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Robert W. McGee

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I. Introduction

The vast majority of articles and books that have been written about trade and trade policy — nearly all — look at trade from a utilitarian perspective. Utilitarians take the position that if free trade is a good policy, it is good because the vast majority benefits. Free trade gives consumers more choices. It gives them lower prices. It creates more jobs than it destroys. It is a positive-sum game. An underlying assumption of most utilitarian-based trade arguments is that governments have some inherent right to regulate trade..

This article looks at trade policy from a different perspective. While utilitarian approaches to trade have some value, and while utilitarian arguments often —and rightly — conclude that free and unrestricted trade is the best policy, they do so for the wrong reason. This article points out that the real reason why totally free and unrestricted trade is good is because it is the only trade policy that does not violate individual rights. While governments have the authority to regulate trade,[1] they do not have the right to do so. It is possible to have the authority to do something even though one does not have the right. An extreme example to illustrate this point would be the situation in Nazi Germany, where Hitler's death camp goons had the authority to murder Jews, gypsies and Poles. Although they had the authority to do so, they did not have the right. The same is true of

* Professor at the W. Paul Stillman School of Business, Seton Hall University in South Orange, New Jersey.

1 The United States Constitution, for example, gives Congress the authority to regulate trade in Article I, Section 8: "The Congress shall have Power . . .To regulate Commerce with foreign Nations."

governments and trade policy. Governments have the authority to regulate trade, and they have the power, but they do not have the right, because the regulating of trade between consenting adults violates property and contract rights and goes beyond the legitimate scope of government.

Of course, this position assumes that governments have a limited role. If one begins with the premise that the legitimate role of government is restricted to the protection of life, liberty and property[2] and that individuals should otherwise be free to regulate their own affairs, then the role of government does not include trade regulation (or rather trade restriction),[3] because such activity is beyond the legitimate scope of government. When government goes beyond these basic functions of protecting life, liberty and property, it becomes a redistributive state.[4] In order to give something to some individuals or groups, it must first take something from others because governments have no resources of their own. Whatever resources they have they must first take from someone.

Frederic Bastiat, the nineteenth century French economist and philosopher, had the following view of what determines whether a law is good or bad:

> See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime. Then abolish this law without delay, for it is not only an evil itself, but also it is a fertile source for further evils because it invites reprisals. If such a law — which may be an isolated case — is not abolished immediately, it will spread, multiply, and develop into a system.[5]

Such laws constitute legal plunder for Bastiat because they allow some individuals to use the force of government to rob others.[6] Trade

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2 Numerous philosophers over the centuries have taken this position. For detailed arguments to support this position, *see* JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT (1690; 1986); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974); TIBOR MACHAN, INDIVIDUALS AND THEIR RIGHTS (1989).

3 There is a subtle, yet distinct difference between trade regulation and trade restriction. Trade restriction prevents trade between consenting adults. Trade regulation need not involve restriction if it confines its role to establishing a rule of law by which trade can be facilitated.

4 For a detailed philosophical critique of the redistributive state, *see* BERTRAND DE JOUVENEL, THE ETHICS OF REDISTRIBUTION (1952).

5 FREDERIC BASTIAT, THE LAW 21 (1950). This book was originally published in 1850 as a pamphlet, LA LOI, reprinted in SOPHISMES ÉCONOMIQUES, Vol. I of OEUVRES COMPLÈTES DE FRÉDÉRIC BASTIAT, 4th ed. (Paris: Guillaumin et C[ie] 1878), at 343-94.

6 For some modern examples of such laws, *see* DEAN RUSSELL, GOVERNMENT AND LEGAL PLUNDER: BASTIAT BROUGHT UP TO DATE (1985); DOUG BANDOW, THE POLITICS OF PLUNDER: MISGOVERNMENT IN WASHINGTON (1990).

laws like NAFTA, GATT and the others do the same.[7] These agreements are not true free trade agreements, although they do contain elements of free trade. NAFTA,[8] GATT[9] and the other trade agreements that are hundreds or even thousands of pages long are not really about free trade. They are about how the plunder gained from protectionism is to be divvied up. In the case of NAFTA, for example, protectionist policies in some areas are allowed to exist for 15 more years.[10] So those who benefit by protectionist policies have the legal

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7 Tariffs, quotas and antidumping laws are the usual tools used to protect domestic producers at the expense of consumers. But they are not the only tools. Deliberately manipulating a currency's exchange rate also has the effect of keeping foreign products from crossing borders. The U.S. policy of deliberately weakening the dollar in comparison to the yen, for example, caused the dollar to drop by eighteen percent in the first eight months of 1993, which made it possible for barely one in fifty Japanese exporters to be profitable in the United States market. During the 1930s, monetary nationalism of this kind was a factor that set the stage for World War II. For more on these points, *see* Judy Shelton, *A Yen to Manipulate*, WALL ST. J., January 28, 1994, at A14.

It might also be pointed out that, while manipulating exchange rates can be protectionist, this tool differs from the other tools of protectionism — tariffs, quotas and antidumping laws — because manipulating exchange rates is more pervasive. Whereas tariffs, quotas and anti-dumping laws can target a particular industry or company, manipulating exchange rates can cause all foreign products to become more expensive in the domestic market.

The goal of such a policy is to reduce trade deficits. Yet reducing trade deficits is not a worthy goal. The relationship between a trade deficit and economic growth is nebulous, at best. Throughout most of the nineteenth century, the United States had a negative balance of trade. Yet the nineteenth century was a period of rapid and prolonged economic growth. The United States had a positive balance of trade during the Great Depression of the 1930s, one of the worst periods the United States economy ever faced. For more on the irrationality of the balance of trade philosophy, *see* Robert W. McGee, *Trade Deficits and Economic Policy: A Law and Economics Analysis*, 11 J.L. & Com. 159-74 (1991-2).

8 The North American Free Trade Agreement.

9 The General Agreement on Tariffs and Trade.

10 For some discussions of NAFTA, *see* GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS (1992); GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT (REV. ED. 1993); ASSESSING NAFTA: A TRINATIONAL ANALYSIS (Steven Globerman & Michael Walker eds., 1993); NAFTA AND THE ENVIRONMENT (Terry L. Anderson ed., 1993); PHILIP L. MARTIN, TRADE AND MIGRATION: NAFTA AND AGRICULTURE (1993); U.S. General Accounting Office, GAO/T-GGD-93-44, *North American Free Trade Agreement: A Focus on the Substantive Issues* (1993); U.S. Int'l Trade Comm., Pub. 2516, *Economy-Wide Modeling of the Economic Implications of a FTA with Mexico and a NAFTA with Canada and Mexico*: Report on Investigation No. 332-317 Under Section 332 of the Tariff Act of 1930 (1992); U.S. Int'l Trade Comm., Pub. 2508, *Economy-Wide Modeling of the Economic Implications of a FTA with Mexico and a NAFTA with Canada and Mexico*: Addendum to the Report on Investigation No. 332-317 Under Section 332 of the Tariff Act of 1930 (1992); U.S. Int'l Trade Comm., Pub. 2596, *Potential Impact on the U.S. Economy and Selected Industries of the North American Free-Trade Agreement*: Report to the Committee on Finance of the United States Senate on Investigation No. 332-337 Under Section 332 of the Tariff Act of 1930 (1993); U.S. Int'l Trade Comm., Pub. 2541, *Potential Effects of a North American Free Trade Agreement on Apparel Investment in CBERA Countries*: Report to the United States Trade Representative on Investigation No. 332-314, (1992); U.S. Int'l Trade Comm., Pub. 2460, *Rules of*

authority to fleece consumers for another decade and a half. If NAFTA were a true free trade agreement, it would only require one sentence, not hundreds of pages. That sentence might read something like this: "As of January 1, 1994, all trade exclusively involving Mexico, the United States and/or Canada will be treated the same as trade involving New Jersey and Kansas." But NAFTA (and the numerous other trade agreements that could be named) do not have such language. They go into great detail describing which special interest is protected for how long. Farmers, the steel industry, the auto industry, the textile industry and countless other special interest groups all receive special deals in many of these so-called "free" trade agreements. These free trade laws have developed into the systems that Bastiat warned us about.

Part II of this article reviews utilitarian approaches to trade policy and points out the weaknesses of the utilitarian approach. Part III presents the rights approach to trade policy, which is superior to the utilitarian approach for several reasons. Part IV summarizes the article and presents conclusions.

II. UTILITARIAN APPROACHES TO TRADE POLICY

A. Free Trade Results in Lower Prices

The free trade literature[11] is replete with examples of how free, unregulated trade results in lower prices.[12] But such empirical evidence is not needed to prove the point. This conclusion can be reached a priori.[13] It just makes sense that prices are lower where

Origin Issues Related To NAFTA and the North American Automotive Industry: Report to the Committee on Ways and Means, U.S. House of Representatives, On Investigation No. 332-314 Under Section 332 of the Tariff Act of 1930 (1991).

11 For summaries of the major arguments that have been put forth for and against free trade over the centuries, *see* Robert W. McGee, *The Trade Policy of a Free Society*, 19 CAP. U.L. REV. 301-41 (1990). For a more detailed critique of trade policy, *see* ROBERT W. MCGEE, A TRADE POLICY FOR FREE SOCIETIES: THE CASE AGAINST PROTECTIONISM (1994).

12 Any general economics text discusses this point, as do books on monopoly theory and practice. For some books that provide interesting examples, *see* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM (1963); GABRIEL KOLKO, RAILROADS AND REGULATION 1877-1916 (1965); JAMES BOVARD, THE FAIR TRADE FRAUD (1991).

13 An *a priori* proposition can be defined as "one that can be known to be true, or false, only by reference to experience, except in so far as experience is necessary for understanding its terms. An *a posteriori* proposition can be known to be true, or false, only by reference to how, as a matter of contingent fact, things have been, are, or will be." ANTONY FLEW, A DICTIONARY OF PHILOSOPHY 15 (1979). Emphasis added by author. Most economists are empiricists. They base their ideas and theories on empirical evidence. But some economists take a different, a priori approach. For example, *see* LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS (1949).

there is competition than where there is not. Economists would say that the supply curve shifts to the right when competitors are permitted to enter a particular market. And as any student of price theory knows, when the supply curve shifts to the right, the price declines.[14]

Monopoly has just the opposite effect on prices. Where there is monopoly, prices tend to be higher than where there is competition. Trade policies that restrict competition give a partial or total monopoly to the supplier(s) that are presently in the market. Their incentive to reduce price to gain market share is reduced or nonexistent because they already have the market to themselves. If General Motors were the only auto manufacturer allowed to sell cars in the United States, it would reduce prices only because it wanted to put two cars in every garage, not because it wanted to compete with foreign auto producers. If it were the only company permitted to sell cars in the domestic market, there would be no foreign competition with which to be concerned.

Free trade also means the absence of tariffs. And tariffs are tacked on to the prices that consumers must pay for foreign products. Thus, this tacking will not take place in a truly free trade regime because tariffs will be zero. Thus, whether a protectionist policy takes the form of a tariff or a trade barrier that prevents foreign producers from competing in the domestic market, a policy of free trade leads to lower prices. Either the supply is increased because foreign producers are allowed to sell in the domestic market, or tariffs are zero.

Using the antidumping laws to beat up on foreign competitors also has a tendency to raise the prices consumers must pay for products.[15] Antidumping laws put a chilling effect on price competition. The only way that foreign competitors can insulate themselves from being hit with an antidumping investigation is to keep their prices relatively high; even then they are not fully protected. It is possible for a foreign producer to be found guilty of dumping even if it charges the same price for its product everywhere it has sales.[16]

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14 Any price theory text discusses this point, as does the price theory section of any general economics text.

15 For a critical analysis of the antidumping laws, *see* Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 Nw J. Int'l L. & Bus. 491-562 (1993).

16 Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 Tex. Int'l L.J. 265, 280 (1987).

B. Free Trade Increases Consumer Choice

A policy of free trade also increases consumer choice. Protectionist measures such as quotas permit only a limited supply of a foreign product to be sold in the domestic market. Consumers that want to purchase a product that is subject to a quota may be precluded from doing so because there just aren't enough units of the product to go around.

If the restrictive trade policy takes the form of a tariff instead of a quota, consumer choices are still limited because the tariff increases the price they must pay. Having a high price serves to limit consumer choices because not all consumers can afford to pay the higher price.

If the protectionist policy takes the form of an antidumping investigation, some foreign producers will decide not to do business in the United States rather than comply with the administrative burdens that come with an antidumping investigation. Matsushita, for example, decided to abandon its small business telephone system sales[17] to the United States, thus losing more than fifty million dollars in export sales,[18] because the Commerce Department demanded that Matsushita translate three thousand pages of financial documents from Japanese into English. The demand was made on a Friday afternoon, and the project was supposed to be completed by the following Monday morning. Being found guilty of dumping can also preclude a foreign company from doing business in the United States, or can force a company to raise its price to the extent that its products are priced out of the market.

C. Protectionism Destroys More Jobs Than It Saves

Numerous studies have found that protectionist trade policies destroy more jobs than they save. One study found that a certain protectionist policy would save 36,000 apparel manufacturing jobs but destroy 58,000 jobs in the retailing end of the apparel industry.[19] That equals a job loss/gain ratio of 1.6 to 1.[20] A study of the effects of the 1984 voluntary restraint agreement on steel imports found that the agreement saved 16,900 jobs in the steel industry but destroyed 52,400

[17] Investigation 731-TA-426. Listed in I.M. DESTLER, AMERICAN TRADE POLITICS 393 (2d ed. 1992).

[18] JAMES BOVARD, THE FAIR TRADE FRAUD 136 (1991).

[19] Laura Megna Baughman and Thomas Emrich, *Analysis of the Impact of the Textile and Apparel Trade Enforcement Act of 1985*, *cited in* I.M. DESTLER & JOHN S. ODELL, ANTI-PROTECTION: CHANGING FORCES IN UNITED STATES TRADE POLITICS, 54, n.40 and 56, n.43 (1987).

[20] 58,000/36,000 = 1.6.

jobs in the industries that use steel[21] for a loss/gain ratio of 3.1 to 1.[22] Another study of steel import restraints estimated that a particular protectionist policy would save 27,072 jobs and destroy 40,927 jobs[23] for a ratio of more than 1.5 to 1.[24] Another study determined that a fifteen percent import quota in the steel industry would save 26,000 jobs in the steel industry and destroy 93,000 jobs in the industries that import steel[25] for a loss/gain ratio of 3.6 to 1.[26]

D. Problems With Utilitarian Approaches to Trade Policy

There are several problems with taking a utilitarian approach to trade issues. The fatal flaw is that the utilitarian approach ignores property and contract rights. But there are other weaknesses as well.

One weakness with the utilitarian approach is that it is not possible to accurately measure gains and losses.[27] So if the goal is to achieve the greatest good for the greatest number, one must work with estimates. Economics textbooks present their examples of the application of marginal utility theory in terms of units, which they call utils. Each util is assigned a numerical value. With each additional purchase, the marginal utility declines.

For example, let's say that Jane is very hungry. She goes into a fast-food restaurant and orders a hamburger for one dollar. Since she is very hungry, the value of the hamburger, to her, is ten utils. And since one dollar is worth only three utils to her,[28] her satisfaction is increased by surrendering the one dollar, worth three utils, for a

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21 Arthur Denzau, *How Import Restraints Reduce Employment*, 80 Center for the Study of American Business, (Washington University at St. Louis) (1987).

22 52,400/16,900 = 3.1.

23 Jose A. Mendez, *The Short-Run Trade and Employment Effects of Steel Import Restraints*, 20 J. World Trade 554-66 (1986).

24 40,927/27,072 = 1.5.

25 Arthur T. Denzau, *American Steel: Responding to Foreign Competition*, 66 Center for the Study of American Business, (Washington University at St. Louis) (1985).

26 93,000/26,000 = 3.6.

27 For a detailed critique of this point, *see* Murray N. Rothbard, Man, Economy, and State 260-68 (1970).

28 She places a value of three utils on one dollar, but other consumers may place different values on one dollar. A rich person may place a value of 0.005 utils on one dollar, whereas a poor person may assign a value of twenty utils to one dollar. And the number of utils' value for a dollar may change with the same individual. As the individual spends more dollars, thereby reducing the supply of dollars, the value of the next dollar — the marginal dollar — may change. So the value of a dollar to a particular individual can change. It is not necessarily constant. It should also be pointed out that a rich person does not necessarily derive fewer utils of benefit from a dollar than does a poor person. This relationship is often assumed by economists (the graduated income tax is based on the validity of this assumption), but this assumption may be invalid.

hamburger that is worth ten utils.[29] She has gained to the extent of seven utils. After finishing the first hamburger, she must decide whether consuming a second hamburger would increase her happiness. If she values the second hamburger at six utils and the next dollar in her purse at three utils, she will decide to purchase a second hamburger because doing so will increase her satisfaction. So she exchanges a dollar, worth three utils, for the second hamburger, worth six utils. After consuming the second hamburger, she must decide whether to buy a third hamburger. If the value of a third hamburger to her is only two utils, she will decide not to buy since she is better off keeping her dollar, which is valued at three utils, rather than exchanging it for something that has a value to her of only two utils.

The problem inherent in using this approach is that utils are defined in terms of definite, measurable units, whereas choices are actually ranks. We can say that she prefers two hamburgers to two dollars, but we cannot say that she gains six utils by making an exchange. Economics textbook writers use utils to illustrate how the marginal utility theory works. But utils actually do not exist.

Attempting to apply the marginal utility theory to international trade presents some problems. For example, if a certain protectionist measure is applied to a particular product, we cannot determine by precise measurement whether the gains received by the domestic producers exceed the losses incurred by domestic consumers. And it should also be pointed out that domestic producers and consumers are not the only ones affected by protectionist policies. Foreign producers, their employees, the companies that would otherwise transport the foreign product to the domestic market, the domestic import companies and their employees, and the businesses that would otherwise receive a portion of the import companies' employee salaries are also affected.

Let's say that a particular protectionist measure causes the price of the average shirt to be five dollars higher than would be the case under free trade. So millions of consumers have to pay an extra five dollars for a shirt, and domestic producers of shirts gain as a result. But they do not necessarily gain the same total amount as the loss that

29 It should be pointed out that these values are subjective. If the seller of hamburgers also valued one dollar at three utils and one hamburger at ten utils, there would be no trade because the seller of hamburgers would be worse off if a trade transpired. The reason any trade takes place is because the buyer and seller place different values on the products or services they buy and sell. Both parties to a trade gain, in their own subjective judgment. The seller of hamburgers would rather have the one dollar than the hamburger, and Jane would rather have the hamburger than the one dollar.

domestic consumers incur because some of the shirts consumers buy will be manufactured by foreign producers. So an induced cost increase also might benefit foreign producers (especially if the induced cost increase is the result of a quota rather than a tariff). The presence of a quota will reduce the number of shirts that a foreign producer can sell in the domestic market, but it will increase the unit price the foreign producer can charge, thus increasing foreign producer profit margins.

Fewer foreign shirts will be purchased as a result, which means that the domestic import companies that would otherwise bring the shirts into the United States will lose business. So they will need fewer employees. And the money that these employees would otherwise earn cannot flow into the purchase of autos, clothing and so forth because these employees do not have jobs as a result of the protectionist measure.

There is really no way to accurately measure the total gains and total losses that result from a particular protectionist measure because it is impossible to predict where the money will flow in the absence of protectionism. But it can be concluded, a priori, that total satisfaction will decrease if consumers have to settle for their second or third choice because some protectionist measure prevents them from buying their first choice.

Another way to look at the effect of a protectionist measure, in an attempt to determine whether the measure is good or bad, is to predict who would gain and who would lose if the particular policy were implemented. In the case of a protectionist measure on textiles, for example, millions of consumers stand to lose because they would have to pay higher prices.[30] But a few domestic textile companies stand to gain by the passage of the measure. Based on this approach, it might be concluded that the protectionist measure is bad because many individuals (consumers) stand to lose something, whereas only a few domestic textile manufacturers stand to gain. But this analysis is

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30 Numerous studies have been made that attempt to measure the extent of consumer losses that result from protectionism in various industries. In textiles and apparel, some results have been as follows: GARY CLYDE HUFBAUER, DIANE T. BERLINER & KIMBERLY ANN ELLIOTT, TRADE PROTECTIONISM IN THE UNITED STATES: 31 CASE STUDIES 146 (1986) (the induced price increase in textiles was 21%); WILLIAM R. CLINE, THE FUTURE OF WORLD TRADE IN TEXTILES AND APPAREL 15 (1987) (the estimated price increase for textiles was 28%); HUFBAUER, BERLINER AND ELLIOTT 146 (1986) (39% price increase in apparel); Carl Hamilton, *An Assessment of Voluntary Restraints on Hong Kong Exports to Europe and the U.S.A.*, 53 ECONOMICA 339-50 (1986) (50% increase in apparel prices); Susan Hickok, *The Consumer Cost of Trade Restraints*, FED. RESERVE BANK N.Y. Q. REV., Summer 1985, at 1,7 (17% to 25% increase in apparel prices); CLINE 15 (1990) (53% increase in apparel prices).

superficial because the unit gains and unit losses are not equal. The domestic textile producers stand to gain much if the measure becomes law, whereas the millions of consumers who lose something would only lose a small amount, perhaps five dollars per shirt.

Another fact to consider is that the textile manufacturers are highly organized special interests, whereas the majority, the consumers, are unorganized. It is in the textile manufacturers' best interest to expend large sums of money to lobby Congress to pass the piece of protectionist legislation. But it is rational behavior for the millions of unorganized consumers not to organize to petition Congress not to pass the bill. The cost of organizing, in terms of time, effort and money expended, is just not worth it. It is better to pay an extra five dollars a shirt than to try to counterbalance the special interest that has the ear of the legislature.

This phenomenon is present regardless of which industry is involved. The steel industry, auto industry, farm lobby and every other producer of domestic goods stand to gain, in the short-run at least, if they can convince Congress to protect them from foreign competition. It pays for them to organize. And it is rational behavior for the consumers of these items not to organize because the cost of doing so exceeds the benefits to be gained by organizing.[31] Thus, the special interests have a built-in advantage over consumers.

The Public Choice School of Economics has been discussing this point for several decades. Wherever the costs of lobbying are low and the potential benefits are high, special interests will run to government for protection or special favors. Public Choice economists call this phenomenon rent-seeking: the seeking of special privileges or protection from government or getting others to pay for your benefits.[32]

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31 There are some exceptions, of course. In some cases, one organized special interest lobbies Congress to pass a piece of protectionist legislation while another, opposing special interest lobbies Congress not to pass it. For example, in some instances, the steel industry's attempt to lobby Congress has been opposed by industry groups that use steel. And domestic auto producers that try to restrict foreign imports have been opposed by foreign car dealerships. So there is sometimes organized opposition, a countervailing power where special interests do battle with each other. For some case studies detailing specific instances where special interest groups have engaged in this kind of activity, *see* I.M. DESTLER AND JOHN S. ODELL, ANTI-PROTECTION: CHANGING FORCES IN UNITED STATES TRADE POLITICS (1987).

32 For more on the concept of rent-seeking, *see* TOWARDS A THEORY OF A RENT-SEEKING SOCIETY (James M. Buchanan, Robert Tollison and Gordon Tullock eds., 1980); THE POLITICAL ECONOMY OF RENT-SEEKING 217-37 (Charles K. Rowley, et al. eds., 1988) (applying the theory of rent-seeking to trade regulation); GORDON TULLOCK, THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING (1989); GORDON TULLOCK, PRIVATE WANTS, PUBLIC MEANS: AN ECONOMIC ANALYSIS OF THE DESIRABLE SCOPE OF GOVERNMENT (1970).

Another basically utilitarian argument is the public policy or common good argument. If a policy of free trade is good, it is good because it is in the public interest or it is for the common good. The fatal flaw in this line of reasoning is that there is no such thing as "the public." The public is just a collective term to describe the general citizenry. The public does not eat, sleep and breathe. Only individuals do these things. Only individuals have interests. In a pluralist society, these interests conflict.[33] Auto manufacturers (their stockholders and employees, actually) have an interest in seeing protectionist legislation passed to protect them from foreign competition. And the millions of individuals who purchase autos have an interest in having low prices and a wide variety of choices. Foreign auto producers also have an interest in selling their products on the domestic market. While it might be concluded that the public interest is in free trade, this conclusion is reached on utilitarian grounds. The consumers who stand to gain by free trade outnumber the auto company stockholders and employees who stand to gain by protectionism. [The interests of the foreign auto producers, their stockholders and employees are usually ignored in arriving at this determination.]

Ayn Rand makes the following point about the concept of the public interest:

> Since there is no such entity as "the public," since the public is merely a number of individuals, any claimed or implied conflict of "the public interest" with private interests means that the interests of some men are to be sacrificed to the interests and wishes of others. Since the concept is so conveniently undefinable, its use rests only on any given gang's ability to proclaim that "The public, *c'est moi*" — and to maintain the claim at the point of a gun.[34]

Aside from this inherent weakness in the public interest argument is the fact that the argument is sometimes used to protect special interests at the expense of the general public. It has been argued that the passage of antimerger legislation is in the public interest, when in fact such legislation often serves to protect entrenched, inefficient management at the expense of shareholders, consumers and the general public.[35] The farm lobby argues that it is in the public interest to have a strong farm sector, so Congress passes legislation to subsidize the

[33] Michael Novak points this out in FREE PERSONS AND THE COMMON GOOD 19-22 (1989).

[34] AYN RAND, THE VIRTUE OF SELFISHNESS 116 (1964); *see also* THE AYN RAND LEXICON: OBJECTIVISM FROM A TO Z 396 (Harry Binswanger ed., 1986).

[35] For a discussion of this point, *see* Robert W. McGee, *Mergers and Acquisitions: An Economic and Legal Analysis*, 22 CREIGHTON L. REV. 665-93 (1988-89).

farm industry and protect it from foreign competition at the expense of the general public.[36]

Industry leaders whose companies are losing market share from foreign or domestic competition petition Congress to regulate their industry to prevent cutthroat competition, in the public interest.[37] But the effect of such legislation is to keep prices abnormally high, compared to what they would be in a free market. Most antitrust actions are initiated not by government but by competitors who see their market share eroded by more efficient competitors.[38] Members of various professions and occupations such as doctors, lawyers, accountants, hair dressers, electricians, opticians, pharmacists, morticians, auto mechanics, speech therapists, tattoo artists and so forth, petition the legislature to pass licensure laws to protect the general public from quacks when research shows that the loosening or repeal of such laws results in higher quality service at lower cost.[39]

Another, related argument is the balancing of interests argument, or the balancing of rights argument. This argument takes the position that the rights of some individuals or groups must be balanced against the rights of other individuals or groups. But this argument is just another variation of the basic utilitarian argument. It is grounded in positive rights theory, which we have already seen is fatally flawed.[40]

The balancing of rights argument, when applied to trade theory, argues that the rights of foreign producers to sell their products on the domestic market must be balanced against the rights of domestic producers to be protected from dumping or unfair competition. There are several weaknesses with this line of reasoning. For one thing, the

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36 For more on this point, *see* JAMES BOVARD, THE FARM FIASCO (1989).

37 The Interstate Commerce Commission and numerous other government agencies were created to protect industry leaders from loss of market share to smaller, more competitive companies. For documentation of this point, *see* GABRIEL KOLKO, RAILROADS AND REGULATION 1877-1916 (1965); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM (1963).

38 D.T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (1990); D.T. ARMENTANO, ANTITRUST POLICY: THE CASE FOR REPEAL (1986). For an in-depth discussion of how the antitrust laws have been used by rent-seekers to feather their own nests at the expense of the general public, *see* WILLIAM F. SHUGHART II, ANTITRUST POLICY AND INTEREST-GROUP POLITICS (1990).

39 MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (1962); OCCUPATIONAL LICENSURE AND REGULATION (Simon Rottenberg ed., 1980); S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA (1987); OCCUPATIONAL REGULATION AND THE PUBLIC INTEREST: COMPETITION OR MONOPOLY? (Robert Albon and Greg Lindsay eds., 1984); STANLEY J. GROSS, OF FOXES AND HEN HOUSES: LICENSING AND THE HEALTH PROFESSIONS (1984).

40 The balancing of rights theory is often discussed in connection with the First Amendment. For a discussion on this point, *see* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987).

rights of consumers to buy the products of their choice from the sellers of their choice is often ignored. But more importantly, this argument assumes that domestic producers have some right to sell their products even though consumers do not want to do business with them. Domestic producers do not have their rights violated when a foreign producer "dumps" products on the domestic market.[41] Although they may be harmed by foreign dumping, their rights are not violated because they have no property rights in transactions that consumers do not want to enter into with them.

If a supermarket opens up across the street from a mom and pop grocery store, there is no doubt that the mom and pop store will be harmed by the competition. It may even be driven out of business. But it cannot be said that their rights are violated by having the supermarket set up shop across the street. The supermarket has every right to open a store across the street (not to mention the fact that consumers will benefit by lower prices and a larger selection), and mom and pop have no right to prevent consumers from taking their business across the street if they want to. Government has no right to prevent the supermarket from opening because there are no rights to "balance." Although the interests of mom and pop are diametrically opposed to the interests of the supermarket, government has no business balancing these interests in one direction or the other. The real issue is rights, not interests. When people speak about balancing "interests," what they really mean is balancing "rights." But in a negative rights regime,[42] rights can never conflict. You have the right to property and so do I. You have the right not to be killed or confined and so do I. It is only in a positive rights regime that rights can conflict because the right of one individual or group must be sacrificed so that another individual or group can gain something. Thus, the balancing of interests argument suffers from several structural weaknesses.

III. The Rights Approach

A major problem with any utilitarian argument is that it is impossible to precisely determine the total gains and the total losses. Thus it is not possible to determine in many cases whether a particular policy

41 Many foreign producers that are accused of dumping their products on the market are not really dumping, in the sense that they are not selling for less than the cost of production. And even if they are, so what? Consumers benefit by the practice. Foreign producers can also be found guilty of dumping if they sell their products for less than "fair value." But aside from the fact that "fair value" is a completely arbitrary concept, this practice neither harms consumers, nor violates anyone's rights.

42 Negative and positive rights are discussed below at Part III.

results in the greatest good for the greatest number. But the fatal flaw in any utilitarian approach is that utilitarian approaches ignore individual rights. If the good outweighs the bad, a utilitarian would not be concerned that someone's rights have to be violated to implement the policy.

To illustrate this point, let's take an example. Let's say that John is and always has been a sex-craved maniac. He has just been released from prison after ten years of incarceration. During that time he has not had sex. Now he is prowling the streets with the goal of making up for lost time. He comes upon a prostitute who is lying on the sidewalk in a drunken stupor. He drags her into an alley and rapes her. While he is ripping off her clothes, she protests by mumbling that he should stop. But she does not put up any resistance and actually falls asleep while he is committing the crime.

She has experienced almost no discomfort or disutility as a result of John's act. But John has experienced a great deal of pleasure. Has society benefitted by the act? A utilitarian would conclude that it had. One person gained and one person lost as a result of the rape. It appears to be a zero-sum game. But the person who gained, gained a great deal, whereas the person who lost, lost only a little. The gains exceed the losses, even if John's utility gain and the prostitute's utility loss cannot be measured precisely, and the act can be declared to be good on that account.

The example is outrageous, but the thought process a utilitarian uses to arrive at a conclusion cannot be faulted on utilitarian grounds. The reader may be quick to point out that the prostitute's rights were violated in a very personal way by John's action. But rights violations are of no concern to a pure utilitarian theorist. All that matters to a utilitarian is whether the gains exceed the losses. The idea that someone's rights might have to be violated to achieve the goal is not worthy of consideration.

But violating someone's rights is never necessary to achieve a worthy goal. If someone's rights must be violated to achieve a goal, the goal is not a worthy one in the first place. Utilitarian approaches all begin with the premise that the end justifies the means. Rights approaches begin with the premise that it is the process that is important, not the destination. A trade policy based on utilitarianism can have protectionist elements if it is determined that the winners from the policy exceed the losers, or if it is determined that "society" benefits as a whole. Under a rights approach to trade policy, "society" is not even at issue. The issue is whether someone's rights, properly defined, are violated by the policy. If rights are violated, then the policy is a bad one. If no one's rights are violated, then the policy is not a bad one.

Which brings us to another important question: What exactly are rights? Philosophers over the centuries have viewed rights from two different and diametrically opposed perspectives. Negative rights include the rights to life, liberty and property. Stated in negative terms, they would be the right not to be killed, the right not to be involuntarily confined and the right not to have your property taken from you without your consent. Negative rights are inherent. They are not rights that are granted by government. They are rights that come before government. Governments are instituted to protect these rights.

Positive rights advocates view rights from a different perspective. Examples of positive rights include the right to medical care and the right to subsidized rent. Positive rights are rights that are granted by government. They are not inherent. And they are rights that are gained at someone else's expense.

Under a positive rights regime, the rights of some must be sacrificed so that others may have rights. In the case of medical care, for example, those who claim a right to medical care gain this right at the expense of others, who must provide it. Free medical care does not mean that medical care is costless: The taxpayer has to pay. But it is free to the recipient, because the recipient incurs no out of pocket costs.

Rent control laws also work in this manner. If the law prevents a landlord from charging eight hundred dollars a month (the market rate) for an apartment, the difference between the actual rent and the market price for the apartment is, in effect, a forceable transfer of property from the landlord to the tenant. If the maximum rent that can legally be charged is five hundred dollars and the rent that could be charged in a free market is eight hundred dollars, then the landlord is, in effect, having three hundred dollars of his property confiscated each month and transferred to the tenant. The tenant's "right" to affordable housing comes at the expense of the landlord. If the tenant lives in a government subsidized housing project, the result is the same, except that it is the taxpayer rather than the landlord who pays for the tenant's right to affordable housing.

Losses always exceed gains under a positive rights regime if for no other reason than the fact that there are transaction costs. The landlord will not voluntarily write out a three hundred dollar check to the tenant each month. There has to be an enforcement authority around the corner ready to enforce the law if the landlord does not want to comply. An army of bureaucrats has to be retained to see that the various redistributive laws are properly administered and enforced. So it cannot be said that a positive rights regime is a zero-sum game, because the losses do not exactly offset the gains. The landlord loses three hundred dollars a month and the tenant gains three hundred dollars a month, but the cost of maintaining the enforcement authority must also be counted, which leads to a negative-sum result. Economists call this net loss a deadweight loss.

But whether this policy or that policy is a zero-sum game, a negative-sum game or a positive-sum game is really beside the point. Discussions about whether a policy is a negative-sum or positive-sum game are utilitarian because the object is to determine whether the gains exceed the losses. In a rights regime, gains and losses are irrelevant. All that matters is whether rights are violated in the negative sense of the term.

IV. Summary and Conclusion

NAFTA, GATT and all other trade agreements are fatally flawed because they begin (at best) from a utilitarian premise. If a trade agreement is indeed intended to be pro-consumer rather than protectionist,[43] advocates take the position that the trade policy should be implemented because it benefits the majority, or that it benefits consumers, or that it is in the public interest. But a proper position to take is that a trade policy should be implemented or adopted if it does not violate anyone's rights. The public interest, public policy or other majoritarian arguments are totally beside the point and do not address the real issue. Whether some policy benefits the majority is irrelevant, not to mention not always easy to determine.

Arguments about the gains and losses involved in adopting NAFTA, GATT or other trade agreements are off the mark and only lead the debaters astray from the real issue. Whether a trade agreement should be adopted or not should be determined solely on the basis of whether anyone's rights are violated. If a trade agreement would violate anyone's contract or property rights, the policy should not be adopted. And if an existing trade policy violates anyone's contract or property rights, it should be abolished immediately. The

43 It cannot be said that all trade agreements fit this description. Some are intended to be protectionist.

proper function of government is to protect life, liberty, property and contract rights and to otherwise leave people alone to seek their happiness in their own way. These are the only functions that a government can rightly perform in a pluralist society where individuals have different interests and goals. Governments that prevent consenting adults from entering into voluntary exchange are going beyond their legitimate scope.