of complexity. Transcription services can be outsourced via access service provider software to the Philippines. An American appellate brief can be researched and written in Jamaica and filed by a licensed attorney in Camden, New Jersey. Increased trade and competition were bound to generate innovation, and the resulting communications breakthroughs furthered the establishment of a global marketplace where the phenomenon of discrete national economies has eroded.

Further, the explosion of economic activity in the transformed world has also brought about a gradual shift in the fundamental policy tools of economic regulation and wealth transfer from the domestic to the international realm. Monetary policy, for example, is increasingly escaping control by states. Although commentators disagree as to the extent of the loss of control by states over monetary policy, the sheer magnitude of markets for currencies inevitably results in the transformation of money from a tool of exchange, which can be manipulated domestically, to a mere commodity. Public debt is increasingly held by foreign actors, and it is increasingly affected more by the interplay of commercial interests than by domestic policy choices. A simplified and simplistic example is the relationship between the United States and Japan. The United States has for a long time been a main purchaser of Japanese goods, and Japan a main purchaser of US debt. While it is true that the United States has a continuing ability to self-finance its debt, over time this phenomenon may


101 See, for example, <http://www.economicalservices.com> (visited Sept 6, 2005) (describing a New Delhi–based company that offers legal research services throughout the world).

extend to new actors on the international scene, including prominently China, with a resulting decrease in domestic control.103

We posit that these phenomena, engendered by the Bretton Woods–driven transformation of the international economic landscape, have resulted in the erosion of modern Statecraft and contributed to the gradual shift towards post-modern Statecraft that is described in Part I. A nation coextensive with national boundaries and a national economy and output is slowly fading away as the interlocutor of the State, and is being replaced by a diffuse array of economic actors and activities that fall outside of their traditional control. States are losing their grip over some economic tools used for regulation of economic and social life. At the same time, as described in Part I, the states’ ability to muster domestic resources to sustain their welfare on a domestic level is being challenged. The upshot is that the welfare of a nation, upheld by a State with strong hallmarks of sovereignty, is fading away as an essential component of Statecraft and a legitimating drive for states. This pillar of the Bretton Woods world is bound to continue to gradually recess and become a more peripheral component of Statecraft as the twenty-first century unfolds, to be replaced by a post-modern Statecraft model in which the State becomes dedicated to (and legitimates itself through) the enablement of economic opportunity.

Concurrently with these phenomena, the balance of powers that characterized the modern world, which was centered on the modern liberal democracies of Europe, the United States, and Japan, is eroding. As a result of the global marketplace wrought by Bretton Woods, the twenty-first century has inherited a multi-polar economic world resting on a global middle class spread across the North and the South. Brazil, India, China, and South Korea, to cite a few, have increasingly become world economic centers. Developing countries have achieved growing importance on the world markets and gradually eroded the dominant market share of the developed countries.104 The old Second World, made up of communist countries, is being replaced by a new Second World comprised of economies formerly classified under the global heading of “developing countries.” Lying within and alongside the first (post-modern)

103 For a general discussion, see Michael Burawoy, *Transition Without Transformation: Russia's Involutionary Road to Capitalism* 25–26, available online at <http://sociology.berkeley.edu/public_sociology/public_sociology_pdf/Burawoy.pdf> (visited Nov 2, 2005) (discussing China, Russia, and the commodification of money).


and second (modern) economies are pre-modern collectives of people that lack the education, infrastructure, and other conditions to benefit from the liberalization of trade that the WTO brought about. These collectives may be Brazilian shantytowns, Afghan mountain towns, or the "excluded" neighborhoods that surround Paris. The bottom line, though, is that the main interlocutors of trade are no longer national middle classes represented by their states; rather the trading world is comprised of a diffuse trading class, numbering some eight hundred million people and spreading out in a multi-polar economic configuration, that is surrounded by those who have yet to become meaningful participants in the global marketplace.

The metamorphosis of the Bretton Woods world means that the trade system's conceptual tool for understanding itself (an aggregation of nation-states governed by the sovereignty, welfare, and balance of powers principles of the twentieth century) is eroding. Our thesis holds that a new constitutional moment is needed to usher in a new trade norm and trade institutions that will complement Bretton Woods, comparative advantage, and accord with the post-modern evolution of key actors of the trading world. In the next subpart, we outline the contours of the new norm, which we describe as the "enablement of global economic opportunity," of the post-modern institutions needed to implement the norm, and of the (modest) constitutional moment that we envision.

B. THE ENABLEMENT OF GLOBAL ECONOMIC OPPORTUNITY

The "enablement of global economic opportunity" is a norm that accords with Statecraft in a diffuse trading world no longer comprised of discrete economic units coextensive with a nation whose welfare the State is dedicated to promote. Our starting point, as with Bretton Woods, is grounded in domestic Statecraft. As we argued in Part I, modern nation-states are gradually being replaced by a collectivity of post-modern states that, although still living side-by-side with modern and pre-modern collectives, will continue to spread post-modern Statecraft during the twenty-first century. Whether they are in fact called China is creating a whole new strata of sophisticated middle class urbanites with a thirst for knowledge, an interest in all things foreign, money to spend and a capacity to consume that is unprecedented in certainly China's history, and, arguably, world history in terms of the life transformation of sheer numbers of people.

“post-modern,” or go by labels such as “market-states,” the important substantive Statecraft element within those states is the gradual replacement of the guarantee of the nation’s welfare with the pushing and prodding of economic activity as the legitimating drive of the State. Additionally, sovereignty and balance of powers will gradually fade away because of the diffuseness that characterizes the global marketplace and will be replaced by a horizontal playing field created by the continued rise of a global trading class spread across borders.\textsuperscript{106} As we made clear in Part I, these phenomena do not mean that the State will disappear. Rather, it will, slowly but surely, move on to its next cycle and take on indicia of Statecraft different from those exhibited in the modern era.

We submit that instead of managing welfare, the nation, sovereignty, and balance of powers, post-modern states will increasingly need to manage diffuseness on the international field and focus on the relationship between their trading class and those of other modern and pre-modern collectivities. They will then be able to foster economic opportunity for their own trading class. In turn, just like Bretton Woods established a trade order that accorded with the components of Statecraft of the modern states, a new constitutional era should usher in a trade order that accords with these transformed elements of Statecraft in the post-modern world. The trade order of states should establish norms, to be superimposed on the Bretton Woods framework, that will embody the enablement of global economic opportunity in a constitutional rite of passage. We describe this constitutional rite of passage below.\textsuperscript{107}

Establishment of the enablement of global economic opportunity as an animating norm of the trading system requires that we move beyond the WTO and establish a new set of institutions. We believe that the trade institutions of the future will lie outside the WTO, have a diffuse and shifting membership consistent with the state of the increasingly post-modern trading world, and be dedicated (at least initially) to implementing discrete projects and adopting ad hoc regulation that in all likelihood will not apply to all states that belong to the

\textsuperscript{106} Cooper, \textit{The Breaking of Nations} at 27–44 (cited in note 8). See also Bobbitt, \textit{The Shield of Achilles} at 233 (cited in note 3); Peter F. Drucker, \textit{The Age of Social Transformation}, Atlantic Monthly 72–73 (Nov 1994).

\textsuperscript{107} In many ways, economic opportunity is a logical extension of welfare promotion. The solidification of the nation in the state-nation evolutionary stage brought about the nation-state. The State’s legitimating drive became the promotion of the welfare of the nation, in a world where sovereign economic units coexisted within a balance-of-powers paradigm. That world brought about the consolidation of economic units into a diffuse whole and resulted in weakening the states. Given the erosion of welfare and of the nation, the State’s legitimating drive should logically move on to fostering economic opportunity and managing diffuseness. Unable to foster welfare, deprived of the nation as the object of its welfare effort, the State can fall back on economic opportunity as its next best alternative.
WTO (double standards). Although our vision evokes the “World Economic Organization” that some scholars have advocated,\(^{108}\) we prescind from any comprehensive global economic government charged with charting out a universal course of action to achieve a stated goal (such as comparative advantage) for everyone involved. Unlike the twentieth century modern society of nations acting under a one-state, one-vote framework (which replicated the internal order of modern liberal democracies), we advocate a post-modern institutional framework that will work together with states and industry representatives to manage the enablement of global economic opportunity throughout the globe on a discrete, issue-driven basis.

This institutional structure should be consistent with the configuration of the post-modern world. Thus, the structure should reflect the fact that the world is no longer subdivided into economic units coextensive with the nation-state. The solution lies in organizing trade governance along industry lines and establishing flexible institutional frameworks to address the issues that arise within each subject matter area. The diffuseness of the post-modern world has created a global middle class that is displacing the nation-state as the true interlocutor of trade. That middle class may be conceptualized as gravitating around a number of discrete industries, each of which raises a given set of issues on the global scale.

Consider, for example, the fashion industry. In that industry, the issues of the day involve, first, the displacement of the means of production to the Far East and other countries where cheap labor abounds, and second, the ability of mass merchants and other retailers from Europe and the United States to gain access to the emerging markets of the Far East.\(^{109}\) To respond to competition, the high-end brands are lowering their standards to tackle less luxurious markets. The mid-range brands are being squeezed out of their markets by these luxury brands and by the generic competition that comes from the Far East. They are riding the tide, waiting to tackle the emerging Far East consumer markets. Thus, industry-specific studies of the issues of the day and contextual negotiation of


\(^{109}\) All aspects of the production of apparel, including not only manufacturing but also creation and design, are moving from their traditional locus in such cities as New York or London to the Far East. See Keith Bradsher, Chinese Apparel Makers Increasingly Seek the Creative Work, NY Times C1 (Aug 31, 2005). For a good example of the efforts by large US and European mass discounters to enter emerging markets, consider the competition between Wal-Mart and Carrefour for the Chinese market, or Wal-Mart’s attempts to penetrate the Indian market. Tim Craig, Most Growth Potential Beyond U.S. Borders, 44 DSN Retailing Today 48 (June 13, 2005); Wal-Mart Closer to Entering India, UPI (June 6, 2005).
possible international regulation and projects are needed to manage the enablement of global economic opportunity within each industry.  

As explained above, states will not go away and, in our model, they will retain a key role in the conduct of international trade organization and governance along such industry and issue-specific lines. In keeping with the diffuse nature of the international marketplace, we believe the new trade organization should be comprised of a shifting representation of states and their governments depending on the industries at issue. The organization could have permanent trading partners (which we will refer to as the “Trade Council”) and then delegate to responsible persons, as determined by expertise in the given subject matter area, who would work jointly with industry representatives and (as explained below) other international organizations to develop appropriate rules. By way of illustration, the trading members could be: the European Union, the United States, Brazil or an alliance of South and Latin American States, Australia, India, Indonesia, the Arab League, Japan, an alliance of the Southeast Asian “tiger states,” and a union of African states. These members could be supplemented by states that are important actors in a particular industry. They could act collectively or, if a particular issue so warranted, by vote of a subset of states that join together in a given subject matter area.

110 Our proposal calls for industry-specific analysis and, in that, distinguishes itself from insightful arguments advocating a reorganization of the WTO along issue-specific lines. Professor Guzman, for example, argues that the WTO should “be structured along departmental lines to permit its expansion into new areas while taming its trade bias. A department for each major issue area would be created within the institution—a trade in goods department, a trade-in-services department, an intellectual property department, an environmental department, and so on.” Andrew T. Guzman, Global Governance and the WTO, 45 Harv Int'l L J 303, 307 (2004). We do not intend to enter the debate over the merits of this or like proposals. Ours is a different proposition focusing on studying, in the context of each industry, all relevant issues that will affect trade in the post-modern, post-WTO world. Compare John O. McGinnis and Mark L. Movsesian, Response: Against Global Governance in the WTO, 45 Harv Int'l L J 353 (2004) (critiquing Guzman's proposal on the grounds, in part, that it would create a “world government” that raises intractable theoretical and practical problems, and arguing that the WTO should stick to its original goals of eliminating protectionist barriers to trade among states).

111 Delegating to government officials based on expertise has been tried in Europe, where the Council sits with ministers from different subject matter areas based on the issue at hand. See, for example, Mario Telò, Démocratie Internationale et Démocratie Supranationale en Europe 37–42, in Mario Telò, ed, Démocratie et Construction Européenne (Editions de l'Université de Bruxelles 1995).

112 The extent to which the new institutions will adhere to a power based rather than rules based regime will evolve over time, in leaps and bounds, as has been the case with other organizations and polities such as the WTO or EU. The balance between “exit” and “voice,” which Professor Weiler articulated in his seminal article on the transformation of Europe, and that has guided insightful analysis of the WTO and other organizations, will continue to provide a powerful lens to analyze the institutional issues bound to arise in the trade organizations of the future. These will include the extent to which states are bound by rules that others have voted in over their objection, whether they can be compelled to account for violations, whether dispute resolution
In each instance, the Trade Council would establish programs designed to create the conditions necessary for enablement of global economic opportunity. Consistent with diffuseness and post-modern Statecraft, the Trade Council would coordinate with other international institutions. In the fashion industry example discussed above, the Trade Council could coordinate with the International Labor Organization. This type of “external cooperation,” which some scholars of trade advocate, would be in line with the diffuse nature of the post-modern world.\(^\text{113}\)

In addition, the Trade Council could determine which issue areas (beyond the traditional areas dealt with by the WTO) are good candidates for regulation.\(^\text{114}\) The norm of enablement of global economic opportunity carries in its penumbra other norms, such as anti-corruption rules, that could be more effectively enforced by cooperation between the Trade Council and, say, the International Criminal Court or ad hoc tribunals.\(^\text{115}\) Likewise, the Trade Council could coordinate with central banks and other financial institutions or organizations to address financial and monetary issues taking into account industry-specific concerns. For example, the recent fall of the dollar,\(^\text{116}\) if met with the inability or unwillingness of the traditional domestic institutions to stem the tide, could deeply unsettle the trade world. Europe could lose substantial market share in the United States. Chinese products, priced principally in dollars, could become even cheaper than they are now, and perhaps more importantly, the Chinese consumer could lose a substantial amount of buying power vis-à-vis its European partners. These issues, however, cannot be considered exhaustively without a study of their impact on trade in various industries. While international

\(^{113}\) See, for example, Bronckers, 4 J Intl Econ L at 49 (cited in note 108).

\(^{114}\) Scholars have advocated tests, in the context of the WTO, for determining which issues are appropriate subject matters for trade regulation. See, for example, Philip M. Nichols, Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority, 28 NYU J Intl L & Pol 711, 714 (1996).

\(^{115}\) Clearly, this is because corruption and transnational bribery could hamper development projects such as those described below, or otherwise hinder the spread of economic opportunity to private economic actors.

\(^{116}\) Mark A. Stein, Export Opportunities Aren't Just for the Big Guys, NY Times C8 (Mar 24, 2005).
institutions and mechanisms already exist to handle those questions, the obvious linkage between trade and financial and monetary matters would, in today's diffuse world, make it logical for the Trade Council to turn its attention to international coordination, information sharing, and possibly joint norms, again on an ad hoc basis.

The type of economic development fostered by this new trade institution will also be in line with the diffuse world of the twenty-first century. The twentieth century's Marshall Plan was intended to shore up nation-states so that a trading world with a relative balance of powers could be established. We believe that twenty-first century trade will also require a Marshall Plan–like investment to complement trade, though one that is of a more modest, gradual, and ad hoc nature in line with the pushing and prodding of economic activity that characterizes the trade norm that we advocate. The Trade Council we envision would coordinate with regional and other development banks, and other institutions, to promote economic, educational, and infrastructural investment. It would work to shift industries of the type now spreading to modern societies such as India or Brazil to pre-modern societies, and generally spread economic opportunity where it is most needed. It could also, in coordination with other international institutions, implement proposals such as that advanced by Jeffrey Sachs to combat poverty in the most pre-modern of collectivities.

Our proposed shift in the trade world should be marked by a constitutional moment. Unlike Bretton Woods, it would anticipate the historical tide before change is forced upon us (possibly in an atmosphere of crisis). Rather than a "North" and a "South," we are faced today with diffuse blocs that cut across traditional borders, coexist within borders, and form the new stage of our political and economic evolution. From inward-looking and outward conquest (in the pre-modern era), to collaboration and the creation of a balanced bloc of sovereign nations in the North (during the modern era), we have entered into a dynamic world where North, South, and the former communist bloc blend to create a diffuse society of post-modern states lying side by side with, and containing within themselves, pre-modern societies. The fundamental challenge of the post-modern society of states will be to preserve a world where the trading blocs across the world continue to grow and to contain countervailing forces—chief among them terrorism, the conduct of asymmetric


119 See note 95. See also Cooper, *The Breaking of Nations* (cited in note 8).
war (especially economic warfare) through terror, and the takeover of a nuclear state by rogue forces. The strategic importance of consolidating a Northern bloc of liberal democracies is no longer at the top of the agenda. If trade, as the outer face of the state, is to follow the inner constitutional order of post-modern societies, and also to further the states’ foreign strategic goals, a constitutional moment must reconfigure the inner constitutional order to accept that the twenty-first century principal commercial interlocutors are the cross-border, diffuse trading classes of the world.

Unlike Bretton Woods, the constitutional moment of the twenty-first century will not usher in a comprehensive regulatory framework dedicated to achieving a norm, but will mark a bifurcation of the international trade order into two distinct parts: the completion of the comparative advantage enterprise within the umbrella of the WTO and its negotiating rounds and the enablement of global economic opportunity through institutions of the type we advocate. A constitutional moment, in the form of a conference akin to the Bretton Woods gathering, should formalize and mark the passage to the redirection of trade. At that conference, the Trade Council would be established and a broad document acknowledging the new trade norm adopted. However, rather than a comprehensive regulatory framework such as the GATT, the conference would merely establish an umbrella framework out of which future regulation and projects would arise. The post-modern world is not only diffuse, it also generates issues of such complexity and magnitude as to make it impossible to establish ex ante a comprehensive normative framework to effectuate the enablement of global economic opportunity. In such circumstances, the system should set in motion a framework for adopting ad hoc regulation and projects. In other words, adopting the norm, and putting in place the institutions that will further it, will allow for the exact normative contours of the system of the future to take shape and grow in leaps and bounds, based on the actual evolution of an international marketplace still in a state of flux.

IV. CONCLUSION

Once the global collectivity sets in motion a new trade order of states, it will have triggered a new cycle which, like Bretton Woods, will generate novel substantive and institutional issues and, over time, transform Statecraft, undergo additional metamorphoses of its own, and ultimately give rise to another

120 Of course, in addition to legal principles that remained in place throughout the system’s existence, Bretton Woods introduced a framework for future negotiations of tariff reduction.

121 Obviously, the outcome of the Doha Round of negotiations, whether it succeeds or fails, will be a key factor shaping the future of this branch of trade because of its emphasis on the removal of subsidies and other impediments to market access by developing countries.
constitutional era. History in fact never ends, but it pauses sufficiently for each generation to recognize its place in the evolutionary path, and to organize its law, international order, and institutions to reflect the needs of the present.

In this Article, we have identified constitutional mechanisms that affect Statecraft, the order of states, and transformative and evolutionary patterns that are borne out of this constitutional interaction. Further, we have articulated what we believe to be the seminal contours of the constitutional order of the early twenty-first century. Today’s challenge is to build a system for coming generations, keeping in mind that when we take on the unavoidable task of transforming the current order we also plant the seeds of an equally inevitable future constitutional metamorphosis.

It goes without saying that further study, thought, and analysis will go into creating the architecture, framework, and construction of the new system. Experts in each industry will identify the salient needs of the actors operating in their field and inform policy-makers and negotiators of the choices that face them. Finance and currency thinkers will study the transformed international and domestic landscape and produce the nuts and bolts of the new order. Institutional theorists will analyze the various means of breathing life into the new norms through transformed institutions. To be sure, the current WTO system will continue to operate with comparative advantage as a central norm of trade. However, we believe that history will continue to call upon us to bifurcate the trade story and focus on how best to spread global economic opportunity.

The new order will not arise overnight. When Robert Schuman declared his vision of a constitutionally transformed Europe, he pointedly prophesized that Europe would be built through a series of “concrete achievements” which, over time, would yield the new legal order that he visualized in 1950 as the “United States of Europe.” The interaction of the various European institutions, the resolution of crises such as the Luxembourg constitutional breakdown of the 1960s, and the random workings of the political process have infused the system with an element of randomness on the road to acceptance by

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122 Changes may have to be made on the WTO’s front as well to reflect the transformed nature of the State. This could constitute a revision of the rules of origin, balance of payments, and other provisions that were devised for a nation-state centric system. Further, whether or not Doha is successful, in the long run the WTO may (by hook or by crook) achieve its integration purpose and complete the removal of barriers to trade. In all events, though, the WTO and its institutions will continuously be called upon to administer the relationship between international and domestic norms and to adjudicate the interpretative issues of the day.

the constituent entities. The same animating principles will occur in the international order of states that we envision.

The future evolution of states and trade will surely face setbacks, if not crises. But by paying heed to the evolving course of history, we stand a greater chance of steering it towards a better course. No doubt, we will continue to struggle with poverty, violence, terror, inequalities, catastrophes, and all the other permanent attributes of the human condition. However, by recognizing the fundamental mechanisms that drive our domestic and international orders, we will have done all we can to organize ourselves as best as possible to face an uncertain future.