

A NEW LIBERAL TRADE POLICY FOUNDATION

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I.	IS IT TIME TO RECAST THE LIBERAL POSITION ON TRADE?	431
II.	DEFENDING THE LIBERAL POSITION	433
III.	CONTRASTING THE CLASSICAL CONSERVATIVE POSITION	433
IV.	THE CENTRAL ROLE OF "LINKAGE"	434
V.	A POLICY AT WAR WITH ITSELF	435
VI.	AN END TO "LINKAGE"	437
VII.	REDUCING CORPORATE TAXES FOR GOOD CORPORATE CITIZENS	438
VIII.	USE OF PRINCIPLED SUBSIDIES	440
IX.	CONCLUSION	441

I. IS IT TIME TO RECAST THE LIBERAL POSITION ON TRADE?

With the enactment of Trade Promotion Authority legislation in August of 2002¹ and a lackluster performance by Democrats in the November elections that followed,² a profound question looms over the left wing of the American body politic, a question that has attracted all too little attention to date: Has the time come for a new liberal approach to international trade and globalization? The answer to this question in turn depends on the answer to a second, but related question: Is the gap between the developed and developing worlds one of, if not the, greatest economic, political, and moral issues of our time?

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1. The 2001-02 battle to renew fast-track procedures, now known as Trade Promotion Authority, in 2002 was a bitter, partisan battle in the House of Representatives. The bill first passed the House by just one vote; see Helene Cooper, David Rogers, and Jim VandeHei, *House Votes Wide Trade Powers for Bush – 'Fast Track' Authority Wins Passage in 215-214 Tally; Senate Passage Expected*, WALL ST. J., Dec. 7, 2001, at A3; it then obtained an important procedural victory in the House by again just one vote; "see House Passes Motion on Conference with Scant Democratic Support," see *Inside U.S. TRADE*, June 28, 2002; and it gained ultimate passage in the House by of 215 to 212. In the end, the bill garnered support from 190 Republicans but only 25 Democrats.

2. See, e.g., R.W. Apple, Jr., *The 2002 Elections: News Analysis; President's Risks Are Rewarded at Polls*, N.Y. TIMES, NOV. 6, 2002, AT A1 (NOTING THE SHIFT IN CONTROL FROM THE DEMOCRATS TO THE REPUBLICANS AND THE DEMOCRATS' LOSS OF SEATS IN THE HOUSE OF REPRESENTATIVES).

As explained below, the answer to both questions, for progressives at least, undoubtedly should be yes. The current liberal position on trade is internally inconsistent and unlikely to achieve the ends that its well-intentioned advocates hope to achieve. It is grounded in unrealistic premises that have spawned a thousand law review articles but achieved precious little in terms of tangible results. It is used by protectionists as an excuse to halt market liberalization efforts,³ and it threatens to deny the people who most need economic advancement the avenues of opportunity that would lead to better lives.⁴

This critique of the liberal orthodoxy is not intended to bury liberal goals in trade policy, but to more sharply define them and hopefully start a dialogue to find better ways to obtain them. The liberal orthodoxy has transformed the trade debate in important and lasting ways. It has brought to the fore concern for the habitability of the planet on which we live, the conditions in which we toil, and the equities of how we spread the wealth we create.⁵ The challenge is to advance these very same goals by unleashing, rather than harnessing, trade, which in and of itself is an engine for attaining a more progressive, sustainable, and humane world: economic growth.⁶ What follows is designed to begin a

3. See, e.g., Edmund G. Brown, Jr., *Free Trade is Not Free*, in THE CASE AGAINST FREE TRADE, at 65-68 reprinted in Raj Bhala, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE at 99-101 (2001) (arguing that free trade agreements only help powerful corporations and produce a "race to the bottom" in which countries lower environmental and labor standards to attract foreign investment). See also Herman E. Daly, FROM ADJUSTMENT TO SUSTAINABLE DEVELOPMENT: THE OBSTACLE OF FREE TRADE, 15 LOY. L.A. INT'L J. 33, 36-42 (1992) (arguing that free trade prevents countries from internalizing the external costs of protecting the environment).

4. See, e.g., P.T. Bauer, Equality, the Third World and Economic Delusion at 76-80, reprinted in Raj Bhala, International Trade Law: Theory and Practice at 1417-20 (2001)

The allegations that external trade, and especially imports from the West, are damaging to the populations of the Third World reveal a barely disguised condescension towards the ordinary people there, and even contempt for them. The people, of course, want the imports. If they did not, the imported goods could not be sold. Similarly, the people are prepared to produce for export to pay for these goods. To say that these processes are damaging is to argue that people's preferences are of no account in organizing their own lives.

5. See, e.g., Charles Tiefer, 'Alongside' the Fast Track: Environmental and Labor Issues in FTA's, MINN. J. OF GLOBAL TRADE 329, 331-33, 338-41 (1998) (describing the debate over environmental and labor issues that arose in connection with efforts to renew fast track during the Clinton Administration).

6. According to the World Bank, "Trade is a vital engine for poverty-reducing growth. Those countries that have intensified their links with the global economy through trade and investment have tended to grow more rapidly over a sustained period and have experienced larger reductions in poverty. Even the pro-development." See, Trade, THE WORLD BANK GROUP, (Sept. 2002) available at, [http://www.worldbank.org/wbsite/extrnl/news/trade/leveraging trade for development](http://www.worldbank.org/wbsite/extrnl/news/trade/leveraging%20trade%20for%20development) (last visited Mar. 12, 2003). Even the left leaning Oxfam has recognized the potential for trade to produce growth in the developing world. See "Harnessing Trade for Growth," Oxfam Briefing Paper, August 2001, at 1.

International trade can be a force for poverty reduction by overcoming local, national, and regional scarcity, and by creating livelihoods and employment opportunities. However, rich countries and powerful corporations have captured a disproportionate share of the benefits of trade, while developing countries and poor men and women have been left behind or made worse off.

conversation that will hopefully better connect policy choices with these aspirations.

II. DEFENDING THE LIBERAL POSITION

In order to fully answer whether it is time for a new liberal approach on trade, it is necessary first to explain what that means. The liberal position on trade – in particular, liberal from a United States political perspective – is principally characterized by three baskets of policy initiatives. The first is the “linkage” of trade with a host of other issues – from labor and the environment to human rights, anti-corruption initiatives, and even anti-narcotics efforts.⁷ The second is the promotion of an array of border protection measures including, but not necessarily limited to, the retention of ordinary tariffs and quotas, use of escape clause or safeguard actions, and the imposition of antidumping and countervailing duties.⁸ And the third is a neo-mercantilist support for market liberalization that results in an increase in the exportation of domestically-made products, a tolerance for imports used in domestic production, but an aversion to imports that compete directly with domestic products.

In sum, the predominant liberal position on trade is not hostile to trade *per se*, but it accepts only what is often referred to as “fair” trade. In practice, however, the distinction between the two can be difficult to see. The pursuit of “fair” trade has led to continued use of quotas on textile and apparel products, tariff peaks on agriculture, and an explosion of trade remedy cases, including perhaps most famously, the recent safeguard action on steel.⁹

III. CONTRASTING THE CLASSICAL CONSERVATIVE POSITION

The liberal position on trade stands in contrast to the classic conservative position, which, at least in theory, is unabashedly pro-free trade. Just as the liberal position is maddeningly complex – drawing fine-line distinctions between useful and harmful imports and circumstances in which “linkage” is appropriate – the classic conservative position is almost naïve in its simplicity. In its purest form, it ignores the extraordinary domestic pressures that can mount

7. See, e.g., letter of Representatives Rangel, Levin, and Matsui, dated September 26, 2001, critiquing the Trade Promotion Authority bill introduced by Republican Ways & Means Chairman Bill Thomas for lack of language ensuring adequate labor and environmental protections in trade agreements, reprinted in *INSIDE U.S. TRADE* (2001).

8. See, e.g., *More than 100 House Democrats Support Dayton-Craig* in *INSIDE U.S. TRADE* (May 24, 2002) (noting strong Democratic support for amendment to Trade Promotion authority that would exclude from fast-track consideration any provision in a United States trade agreement proposing to change a United States trade remedy law).

9. While it was President Bush who formally launched the United States safeguard action and imposed it, liberals in Congress have been seeking such protection for steel for years.

to impose trade barriers. The reality, of course, is another matter. Leading conservative politicians have supported protective measures when it is *their* constituents whose businesses and jobs are threatened by import competition. In practice, the differences between liberals and conservatives when it comes to trade may be more one of degree than kind. Liberals may be more eager, or perhaps comfortable, to impose trade protection than conservatives, but both appear ready to do so when the circumstances in their view justify it.¹⁰

IV. THE CENTRAL ROLE OF “LINKAGE”

In the past, the seminal distinction between the liberal and conservative positions has been “linkage.” While liberals have pursued “linkage,” conservatives have resisted. The enactment of Trade Promotion Authority legislation revealed that conservative opposition to “linkage” in the United States may be waning. Between 1994, when fast track was last in effect, and 1998, the debate turned in large part on the relationship between trade, on the one hand, and labor and environmental standards on the other. During this time, two fast-track bills failed to become law.¹¹

In 2001 and 2002, controversy over labor and the environment all but disappeared, as even the main proposals from the Republican-led House of Representatives included United States negotiating objectives that called for trade-related labor and environmental issues to be accorded equal weight with conventional trade issues and to be enforced in the same way as other provisions in trade agreements – that is, through the use of trade sanctions. Instead, the key issues were the adoption of benefits for workers who lose their jobs due to trade; proposed reforms to investor-state dispute-resolution proceedings; and the extent to which new trade agreements can weaken United States trade remedy laws.¹²

10. One need only look at the United States safeguard action on steel. President Bush, who campaigned for office on a strong pro-free-trade platform, requested the United States International Trade Commission to investigate steel imports and, as a result of that investigation, he chose to impose significant protections for the steel industry. President Bush’s action has been roundly denounced and characterized as protectionist in many quarters. It is the subject of numerous World Trade Organization dispute-settlement proceedings. The President, however, was not alone, on the American political right in endorsing protection for United States steel. A number of conservative members of Congress are members of the Steel Caucus, which generally favors greater protection from imports. And, southern Republicans and Democrats alike have backed protection for United States textile manufacturers.

11. See Jutta Hennig, *Bipartisan Opposition Leads to 180-243 House Defeat of Fast Track*, in *INSIDE U.S. TRADE* (1998); *Finance Aide Calls for Broad Debate in Wake of Fast Track Collapse* in *INSIDE U.S. TRADE* (Nov. 28, 1997) (Chronicling effects of decision to withdraw fast track legislation on eve of vote.).

12. See, e.g., *Final Trade Bill Agreement Falls Short of Senate TAA Provisions*, in *INSIDE U.S. TRADE* (2002).

V. A POLICY AT WAR WITH ITSELF

At first blush, the central pillars underlying the predominant liberal position on trade – “linkage” between trade and other issues, comfort with protection in certain contexts, and a degree of hostility to import competition – advance classic liberal goals. They attempt to use trade policy to bolster liberal causes such as worker rights and clean air. They also attempt to protect blue-collar workers from the vicissitudes of uncertain market forces – market forces that not only may arguably advantage the privileged few over the ordinary masses, but that also may be unfairly manipulated by “foreigners” who do not live and play by the same rules as we do (however “we” may be defined).

But, in actuality, the predominant liberal trade position is a policy argument at war with itself, or at least with core liberal values. “Linkage” in the abstract may be laudable. It might indeed be just and wise to link trade benefits to improved labor and environmental standards, but almost all attention concerning “linkage” has been over how to word abstract United States negotiating principles in fast-track bills rather than making concrete progress on these issues in international trade agreements.

The plain truth is that United States trade partners have shown little interest in pursuing “linkage.” Developing countries in particular view “linkage,” at best, as a legitimate policy that incidentally minimizes aspects of their comparative advantage in certain sectors. At worst, they view it as a naked attempt to impose discriminatory and protectionist measures by developed countries against the goods and services of developing countries.¹³

Either way, developing countries have a point. International trade rules that would permit a measure barring the importation of a blouse made in Bangladesh through child labor opens the door to import barriers to blouses made by Indonesian workers who make less than a prescribed minimum wage, or Guatemalan workers who toil in unpleasant or unsafe factories, or Chinese workers who live in a country that doesn’t have adequate pollution safeguards or Western civil liberties. Developing countries that resist acceptance of such measures argue, with a large degree of historical accuracy, that developed countries attained their current level of economic advancement without such government intervention in the marketplace, yet they now want to impose a new set of rules on the rest of the world.

Only the coldest of hearts would want children to work instead of attend school, or allow workers to endure the hardship of sweatshops or earn less than a subsistence wage. But, to many in the developing world, only the coldest of

13. See, e.g., JOHN H. JACKSON ET. AL., *LEGAL PROBLEMS OF INT’L ECON. RELATIONS* 1186 (4th ed. 2002) (“some developing countries have also expressed concern that some of the ‘new’ issues for the GATT/WTO system – environment, human rights, labor standards – may lead to disguised protectionism”).

hearts would take jobs away from a child who must work to support her family, or deny a job – menial though it may be – to a worker who has no better alternative. It has yet to be proven that closing developed country borders to developing country goods will improve the standards such policies may be designed to achieve, but market barriers almost surely will have a painful impact on those least able to endure further economic setbacks.

There can be little doubt that liberal acceptance of protective measures has decidedly illiberal effects. One need not be an economist to understand that tariffs or quotas not only harm the interests of foreign exporters, but also domestic importing enterprises, domestic retailers that sell imported goods, domestic manufacturers that rely on imported inputs in their products and, perhaps most important of all, domestic consumers who pay more for whatever products reach the shelves of their local stores. Consumer welfare is generally the first casualty of trade protection. Consumers are forced to pay more for less choice and, in some instances, less quality.

At bottom, tariffs and quotas are regressive in nature. They disproportionately affect the poor and small businesses. The notion of increased domestic sales taxes are often anathema to liberal policymakers and politicians because they are regressive taxes, yet tariffs are embraced because of the charade that they are somehow borne only by foreigners. The reality is that the cost of tariffs, at least in part, is passed on to all of us. Compounding this reality is that trade protection often begets more trade protection. Thus, the regressive tariffs we impose on United States consumers today may be imposed on their German, Japanese, or Brazilian counterparts tomorrow.

While the twin-headed hydra of “linkage” and limited protectionism may be justifiable in liberal terms by a reasonable desire to provide additional security to domestic workers – an important concern – it does nothing to help the billions of people around the world living in abject poverty, conditions most of us in the United States would consider unthinkable in the 21st century. As much American Democrats may want to preserve well-paying manufacturing jobs for middle-class workers in Ohio and Michigan, they should not want to do it at the expense of the four billion people in the world who survive by tilling the soil,¹⁴ or the three billion who have never made a phone call,¹⁵ or the 2.8 billion who live on less than two dollars a day,¹⁶ or the 1.2 billion who live on one dollar a day.¹⁷

14. See Ambassador Robert B. Zoellick, Commencement Address at St. Joseph's College, Rensselaer, Indiana (May 5, 2002).

15. *Id.*

16. The World Bank Group, *Twenty Questions About Poverty and Development*, at 1, available at <http://www.worldbank.org/poverty/quiz/whole.htm> (last visited Mar. 12, 2003).

17. The World Bank Group, *World Development Indicators 2002, Economy, Growth and*

To be perfectly clear: this is *not* a call for the diminution of American prosperity in order to close the North-South gap. A policy based on such a wealth transfer is not only of questionable morality; it is politically unfeasible. Instead, United States liberal trade policies should be retooled to promote growth both at home *and* abroad in developing countries, especially for those within and without the United States who have the least and need the most. As Presidents Kennedy and Clinton said, two pro-free trade liberals, we need a trade policy that creates a rising tide that lifts all boats.¹⁸

VI. AN END TO "LINKAGE"

So, how can such an admittedly utopian vision be attained? First, it is time to move away from "linkage." Delinking trade from labor and environmental standards *does not* mean turning our backs on lifting environmental and labor standards in nations where these standards are lacking or inadequate. It means putting industrialized country money where our mouths are. If we are serious about cleaning the air, purifying drinking water, ending child labor and sweatshops, and promoting freedom and democracy, as we should be, then we ought to enhance the international programs designed to do so. We should be honest with ourselves and recognize that pollution in Mexico or Argentina was not created by international trade, and it will not be cured through international trade agreements.¹⁹ The same can be said for impure water or smog in Egypt or Pakistan. International trade is for the most part a small fraction of the economies of the countries of the developing world, and in most instances it is but a tributary to the main rivers of problems that course through them. It thus is at the margins of the problems that are now being linked with trade.

What we need is not defensive measures to guard against the so-called "race to the bottom." Trade "linkage" merely locks in existing environmental and labor standards that have proven in the United States view to be ineffective. The labor and environmental provisions of the NAFTA and the United States-Jordan Free Trade Agreement, for example, do not lift standards, but rather fix in place the very policies that such provisions were initially proposed to counteract. Instead, what we need are affirmative measures to create a "race to

Development, at 2, available at <http://www.worldbank.org/data/wdi2002/economy.pdf> (last visited Mar. 12, 2003).

18. For example, President Kennedy encouraged free trade reforms by arguing, "[a]s they say on my own Cape Cod, a rising tide lifts all the boats." President's Address in the Assembly Hall at the Paulskirche in Frankfurt, *Published Papers*, 519 (June 25, 1963).

19. See, e.g., HAKAN NORDSTROM & SCOTT VAUGHAN, WTO SECRETARIAT, Special Studies No. 4, Trade and Environment (1999) (reviewing prior studies and concluding that international as opposed to domestic trade may exacerbate negative environmental conditions or diminish enthusiasm for environmental reforms, but there is little evidence that it is the cause of world's major environmental problems).

the top.” If we want workers to have a right to organize, if we want the cutting of rain forests to stop, we must put the full weight of the United States and the developed world behind initiatives that will strive to meet these goals.

This of course also means tapping the treasuries of the United States and developed countries to invest in these initiatives. We must offer carrots and not just trade sanction sticks. Even if it could be shown to produce results, threatening to cut off market access for developing country agriculture or textiles is a rather indirect way to secure cleaner air in Peru. United States consumers and Peruvian farmers, two groups liberals should want to help, are asked to shoulder a considerable burden so that other liberal priorities may advance.

Of course, a “race to the top” will not come cheap. But, the truth is that United States foreign aid lags behind almost every other industrialized nation as a percentage of GDP. It has stood at roughly ... of United States GDP, and almost all of the richest countries in the world consistently fail to meet their established goal of... We of course cannot fund all of the initiatives that might be deserving of funding, but we can do more.

Some might wonder where the money will come from, especially at a time when the United States budget has slipped from surplus into deficit. The answer to the question is too complex to go into depth here, but United States to its credit has responded to various crises throughout its history by mobilizing resources commensurate to quell the disturbances at hand. If United States liberals would unify around the notion that two billion people in the world today living without sanitation, and one billion people living without clean water, is a crisis, I believe the money can be found.

VII. REDUCING CORPORATE TAXES FOR GOOD CORPORATE CITIZENS

Beyond an end to “linkage,” I submit that the liberal position on trade should begin to turn away from border measures and turn to a new approach to the treatment of corporations and the use of subsidies.

It is remarkable that the same zeal liberals apply to curbing the “race to the bottom” in international trade is not applied to corporate law in the United States. Currently, we have fifty different state corporate laws that to some extent compete with each other. It is axiomatic that Delaware is one of the best places for businesses to incorporate because it offers executives the greatest discretion and corporations the greatest protections. And, relaxation of local rules and regulations to attract businesses to a region are commonplace.

A new and better approach need not punish corporations or encumber their operations. What it should do is provide corporations with incentives to be

better United States and global citizens and to keep good jobs in the United States. If we want United States companies that do business overseas to pay a living wage, or adhere to environmental practices akin to those required here, we should give them an economic reason to do so. We could of course pass a law that all United States businesses must pay their employees wherever located the United States minimum wage, and require these companies to meet United States environmental standards everywhere in the world. Doing so, however, would likely lead to a retrenchment of United States investment in the countries that desperately need it.

Rather, liberals should study, and perhaps seek to implement, a reduction in United States corporate taxes conditioned on corporate behavior that advances certain core values. A reduced tax might operate as follows:

- a) The United States corporate rate could work on two tracks. The current system could remain in effect and operate precisely as it does now;
- b) However, a second, lower United States tax rate could be applied for income earned as a result of the production of goods in the United States or services supplied in or from the United States. The rate reduction should be calibrated to be at the low end of major developing countries. It need not be the lowest rate among industrialized nations, since the United States has sufficient efficiencies and benefits to overcome a small tax advantage offered by its main developed competitors;
- c) This reduction likely would pay for itself in part. A large number of companies would increase production and operations in the United States if the United States tax rate were lower;
- d) This lower rate, however, would be conditioned on companies pledging to be good corporate citizens. These companies would have to meet certain minimum environmental and labor standards overseas. These companies would have to be willing to act as United States business ambassadors, promoting improved practices around the world. These companies would have to agree to be run for the benefit of workers and shareholders as much as executives. In this post-Enron, Arthur Andersen, and Worldcom world, there may never be a better time to retool the United States approach to how and for whom companies should be operated;
- e) This lower tax rate also would be available for companies doing business in least developed countries. This would avoid a lower United States corporate tax rate steering investments away from the countries that need it most.

Some might criticize such a dual tax system as violating the principal of tax neutrality – that is, a tax system should not be used to affect where business

activities take place. However, such a principal is honored mostly in the breach. Indeed, the WTO's export subsidy rules actually are skewed to allow countries to tax export income earned offshore less than income earned domestically. Such a regime only fuels the fire that leads many on the left to charge that international trade leads to an evaporation of good jobs in developed countries.

This tax proposal is intended to balance and advance several liberal goals. It would diminish the need for border protection and hopefully pave the way to retain and expand developing country access to the United States market. To the extent developing country goods make inroads in the United States, the answer would not be protection, but a reduction in taxes to make United States companies more competitive. A tax reduction of course can affect the conditions of competition, but unlike a tariff or quota, a tax cut would at least give developing country goods a fighting chance. It would also energize the private sector to improve overseas standards, rather than resorting to border-closing sanctions to punish countries that fail to meet certain prescribed goals. And, it would take one of the most important policy tools of the right and convert it to progressive ends – no small political advantage.

VIII. USE OF PRINCIPLED SUBSIDIES

Finally, a new approach to the use of subsidies could advance the liberal goals of helping United States workers and producers without unduly harming the interests of the developing world. Unlike the recent farm bill, in which large portions of \$180 billion dollars in subsidies will in no small measure go to parties other than family farmers or farmers in distress, new United States subsidies should:

- 1) Fund research and development (which likely will have spill-over effects that will offer benefits well beyond the enterprise or product at hand);
- 2) Help businesses and industries that are in need of adjustment (using subsidies rather than border-closing safeguard actions);
- 3) Provide aid to small businesses;
- 4) Cover the costs of worker training, relocation, and benefits; and
- 5) Aid industrial modernization.

While here too it is possible that developing country competitors may be disadvantaged through increased United States subsidies, resort to subsidies in general should be less harmful than tariffs or quotas. This would be especially true if safeguards are put in effect to ensure that subsidies are not used simply to alter the terms of competition or to help large players get an even greater share of the market.

IX. CONCLUSION

In conclusion, it may be true, from the perspective of developing countries, that the best United States trade policy would be the conservative trade policy. That is, a trade policy in which markets are simply opened and products can compete strictly on economic terms. Such a vision, though, would ignore the fact that the conservative position is generally predicated on reciprocity, which would mean that developing countries must abandon their often double-digit tariffs to see an end to United States tariffs that in most cases are lower. It also ignores the political reality that a protection-free world is simply not possible at this time.

What is realistic is a shift away from trade-reducing policies that emanate from "linkage," the exponential growth in the use of trade remedies, and straight-out protection. Meaningful labor, environmental, and human rights projects, reduced corporate taxes in exchange for improved corporate behavior, and targeted use of subsidies would advance liberal ideas while enhancing the welfare of the average consumer and the poor. It may be that such policies would not provide the guaranteed protections the current liberal position on trade seeks, but such policies would not harm the very people liberals in general want to help.

Robert Bork, a well-known United States conservative jurist and legal scholar, was once asked how he came to be such an ardent right-winger when he was a socialist early in life. He responded by saying that "anyone who is not a socialist at eighteen has no heart; anyone who is a socialist at forty-eight has no brain." Paraphrasing Bork, it may be correct to say that "any liberal who strives to protect a small number of United States jobs at the expense of the developing world has a heart in need of resuscitation; but a liberal who strives to protect those most in need of protection here in the United States and in the developing world have both a heart and a brain."