Farewell to Jackson-Vanik: The Case for Unconditional MFN Status for the People's Republic of China

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The Jackson-Vanik Amendment to the 1974 Trade Act linked Most-Favored-Nation ("MFN") status for "nonmarket economy" countries to the issue of human rights. In recent years, Jackson-Vanik's mandate has spurred contentious debate over the extension of MFN status to the People's Republic of China because of continued reports of human rights abuses in that country. In this Comment, the author argues that U.S. policymakers have failed to ask the threshold question of whether a country's human rights record is a proper criterion for extending MFN treatment. The author advocates the repeal of Jackson-Vanik and the extension of unconditional MFN status as a basis for normalized trade relations between the United States and China.

I.
INTRODUCTION

The Jackson-Vanik Amendment¹ to the 1974 Trade Act² established guidelines for U.S. trade relations with Communist nations. The Amendment linked the extension of Most-Favored-Nation (MFN) status for a "nonmarket economy" country to its record on human rights, specifically its emigration practices.³ Since its adoption, Jackson-Vanik has mandated an annual review for most Communist nations receiving U.S. MFN status.

In recent years, Jackson-Vanik has become a focal point of tension in relations between the United States and China.⁴ In the aftermath of the


I would like to thank Professor Bob Berring for his guidance on this piece, and the editors at Asian Law Journal, Eric Lai, Grace Hsu, Lyra Rufino-Maceda, and Jasmin Patel, for their patience, insight, and hard work. Thanks also to the able staff of ALJ and to its Executive Board members, who have worked so hard to make this journal possible.

This Comment is dedicated to my parents, Jenkal and Mary Tan Lee Kuo, whose love for China has been my inspiration.

3. Id.
The Tiananmen Square incident in June of 1989, many human rights advocates criticized the Bush Administration’s response as too accommodating and began to call for tougher U.S. measures, including revocation of MFN treatment. From 1990 to 1992, China’s MFN status hung in a balance between White House efforts to continue MFN treatment and congressional attempts to revoke or place conditions on its extension. In May of 1993, with congressional approval, President Clinton renewed China’s MFN status but attached strict conditions requiring improvements in China’s human rights record before he would agree to renew China’s MFN status in 1994.

China’s MFN status is one of the most important foreign policy decisions our Government will make this year and certainly the most important with respect to China.); Sino-American Relations: Current Policy Issues, Hearings Before the Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations, 102d Cong., 1st Sess. 1 (1991) [hereinafter Sino-American Relations Hearings] (statement of Sen. Alan Cranston) citing MFN status for China as “[t]he principal issue before the Congress today” in U.S.-China relations.

5. On June 4, 1989, the Chinese military opened fire upon demonstrators in and around Tiananmen Square in Beijing.


6. Although President Bush quickly condemned China’s leaders and pledged to halt military sales and suspend visits by military delegations, he was reluctant to impose additional immediate sanctions. See Robert Pear, President Assails Shootings in China, N.Y. Times, June 4, 1989, at A21; Bernard Weinraub, President Spurns Other Sanctions, N.Y. Times, June 6, 1989, at A1.

For a detailed overview of economic sanctions and other measures imposed by the Bush Administration in the wake of the 1989 crackdown, see REPORT ON ECONOMIC SANCTIONS AGAINST CHINA: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 192, 101st Cong., 2d Sess. 9-19 (1990) (discussing suspension of Overseas Private Investment Corporation services, Trade and Development Program activities, munitions export licensing, crime control and detection instruments equipment shipments, satellite technology transfer, nuclear cooperation, and efforts to liberalize controls of high technology exports).


9. See CONTINUATION OF WAIVER AUTHORITY: COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 97, 103d Cong., 1st Sess. 1, 4-5 (1993) [hereinafter CONTINUATION OF WAIVER AUTHORITY] (conditioning subsequent renewal of MFN in 1994 to China’s abiding by freedom of emigration objectives and an agreement on prison labor, and on progress toward adherence to the Universal Declaration of Human Rights, the release of political prisoners, the respect for Tibet’s religious and cultural heritage, and the permitting of international broadcasts into China).
The Chinese have watched this high-stakes, political seesaw with keen interest and, more recently, vocal protest. Given the importance of the MFN issue to bilateral relations, final resolution of the MFN question has become critical to any coherent U.S. policy toward China.

The American public’s collective outrage over the events in 1989 would seem to require decisive action on the part of the U.S. government. The litany of abuses in China, confirmed by personal accounts and by international monitoring organizations such as Asia Watch and Amnesty International, form strong ammunition for those who would restrict or completely revoke MFN status. Recent proposals to restrict MFN extension have condemned China for the nationwide arrest of political dissidents and participants in the 1989 uprising, the abuse and torture of detained persons, China’s de facto martial law in

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10. See Sheryl WuDunn, China Denounces Terms of Clinton’s Trade Deal, N.Y. TIMES, May 30, 1993, at A4 (quoting the Chinese government response that “[i]f the U.S. side should insist on its way, it can only seriously impair Sino-U.S. relations and their economic and trade cooperation, which eventually will hurt the vital interests of the United States. Any attempt to impose one’s way on others will go nowhere.”).


15. After the 1989 crackdown, thousands of participants—perhaps as many as 30,000—were allegedly rounded up and detained without charge. See May 1990 MFN Hearings, supra note 4, at 47. By 1991, a “majority” of those held in connection with the 1989 crackdown had supposedly been released. See June 1991 MFN Hearings, supra note 12, at 7 (statement of Lawrence S. Eagleburger, Deputy Secretary of State).

16. The conditions in which prisoners are held are said to be truly deplorable. “[P]rison cells are grossly overcrowded, diet severely inadequate, infectious disease widespread, and torture, beatings, and abuse frequent.” One student described the majority of detainees as bearing wounds inflicted by severe beatings by prison guards, and as having given false confessions under duress. May 1990 MFN Hearings, supra note 4, at 47 n.5. See generally Sino-American Relations Hearings, supra note 4, at 36-37 (statement of Curt Goering, Amnesty International USA) (describing torture and ill-treatment of prisoners in China).
Tibet, the use of prison labor for export products, and restrictions on freedom of religion, the press, and peaceful assembly.

Not surprisingly, the Chinese have responded negatively to U.S. concern for human rights in China by claiming that it amounts to unwarranted interference in their internal affairs. In addition, the leadership in Beijing has raised a relativist defense of China’s human rights record, stating that...

17. The Chinese imposed martial law in Lhasa in March of 1989 in response to growing defiance of Chinese rule. Martial law was officially lifted on May 1, 1990. Critics charge, however, that de facto martial law is still maintained over the entire region. See Sino-American Relations Hearings, supra note 4, at 33 (statement of Curt Goering) (describing Amnesty International study of the plight of Tibetan nationalists).

18. The issue of Chinese exports produced by prison labor is generally considered "one of the more significant" issues in U.S.-China relations. Thomas L. Friedman, U.S. Inspections Of Jail Exports Likely in China, N.Y. Times, Jan. 21, 1994, at A1 (quoting Lloyd Bentsen, Secretary of the Treasury).

19. See, e.g., Sino-American Relations Hearings, supra note 4, at 34 (statement of Curt Goering) (reporting that freedom of religion is only protected "for those who practice within the context of officially recognized and officially controlled religious organizations"); United States-People’s Republic of China (PRC) Trade Relations, Including Most-Favored-Nation Trade Status for the PRC: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means, 101st Cong., 2d Sess. 304-13 (1990) [hereinafter, June 1990 MFN Hearings] (statement of Amy L. Sherman, the Puebla Institute) (testifying that persecution of independent religious believers has dramatically increased).


21. During General Brent Scowcroft’s second visit to Beijing, seven students knelt in front of the Central Broadcasting TV Studios displaying a banner that asked, "Why are we so poor?" The students were beaten and arrested, and two of them were allegedly sentenced to death. The others were given severe prison terms. June 1990 MFN Hearings, supra note 19, at 151 (statement of Dr. Yang Ye).

22. China officially continues to reject any unified criteria for human rights and cautions that "if every country were allowed to treat human rights issues in other countries according to their own standards, then it would be entitled to interfere with the other countries... on the pretext that human rights are being infringed." Information Office Director on Human Rights in China, Xinhua General Overseas News Service, Nov. 2, 1991, available in LEXIS, Nexis Library, Xinhua File (quoting Zhu Muzhi, Director of the State Council Information Office).
each nation has its own concept of human rights, depending on its historical background, cultural tradition and values, and economic development.

Congressional debate has for the most part centered on whether MFN extension would either further or frustrate the goal of improving human rights in China. Opponents of MFN extension generally believe that economic sanctions would send a clear signal of U.S. resolve and would weaken the Chinese economy enough to compel improvements in human rights. Proponents counter that MFN treatment benefits reformist elements in Chinese society; MFN revocation would thus damage the sectors

23. Because Chinese history is in large part defined by the struggle against foreign intervention in Chinese affairs, linkage of MFN and human rights runs the risk of antagonizing Chinese leaders who are sensitive to what they perceive as a historical pattern of Western meddling. For example, Director Zhu of the State Council Information Office stated that the U.S. policy of imposing its definition of human rights “cannot but remind one of the colonialists” and “have become pretexts ... to indulge in power politics and hegemonism.” Id. Other official pronouncements agree:

The right to independence means the full independence a state enjoys in exercising its rights and in handling its domestic affairs within the scope of sovereignty, free from external interference. If a state or a nation loses its independence and sovereignty, it will lose all the assurances and will be absolutely vulnerable to foreign invasion and domination. We will never forget the bitter experience of old China as a semi-colonial and semi-feudal society. It was those imperialist powers, namely, Britain, France, the United States, Japan and Russia, that devastated China’s national sovereignty and the Chinese people’s right to subsistence.

24. The traditional Confucian concept of human rights is not founded upon the individual as a unitary actor, but rather upon the interaction of the individual with others in society. Thus, traditional Chinese thinking assumes a harmony of interest between the state and the individual and does not encourage or contemplate conflict between the two. See ANDREW J. NATHAN, CHINESE DEMOCRACY 113 (1985).

Within a traditional, properly functioning social order there would be no place for the assertion of “individual rights” as understood in the West:

individuals have legitimate interests, to be sure, and in the good society, these interests will be taken care of ... To surround these interests with an aura of sanctity and to call them “rights,” to elevate the defense of these individual interests to the plane of a moral virtue, to “insist on one’s rights”—is to run entirely counter to the spirit of [the traditional Chinese social order]. The proper predisposition with regard to one’s interest is the predisposition to yield rather than the predisposition to insist.


25. The Chinese leaders have argued that “Marxist” human rights of economic entitlement are preferable to “Capitalist” human rights of individual political liberties. See, e.g., Human Rights in China “Superior” to Those in West, supra note 23. These entitlements, in China’s case, include the “people’s right to subsistence and development”—the struggle for which so many lives were lost. Id. This implies that there are “fundamental” Marxist rights that, though different than those of pluralistic or democratic societies, are at least equally inalienable to the Chinese.


27. See May 1990 MFN Hearings, supra note 4, at 81-86 (statement of Dr. Haiqing Zhao, Harvard University, Chairman of the Nat’l Comm. on Chinese Student Affairs, Independent Federation of Chinese Students and Scholars) (arguing that suspending MFN would hurt the Chinese government financially and encourage democracy in China); id. at 221 (statement of Rep. Tom Lantos) (proposing that the economic difficulties resulting from denying MFN would urge China to adopt more “decent” human rights policies).
of China best suited to bring about democratic change and improved human rights.28

The debate over whether to revoke or extend MFN status in light of China’s human rights record poses the wrong question. It ignores the threshold question of whether a country’s human rights record is a proper criterion for MFN trade policy. This Comment argues that Jackson-Vanik establishes an inappropriate forum for U.S. concerns over China’s continuing human rights violations. By perennially threatening revocation of MFN status, the Jackson-Vanik Amendment undercuts the use of the MFN principle as a basis for normalized relations between countries. Furthermore, Jackson-Vanik is outdated legislation that has become increasingly irrelevant and impractical to administer in the post-Cold War world.

Part II of this Comment examines the rationales underlying the MFN principle, establishing its importance as the basis for normalized international trade relations. Part III critiques the history of U.S. MFN practices, pointing out specific departures from the MFN principle and giving context to current U.S. MFN policy under Jackson-Vanik. Part IV analyzes the application of the Jackson-Vanik Amendment to China, exposing many of the substantive and practical problems with the Amendment. By calling for the repeal of Jackson-Vanik, this Comment seeks to set aside the greatest obstacle to normalized U.S.-China trade relations and to establish the paradigm of unconditional MFN treatment to guide future relations.

II. THE MFN PRINCIPLE AS A FOUNDATION FOR NORMAL RELATIONS

A. Early European MFN Practice

MFN is fundamentally a Western principle that originated through the early efforts of European nation-states to avoid discriminatory trade practices in commercial competition.29 While endeavoring to avoid destructive trade wars, each state also wanted to ensure that its products received treatment at least as favorable as what its trading partners accorded other states. Naturally, a state did not wish to extend trade concessions or guarantees to another state without a reciprocal extension or guarantee for its own com-

28. See, e.g., June 1991 MFN Hearings, supra note 12, at 5-6 (statement of Dep. Sec. Lawrence S. Eagleburger) ("Awareness of Western ideas and concepts has spread from small groups of the intellectual elite, to the bureaucracy, the urban work force, and even to the rural population. It is these very forces of reform that generated the pressures which exploded in Tiananmen Square 2 years ago.") It is not surprising, therefore, that hardline Communist Party leaders would just as soon see MFN status revoked; more moderate leaders seem to be gambling, however, that China can participate in global markets yet retain its current political system. Renewal of MFN Trading Status for the People’s Republic of China: Hearing and Markup on H.R. Con. Res. 174 Before the House Comm. on Foreign Affairs, 102d Cong., 1st Sess. 27 (1991) [hereinafter MFN Trading Status Hearing and Markup] (statement of Dep. Sec. Lawrence S. Eagleburger).

29. See Tsung-Yu SzF, CHwA AND THs MOST-FAvoRED-NAMlON C.Aus 12 (1925). Although the first instances of the use of the clause appeared as early as the 14th century, it was not until the 17th century that the clause came into more extensive use. Id.
merce, because its products would risk falling into a position of competitive
disadvantage in world markets.  

Concessions between two contracting parties, however, often had the
effect of disadvantaging nations not party to the contract. A new bilateral
treaty with favorable tariff reductions, for example, could cause previously
negotiated tariffs with third nations to be relatively higher. The MFN
clause, in its classic form, remedied this potential source of tension by obli-
gating a signatory to extend automatically to its trading partners the most
favorable concessions and guarantees accorded to any other trading partner.
Thus, if a signatory reduced tariffs for one nation, the signatory would be
obligated to reduce tariffs for all of its established most-favored trading
partners.  

The European powers preferred this practice of extending "uncondi-
tional" MFN status because it obviated the need to renegotiate concessions
with third parties should bilateral trade negotiations result in more favorable
terms between two contracting nations. Unconditional MFN treatment
reflected a view of trade as a multilateral endeavor, where a nation saw its
trading partners as a group rather than as particular actors, and nations con-
formed to generally accepted standards of behavior in granting concessions.
The MFN clause was thus a convenient and accepted instrument that theo-
retically reduced barriers to their lowest common levels.

Through its customary operation, the MFN clause eased tensions
between existing trading partners who would otherwise be tempted to
engage in discriminatory trade practices for their own protection or
advancement. In sum, the use of MFN policy was a way to "draw nations
together, to make their commercial policies inter-acting and to some extent
interdependent."

B. National Sovereignty and Reciprocity

Implicit in the establishment of workable trade relations among coun-
tries was the MFN principle’s recognition of nations as independent sover-
eigns. By extending MFN status to another nation, a state acknowledged
that nation’s existence, independence, and right to equal treatment. Thus,
the early use of the MFN principle in Europe coincided with the growing
acceptance of the world as composed of diverse, sovereign, and equal
nations. The MFN principle also buttressed the notion of national sover-
eignty and equality by emphasizing reciprocity of obligation among trading
partners as they worked toward mutual gain.

Reciprocity of obligation within the MFN context did not mean that a
nation expected to receive from a trading partner whatever actual trade con-
cessions it had made to the partner. The true quid pro quo of MFN recipro-

31. Id. at 4.
32. Id. at 6.
real equality of concessions. Thus practiced, MFN reciprocity would ultimately operate to ensure that a nation treated all nations within its trading group equally, regardless of concessions obtained through bilateral agreements.33 Further, no nation could act to advance its own interests without taking into account the interests of all nations within its trading group. Reciprocal obligation therefore eliminated discriminatory practices to the extent the obligations were honored.34

Beginning in earnest in the 17th century, European political scientists struggled to define a set of governing principles for an increasingly multinational world. The MFN principle, designed to facilitate relationships among co-equal nations, fit comfortably within the Naturalist and the Positivist theories of international relations—the predominant schools of political philosophy underlying the modern law of nations.35

The Naturalists reasoned that in the law of nations there was natural equality among nations, just as in the law of nature there was natural equality among men.36 Reciprocity of obligation among nations, a cornerstone of the MFN principle, followed logically from natural equality.37 Given the centrality of trade to good relations among the European powers, the MFN principle, which mandated equal tariff treatment among nations, was thus a simple extension of the obligation imposed by the law of nations.

The Positivist school of international law asserted that the law of nations derived not from the law of nature, but from the operation of custom, treaties, and common understanding among sovereign nations.38 Positive law was “the law which has been accepted among most nations by customs in harmony with reason, and that upon which single nations agree with one another . . . .”39 Because natural law was a mere abstraction, the

33. To illustrate, MFN reciprocity ensured that A would have to give to B whatever A later granted to C, while B would have to give A whatever B later granted to D. Thus, even if C were a powerful nation that could extract weighty concessions, A would continue to treat B on a par with C.


35. See generally Edwin D. Dickinson, The Equality of States in International Law 68-69 (1920). A third school of thought—the Grotian or “Eclectic” thinkers—combined principles from both the Naturalist and the Positivist viewpoints. See id. at 95-99.

36. Id. at 80-82 (summarizing the writings of Samuel von Pufendorf), 87-88 (quoting Burlamaqui’s summary of the Naturalists’ derivation of the natural equality of states).

That the world’s nations are equal and deserving of equal treatment flows from Hobbes’ writings on natural law and the state of nature. As individuals were in a state of nature (with the liberty to do whatever was best for the preservation of their existence) and as they served no law but natural law (that is, that body of law designed to make their lives secure) so, too, was the extension of the individual—the Commonwealth or State—in a state of nature. States were thus subject to the law of nature, which when analogized to the state was the law of nations. Id. at 69-75.

37. See, e.g., id. at 85 (“Nations are obliged the more to respect one another as equals because they are always in a state of natural liberty, and consequently in a perfect equality of right toward one another.” (quoting Jean Barbeyrac on Pufendorf)); id. at 88 (“This society [of nations] is . . . one of equality and independence, which establishes a right among them, and pledges them to have the same regard and respect for one another.” (quoting Burlamaqui)).

38. Id. at 89. To the Positivists, sovereignty extended only so far as a state’s true independence. States were not regarded as equal because they were like persons in a state of nature; rather, their equality was acknowledged only insofar as they enjoyed the same status. Id. at 94.

39. Id. at 90 (quoting Zouche).
Positivists found the MFN principle, embodied in an express governing instrument common to all major nations, to be quite appealing.\footnote{The Positivists further believed that no international law would ultimately endure without some advantage accruing to its adherents. For example, in denouncing the Naturalist doctrine, the scholar Rachel defined the law of nations as "a law developed by the consent or agreement . . . of many free nations, whereby for the sake of utility they are mutually bound to one another." \textit{Id.} at 92 (quoting Rachel).}

Whether propounded by the Naturalist or Positivist view, the MFN principle had at its heart a view toward harmonious relations among states. The principle enabled competing powers to coexist and trade peacefully under a regime of reciprocal obligation. It acknowledged national sovereignty, the basis from which both schools of thought derived their respective views on the modern law of nations. Thus conceived and practiced, the MFN principle formed the very core of normal economic relations among states.

III.

U.S. MFN Practice

Despite the rationales underlying the MFN principle, the United States has historically failed to appreciate its full spirit and purpose—that is, the MFN principle's role in stabilizing world trade and the importance of reciprocal obligations. Consequently, the United States has time and again misapplied the principle in its relations with other powers. This Part will trace the historical application of the MFN principle by the United States. It will outline the basic characteristics of U.S. MFN policy, which generally favored conditional over unconditional MFN extensions, non-reciprocal over reciprocal arrangements, and the use of MFN status as a political tool to extract certain behavior from other nations. This brief summary gives context to many of the theoretical problems and political overtones that plague modern U.S. MFN policy toward China.

A. Early Applications

When it first began to trade with the Europeans in sizeable quantities, the United States employed a "conditional" interpretation of the MFN principle. Under the American trade model, third parties were not automatically entitled to privileges granted by the United States to another trading partner. Were the United States to establish a favorable trading relationship with one party, it would require third parties—even established most-favored parties—to furnish the same or similar compensations, or make the same concessions that the newly contracting party had made. Should the third party be unwilling to comply, it would be denied MFN status constructively, because the newly negotiated deal would constitute a trading relationship superior to its previously "most-favored" treatment.\footnote{\textit{Sze}, supra note 29, at 16.} Thus, a party's MFN status was conditioned on its providing additional compensa-
tion or concessions whenever the United States negotiated a better deal with any other trading partner.

Through conditional MFN treatment, the United States demonstrated a reluctance to relinquish the use of tariffs as leverage. Had the United States agreed to unconditional, multilateral MFN terms, it could not have promised more attractive terms to one nation, or threatened to raise tariffs or revoke MFN status for that nation, without implicating the rights of all other trading partners. By maintaining separate, bilateral treaties with its primary trading partners, however, the United States could respond to tensions with one nation without affecting trade concessions made to another. As a consequence, conditional MFN policy discouraged uniform treatment of particular products and tended to deprive U.S. MFN clauses of much of their value. Nevertheless, conditional MFN policy was upheld by the U.S. courts as proper and continued in practice until the early 1920s, aggravating many U.S. trading partners who saw themselves as granting concessions while the United States preserved its bargaining position.

42. At least one commentator has come to the partial defense of "conditional" MFN treatment as more equitable than "unconditional" MFN treatment, pointing out that under conditional MFN treatment "the concession granted to a third party is extended to a contracting party only at a cost equivalent to that paid by the third country," while "unconditional" arrangements allow third parties to benefit without anything in exchange. K.R. Gupta, A Study of General Agreement on Tariffs and Trade 37-38 (1967).

Moreover, "unconditional" MFN treatment may unduly deter unilateral reduction of tariff rates because participating nations will have an incentive to wait until they receive the concession through the unconditional MFN clause rather than negotiate reciprocal concessions. This is an example of a classic "free ride" dilemma. Id. at 39.

43. Cf. Snyder, supra note 30, at 212-15 (arguing that conditional MFN is "unsatisfactory in operation").

44. For example, in Bartram v. Robertson, 122 U.S. 116 (1887), the Supreme Court held that the United States was not bound to extend the same favors to sugar from Dutch St. Croix as it had pledged to sugar from Hawaii. At the time, Hawaii was a sovereign nation that had concluded a mutual trade agreement with the United States, under which products could be traded with the United States free of duty in exchange for special concessions from Hawaii. Id. at 118-19.

The Court reasoned that the treaty with Denmark was "not intended to interfere with special arrangements with other countries founded upon a concession of special privileges," and since Denmark had not paid like compensation, the duty free status of Hawaiian sugar did not violate the Danish treaty. Id. at 120-21.

45. Cf. Snyder, supra note 30, at 215 (describing the American practice of conditional MFN as an "attempt to preserve the utmost autonomy on the one hand, while preserving the semblance of fair treatment on the other"). The United States sometimes violated the spirit of MFN clauses while arguably staying within the letter of the treaties that contained them. In North German Lloyd Steamship Co. v. Hedden, 43 F. 17 (1890), a federal circuit court in New Jersey concluded that an act setting higher rates for shipping from foreign ports was only geographically discriminatory when it permitted lower rates of duties on vessels originating from certain regions, and that therefore the Act did not violate the most-favored-nation clause contained in a treaty with Germany. Id. at 20. That treaty had stated in Article 9 that "the contracting parties...engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party." Id. at 19 (emphasis added).

For a detailed account of an averted trade war between the United States and Germany over the issue of U.S. conditional MFN practices, see P. Wolman, Most Favored Nation, The Republican Revisionists and U.S. Tariff Policy, 1897-1912, at 55-76 (1992).
In its early trading relations with non-European powers, the United States often abandoned the principle of reciprocity, demanding unconditional MFN treatment while offering absolutely nothing in return. For example, during negotiations for the Treaty of Wanghea, signed between the United States and China in 1844, the U.S. trade minister relayed that "the government of the United States should find it impossible to remain in terms of friendship and regard with the Emperor, if greater privilege or commercial facilities should be allowed to the subjects of any other government than should be granted to the citizens of the United States." After obtaining this concession, however, the United States offered no similar gesture to the Emperor.

The practice of demanding "unilateral" MFN extension from less powerful nations such as Imperial China reflected a sentiment that while the United States was itself not required to bestow MFN status as a privilege, it nevertheless expected nondiscriminatory treatment from other nations as a matter of right. This one-sided attitude laid the foundation for the extreme politicization of the MFN principle in later years by couching the discussion in terms of U.S. foreign policy goals rather than the MFN principle's multilateral benefits.

B. Dual Tariffs and the Smoot-Hawley Act

In the early 1900s, the United States began to experiment with a dual-tariff system wherein favored nations would enjoy one set of tariffs, while disfavored nations would be subject to a different, penalizing set. The problematic U.S. practice of conditional MFN treatment was an influential factor in the establishment of this dual-tariff system. Conditional MFN treatment required the United States to negotiate separate bilateral treaties with each nation, risking the promulgation of confusing tariff schedules, each of which could be undercut by a subsequent negotiation. To remedy this, Congress and the President began to favor a two-tiered system, with one set of uniform minimum tariffs designed to please European trading partners, and another set of maximum "punitive" tariffs to appease U.S. protectionists.

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46. SzF, supra note 29, at 32.
47. Id. at 33 (quoting S. Doc. No. 138, 28th Cong., 2d Sess. 5 (1843)).
48. In several of China's treaties containing MFN clauses, "one can readily see the entire disregard of the essential elements of compensation and reciprocity. The Chinese side has been totally neglected in these unilateral agreements." Id. at 36.
49. The impetus for tariff reform came largely through the work of turn-of-the-century Republican revisionists who sought to find a middle ground between their own party's protectionist platform and Democratic calls for free trade. The revisionists favored a multiple-tariff system negotiated by a trade commission liberated from partisan politics. See generally WOLMAN, supra note 45, at xi-xii. The Republicans viewed tariff reform as essential for U.S. entry into the relatively liberal European minimum-tariff system under which the major European industrial powers traded. Id. at 20.
50. See supra text accompanying notes 42-45.
51. WOLMAN, supra note 45, at 122.
52. Id. at 144.
The Payne-Aldrich Act of 190953 codified this dual-tariff system, which remains in place today in modified form.54 Under Payne-Aldrich, the minimum tariff normally applied, but the United States would invoke the maximum tariff if foreign trading partners altered their tariff rates or policies to the detriment of the United States. The maximum duty would go into effect unless the President declared that lack of discrimination warranted the lower rates.55

This dual-tariff system was temporarily replaced in the midst of the Great Depression when Congress enacted the Smoot-Hawley Tariff Act of 193056 marking the high point for protectionist sentiment in the United States. Smoot-Hawley established a single set of tariffs creating new, increased duties for approximately 20,000 items.57 At the same time that it presented its partners with higher and higher tariffs, however, the United States continued to demand unconditional MFN treatment from them, thus reaping the benefits of European bilateral bargaining while offering little in return.58 Predictably, this caused resentment and anger among U.S. trading partners, and most nations raised their tariffs in response, causing economic chaos and enormous drops in the volume of international trade.59

Smoot-Hawley was the last general tariff law passed by Congress. In 1934, Congress passed the Reciprocal Tariff Act60 which authorized the President to negotiate rates of duties to apply to imports from nearly all nations irrespective of their MFN status.62 Through persistent negotiation, the high tariff rates were gradually reduced. By 1945, the United States had entered into bilateral trade agreements with twenty-seven nations63 as it positioned itself for the end of the war and the new economic order to follow. The devastating Smoot-Hawley tariffs remain relevant today, however, primarily because Communist countries that are denied U.S. MFN status continue to be subject to them.64

54. The United States currently divides its tariff schedules into “column one” for its most-favored trading partners and higher “column two” rates for disfavored nations. See U.S. INT’L TRADE COM’N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES 1-2 (1990) [hereinafter 1990 TARIFF SCHEDULE].
58. See Snyder, supra note 30, at 197.
59. I.M. Destler, American Trade Politics: System Under Stress 9 (1986). From 1929 to 1931, U.S. imports dropped from $4.399 billion to $1.45 billion, while exports fell even farther from $5.156 billion to $1.647 billion. Id.
60. Id. at 9.
63. Destler, supra note 59, at 10.
64. See May 1990 MFN Hearings, supra note 4, at 231 (statement of Richard Solomon, Ass’t Secretary of State for Asia) ("[W]ithout MFN, United States tariffs would rise to the punitive levels set
C. MFN Policy and the Cold War

Following World War II, proponents of free and nondiscriminatory trade were determined to avoid the mistakes of the 1930s and to establish a stable international economy. The General Agreement on Tariffs and Trade (GATT) was drafted in 1947 and ultimately became the cornerstone for multilateral trade in the postwar world. When the United States signed the GATT, it pledged to grant unconditional, reciprocal MFN status to twenty-one of its trading partners. At the core of the GATT is its most famous clause, Article I, Section 1, which states:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

The GATT thus encouraged trade liberalization while explicitly recognizing that tariffs were a legitimate means of import protection. Through successive trade negotiation “rounds,” the GATT provided a mechanism by which international tariffs could be reduced. To this end, the GATT has been extremely successful; the average level of industrialized nations’ tariffs applied against manufactured goods is now less than five percent.

The internationalist aspirations of the GATT remained incomplete, however, because the Communist nations of the world continued to be excluded from the Agreement’s auspices. Although the market orientation of the GATT made it largely incompatible with the state-trading system of the Communist nations, fierce political and ideological differences also...
kept the United States and the Communist bloc from trading on a nondiscriminatory basis. While the Communist nations had their own suspicions about U.S. motives,71 U.S. political considerations contributed to the failure of the GATT to embrace its own principles of multilateralism and nondiscrimination.

From the U.S. standpoint, it was imperative to halt perceived Communist advancements by “containing” Soviet influence around the world72 and driving wedges between Eastern Europe and the Soviet Union. MFN treatment became a powerful tool to achieve these policy goals. Former U.S. protests over the incompatibility of state-trading systems with the GATT’s market-oriented, tariff-centered operating principles evapora
ted when there was an opportunity for political gain.73 Using its enormous economic leverage, the United States exploited differences among the Eastern European satellite states by allowing those states that pursued paths independent of the Soviets to accede to the GATT,74 while causing hard-

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71. From a Marxist viewpoint, the United States, as a capitalist nation, was advocating the MFN principle in order to advance its own profit interests by creating sales opportunities for its own goods. See Kocsn, supra note 62, at 196 (citing 1947 declaration by Eugene Varga). From the Leninist standpoint, the United States as an imperial power was also vitally interested in curtailing the industrialization of the Eastern European states. It was, therefore, in the interest of those states not to participate in the GATT system, thus preventing capitalist domination by the Western powers and safeguarding the industrialization process. See Kostecia, supra note 65, at 3-4.

The smaller Eastern bloc nations, no doubt under the partial direction of Moscow, initially viewed multilateralism as a mechanism that favored more industrialized, wealthier nations at the expense of smaller, less diversified ones. Poland argued, for example, that bilateral trade agreements made possible the export of a commodity in high demand in exchange for other essential imported commodities, whereas formal multilateralism would split up the export of the surplus and prevent smaller nations from receiving the goods they needed. Kocsn, supra note 62, at 191. The Poles insisted that bilateralism was not discriminatory, because it was not performed “arbitrarily, unilaterally, and independently of any economic considerations.” Id.

The Eastern bloc gradually eased back from this rejection of multilateralism, particularly as they tried to forge closer ties with the West. See id. at 192-98.


73. See generally Kosteckia, supra note 65, at 14 (exploring the technical feasibility of East-West relations within GATT, in light of the incompatibility of state-trading systems).

74. The process of accession to the GATT is fairly straightforward. The General Agreement states that “a government . . . may accede to this Agreement . . . on terms to be agreed between such government and the contracting parties. Decisions of the contracting parties under this paragraph shall be taken by a two-thirds majority.” Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, Mar. 24, 1948, 62 Stat. 1992, 1993, 62 U.N.T.S. 30, 34. Custom has required that applicants grant tariff concessions as a kind of “entrance fee” to the GATT. These concessions are extended to all contracting parties, consistent with the policies of nondiscrimination and reciprocity. With accession, the new member is entitled to MFN status from all contracting parties. But because
line governments economic hardship through persistent denial of the benefits of MFN status and free trade with the West. The United States thus supported the accession of Poland, Yugoslavia, Romania, and Hungary to the GATT while continuing to deny MFN status to all other Communist countries.

For the Communist nations that did accede to the GATT, "special arrangements" were made to permit their full participation, amounting to what the Soviets considered to be "second class citizenship." The United States resisted any efforts to amend the GATT to include general provisions for other target-controlled, state-trading nations. The country-by-country approach to Communist accession to the GATT was designed to encourage decentralization of socialized economies, and policy makers believed any general scheme of incorporation would compromise the GATT's liberalism and advantage communism.

The United States made official its anti-Communist policy by enforcing a strategic embargo against the Eastern bloc and enacting the Trade Agreements Extension Act of 1951 to deny MFN status to the Soviet Union and other nations under the control of international communism. Under the Act, however, Congress gave the President authority to merely "suspend" the benefit of trade concessions, allowing him to later restore MFN status to those "countries which appear to be throwing off the yoke of communism . . . " In line with this policy, the Act did not apply to Yugoslavia, which the United States viewed as outside of the Soviet sphere.

tariffs have little influence over import decisions for nonmarket economies, the contracting parties would not be assured of reaping any kind of export benefit from the accession of a Communist nation. Although at least two different methods have been suggested for the proper "entrance fee" for nonmarket economies—guarantees of quantitative import pledges and commercial considerations clauses by the nonmarket country—each fails to uphold the principles of nondiscrimination and reciprocity simultaneously. Haus, supra note 34, at 22-23.


76. Kostecki, supra note 65, at 14. For example, Poland was granted "associational" status, which provided for an annual review of trade relations and participation in certain bodies of the GATT. Id. at 28.

77. Id. at 15-16. Soviet charges that the multilateralist rhetoric of the GATT was as much a political vehicle as it was an economic one were buttressed by the fact that by 1960, the contracting parties of the GATT only comprised 37 out of 82 members of the United Nations. The Soviets argued that the less developed nations believed "membership in [GATT] would interfere with their industrial development, in view of what its principles and practice amount to." Koco, supra note 62, at 196 (quoting a 1960 article by Anastas Mikoyan reflecting the official position of the Soviet government).


79. Id. § 5 (repealed 1962). The full text of the section reads:

As soon as practicable, the President shall take such action as is necessary to suspend, withdraw or prevent the application of any reduction in any rate of duty, or binding of any existing customs or excise treatment, or other concession contained in any trade agreement entered into under authority of section 350 of the Tariff Act of 1930, as amended and extended, to imports from the Union of Soviet Socialist Republics and to imports from any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement. Id.

of influence. The United States also later exempted Poland from the scope of the Act after granting it MFN status in 1960.

Congress reiterated the division between Communist and non-Communist trading partners in the Trade Expansion Act of 1962. One of its main purposes, as stated in Section 102, was to "prevent Communist economic penetration" of the West. The Act set new tariff schedules affirming "column two" (Smoot-Hawley) rates on all trade with listed Communist countries while maintaining preferable "column one" rates for all other trading partners. The amended 1962 Act adopted much of the basic language of the 1951 Act but broadened the scope of the law to include all countries or areas dominated by communism. As in the 1951 Act, the President retained the option of merely suspending MFN status for a country "which appears to be achieving a substantial degree of independence from the foreign government or foreign organization controlling the world Communist movement" and re-granting it when appropriate.

As the GATT and the 1951 and 1962 Acts demonstrate, during the Cold War the United States transformed MFN policy from an economic instrument to prevent unfair trade practices to a foreign policy tool to isolate enemies and protect Western markets. The current theory of economic engagement, which posits that from trade with the West flow Western ideals and change was not seriously considered. On the contrary, many

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81. Kostecki, supra note 65, at 25.
82. Poland was in effect "rewarded" for its change in leadership and liberalization of some of its domestic policies. The United States granted MFN status after concluding that Poland was not "Soviet dominated." Haus, supra note 34, at 15.
84. Id. § 102, 76 Stat. at 872. The goals of the Act thus were in keeping with the general strategy of containment inherited by President Kennedy from previous administrations. See generally Gaddis, supra note 72.
86. See Trade Expansion Act of 1962 § 231 (Products of Communist Countries or Areas). The 1951 Act had instructed the President to take action against all nations or areas "dominated or controlled by the foreign government or foreign organization controlling the world Communist movement." Trade Agreements Extension Act of 1951 § 5. This language would have been ill-suited for 1962, by which time the Sino-Soviet split had eroded the monolithic vision of communism shared by most American policy makers.
88. Given the iteration of this principle in both the 1951 and 1962 Acts, the absence of any similar principle in Jackson-Vanik concerning Communist nations in transition is striking, perhaps reflecting a growing pessimism over the chance that any Communist country would ever revert to a market-based system.
89. See generally U.S. Dep't of State Dispatch (June 8, 1992), available in LEXIS, Nexis Library, DState File ("No one has found a way to import our goods without importing our ideas. The opening of China and expansion of bilateral commercial relations made possible by MFN has contributed significantly to improved living standards, the introduction of progressive economic thinking, and further integration of China into the world community."); see also June 1991 MFN Hearings, supra note 12, at 4 (statement of Dep. Sec. Lawrence S. Eagleburger) ("The administration supports the extension of MFN because it believes that an open China is key to our eventual hopes for a more democratic China. MFN has become over the past 11 years an underlying structural component of..."
opponents of freer trade with Communist states believed that MFN status would serve to prop up centralized economies that were otherwise likely to collapse under their own weight.90

D. The Trade Act of 1974

In 1969, the Nixon Administration began an aggressive policy of détente with the Soviet Union, presenting an opportunity for the United States to dispose of categorical MFN status discrimination against Communist nations. The move toward better trade relations with the Soviet Union was underwritten with hopes of improved diplomatic relations. As then Secretary of State Henry Kissinger stated, "[O]ur justification for increased trade with the Soviet Union has never been based primarily on economic grounds . . . We see it as a tool to bring about or to reinforce a more moderate orientation of foreign policy and to provide incentives for responsible international behavior . . . ."91

Kissinger employed the economic "carrot" of credits and MFN status as leverage to achieve Soviet cooperation on political matters, most notably the ongoing war in Vietnam.92 Meanwhile, however, Jewish lobbyists and conservative politicians opposed to Soviet trade relations began a campaign to link MFN treatment to the issue of Jewish emigration from the Soviet Union.93 These forces found a champion for their cause in Senator Henry Jackson, who introduced such legislation in early October of 1972,94 just weeks before the signing of the 1972 Trade Pact with the Soviets.95 Jackson’s bill also coincided with the Nixon Administration’s preparation of a new trade bill, which would request authorization from Congress for

our relationship, which has facilitated our ability to engage the Chinese on a broad range of issues . . . ."); Id. at 5 (statement of Dep. Sec. Lawrence S. Eagleburger) (citing the failure of two decades of the policy of economically isolating China and comparing the state of repression in China before MFN status was granted in 1980 to the comparatively lower levels of repression today).

90. See PAULA STERN, WATER’S EDGE: DOMESTIC POLITICS AND THE MAKING OF AMERICAN FOREIGN POLICY 28-30 (1979). Interestingly, one of the strongest proponents of linkage was Andrei Sakharov, who stated during an interview that the United States should demand unrestricted emigration as a minimum prerequisite for improved trade relations with the Soviets. Id. at 85. The call for harsh measures by Soviet dissidents parallels similar calls by China’s most famous dissidents, including Professor Fang Lizhi and student leader Chai Ling. See Robert L. Bernstein and Fang Lizhi, AMERICA’S Must Be One of the Voices, L.A. TIMES, Nov. 5, 1991 at B1 (criticizing the focus of current bilateral policy issues and commenting that the "practical effect of . . . [the U.S.] government’s approach has been to condone the Chinese leadership’s practices"); see also Chai Ling, Remarks at News Conference on China and Most-Favored-Nation Status, (May 2, 1991) (declaring support for the placement of conditions upon the renewal of Chinese MFN) (available in LEXIS, Nexis Library, FedNew File).

91. STERN, supra note 90, at 199.

92. Id. at 199-200.

93. Id. at 10-12.

94. Id. at 18.

95. In the October 18, 1972 Trade Pact, the United States agreed to seek congressional approval for the extension of MFN status to the Soviet Union, and the Soviets agreed to repay $722 million of their lend-lease debt from World War II. The Pact accompanied a new maritime agreement on grain shipments and the extension of Export-Import Bank credits. Id. at 44.
the U.S. Trade Representative to negotiate tariff reductions under the GATT and extend MFN status to the Soviet Union.96

The Jackson Amendment (later joined by House Ways and Means Committee member Charles Vanik and renamed the Jackson-Vanik Amendment) restricted the extension of MFN status to Communist countries by requiring the President to first determine that a given country was not in violation of the Trade Act’s emigration requirements, and to report this determination to Congress. When the trade bill debate went to the floor in Congress, the Jackson-Vanik Amendment nearly eclipsed all other issues.97 Meanwhile, Soviet General Secretary Brezhnev warned that “utterly irrelevant and unacceptable” conditions to trade and “demands on questions totally unconnected with the area of trade and economics and lying completely within the domestic competence of states” should be avoided,98 and the official Soviet news agency Tass further began to accuse Senator Jackson of “a policy of extortion.”99 After the measure passed the House,100 Kissinger, who had feared adverse reaction to the Amendment by the Kremlin, negotiated at length with Jackson on the issue while conducting separate negotiations with the Soviets. On October 18, 1974, Kissinger announced a compromise “loophole” whereby the President could waive the emigration requirements based on assurances that Soviet practices would lead “substantially” to free emigration.101 In a series of letters, Kissinger relayed to Jackson his assumption that “the rate of emigration from the U.S.S.R. would begin to rise promptly from the 1973 level" while Jackson stated his understanding of a benchmark of 60,000 émigrés per year.102 The amended Trade Bill sailed through the Senate by a vote of 77 to 4,103 and President Ford signed the bill into law on January 3, 1975, albeit expressing "reservations about the wisdom of legislative language that can only be seen as objectionable and discriminatory by other sovereign states."104

Despite the compromise reached by Jackson and Kissinger permitting the presidential waiver of emigration requirements, within a week after President Ford signed the Trade Act, the Soviets balked at the perceived

96. Id. at 59, 69. One of the chief questions was whether to combine the question of Soviet MFN status with the Trade Bill or to leave the two bills separate. Many of President Nixon’s advisors correctly warned that linking the two would provide a convenient hostage for Senator Jackson’s amendment. Id. at 59-61.

97. See Pastor, supra note 57, at 143.

98. Stern, supra note 90, at 165.

99. Id. at 111.

100. The Jackson-Vanik Amendment proved immensely popular in Congress. The vote to include the Amendment in the Trade Bill passed by nearly a three-to-one margin in the House, while the Trade Bill itself passed by a lesser margin of two-to-one. For a detailed account of Senator Jackson’s behind-the-scenes lobbying and the influence of constituent groups on the decision making process, see generally Stern, supra note 90.


102. Id. at 174. Jackson heralded his victory over the Soviets at a highly publicized media event that day, much to the chagrin of the Soviet leadership. Id. See also Stern, supra note 90, at 163-65.

103. Stern, supra note 90, at 179.

104. Id. at 188.
intrusiveness of the Act’s terms and reneged on the 1972 Trade Agreement. Kissinger was forced to announce that President Ford would not exercise his waiver authority and that the 1972 Trade Agreement, with its provisions for MFN treatment, could not be brought into force. As a final blow, following the collapse of the trade agreement, the emigration of Jews from the Soviet Union, as measured by arrivals in Israel, dropped dramatically.

The establishment of emigration practices as a criterion for MFN status renewal under Jackson-Vanik shifted the U.S. focus from the external effects of communism to the internal treatment of Communist nations’ citizens and deepened the discriminatory bent of U.S. MFN practices. Jackson-Vanik raised the stakes and changed the tenor of trade negotiations by introducing a normative human rights consideration into economic decision making with respect to certain nations. As the following Part will show, Jackson-Vanik has had an unanticipated, yet profound, effect upon U.S.-China relations as a result of China’s Communist system and the Amendment’s linkage of MFN status to human rights.

IV.
JACKSON-VANIK AND CHINA TODAY

The current application of the Jackson-Vanik Amendment to U.S. MFN policy towards China reveals many of the Amendment’s shortcomings. First, the Amendment’s distinction between market and nonmarket economies fails to recognize the transitional nature of China’s economy and does not provide a sensible guideline for U.S. human rights policy. Second, the specific language of Jackson-Vanik linking a country’s emigration practices to its MFN status is inappropriate to the Chinese situation because the United States is less concerned with increasing the number of émigrés from China than in stemming their flow. Third, the Amendment fails to define the scope in which the United States is to formulate its trade policy, transforming the MFN issue into a “dumping ground” for all U.S. grievances with China. Finally, the Amendment uses the MFN issue as a weapon to achieve U.S. policy goals, but ultimately leaves policy makers with only the extreme, and thus limited, option of either extending or revoking MFN status.

105. Id. at 190. On January 10, 1975, the Soviets sent a letter indicating they refused to comply with the requirements to provide emigration assurances or to make needed technical changes in the 1972 Trade Agreement. In the ensuing discussions, the Soviets made it clear that they would repudiate any unilateral move by President Ford that suggested he had any kind of assurances on emigration.

106. Id.

107. Id. at 217-18. In 1973, Israel recorded the arrival of 33,364 emigrants from the Soviet Union. The number fell to 8,295 by 1975. Aside from Soviet curtailment of emigration, the drop may be attributable in part to fewer Jewish émigrés wanting to go to Israel after the Yom Kippur War.
A. The Market-Nonmarket Distinction

One of the defining aspects of Jackson-Vanik is its discriminatory treatment of Communist countries. As previously discussed, the Amendment was originally directed towards the Soviet Union. In 1974, the applicability of Jackson-Vanik to China was not at issue, as there was virtually no U.S.-China trade. China fell within Jackson-Vanik's ambit because the Amendment's provisions applied to all countries listed in Paragraph 3(d) of the 1974 Tariff Schedules, that is, all nations not then receiving MFN treatment. When the issue of Chinese MFN status finally arose, Senator Jackson himself was said to have been "startled to find out that people thought Jackson-Vanik applied to China. [It] never crossed his mind." President Carter officially deleted China from the list of column two nations in 1979 as part of his extension of trade relations, but this did not technically remove China from the scope of the Amendment because China had been a Communist nation at the time of Jackson-Vanik's passage. Given that Jackson-Vanik's sweeping language may have been unintentionally overbroad, it is no surprise that the Amendment serves as a poor platform for U.S. MFN and human rights policies. As a baseline for U.S. trade with Communist nations, Jackson-Vanik ignores the profound economic reforms currently underway in China. As a touchstone for human rights policy, the Amendment makes an arbitrary distinction between the human rights records of Communist and non-Communist nations.

1. China's Economy in Transition

Jackson-Vanik's market-nonmarket distinction is complicated by the nature of China's transitional economy. The Chinese have dramatically restructured the productive forces within their economy such that, by some estimates, in 1990 less than forty percent of China's national income was derived from state-controlled enterprises. Further, industrial output from state enterprises dropped from eighty percent in 1980 to about fifty-four percent in 1990. However, Jackson-Vanik does not contain any explicit mechanism to address the status of nonmarket systems in transition to market economies. As China increasingly embraces capitalist market principles, its classification as a "nonmarket economy" will become less compelling.

Congress has responded in an ad hoc fashion to the transitional nature of the Chinese economy. Bill drafters have recognized that congressional action cannot be aimed broadly at the Chinese economy, as MFN revoca-

108. See supra text accompanying notes 91-107.
112. See, e.g., MFN Trading Status Hearing and Markup, supra note 28, at 13 (statement of Dep. Sec. Lawrence S. Eagleburger).
tion threatens to harm elements of society that are most likely to promote reform.\textsuperscript{113}

The difficulty in attempting to punish the Chinese state while preserving the strength of transitional market forces is best illustrated in a recent congressional resolution.\textsuperscript{114} This bill would have required the Secretary of the Treasury to determine and list "which businesses, corporations, partnerships, companies or other persons are state-owned enterprises" in order to tailor MFN revocation to apply only to the state-controlled economy.\textsuperscript{115} Critics charged that the task would be nearly impossible to perform with any level of accuracy, particularly given the vast number of enterprises involved.\textsuperscript{116} Furthermore, the complex nature of foreign and private investment in China could allow the Chinese government to reclassify many businesses so that their products continue to receive MFN treatment.

Congress has acknowledged that it is faced with a changed world picture. Communism has been discredited to a large extent as a viable economic system,\textsuperscript{117} and market reforms are gaining momentum, particularly in China.\textsuperscript{118} Rather than revise its legislative response to these changed circumstances, however, Congress has adhered to the political philosophies of the Cold War by mechanically applying Jackson-Vanik's provisions to China and by attempting to correct the Amendment's overly broad reach through tailored bills that will be difficult and impractical to administer.

2. A Double Standard in Human Rights

The United States' discriminatory attitude toward the human rights policies of Communist countries has also led to charges of a double standard in U.S. foreign policy. The revocation of MFN status was not seriously considered for non-Communist nations such as Syria, Iraq, Iran, or Libya, even during periods of gross human rights violations in those countries.\textsuperscript{119} The question of China's human rights record and MFN status, on
the other hand, resurfaces with regularity because of Jackson-Vanik's annual review process, which has been aptly described as a "legislatively-mandated" action that is "a convenient outlet for . . . punitive impulse." It is no solution to require all nations to pass the human rights litmus test prior to receiving MFN status. Beyond the impracticality of such extensive, case-by-case congressional review, such a system would destroy the MFN principle's stabilizing qualities by throwing MFN status for many nations into perpetual doubt. But neither is it a solution to select a dozen Communist countries for scrutiny, particularly when the human rights records of those countries fare better than those of many other U.S. trading partners. A consistent U.S. MFN policy must be developed but must not contain Jackson-Vanik's arbitrary focus on Communist nations' human rights records.

No other Western industrialized power has questioned China's MFN status. This fact undermines the use of MFN status as a legitimate bargaining chip in U.S. foreign policy. It suggests that other nations either do not believe that MFN status should be linked to human rights, or that human rights in Communist countries do not deserve more careful assessment than human rights in non-Communist countries. It leads the Chinese to question why the United States feels it alone has the right to dictate terms

hand, a full U.S. embargo against a nation such as Iraq is tantamount to a refusal by the United States to recognize the legitimacy of that government, a matter not at issue in the case of China. Because the President must affirmatively waive the emigration requirements for a given Communist nation before he may grant it MFN status, and thereafter must annually renew that waiver, he necessarily draws attention to the state of U.S. relations with that nation.

It is difficult to imagine, for example, that if faced with the question, Congress would have extended MFN status for Iraq under Saddam Hussein or for Iran under Khomeini. When presented with an opportunity for revocation, however, Congress has not shown great hesitation. For example, Congress voted to revoke Romanian MFN status due to gross human rights violations by the Ceausescu regime after it was asked to approve a presidential request for waiver. See May 1990 MFN Hearings, supra note 4, at 4 (statement of Rep. Christopher Smith).

121. Id. at 226 (statement of Ass't Sec. Richard Solomon). One Congressman reacted angrily: "You are suggesting that Members are looking merely for an outlet for their punitive impulse; that is their motivation?" Id. (statement of Rep. Tom Lantos).

122. The United Nations General Assembly did, however, vote to criticize (albeit mildly) the suppression of demonstrators in Beijing—the first time in the history of the United Nations that a permanent member of the Security Council was condemned by the organization for violating human rights. See HUMAN RIGHTS IN DEVELOPING COUNTRIES 1990, at 107 (Bard-Anders Andreassen and Theresa Swinchart eds., 1990). In a related embarrassment, the Nobel Peace Prize was awarded to the Dalai Lama of Tibet, leading the Chinese government to criticize the award as "gross interference in China's internal affairs" and "open support to the Dalai Lama and the Tibetan separatists in their activities to undermine and split China." Id. at 108. China's human rights record may also have been a factor in its failure to secure the Olympics for the year 2000. See Alan Riding, Envelopes Please, as I.O.C. Votes on 2000 Games, N.Y. Times, Sept. 23, 1993, at B15 (discussing how human rights has become the central issue in Beijing's bid for the 2000 Summer Olympic Games). The U.S. House of Representatives passed a resolution calling on the International Olympic Committee to deny the bid, see H.R. 188, 103d Cong., 1st Sess. (1993), eliciting an angry response from the Chinese leaders. See, e.g., Nicholas D. Kristof, Whither That Torch? China's Burning to Have It, N.Y. Times, July 28, 1993, at A4 (quoting the Chinese Olympic Committee's description of the resolution as an "overbearing act . . . [that] will certainly be firmly refused by all people who cherish and safeguard the independence of the International Olympic Committee").
through the threat of MFN revocation. The Chinese thus pose a fair question when they ask why the human rights record of China has been subjected to U.S. congressional scrutiny. The explanation that the review process for Communist countries is a historical by-product of the Cold War must seem inadequate to the Chinese and hardly allays their suspicions of U.S. motivations behind an overtly discriminatory policy.

B. MFN Status and Chinese Emigration Policies

The current debate over China's MFN status under Jackson-Vanik focuses on the broad picture of human rights, but the Amendment itself only directly addresses the fundamental right of citizens in Communist nations to emigrate.\(^{123}\) The question of emigration, while one of obvious importance to U.S.-Soviet relations in 1974, lacks much relevance to current U.S.-China relations. As discussed earlier, the impetus for linking emigration and MFN status originated largely from Jewish lobbyists who wished to effect an increase in the number of Jewish émigrés from the Soviet Union.\(^{124}\) Senator Jackson and Henry Kissinger also sought to measure the success of the Amendment's linkage by the actual number of Jews permitted to emigrate.\(^{125}\)

The Amendment's specific language supports its drafters' quantitative objectives. Under Subsection (a), a nonmarket economy nation is ineligible for MFN treatment if the President determines that the nation 1) denies its citizens the right or opportunity to emigrate; 2) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; or 3) imposes more than a nominal tax, levy, fine, fee or other charge on any citizen as a consequence of that citizen's desire to emigrate to the country of his or her choice.\(^{126}\) These provisions were tailored to address direct and indirect restrictions upon the right of Soviet Jews to emigrate in large numbers.

In contrast, critics of China's emigration policies have focused not on the quantity of émigrés but rather on the political nature of the application process. During the debates on the extension of MFN status to China, critics pointed to China's promulgation of new regulations as proof of China's retrenchment on the denial of the right to emigrate. Under the new regulations, a graduate student applicant is not permitted to travel abroad until

\(^{123}\) The Amendment does not technically require the President to consider other human rights concerns prior to extending MFN status, and the question of whether other human rights concerns should fall into the ambit of the President's considerations usually has been answered in the negative. For example, during the debate over the initial granting of MFN treatment to China, then Deputy Secretary of State Warren Christopher asserted unequivocally that nondiscriminatory treatment "does not depend upon the human rights performance of the country in question. Under the Jackson-Vanik Amendment it is focused on the question of emigration rather than broadly on the question of human rights." *Agreement on Trade Relations Between the United States and the People's Republic of China: Hearing before the Subcomm. on Int'l Trade of the Comm. on Finance, 96th Cong., 1st Sess. 37* (1979).

\(^{124}\) See supra text accompanying notes 93-95.

\(^{125}\) See supra text accompanying notes 102-104.

five years after completing a degree. Authorities also developed a special “questionnaire” that asks travellers to state their level of involvement in the June 4th uprisings and have demonstrated an unwillingness to allow certain dissidents to leave.

The Amendment does not directly address whether regulations screening applicants by their political activities violate the Amendment’s provisions, nor whether the denial of exit visas for a select few of the nation’s citizens constitutes an impermissible infringement of the right to emigrate. The language of Jackson-Vanik asks only the very broad question of whether a nation denies its citizens the right or opportunity to emigrate, specifically addressing only the imposition of taxes, levies, or fines upon would-be émigrés.

U.S. presidents have elected to request a waiver rather than determine whether China has met Jackson-Vanik’s emigration requirements. Subsection (c) of the Amendment authorizes the President to effect a waiver if he reports that the waiver would “promote the objectives” of freer emigration, and that he has “received assurances” that the emigration practices of the nation will lead substantially to freer emigration. The waiver is not difficult to justify. In 1979, President Carter issued the first such executive waiver, proclaiming an extension of MFN status to China on the basis of a bilateral trade agreement signed earlier that year. In addressing the question of emigration under the waiver, Carter stated

Chinese leaders on several occasions have called for facilitating family reunification and for simplifying the procedure for getting permission to enter or leave China. During this period we have noted a marked relaxation of Chinese emigration procedures. Processing time has been reduced for most cases and numbers of emigrants have jumped dramatically. We have recently had discus-

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127. House Comm. on Foreign Affairs and the Senate Comm. on Foreign Relations, Country Reports on Human Rights Practices for 1990, 102d Cong., 1st Sess. 858 (1991) [hereinafter 1990 Country Reports]. The policy permits some applicants, however, who have not graduated or who have some relatives overseas to avoid the work requirement and reimburse the state on a sliding scale for its educational investment. Id.


129. The most prominent would-be émigré was Fang Lizhi, the dissident professor who sought refuge in the U.S. Embassy in Beijing after the crackdown. See id. at 76-77 (statement of Dr. Haiching Zhao). Professor Fang and his family were later permitted by the Chinese authorities to leave China and reside in the United States. June 1991 MFN Hearings, supra note 12, at 7 (statement of Dep. Sec. Lawrence S. Eagleburger).

130. It may have been difficult for the United States to expressly condemn the use of political litmus tests on the right to emigrate given its own record of attempting to prevent communists or their sympathizers from doing the same. At one time, Congress prohibited the issuance of passports to any member of a Communist organization. Subversive Activities Control Act of 1950, 50 U.S.C. §§ 781, 785 (1988). The Supreme Court later struck down this statute as an unconstitutional deprivation of liberty without due process of law in Apteker v. Secretary of State, 378 U.S. 500 (1964). Congress has also labeled certain nations off-limits to U.S. travelers, authorizing the Secretary of State to refuse visas to nations such as China. See, e.g., Porter v. Herter, 278 F.2d 280 (D.C. Cir. 1960), cert. denied, 364 U.S. 837 (1960).


sions with senior Chinese officials and firmly believe that Chinese
statements and the marked increase in emigration reflect a policy of
the Government of China favoring freer emigration.\textsuperscript{133}

Thus, the only tangible progress that Carter noted was a "marked
relaxation" of procedure and a jump in the number of emigrants. Indeed, in
practice the issue of Chinese emigration has never been a serious obstacle
to the continuation of MFN status for China. China's laws generally recog-
nize the right of its citizens to leave the country\textsuperscript{134} in order to join relatives
abroad or upon any other reasonable private grounds,\textsuperscript{135} including the
desire to emigrate.\textsuperscript{136}

In 1992, President Bush determined that a waiver of the emigration
requirements was in order since the "U.S. numerical limitation for immi-
grants from China was fully met" and that "the principal restraint on
increased emigration continues to be the capacity and willingness of other
nations to absorb Chinese immigrants" rather than constraints of Chinese
policy.\textsuperscript{137} President Clinton reiterated this rationale in 1993.\textsuperscript{138} Given
China's willingness to allow "millions" of its citizens to emigrate,\textsuperscript{139} presi-
dents may easily contend that China satisfied the requirements for waiver of
Jackson-Vanik's provisions.\textsuperscript{140} Thus, if sheer numbers are the best measure
of a nation's emigration policy under Jackson-Vanik, China has clearly met
the Amendment's objectives. Indeed, congressional demands for freer Chi-
nese emigration under Jackson-Vanik stand in stark contrast to current
efforts to strictly limit the number of Chinese arrivals.\textsuperscript{141}

\textsuperscript{133} Agreement on Trade Relations Between the U.S. and the People's Republic of China:
\textsuperscript{134} 1990 Country Reports, supra note 127, at 858.
\textsuperscript{135} The Nationality Law of the People's Republic of China, art. 10 in The Laws of the People's
Republic of China (1979-1982) 182, 183 (Legislative Affairs Comm'n of the Standing Comm. of the
Natl People's Congress of the P.R.C., ed., 1987). Army personnel and government officials, however,
are subject to greater restrictions. Id. at art. 12.
\textsuperscript{136} Regulations on Travel in the People's Republic of China § 2.
\textsuperscript{137} U.S. Dept. of State Dispatch, supra note 89, at 1. The statement made no mention,
however, of whether the Chinese government would not allow certain individuals or classes of persons
to emigrate.
\textsuperscript{138} Continuation of Waiver Authority, supra note 9, at 5.
\textsuperscript{139} At a meeting between Deng Xiao Ping and congressional leaders, Deng was quoted as saying
to Senator Jackson, "How many million do you want in Seattle next Wednesday? . . . I have 100
million. . . ." June 1990 MFN Hearings, supra note 19, at 124 (statements of Roger W. Sullivan and
\textsuperscript{140} As another example of official assertions that China meets the waiver requirements of
Jackson-Vanik, see also MFN Trading Status Hearing and Markup, supra note 28, at 3 (statement of
Dep. Sec. Lawrence S. Eagleburger) ("[T]here is simply no doubt that China's emigration policy meets
the legal requirements for waiver of MFN. The Chinese government continues to permit its citizens to
emigrate to the United States and elsewhere. In fiscal year 1990, approximately 17,000 U.S. immigrant
visas were issued in China, the full number permitted by the United States.").
\textsuperscript{141} See, e.g., Paul Glastris, Immigration Crackdown, U.S. News and World Report, June 1993,
at 34, 34-35 (noting President Clinton's strong reaction to a beached smuggling boat full of Chinese
illegal aliens and observing that many experts recommend that a regulation allowing asylum claims
based upon China's one-child policy should be rescinded to diminish incentives for illegal Chinese
emigration).
Nevertheless, the White House and Capitol Hill continue to abide by the technical requirements of the law, even where both sides understand that the emigration issue is a red herring. Notwithstanding the letter of the Amendment, the extension of China’s MFN status has nothing to do with how many Chinese are “allowed” to leave. The irrelevance of Jackson-Vanik’s emigration requirement to the current debate over China’s MFN status illustrates the need for a new trade policy toward China.

C. The MFN Issue as a Dumping Ground for Congressional Grievances

Although the President is required by the Amendment to report to Congress only on China’s emigration record, and though Jackson-Vanik is in spirit concerned about the protection of human rights, the Amendment’s provisions permit Congress to pass a resolution of disapproval without any subject matter limitation. Seizing this opportunity, Congress has treated the disapproval mechanism as a “dumping ground” for its grievances against China. In bills passed in 1991 and 1992, Congress called on China to make significant improvements in areas unrelated to human rights as a necessary condition for extension of MFN status. These conditions included providing adequate protection of U.S. patents, copyrights and intellectual property; providing fair access to Chinese markets by lowering tariffs and nontariff barriers and increasing the purchase of U.S. goods and services; limiting missile sales and biological weapons proliferation; and pledging to halt all assistance to non-nuclear states in the development of weapons. In 1993, President Clinton expressly conditioned the extension of MFN status to China on whether China complies with the 1992 bilateral agreement concerning prison labor. Finally, lawmakers point to China’s growing trade surplus with the United States, which amounted to 18 billion

142. Given Congress’ apparent willingness to bring a host of other issues to the table during debate over the MFN issue, President Bush began to proactively address likely concerns outside the legislatively mandated report on emigration policies. For example, in his June 1992 waiver request for China, President Bush touched upon not only emigration issues but basic human rights, non-proliferation of weapons, economic reforms, and regional and multilateral cooperation. Waiving Certain Emigration Practices with Respect to China: Message from the President, 102d Cong., 2d Sess. (1992).

143. See H.R. 2212 and H.R. 5318, supra note 8.

144. Lack of such protection caused well-known U.S. companies such as Walt Disney to pull their operations out of China. See John Frank-Keyes, Disney Encounters Problems in China Again, S. CHINA MORNING POST, July 8, 1993, available in LEXIS, World Library, SChina File.

145. China requires import licenses and extensive inspection standards and review. Beginning in 1989, China instituted a number of protectionist measures that expanded its centrally managed planning to cover two-thirds of its trade and unilaterally hiked tariffs on many items. Chinese companies have falsified country of origin documents to transship textiles and apparel to the United States. See MFN Trading Status Hearing and Markup, supra note 28, at 29 (statement of S. Linn Williams, Deputy Trade Representative).

146. For a detailed account of the alarming extent of Chinese nuclear proliferation and weapons sales, see Sino-American Relations Hearings, supra note 4, at 7-25 (statement of Dr. Gary Milhollin, Dir. of Wisconsin Project on Nuclear Arms Control).

147. See Continuation of Waiver Authority, supra note 9, at 4.
dollars in 1992. They argue that the United States has nothing but its trade deficit to lose from the revocation of China’s MFN status.

The tendency of Congress to add to the China grievance list produces several untoward results. First, the mandate of the Amendment itself—the fundamental human right to emigrate—is lost in a flurry of competing economic and political interests. Even if one takes a more expansive view of the goals of the Amendment to encompass all human rights, the powerful message that Congress hoped to convey over the Tiananmen massacre has been diluted by rider issues unrelated to the crackdown. Second, while this dumping serves to highlight U.S. grievances, it also undermines the importance and potential of bilateral and multilateral negotiations and agreements on intellectual property protection, market access, and weapons proliferation. Consequently, China may understandably become skeptical of Congress’ intentions. It may feel that conditions placed on MFN status are only a smoke screen to accomplish the real goal of protecting U.S. industries against cheaper Chinese goods. With so many U.S. complaints in the MFN basket, the Chinese may rightfully conclude that MFN status revocation is inevitable, leaving diminished incentives for significant progress on any single issue.

D. Revocation: The “Doomsday" Weapon

1. The Misconstruction of the MFN Principle

Jackson-Vanik has transformed MFN from a principle of international trade to a foreign policy tool. The threat of MFN status revocation, with the consequential imposition of dramatic and punishing tariffs by the United States, is a gross theoretical departure from the original purposes of the MFN principle.

The use of MFN status as a weapon stems in large part from a common view of many U.S. policy makers that MFN status is a privilege they can bestow rather than a custom they ought to extend. Part of this misconstruction arises from the very term “most-favored-nation.” As previously discussed, the presence of the clause in a treaty does not truly create a “favored nation.” Instead, it places a trading partner on par with an implied

150. Cf. U.S. Dep’t of State Dispatch, supra note 89. China was one of three countries designated as a special 301 country under the 1988 Trade Act, June 1991 MFN Hearings, supra, note 12, at 11 (statement of Dep. Trade Rep. S. Linn Williams). In addition, the United States imposed $85 million in sanctions on the Chinese for illegal transshipments of textiles. Id. at 14; Sino-American Relations Hearings, supra note 4, at 93.
151. See supra text accompanying notes 41 to 48.
most-favored third party.\textsuperscript{152} The term "most-favored-nation" is misleading because it suggests that only a select number of favored trading partners receive special treatment.\textsuperscript{153} In fact, the very opposite is true: Only about one dozen nations, all of which are "Communist," do not currently receive U.S. MFN status, while all other U.S. trading partners receive it.\textsuperscript{154}

In the debate over China's trade status, U.S. policy makers have often used the term "most-favored-nation" to further political ends, again by suggesting that MFN status is a privilege rather than the norm. For example, opponents of MFN extension described China as a "beneficiary" of MFN status,\textsuperscript{155} asked whether the Chinese government "deserves" MFN treatment,\textsuperscript{156} and declared that MFN status "entitles" trading partners to low tariffs.\textsuperscript{157} One of the most vocal opponents of extending MFN status to China admitted that the use of the term "MFN" is a bit "misleading" because "being considered the most-favored-nation when everybody else is the most-favored nation...is like having 107 best friends,"\textsuperscript{158} but nevertheless contended that the withdrawal of MFN status would not be a "denial of a basic right" because "[m]ost-favored nation treatment has always been considered something a nation has a right to confer and not to confer as a matter of will."\textsuperscript{159}

Because U.S. policy makers often view MFN status as a weapon they may employ, the immediate trade stabilizing benefits of the MFN principle and its value as a foundation for future relations have been lost. The MFN issue has become a source of enormous tension instead of a bridge that brings China and the United States together as trading partners. Instead of making our economies interdependent, the MFN issue now symbolizes our mutual mistrust.

2. The MFN Gambit

MFN treatment displays serious shortcomings as a foreign policy weapon. The Amendment speaks only of MFN status extension or revocation, thus construing trade with China in all or nothing terms. Legislative compromises that have sought to "condition" MFN treatment for single

\textsuperscript{152} Snyder, supra note 30, at 11 (quoting Farra, \textit{Les Effets de la Clause de la Nation la Plus Favorisée et la Spécialisation des Tarifs Douaniers} 57 (1910) (stating that the clause refers to "le traitement de la nation étrangère la plus favorisée"—the treatment of the most favored outside nation)).

\textsuperscript{153} See, e.g., May 1990 MFN Hearings, supra note 4, at 225-34 (statement of Ass't Sec. Richard Solomon) (defending the Bush Administration's decision to waive the Jackson-Vanik emigration requirements and extend MFN treatment for another year and stating that MFN treatment "merely means that normal tariff rates, rather than discriminatory tariffs, will apply to bilateral trade."). See also June 1991 MFN Hearings, supra note 12, at 5 (statement of Dep. Sec. Lawrence S. Eagleburger) ("MFN is the normal basis for trade throughout the world....").


\textsuperscript{155} May 1990 MFN Hearings, supra note 4, at 190 (statement of Rep. Tom Lantos).

\textsuperscript{156} Id. at 200 (statement of Rep. Gerald Solomon).

\textsuperscript{157} Id. at 209 (statement of Rep. Nancy Pelosi).

\textsuperscript{158} June 1990 MFN Hearings, supra note 19, at 9 (statement of Rep. Barney Frank).

\textsuperscript{159} Id.
year terms only forestall an ultimate decision on whether to extend or revoke MFN status. Jackson-Vanik therefore leaves policy makers with few options to resolve complex issues, forcing China to respond by either capitulating or stonewalling. This "economic brinksmanship" is in essence a form of "mutually assured destruction," with the United States holding its finger on the MFN button that would begin a trade war should its human rights demands go unmet.

Continued reliance on the Amendment puts U.S.-China relations at risk. Revocation of China's MFN status could result in economic and political losses to both sides and deny the U.S. any remaining leverage to effect significant improvement in human rights.\(^\text{160}\) If history is any guide, the angry Soviet response to the original passage of the Amendment, which resulted in repudiation of the 1972 Trade Agreement, bodes badly for the prospects of Chinese accommodation.\(^\text{161}\)

The Amendment's mandated practice of annual presidential review, with its inevitable legislative counterpart,\(^\text{162}\) contradicts the original purpose of MFN status extension. Annual review places the future of trade relations in perpetual limbo and is reminiscent of the criticized U.S. practice of conditional MFN treatment. In contrast, unconditional MFN treatment provides a stable basis for present and future trade decisions by the parties.

Although it is undisputed that the United States as a sovereign state may adopt such a controversial stance, it does not follow that it should do so. Revocation of China's MFN status carries two serious political consequences. First, periodic review may invite retaliation by China and give market advantages to nations that extend unconditional MFN treatment to China. Second, the lack of guarantees for MFN status introduces considerable doubt into the minds of Americans doing business in China, who may choose to make only short term investments while investors from other nations are able to reap the benefits of longer term commitments.

\(^{160}\) Some in Congress have noted, on the other hand, that MFN treatment loses its entire value as political leverage if the Chinese believe the United States shall never revoke it. Cf. June 1991 MFN Hearings, supra note 12, at 19 (statement of Sen. John H. Chafee).

\(^{161}\) During Secretary of State Warren Christopher's recent visit to China, Chinese Premier Li Peng was defiant in the face of U.S. conditions on the renewal of MFN status: "China will never accept the United States' human rights concepts. ... History has proved it is futile to apply pressure against China." See Geoffrey Crothall, Hardline Stance on MFN, S. CHINA MORNING POST, March 13, 1994, at 1, available in LEXIS, World Library, SChina File. The Chinese leader also indicated that China is ready to endure whatever economic hardships the United States may inflict through MFN revocation. Id.

\(^{162}\) The Subsection originally stated that the President's waiver authority will continue in effect for twelve months unless within 60 days of the expiration of the previous 12-month extension, "either the House of Representatives or the Senate adopts, by an affirmative vote of a majority of the Members ... a resolution disapproving the extension of such authority generally or with respect to such country specifically ...." supra note 1. Responding to the ruling of the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983) (holding one-house congressional vetoes unconstitutional as violative of the Presentment Clause), Congress amended Jackson-Vanik in the Customs and Trade Act of 1990 to require the disapproval of a majority of both houses of Congress within 60 days. Should such a bill be passed, it would then have to be presented to the President and subjected to veto authority. Customs and Trade Act of 1990, Pub. L. No. 101-382 § 132, 104 Stat. 629 (1990).
3. The Consequences of Revocation

If the United States ever carried through with its threat to revoke China's MFN status, the consequences would be severe. Indeed, such a drastic change in trade status would most likely spell the end to normal relations between China and the United States. As discussed earlier, the punitive nature of revocation has historical roots in the dual minimum-maximum tariffs of turn-of-the-century trade policy. The Payne-Aldrich Act had maximum rates that imposed a twenty-five percent surcharge upon the entire value of imported items. At the time, the penalty was considered so dramatic that it, like a "doomsday weapon," could only be used against the most extreme discrimination, since its use would inevitably begin a trade war. This "doomsday" specter has survived to this day: Were China's MFN status revoked, tariffs on Chinese-made imports would shift from column one to column two rates, likely creating an intolerable trading relationship once the Chinese retaliated. According to former Assistant Secretary of State Richard Solomon,

Non-MFN duty rates are up to ten times higher than the MFN rates. Tariffs on certain toy products, for example, would rise from 6.8% to 60% Tariffs on some women's apparel would increase from a range of 6% to 17.7% to a range of 60% to 90%. The average duty on China's top 25 exports to the United States in 1989 was 8.8%. If those same products were imported under non-MFN rates, the average duty would have been fifty percent.

Retaliation by China would subject U.S. principal exports to rates thirty to fifty percent higher than the MFN rates. This would affect, in particular, U.S. wheat exports, of which China was the largest foreign purchaser, taking approximately twenty percent of the total U.S. wheat export in 1989.

The dramatic difference in tariff rates between column one and column two is of course the legacy of the Smoot-Hawley Act, which was so vilified as a chief cause for economic turmoil and international hostility in the 1930s. Curiously, some members of Congress continue to dismiss the difference between column one and column two tariff rates as negligible. One legislator recently characterized a move from column one to column two as only a "slight variation in tariff schedules . . . [n]ot a big deal."

He further stated, "[W]e are talking about relatively inexpensive products, and so an increase on duty, even if it is twenty or thirty percent, when you are talking about an item that costs less than $1, is not a substantial increase in duty."

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163. Wolman, supra note 45, at 149.
164. Id.
165. See supra note 54.
166. May 1990 MFN Hearings, supra note 4, at 252 (statement of Ass't Sec. Richard Solomon).
167. Id. at 253.
168. See supra text accompanying notes 56 to 64.
Most commentators and business leaders disagree, some even suggesting that a loss of MFN status and a return to Smoot-Hawley is only one step short of a full embargo and would result in losses of tens of thousands of jobs and severe economic dislocation in both countries. Furthermore, many point out that MFN status revocation would deprive the Americans of access to the world's largest consumer market and fastest growing economy, resulting in diminished future exports and a wasted opportunity for increased growth in the United States.

V. CONCLUSION

The problem this Comment has addressed is not whether the extension of China's MFN status will ultimately improve human rights in that country. Rather, this Comment has explored whether the very question of MFN status revocation or extension in light of events in China is in the first instance appropriate. I conclude that it is not.

As this Comment has shown, Jackson-Vanik is the culmination of a long history of misguided U.S. MFN policy, which has been generally nonreciprocal, short-sighted, and politically motivated. Its application to China today is essentially a product of historical oversight. Without the platform of Jackson-Vanik, born out of the Cold War with the Soviets, the current debate would never have occurred.

Through its use of MFN treatment as a foreign policy weapon, the Amendment continues to violate the tenets of the MFN principle and diminish its effectiveness as a mechanism for international cooperation. The

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170. Id. at 50 (statement of John Kamm).
171. See, e.g., June 1990 MFN Hearings, supra note 19, at 39-41 (statement of Steven A. McCoy, President of the North American Export Grain Association, Inc.), 105-08 (statement of Douglas R. Hanson, Vice President, Asia Pacific/Canada 3M on behalf of the Emergency Committee for American Trade), 109-16 (statement of Fermin Cuza, member, Board of Directors, American Association of Exporters and Importers, and Assistant Treasurer, Foreign Trade Services, Mattel, Inc.), 188-90 (statement of Jeffrey A. Clevenger, President, Saginaw Machine Systems on behalf of NMTBA - The Association for Manufacturing Technology), 192-95 (statement of A. Curts Cooke, President and Chief Operating Officer, Russ Berrie & Co., Inc.), 196-201 (statement of Dr. Peter Nelsen, President and Marie A. Bolzen, Director of Research, International Trade Council), 204-08 (statement of Howard Lewis III, Vice-President, International Economic Affairs, National Association of Manufacturers), 291-93 (statement of David Miller, President, Toy Manufacturers of America), 296-99 (statement of Frank D. Kittredge, President, National Foreign Trade Council, Inc.). Hong Kong would particularly be affected. Id. at 53-58 (statement of John Kamm). For a contrary view on potential economic impact of MFN revocation, see id. at 152-55 (statement of Dr. Yang Ye). One expert has suggested that MFN revocation would not stop Chinese imports from coming into the United States because the tariffs imposed by the United States depend in part on the total cost of the good. In some cases, then, the rise in tariffs could be offset by the Chinese—presumably because they are a state-trading country—without making the product uncompetitive. See June 1991 MFN Hearings, supra note 12, at 19 (statement of Dep. Trade Rep. S. Linn Williams). U.S. goods, on the other hand, may be unable to overcome the rise in tariffs should the Chinese retaliate and revoke U.S. MFN status.

Amendment's anachronistic adherence to political distinctions between Communist and non-Communist nations, as well as its awkward and largely irrelevant mandate for free emigration, demonstrate its increasing inapplicability today. More ominously, the Amendment's procedure for annual congressional review gives rise to an incoherent U.S. MFN policy toward China that threatens the very basis of our relations.

This Comment does not seek to trivialize the extent of repression practiced by the current regime in Beijing or by other totalitarian governments. It is difficult to subject what is at heart an emotional issue to the rigors of consistency in foreign policy and the need for pragmatic solutions. Mechanisms exist, however, within the scope and purpose of the United Nations for multilateral condemnation and sanctions over China's human rights violations. On this matter, the United States should not and cannot afford to stand alone in risking the loss of MFN status and the end to normal relations.

We must instead recognize that the law under Jackson-Vanik is discriminatory and counterproductive, and that the Amendment should be repealed promptly. As a new basis for trade, the United States should unconditionally extend MFN status to China, without the onus of periodic review, in order to bring U.S.-China relations in line with those between the United States and its other major trading partners.