# THE DISPARATE TREATMENT OF RIGHTS IN U.S. TRADE

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*ABSTRACT*

Rights advocates are increasingly urging U.S. trade negotiators to include new binding and sanctionable provisions that would protect human rights, women's rights, and gender equality. Their efforts are understandable. Trade agreements have significant advantages as a process for advancing international rights. Even though Congress and the Executive incorporate international environmental standards and labor rights in U.S. trade agreements, they have refused to incorporate gender rights and broader human rights. The rationale behind the United States' disparate treatment of rights in trade has received almost no scholarly attention. That is a mistake.

Using labor rights as a case study, this Article discerns the rationale for incorporating rights in U.S. trade policy. Properly understood, U.S. policymakers incorporate some rights in U.S. trade agreements because they view those rights as critical to protecting national industries and citizens from unfair trade conditions. Efforts to incorporate rights as the ends rather than the means to trade policy accordingly fail to resonate with policymakers. Those efforts also fail to appreciate the significant policy drawbacks of coupling trade law and international rights law, such as conflicts between international law and U.S. federal and state laws, and challenges to domestic processes in the United States and abroad. Nevertheless, there are alternative ways that the United States may protect international rights while preserving the sanctity of both regimes.

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# TABLE OF CONTENTS

I wouldn't really say that we started a lot of trade wars. I don't think that's accurate. We have really enforced our laws. We've insisted on fairness for American workers. But when you look... where would you really say we started a trade war?

-Robert Lighthizer, United States Trade Representative[1]

## INTRODUCTION

Why do U.S. trade agreements leverage trade sanctions to protect workers' rights and the environment but fail to protect other rights?[2] We know that the benefits of international trade are not shared equally.[3] And yet, apart from legally-binding provisions regulating labor rights and environmental standards ("trade-plus provisions"), U.S. trade agreements omit binding provisions that might redistribute trade benefits more broadly,

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[1] Faisal Islam, *"We're Proud of what we've done, says Trump's trade chief*, BBC NEWS, (Dec. 18, 2020) (quoting USTR Robert Lighthizer), https://www.bbc.com/news/business-55345826.

[2] The term "rights" as used in this Article tracks the terminology contained in international legal instruments including United Nations (U.N.) conventions. *See, e.g.* UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) (describing "human rights"); ILC, ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, art. 2, 37 I.L.M. 1237, (June 18, 1998) [hereinafter "1998 DECLARATION"] (describing "labor rights"); CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, http://www.un.org/womenwatch/daw/cedaw/cedaw.htm [hereinafter "CEDAW"] (describing the realization of "rights" for women). One point of departure concerns environmental standards. While some scholars characterize those standards as "rights," this Article tracks the language of the trade discourse that commonly refers to "environmental standards." *See, e.g.,* USTR, *The United States and Environmental Protections in the TPP* (Jan. 2014) ("we can continue to call on TPP partners to join us in achieving the high environmental standards being proposed and advocated by the United States."), https://ustr.gov/about-us/policy-offices/press-office/blog/2014/January/The-US-and-Environmental-Protections-in-the-TPP. Collectively, this Article refers to rights and standards as "international rights." I acknowledge that trade agreements regulate other non-traditional rights such as intellectual property and investment. *See* Simon Lester, *The role of the international trade regime in global governance*, 16 UCLA J. INT'L L. FOREIGN AFF. 209, 215 (2011). This Article focuses exclusively on the disparate treatment of social rights.

[3] *See, e.g.,* David Kucera & William Milberg, Gender Segregation and Gender Bias in Manufacturing Trade Expansion: Revisiting the 'Wood Asymmetry', *in* THE FEMINIST ECONOMICS OF TRADE 185-212 (Irene Van Staveren, et al., eds. 2007). Relevant to this Article, the authors find that trade expansion between the United States and developing countries "resulted in employment declines that disproportionately affected women." *Id*. at 185. *See also* MARKÉTA VON HAGEN, TRADE AND GENDER – EXPLORING A RECIPROCAL RELATIONSHIP: APPROACHES TO MITIGATE AND MEASURE GENDER-RELATED TRADE IMPACT 1 (Mattia Wegmann, Sabine Heuskel, & Ellen Kallinowsky, eds. 2014) ("Economic policy, including trade policy and trade policy related instruments … have often impacted and benefited men and women differently.").

such as by protecting the equal opportunities of women as well as men to participate in trade activities. The scholarly attention on trade-plus provisions focuses on the impact of those provisions on rights and trade.[4] Surprisingly little attention has been placed on the intentions of adopting those provisions in the first place or, relatedly, on whether those intentions would apply equally to a broader spectrum of international rights.

This Article explores the rationale behind the inclusion of labor and environmental standards in U.S. trade law and its implication for the future inclusion of additional rights. It makes two central claims, one pragmatic and the other normative. My pragmatic claim is that policymakers intend for trade agreements and their provisions to regulate trade competition; trade-plus provisions are no exception. Rights will be incorporated into trade law only if they prove germane to achieving fair trade conditions.[5] My normative claim, which is more likely to draw the ire of my fellow rights advocates, is that the above criterion is necessary to maintain the integrity of the trade and international rights regimes, even if it excludes some rights while favoring others.

My first claim may appear intuitive; it nevertheless challenges the scholarship examining the intersection of rights and trade. That scholarship falls within the predominant trade theories – free trade and embedded liberalism – that provide various explanations of the State's role in interlinking trade policy with rights.[6] This Article's intention is not to adjudicate those theories. It instead aims to highlight the fault lines in which they track, namely, between the State's role to mitigate harm within and regulate trade abroad. Implicit but underexamined in that discourse is a central paradox in the State's role to compete with its trade partners while mitigating social harm in those countries, and the implications of that paradox for the trade and international rights regimes.

Rather than confront that paradox, trade and rights scholarship mischaracterize the governance of rights in U.S. trade. They assume it is either inherently altruistic (intended to protect rights and standards domestically and abroad, equally)[7] or inherently duplicitous (intended to restrict trade).[8] However, a close examination of the legislative history of those provisions demonstrates a much more limited reasoning. That is, that U.S. policymakers adopted trade-plus provisions to protect the rights and standards of American workers and businesses.[9] This claim has critical

[4] *See infra* pp. 36-38.
[5] *See infra* Part II.
[6] *See infra* Part I.A.
[7] *See infra* Part II.A.
[8] *See infra* Part I.A.2.
[9] *See infra* Part I.B.

implications for broader rights advocacy, such as gender, which focuses almost exclusively on protecting rights abroad.[10]

My second claim may appear counterintuitive; it nevertheless connects previously attenuated constitutional and trade scholarship to rights scholarship. Constitutional and trade scholars have long observed that the constitutional requirements for entering into trade agreements are simpler than for international treaties.[11] The Treaty Clause prescribed by Article II of the Constitution[12] requires a two-thirds senatorial consent before the Executive may enter into a treaty. Thus, scholars have observed that the Treaty Clause is the "highest requirement in the Constitution among congressional votes…."[13] Trade agreements, by contrast, are classified as "congressional-executive" agreements.[14] All that is required is a simple majority of both houses of Congress.[15] Furthermore, under successive trade legislation known as "fast track" or Trade Promotion Authority (TPA), Congress has agreed to vote either up or down on trade agreements entered into by the executive, further simplifying that process.[16]

Those bifurcated procedures[17] have important implications for rights governance. Rights incorporated through trade agreements and not through treaties enable the United States to shape and define those rights, thereby ensuring against conflict of laws, and making it more politically palpable for

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[10] *See infra* Part IV.A.

[11] *See, e.g.,* Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257 (1994), *reprinted in* NAFTA AND THE ENVIRONMENT 23 (Kluwer, 1996) (noting that "as a result of the fiasco in the Senate on the Treaty of Versailles, many enlightened commentators viewed [interchangeability between treaties and congressional-executive agreements] as a very beneficial development.") (internal citations omitted).

[12] U.S. CONST. art. II § 2, cl. 2.

[13] *See* Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT'L L. 315, n 79 (2018).

[14] In addition to negotiating treaties and using the congressional-executive method, the President may use a "sole executive" agreement. *See* Charnovitz, *supra* note 11, at 18 (discussing the three methods under which the U.S. government may enter into binding agreements with another government). Current trade negotiations fall under the congressional-executive method, which remains the basis for this Article's examination.

[15] *See, e.g.,* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1238 (2008).

[16] TRADE ACT OF 1974, Pub. L. 93-618, 88 Stat. 1978, § 151 (1975). For a comparison of processes between treaties (self-executing and non-self-executing and congressional-executive agreements, *see* Hathaway, *supra*, note 15, at 1317-1322.

[17] *See* Hathaway, *supra* note 15, at 1238 ("the process for making binding international agreements in the United States today proceeds along two separate but parallel tracks: one that excludes the House of Representatives and another that includes it, one that requires a supermajority vote in the Senate and another that does not, one that is expressly laid out in the Constitution and one that is not.").

Congress than the treaty process.[18] However, doing so raises two fundamental yet underexplored drawbacks, both of which cast a new, foreboding light on the current efforts to inject a greater spectrum of international rights in trade law.

First, the consequences of the United States' autonomy to define the rights incorporated into its trade agreements are significant. In its trade agreements, the United States has the autonomy and bargaining power to anchor the rights in its trade agreements to national laws and jurisprudence, effectively decoupling those rights from their international instruments in the process.[19] For example, U.S. labor provisions expressly incorporate the fundamental labor rights "as stated" by the International Labor Organization (ILO).[20] Yet, the ILO's supervisory bodies have consistently criticized U.S. national and State laws for failing to satisfy those fundamental rights.[21] In other words, the "international" rights incorporated into U.S. trade law are not so international, after all.

Second, and in light of the above, we must consider the potentially disharmonious ripple effect of those binding commitments across international and national legal regimes. The rights as defined in U.S. trade agreements might conflict with the rights as defined and interpreted by international treaty bodies.[22] They may also conflict with the domestic laws of trade partners committed to both U.S. trade agreements and international treaties.[23] And finally, governance of rights through the processes of trade

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[18] *See generally* Luisa Blanchfield, CRS FOR CONGRESS, *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Congressional Issues*, CRS 4 (updated Oct. 28, 2008) ("Successive U.S. Administrations have strongly supported [CEDAW's] overall goal of eliminating discrimination against women. They have disagreed, however, on whether the Convention is the most efficient and appropriate means of achieving this goal.").

[19] *See infra* Part IIII.

[20] Those rights are: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labor; (3) the effective abolition of child labor; and (4) the elimination of discrimination in respect of employment and occupation. *See* 1998 DECLARATION, *supra* note 2, at art. 2.

[21] *See infra* Part III.

[22] *See infra* Part II.C.2.

[23] For further discussion of the incoherency between trade agreements and the ILO's supervisory machinery, *see* Jordi Agustí-Panareda, Franz Christian Ebert & Desirée LeClercq, *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 COMP. LAB. L. & POL'Y J. 347, 361-67 (2015); Philip Alston, *Labor Rights in US Trade Law: Aggressive Unilateralism*, 15 HUM. RTS. QUART. 1, 18 (1993) (raising the possibility that the United States would hold trade partners to lower standards than would be judged at the ILO). *Compare with* Stacie E. Martin, *Labor Obligations in the U.S.-Chile Free Trade Agreement,* 25 COMP. LAB. L. & POL'Y J. 201, 203-204 (2003) (referring to U.S. labor provisions in its trade agreements and optimistically predicting that "[i]t is with less developed countries that the United States is posed to influence the standard for labor to a significant degree.").

negotiations and enforcement – often criticized for being secretive and exclusive of stakeholder participation[24] – raises serious issues of democratic subjugation.

By failing to acknowledge these drawbacks, rights advocates continue to ask Congress and the Executive to juxtapose international right law's normative content with trade law's economic and enforcement entitlements[25] or "teeth."[26] Most recently, during the "NAFTA 2.0" negotiations,[27]

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[24] Recently, the Labor Advisory Committee for Trade Negotiations and Trade Policy, which advises the U.S. Trade Representative, complained that the Trump Administration was not following consultation its own guidelines to engage with outside advisers. *See* INSIDE U.S. TRADE, *Labor advisers: Administration not following consultation rules on UK talks* (Jul. 2020). *See also* Alston, *supra* note 23, at 22 (criticizing the manner in which the United States evaluates compliance of its trade partners to rights commitments in FTAs behind closed doors and then simply issues a press release announcing the results). Some scholars accuse the Administration of privileging the views of some stakeholders over others in formulating trade policy.

[25] *See* Thomas Risse & Kathryn Sikkink, *The Socialization of Human Rights Norms Into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 31-35 (Thomas Risse, Kathryn Sikkink, & Stephen C. Ropp eds., 1999) (describing rule-consistent behavior as the final phase in movement for rights change); Suzanna Zakaria, *Fair Trade for Women, at Last: Using a Sanctions Framework to Enforce Gender Equality Rights in Multilateral Trade Agreements*, 20 GEO. J. GENDER & L. 241 (2018); Raj Bahla & Cody N. Wood, *Two Dimensional Hard-Soft Law Theory and the Advancement of Women's and LGBTQ+ Rights Through Free Trade Agreements*, 47 GA. J. INT'L & COMP. L. 302, 302 (2019) (advocating for stronger trade provisions that establish binding and enforceable "hard law" obligations to respect the rights of LGBTQ+ persons); KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 8 (1982) (comparing the ability of economic institutions to require countries to adopt policies or "face severe financial strictures," rights advocates "have only moral suasion to carry their message…"); Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 594 (2005) (proposing that rights enshrined in trade agreements are an attractive alternative to human rights agreements).

[26] *See generally* Susan Aaronson, *Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO*, 6 WORLD TRADE REV. 3, 413, 413 (2007) (noting that trade agreements are covered by a system of dispute settlement whereas international human rights have no equivalent mechanism to supervise implementation or sanction violations). There are a number of additional reasons that rights advocates may prefer the trade regime over the rights regime, including the increasing disenchantment with the efficacy of the rights regime to protect rights subsequent to the ratification of treaties; Hafner-Burton, *supra* note 17, at 595; Harlan Grant Cohen, *What is International Trade Law For?*, Ed. Comment, 113 AM. J INT'L L 326 (2019); Lance Compa, *Labor Standards in International Trade*, 25 GEORGETOWN J. INT'L L. 165, 166-67 (1993) (discussing the economic incentives derivative from trade that encourage firms to exploit rights).

[27] *See* USTR, *USTR Releases Updated NAFTA Negotiating Objectives* (November 17, 2017),
https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/november/ustr-releases-updated-nafta.

Canadian negotiators vowed to introduce a stand-alone gender chapter that would incorporate international treaties on gender equality and introduce policies to improve the capacity of women to "access and fully benefit from the opportunities created by trade and investment."[28] Those negotiators, along with rights lobbyists,[29] aggressively campaigned the U.S. Congress and the Office of the United States Trade Representative (USTR), which is the U.S. executive agency responsible for trade negotiations.[30]

Notwithstanding those efforts, the finalized United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020 without those proposed gender provisions.[31] The new agreement also continues to exclude other rights that have similarly been the subject of advocacy

[28] *See* GOVERNMENT OF CANADA, *Trade and gender in free trade agreements: The Canadian Approach*, https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/trade_gender_fta-ale-commerce_genre.aspx?lang=eng; GOVERNMENT OF CANADA, *Address by Foreign Affairs Minister on the modernization of the North American Free Trade Agreement (NAFTA)* (pledging to make NAFTA "more progressive" by "adding a new chapter on gender rights, in keeping with our commitment to gender equality…").

[29] *See* INSIDE U.S. TRADE WORLD TRADE ONLINE, *UPS pushes WTO plurilateral initiative to combat gender discrimination* (Aug. 28, 2019) (arguing that trade should enable women to "own property, develop a business, engage in cross-border trade and be able to freely move in order to advance their business interest."), https://insidetrade.com/daily-news/ups-pushes-wto-plurilateral-initiative-combat-gender-discrimination. For a description of feminist engagement behind multilateral efforts to advance gender rights through various fora, *see generally* Gita Sen, *Gender Equality and Women's Empowerment: Feminist Mobilization for the SDGs*, 10 GLOB. POL'Y, Supp. 1, 28, 30-32 (2019). For further information concerning multilateral efforts to advance women's rights in trade, *see infra* Part IV.

[30] USTR, *About Us*, https://ustr.gov/about-us/about-ustr.

[31] Although USMCA did not adopt a new gender chapter or affirmative protections for women's participation in trade on a broad scale, it did adopt new cooperative provisions with respect to promoting the participation of women in small- and medium-sized enterprises (SMEs). UNITED STATES–MEXICO–CANADA AGREEMENT [hereinafter USMCA], art. 25.2(b). Recently, the Canadian government explained the various ways in which USMCA provides further, albeit indirect, benefits for women. *See* INSIDE U.S. TRADE, *Ambassadors, Commerce official tout USMCA's benefits for women entrepreneurs* (July 31, 2020).

campaigns, such as human rights,[32] indigenous rights,[33] the right to food,[34] among others.[35]

Efforts by rights advocates to place additional rights within the citadel of trade law are understandable even if unsuccessful. Trade-plus provisions have significantly advanced rights on a global scale.[36] For instance, labor provisions in U.S. trade agreements have incentivized substantial

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[32] *See, e.g.,* Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19, 22-25 (2000) (exploring ways to integrate human rights into WTO trade law); Hoe Lim, *Trade and Human Rights*, 35 J. WORLD TRADE 275, 275 (2001) (noting the expansive literature advancing various "theoretical, empirical and policy issues" concerning the relationship between trade and human rights).

Some scholarship includes labor rights within the broader umbrella of human rights. *See, e.g.,* EMILIE M. HAFNER BROWN, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS 9 (2011) (referring to the fundamental labor rights as human rights for the purpose of her analysis); Stephen Joseph Powell & Trisha Low, *Beyond Labor Rights: Which Core Human Rights Must Regional Trade Agreements Protect?*, 12 RICH. J. GLOBAL BUS. 91, (2012) (identifying six categories of human rights that incorporate the fundamental labor rights and advocating for their similar inclusion in trade). For the purpose of this Article, the term "human rights" is distinguishable from labor rights, particularly within the framework of trade policy, an area where human rights advocates argue for the inclusion of human rights currently not contained in U.S. trade agreements. It nevertheless recognizes that there is much overlap between labor rights and human rights, including in underexplored areas such as pregnancy testing, sexual orientation, gender identity, and caregiving responsibilities, some which are currently regulated through labor-rights provisions. *See* USMCA, *supra* note 31 at Ch. 23.

[33] *See, e.g.,* David P. Kelly, *Trading Indigenous Rights: The NAFTA Side Agreements as an Impetus for Human Rights Enforcement*, 6 BUFF. HUM. RTS. L. REV. 1113, 113 (2000) (examining "the doors [trade] agreements may open for the enforcement of indigenous rights.").

[34] *See, e.g.,* HIGH COMM'R FOR HUMAN RIGHTS, *Globalization and Its Impact on the Full Enjoyment of Human Rights*, *in* REPORT OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS SUBMITTED IN ACCORDANCE WITH COMMISSION ON HUMAN RIGHTS RESOLUTION 2001/32, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2002/54 (Jan. 15, 2002); *see also* Chris Downes, *Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food*, 47 VA. J. INT'L L. 619, 692 (2007) (arguing that trade negotiators must "pay direct attention to the relationship between competing trade and food obligations.").

[35] *See, e.g.,* Chantal Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT'L L. REV. 1399, 1400 (2003) ("This essay stakes a claim for attentativeness to the complexities of globalization in the contemporary, and of trade as a solution to poverty."); Stephen Kim Park, *Talking the Talk and Walking the Walk: Reviving Global Trade and Development After Doha*, 53 VA. J. INT'L L. 365, 400-413 (2012).

[36] *See* USTR/DOL, STANDING UP FOR WORKERS: PROMOTING LABOR RIGHTS THROUGH TRADE 14-48 (Special Rep. Feb. 2015) (describing the legislative and practical advancements in trade-partner countries to promote and respect international labor rights) [hereafter, "STANDING UP FOR WORKERS"). *See generally* Alston, *supra* note 23, at 23 (acknowledging that rights advocates "remain supportive" of the incorporation of rights in U.S. trade agreements despite the procedural drawbacks.)

improvements in the labor laws and practices in trade-partner countries such as Colombia, Jordan, and Bahrain, to name a few.[37] In USMCA, the United States codified and thus legitimized the right to strike – a source of significant multilateral disagreement[38] – as a necessary corollary to the fundamental right to freedom of association.[39]

The relationship between rights and trade governance is, therefore, complex. On the one hand, trade agreements provide an alternative to treaty governance and have a track record of improving rights in other countries. On the other hand, if all rights, including those unrelated to trade, are incorporated and governed through binding and sanctionable trade commitments, the unilateral definitions and interpretations assigned to those rights through trade may obstruct cohesive international rights governance.

The requisite link between rights and trade conditions in U.S. trade policy threads the needle between legal commitments to trade and rights, thereby ensuring that the fabric of both regimes remains intact. The consequential incorporation of some rights, such as labor and environmental standards, and not others, such as broader human rights, results in collaterally disparate treatment of rights in trade. That treatment is a necessary drawback of broadening trade law to address trade-germane social concerns.

To make those arguments, this Article proceeds in four parts. Part I sets the basis of my pragmatic argument. Part I.A describes the dominant trade theories and explains how those theories fail to account for the incorporation of rights in trade for foreign welfare. Using labor rights as a case study, Part I.B. traces the gradual incorporation of labor rights in U.S. trade law and demonstrates that policymakers incorporated labor provisions to protect American workers and businesses from unfair competition.

Part II draws from the lessons of Part I and compares the relative success of environmental standards to the relative lack of success of human rights in U.S. trade law. I demonstrate that labor rights and environmental standards have both proven integral to protecting the conditions of trade. Human rights advocates have, by contrast, demonstrated only an attenuated relationship to trade objectives.

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[37] S*ee* STANDING UP FOR WORKERS, *supra* note 36, at 14-48. *See also infra*, Part I.C.2.

[38] In 2012, discord over whether the right to strike is a necessary corollary of the ILO's convention on freedom of association resulted in a walk out by the employer constituents, rendering the annual supervision of ratified instruments at the ILO impossible that year. For an examination of the debate, *see* Janice Bellace, *The ILO and the right to strike,* 153 INT'L LAB. REV. 29, 56-59 (2014).

[39] *See* USMCA, *supra* note 31, at art. 23.3(a) n. 6 ("For greater certainty, the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike."). *But see* David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L REV. 1842, 1868-1872 (2014) (pointing out inconsistencies between the U.S. and ILO interpretations of the right to strike).

Part III pivots to my normative claim, which is rooted in broader concerns of incoherence across the trade and rights regimes. It concludes that should U.S. trade agreements remove their requisite link to trade, the costs of conflicting laws and subjugated democratic processes will diminish any gains in comprehensive rights regulation.

Part IV applies the requisite trade link to gender rights and argues that the data may be inconclusive. On balance, and considering the specific tensions between gender rights norms and U.S. laws and jurisprudence, I recommend against regulating gender rights through binding and sanctionable trade provisions. Nevertheless, I conclude that U.S. trade agreements can still protect rights without implicating legal tensions by including mandatory cooperation provisions, formal programs to gather data, and earmarked capacity-building resources.

## I. INTERNATIONAL RIGHTS AND THE UNITED STATES TRADE AGENDA

Rights advocates have, over the years, both shunned and welcomed international trade.[40] They have witnessed the erosion of rights such as those of workers in favor of mercantile interests.[41] They have also witnessed the potential for international trade law to incentivize and enforce rights.[42] Legal positivist and normative theorists[43] have struggled to reconcile this tension.[44]

Scholars have taken recent steps to merge the trade and rights silos. Harlan Cohen, for example, explores ways to protect rights through trade by invoking traditional trade theories (or "normative narratives").[45] Those theories enable us to better interpret the trade "regime's rules, suggesting answers that better fit the goals or values that rules are meant to achieve."[46]

Although recent attempts such as these shed critical light on the potential

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[40] *See, e.g.,* SANDRA POLASKI, SARAH ANDERSON, JOHN CAVANAGH, KEVIN GALLAGHER, MANUEL PÉREZ-ROCHA, & REBECCA RAY, HOW TRADE POLICY FAILED U.S. WORKERS – AND HOW TO FIX IT 33-36 (Institute for Policy Studies, 2020) (criticizing labor provisions for failing to adequately protect workers while advocating that those provisions be strengthened.).

[41] *Id*. at pp. 8-26 (describing how trade agreements have harmed U.S. workers).

[42] *See supra* n 35.

[43] For a discussion of the complimentary interplay between positivist and normative theories in applying law to moral values, *see* Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 U. PA. J. CONST. L. 387, 389-394 (2014). *Compare with* Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 OX. J. LEG. ST. 683, 684 (2005) (arguing that legal positivism and normative theory are distinct in that positivism is morally neutral).

[44] *See, e.g.,* Cohen, *supra* note 26, at 329.

[45] *Id.*

[46] *Id*. ("Shared narratives help to justify the legal regime to those who live with and under it, embedding the rules within a particular society and its politics.").

benefits of trade-plus provisions, they remain anchored in the dominant trade free trade and embedded liberalist theories. Under those theories, rights and trade scholars have debated whether there are cracks in trade law's architecture and how policymakers might improve its scaffolding to protect the social rights of national citizens. However, those scholars do not examine the cracks as they relate to protecting the rights of foreign citizens in trade-partner countries. This omission leaves rights such as gender, whose incorporation in trade could strengthen rights in trade-partner countries, under a cloud of uncertainty.

### *A. The Theories of U.S. Trade*

After the Civil War, America's trade policy formed under a relatively simple objective: protect America's nascent businesses and its workers from foreign competition.[47] In his detailed description of U.S. trade policy, Professor Douglas Irwin recounts the manifestation of protectionist concerns from the earliest discussions of America's trade policy.[48] James Madison, he notes, observed that the "clashing interests" that underpinned trade policy were not likely to be resolved.[49]

The Constitution sought to balance trade powers between the legislative and executive branches.[50] For instance, Article I of the Constitution designates Congress as the appropriate authority "to regulate commerce with foreign nations" and "to lay and collect taxes, duties, imposts, and excises."[51] Article II then designates the President as the appropriate authority to conduct foreign affairs by negotiating and entering into treaties such as trade agreements.[52] As mentioned, the Treaty Clause restricts the authority of the President by requiring a two-thirds senatorial consent. Despite those attempts to balance trade powers, the role of the various branches of government to regulate social rights and standards have remained opaque.

The various trade law theories reveal an ideological tension between those who prioritize free and open trade and those who view trade as one objective among other State responsibilities towards its citizens. Although the theories appear to take radically different positions on trade, they are analytically coterminous at a deeper level. Together, they advocate for trade policy with clear rules.

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[47] *See infra*, Part I.B(1).

[48] *See* DOUGLAS A. IRWIN, CLASHING OVER COMMERCE 1 (2017) (internal citation omitted).

[49] *Id*.

[50] *Id*. at 62.

[51] *See* U.S. CONST, art. I §§ 8(1), (3).

[52] *See id*. at art. II § 2.

1. Free Trade

Free trade policy developed in the wake of early protectionist policies, when countries imposed high tariff rates to tax imports and to give domestic industries a competitive leg up.[53] It is a neoliberal, hands-off approach to trade. At its core, it believes that unfettered trade will lift all sectors (or, as Presidents Kennedy and Clinton have both stated, it "lifts all boats"[54]) to the advantage of society as a whole.[55] It rests on the principle of comparative advantage, according to which countries concentrate on producing and trading items that they are relatively better at making than they are at making other products.[56]

Free trade enables countries to specialize in producing those goods and services and trade for everything else. By maximizing efficiency and concentrating finite resources, countries may increase their total wealth.[57] Consumers purchasing those imported goods benefit from lower prices. Exporters benefit from gaining access to foreign markets through the reciprocal exchange. Everyone, in theory, should win.

Promises of everlasting benefits through unfettered trade had a profound influence on U.S. trade policy and the global trading system. The latter falls within the architecture of the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), both of which limit or prohibit trade restrictions and discrimination.[58]

Following the GATT's adoption, however, Cohen notes that "the promised economic benefits were no more than ideas, difficult to translate into pocketbook benefits or increased opportunities."[59] The abstract promises

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[53] *See, e.g.*, Dani Rodrik, *What do Trade Agreements Really Do?*, 32 J. ECON. PERSPECTIVES 73, 74 (2018) ("Economists disagree about a lot of things, but the superiority of free trade over protection is not controversial"); John Gerard Ruggie, *Trade, Protectionism and the Future of Welfare Capitalism*, 48 J. INT'L AFF. 1 (Summer 1994) (describing concerns with the "disastrous isolationist trend" in U.S. economic policy and its relationship to trade wars).

[54] *See* Hal Shapiro, *A New Liberal Trade Policy Foundation*, 9 ILSA J INT'L & COMP. L 431, 437 (2002) (citing, for instance, President's Address in the Assembly Hall at the Paulskirche in Frankfurt, *Published Papers*, 519 (June 25, 1963).).

[55] *See* Cohen, *supra*, note 26, at 333.

[56] For a description and historical account of the concept of comparative advantage in trade, *see* ANDREA MANESCHI, COMPARATIVE ADVANTAGE IN INTERNATIONAL TRADE: A HISTORICAL PERSPECTIVE (1998).

[57] *See* Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 993 (2017).

[58] See GENERAL AGREEMENT ON TARIFFS AND TRADE, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. I [hereinafter "GATT"].

[59] *See* Cohen, *supra*, note 26, at 328.

of free trade left too many tangible costs to "the other interests that were being trampled in the rush toward faster and deeper globalization."[60] Free trade and its supporters have consequently faced fierce and emotional opposition from scholars and policymakers who seek to balance liberalization and social welfare.[61]

*2.* Embedded Liberalism

Embedded liberalism grew out of frustrations with the social costs of free trade. Scholars such as John Ruggie alleged that trade policies had become "disembedded" from domestic cultures and policies during the interwar period.[62] Post-war trade policymakers began to recognize the importance of the role of the State in recoupling (or re-embedding) domestic policies within trade liberalization.[63]

Ruggie and his supporters argued that governments not only had a role in ensuring a fairer distribution of trade's gains but an *obligation* to act as mediators[64] to balance "the quest for domestic stability" with the "mutually destructive external consequences" of liberalized trade.[65] Those efforts, some argue, led to broader multilateral efforts to support state welfare.[66]

During the 1940s, for instance, governments established international organizations such as the United Nations (U.N.) and the Bretton Woods institutions (the World Bank and the International Monetary Fund) to achieve global peace and prosperity. At that time, international economic law and human rights law formed a cohesive framework.[67]

Shortly following the postwar era, however, international economic law and international rights law decoupled.[68] While economic rights became popularized within the trade discourse, international rights law struggled to gain momentum.[69] Countries like the United States incorporated economic policies such as tariff adjustments into their trade legislation, for instance, but not did not similarly incorporate human rights.[70] Instead, governments

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[60] *Id*.

[61] *See, e.g.,* POLASKI, ET AL., *supra* note 40.

[62] *See* John Gerard Ruggie, *International Regimes, Transactions, and Change*, 36 INT'L ORG., 379, 394 (1982).

[63] *Id*.

[64] *Id.* at 391-393.

[65] *Id*. at 393.

[66] *See, e.g.,* Cohen, *supra* note 26, at 336-37 (describing embedded liberalism and its relationship to the Bretton Woods institutions).

[67] *Id*.

[68] *See* Thomas, *supra* note 35, at 1401 ("International human rights law and international economic law have evolved more or less separately for most of the postwar era.").

[69] *See* Cohen, *supra* note 26, at 337.

[70] *Id*.

regulated rights through a parallel tract of international legal instruments, primarily through treaties adopted by the U.N. and its specialized organizations.[71]

The social concerns emanating from embedded liberalism failed to manifest in the GATT.[72] Nevertheless, it had a profound impact on U.S. trade policy. To protect American citizens, in the 1990s, the United States began to incorporate certain rights protections in its trade agreements – notably, those seeking to establish a common floor of environmental and labor standards – while, separately, adopting national legislation to compensate workers harmed by liberalized trade.[73]

3. Accusations of Protectionism

In contrast to Ruggie's optimistic theory of re-embedded trade and welfare policies, international economic scholars dispute whether social rights in trade agreements are intended to protect national welfare or simply to restrict trade. Jagdish Bhagwati, for example, accuses governments of including social rights in their trade agreements as a new, albeit disguised, tool for protectionism.[74] Bhagwati argues that the "rights" incorporated in trade instruments by countries such as the United States simply reflect a fear that "trading with the South and its abundance of unskilled labor" put their "own unskilled at risk."[75] Other economists, such as Dani Rodrik[76] and Dominick Salvatore,[77] disagree and argue that domestic considerations in trade policy are necessary even if temporary.

Despite the ongoing debate, protectionist allegations have successfully monopolized the disourse. The term "protection" and the conception of embedding social rights to serve national interests have become inherently

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[71] *Id*.

[72] *See infra* p. 18.

[73] See Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151, 156 (2020).

[74] *See* Jagdish Bhagwati, *Free Trade, 'Fairness' and the New Protectionism*, *in* EXPLORATIONS IN ECONOMIC LIBERALISM – THE WINCOTT LECTURES 189 (1996); Bela Balassa, *The New Protectionism' and the International Economy*, 12 J. World Trade L. 409, 422 (1978) (contrasting the policies of new protectionism with the traditional, over protectionism of the 1930s tariff laws).

[75] *See* Bhagwati, *supra* note 74, at 189.

[76] *See, e.g.,* Dani Rodrik, *How to Save Globalization from its Cheerleaders*, CEPR Disc. Paper No. 6496, 26 (Rev. Sept. 2007); ELLIOT ET AL., *supra* note X, at 17 (acknowledging the concern of developing countries that "higher labor standards could reduce growth by threatening the trade prospects of poor countries.")

[77] *See* Dominick Salvatore, *Protectionism and world welfare: introduction*, *in* PROTECTIONISM AND WORLD WELFARE 2 (Dominick Salvatore, ed. 1993) (discussing the rise of new protectionism in the mid-1970s).

suspicious, a narrative that rights scholars accept. As I argue below,[78] that acceptance has proven to be a grave mistake. It leaves those scholars struggling to identify and rationalize alternative explanations for the including of rights, to the detriment of the right discourse and movement.

The following sections will demonstrate that, to the contrary of the literature, U.S. trade policy has embraced and thus reflects the ideals of embedded liberalism as they concern U.S. workers and industries. Those concerns are legitimate, particularly given the growing body of evidence that unregulated trade harms U.S. actors. When rights advocates deny the existence of those concerns in trade policy, they also deny the legitimacy of those concerns to trade policy.

### *B. Labor Rights Protection in U.S. Trade*

The below sections trace the adoption of international labor rights in U.S. trade law. I demonstrate that U.S. policymakers sought to ensure that cheaper costs of production abroad would not drive down prices of national goods and, with those prices, American wages and business competitiveness.

#### 1. America's Founding Protectionism

Discussions among policymakers in the late 18th Century highlight critical concerns for protecting nascent American firms and workers from competition with foreign countries. Those latter countries, with well-established firms that paid lower wages, could produce the same goods for less money. Alexander Hamilton, addressing the House of Representatives in 1791 in his famous *Report on the Subject of Manufactures*, lamented the "embarrassments" of the country's inability to establish the necessary competitive manufacture sector.[79] He argued that U.S. policymakers should strategize to gain a competitive edge. Rather than reduce wages for American workers, he proposed that Congress use its tariff powers to tax and raise the prices of foreign goods.[80] He cautioned that, until Congress acted, America's relatively higher costs "obstructed the progress of our external trade."[81]

Early American lobbyists were not particularly helpful in defining a cohesive U.S. trade policy. Organized labor, which would eventually become

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[78] *See infra* pp. 27-30.

[79] *See* Alexander Hamilton, *Report on the Subject of Manufactures, in* STATE PAPERS AND SPEECHES ON THE TARIFF 1 (1893).

[80] *Id*. at 62-63. In his 1831 essay, for instance, Albert Gallatin reaffirmed the conclusion that immigrant workers increased the supply and thus decreased the cost of labor in England. *See* Alexander Gallatin, *Memorial of the Committee of the Free Trade Convention in* STATE PAPERS AND SPEECHES ON THE TARIFF 144-45 (1893).

[81] *See* Hamilton, *supra* note 79, at 1.

a key trade lobbyist,[82] was internally conflicted. Individual unions prioritized the interests of their specific industries, which resulted in divisions between unions that represented domestic producers (which lobbied in support of U.S. trade protectionism) and unions that represented larger exporter markets (which lobbied in favor of free trade to encourage reciprocity among trade partners).[83]

Congress ultimately resolved to protect its industries by imposing heavy duties on imports.[84] Its protectionist posture governed U.S. trade policy during much of the period following the First Congress through the opening of the Depression.[85] That policy only began to change in the wake of war, when competing concerns such as access to foreign markets and the achievement of global peace outweighed the need for domestic market protection.[86]

2. The Free Trade Era

The 20th Century witnessed profound changes in U.S. trade policy. The protectionist policies underlining the post-Civil War years of the U.S. trade agenda clashed with new policies to attract foreign investment.[87] Free trade advocates argued that tariffs simply raised the prices of protected goods domestically, the proceeds of which went to those industries and thus neither to the public good nor the working class.[88] Protectionist advocates, by contrast, cautioned of the dangers of trading with a "squalid Europe" and the consequential "looming degradation of wages and working conditions" in America.[89]

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[82] *See infra* pp. 21-22.

[83] *See* IRWIN, *supra* note 48, at 467 (citing to the Ways and Means Committee hearings in 1945 surrounding trade renewal authority)

[84] *Id*. at 68 (while noting that the predominant objective at this time was to generate revenue for the government).

[85] *Id.* at 65-67 (describing the intention for Congress to have delegated authorities to control U.S. port access as a way to induce trade negotiations).

[86] *Id*. at 455 (describing the post-war US trade policy).

[87] *Id*.

[88] *See, e.g.,* Gallatin, *supra* note 80, at 165 ("It is clear that the mechanic who pays $20 more for the implements of his trade, the necessary clothing of his family, and the sugar it consumes, must either enhance the price of the products of his industry in the same proportion, or receive so much less for his labor."). *See also* Robert J. Walker, *Treasury Report of 1945 in* STATE PAPERS AND SPEECHES ON THE TARIFF 226-27 (1893) (disagreeing with the proponents of high tariffs that protectionism was needed to augment wages, arguing instead that such tariffs tipped the balance of power in favor of capital over wages, at the expense of the working class).

[89] *See* EDWARD GRESSER, FREEDOM FROM WANT: AMERICAN LIBERALISM AND THE GLOBAL ECONOMY 56 (2007).

This debate continued over the next one-hundred years.[90] While tariff rates remained relatively steady throughout the late 1800s until the 1930s, positions on tariff efficacy divided sharply across party lines.[91] Republican members of Congress exalted high tariffs as critical "to safeguard the high wages of American labor from the competition of low-wage foreign workers," whereas proposals to reduce such tariffs were labeled "bills to reduce American wages."[92]

The protectionist argument lost intellectual steam, of course, once the United States became both the world's largest economy and the world's leading manufacturing producer.[93] It did not, however, diminish the role of American businesses and workers as drivers of U.S. trade policy. Republicans continued to propose high tariffs in the name of protecting "American labor,"[94] while Democrats began to blame trade as "the principal cause of the unequal distribution of wealth [under which] the American farmer and laboring man are the chief sufferers…."[95]

In the 1920s, U.S. trade policy shifted in reaction to postwar recession.[96] The United States suffered from intense deflation, its unemployment rose, and imports and exports fell sharply.[97] U.S. trade policy quickly reverted to tried-and-true protectionism, culminating in the Smoot-Hawley Act, which remains the most controversial piece of legislation in

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[90] *See id.* at 57; Irwin, *supra* note 48, at 7.

[91] Protecting domestic industries has been a pronounced objective throughout the United States' trading history. According to Irwin, however, it was one of three Congressional objectives. The other two were raising revenue for the government and pursuing reciprocity agreements with other governments to encourage the importation of U.S. exports. *See* IRWIN, *supra* note 48, at 7. Although trade policy largely fell along party lines, internal dissent emerged periodically, particularly between policymakers who favored high tariffs to protect American industries and those who favored low tariffs to attract foreign exports. *See id*. at 414 (describing rifts in the Democratic party concerning tariff rates).

[92] *See id*. at 242. Notably, the objectives of protectionism were not limited to wages discrepancies; tariff proponents additionally wanted to ensure that America's "infant industries" could compete with the well-established, mainly British, foreign rivals. *Id*. at 269. This rhetoric reemerged, for example, during presidential election of 1896, when the "uncompromising principle" of tariffs was "the protection and development of American labor and industries" including by upholding "the American standard of wages for the workingman." *Id*. at 295 (internal citations omitted).

[93] *Id*. at 277.

[94] *Id*. at 324 (quoting the chairman of the Finance Committee, Nelson Aldrich, who during the 1909 tariff debates declared that a reduction of tariff rates for wool and woolens would amount to "an attack upon the very citadel of protection and the lines of defense for American industries and American labor.").

[95] *Id*. at 312 (quoting the Democratic platform, which was urging President Wilson to lower tariffs in 1909) (internal citations omitted).

[96] *Id*. at 349.

[97] *Id*.

American trade policy.[98]

The Smoot-Hawley Act increased tariff rates by approximately 42 and 59 percent.[99] This increase had a catastrophic impact on global trade as trade partners competed to out-tariff one another.[100] In the short term, that policy worked well both for Congress, whose domestic constituents had lobbied for protection, and for the presidents who gladly welcomed the high revenue gained from tariffs.[101] Soon after enacting the Act, however, other countries began to retaliate by enacting their own tariffs. Global trade came to a stop.[102] The United States' deficit grew, exports plunged, all while the economy stumbled under the weight of the Great Depression.[103]

3. The Embedded Liberalist Era

The Great Depression and postwar era are known as "the most momentous shift in U.S. trade policy since the nation's founding."[104] President Roosevelt used his 1944 State of the Union address to emphasize the critical importance of trade to raising global standards of living and, correspondingly, lowering the possibility of war and injustice.[105] He urged Congress to support a trade policy that would form "the economic basis for the secure and peaceful world we all desire."[106] Roosevelt's trade agenda thus shifted from focusing narrowly on the conditions of competition to a broader focus on peace,[107] awakening the potentials of a socially-conscious trade policy.[108]

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[98] *Id*. at 371.

[99] *See* GRESSER, *supra* note 89, at 75.

[100] *See, e.g., id*. at 78 (discussing retaliation against the increased tariff on eggs by "dozens" of countries including Canada).

[101] *See, e.g. id*. at 65 ("The tariff still provided half the government's revenue in 1912.").

[102] *Id.* at 86 ("The experience of the Smoot-Hawley law showed that trade barriers could spread…making recovery from crises more difficult or even impossible.").

[103] Although scholars associate the Smoot-Hawley Act with the Depression, its causal relationship is debatable. *See id.*, at 75 ("The Smoot-Hawley Act did not cause the Depression, which began with the stock market crash in the autumn of 1929); IRWIN, *supra* note 48, at 394.

[104] *See* IRWIN, *supra* note 48, at 489.

[105] *See* GRESSER, *supra* note 89, at 23. *See also* JEFF FAUX, THE GLOBAL CLASS WAR 14 (2006) ("World War II dramatically changed the attitude of America's governing elites toward trade protections…they had virtually no foreign competitors.").

[106] *See* GRESSER, *supra* note 89, at 23 & n 16 (quoting Public Papers of the President, Franklin Roosevelt, *The President Urges the Congress to Strengthen the Trade Agreements Ad.* (1945)).

[107] *See* IRWIN, *supra* note 48, at 495 ("foreign policy was arguably a crucial factor behind political support for the postwar trade agreements program.").

[108] *See* HAFNER-BURTON, *supra* note 32, at 61 ("The movement toward fair preferential trade agreements mainly took off in the United States with the changing geopolitics of markets and political loyalties that followed the end of the cold war.").

That socially-conscious trade policy manifested in efforts to gain effective rights protections on a multilateral platform. Rather than focus on unilateral efforts, as we see today, the United States participated in the 1948 Havana Charter for the International Trade Organization (ITO).[109] That draft charter recognized "that unfair labor conditions, particularly in production for export, create difficulties in international trade, and [that] accordingly, each member shall take whatever action may be feasible and appropriate to eliminate such conditions within its territory."[110] Efforts to adopt the ITO failed, however, and the United States' efforts to include similar multilateral commitments in the GATT were similarly unsuccessful.[111]

In 1955, the American Federation of Labor and the Congress of Industrial Organizations merged to become the AFL-CIO, the largest and most powerful labor-union body in the United States.[112] Its merger unified the positions and interests of its diverse trade union membership, enabling the labor movement to capitalize on Roosevelt's trade agenda. Out of the gate, the AFL-CIO supported the gradual removal of trade barriers upon two conditions.[113] First, workers adversely impacted must be granted adjustment assistance. Second, trade negotiations must comply with "international labor standards."[114]

The AFL-CIO's demand for *international* standards in trade suggests that the concern for the rights of foreign workers had begun to merge with its interests in protecting its national union members. That concern would not permeate in trade policy or advocacy, however, for another forty years. Instead, efforts under the name of international standards intended to "tak[e] wages out of the competition."[115] Reference to international labor standards was, counterintuitively, a nationally-focused nomenclature.[116]

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[109] U.S. DEP'T OF STATE, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, Pub. No. 3206 (1948

[110] *Id*. at Ch. 2, art. 7.

[111] *See* Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNT'L L. 659, 665 (1998) (discussing the history of the ITO).

[112] *See* TIMOTHY J. MINCHIN, LABOR UNDER FIRE: A HISTORY OF THE AFL-CIO SINCE 1979 14 (2017)

[113] *See* Daniel J.B. Mitchell, *Labor and the Tariff Question*, 9 IND. REL. 268, 271-72 (1970).

[114] *Id*.

[115] *Id*. at 272.

[116] Although the prevalent notion of international labor standards focused on the implications of poor labor rights on costs of production (and thus of competition), the AFL-CIO's position taken within the GATT's multilateral framework included considerations of the treatment of workers abroad and called for the need for "international coordination of trade union activity…". *See, e.g.,* HEARINGS BEFORE THE COMMITTEE ON WAYS AND

While the lobbying efforts of labor and other interest groups continued to pressure Congress and the Executive to protect American workers in trade, U.S. policymakers were grappling with deeper procedural questions concerning how to balance the legislative and executive trade-agreements powers.[117] In 1962, Congress removed authority to negotiate trade agreements from the State Department and created a new agency under the Executive Office of the President, which later evolved into USTR. As Irwin recounts, this change "reflected Congress's growing belief that trade policy and foreign policy should be undertaken by separate entities" lest "diplomatic objectives" interfere with "the country's commercial interests."[118] The State's role to regulate social rights fell to the wayside, eclipsed by interagency power battles.[119]

By the mid-1960s and into the 1970s,[120] it was clear to Americans, including labor unions, that the U.S. trade agenda had not lived up to its potential of improving living standards.[121] Increased imports (particularly in Japan and Germany)[122] threatened American jobs and firms and incentivized many assembly operations to relocate to other countries (Mexico).[123] As a result, workers were displaced and union organizing, despite efforts to the contrary, began to decline.[124]

Recognizing that "America's world trade position has properly

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MEANS, HOUSE OF REPRESENTATIVES, 91ST CONG, 2nd Sess. on Tariff and Trade Proposals, Part 5, (1970) American Federation of Labor and Congress of Industrial Organizations, Exhibit 3, International Fair Labour Standards, at pp. 1726-27.

[117] *See* Claussen, *supra* note 13, at 330.

[118] IRWIN, *supra* note 48, at 526.

[119] *Id*.

[120] *See, e.g.,* Jefferson Cowie, *National Struggles in a Transnational Economy: A Critical Analysis of US Labor's Campaign against NAFTA*, 21 LABOR STUDIES J., 3, 6 (1997) ("When the economic tables began to turn in the 1970s, the AFL-CIO's first strategy was a simple defensive mechanism to protect what it had.").

[121] *See* IRWIN, *supra* note 48, at 549 ("Labor unions immediately attacked the administration proposal on the grounds that a further reduction in trade barriers would damage the economy."). *See also* Balassa, *supra* note 74, at 418 (attributing Carter's protectionist measures in the 1970s to "increased protectionist pressures emanating largely from labor…") (internal citations omitted.).

[122] *See* IRWIN, *supra* note 48, at 537 (describing the increase in steel production in Japan and Germany, and the relative decline in U.S. steel production during this period).

[123] *Id*. at 541 (arguing that "organized labor was more opposed to foreign investment by American companies than to imports" at that time); MINCHIN, *supra* note 112, at 29 (discussing the range of companies that moved production to Mexico due to the lower wages there).

[124] *See* GRESSER, *supra* note 89, at 117 ("Trade unions lost their faith [in trade] during the later 1960s and early 1970s, first as clothes began to flow in from Japan and its less wealthy neighbors Korea and Taiwan; then, more powerfully, as Japanese heavy industry pressed upon American steel, electronics, and cars."); MINCHIN, *supra* note 112, at 16.

become an issue of increasing public concern," the AFL-CIO became more involved in trade lobbying in the 1970s.[125] It heavily influenced new legislation to prevent the loss of any American jobs due to offshoring.[126] It also released a 1971 report[127] cautioning that, unless trade policy changed, the United States would become "a permanent debtor in the world market within a very few years."[128] Among other policies, the report described Mexico's maquiladora program,[129] under which U.S. companies received financial incentives so long as they only hired Mexican workers and exported products from Mexico.[130] Citing to the exorbitantly low minimum wages, the report muses that "[t]he extent to which Mexican workers along the border are benefiting remains questionable. And it is clear that the program is harmful to workers on the U.S. side of the border…".[131]

The 1970s thus witnessed an insurgence of trade restrictions and protectionism, albeit with a new trade arsenal.[132] Governments, including the United States, began providing subsidies to domestic companies, particularly in the high-tech industry, while imposing restrictions on imported automobiles, consumer electronics, and agricultural products.[133]

The resulting Trade Act of 1974 introduced two significant changes to U.S. trade policy and its position on international labor rights. First, the Act delegated authority to the executive branch, for the first time, under a new procedure interchangeably called "fast-track" or trade promotion authority (TPA).[134] Under that procedure, which Congress has since extended through successive trade legislation, Congress agrees to vote either up or down on any trade agreement reached between the President and a trade partner country within 90 days of submission.[135] In delegating its authority, however, Congress maintains some control over trade substance by

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[125] *See* Mitchell*, supra* note 113, at *id.* at 29-30 (describing the "dissonance between labor and the White House over trade" in the early 1970s).

[126] *See* IRWIN, *supra* note 48, at 541 ("It was no secret that organized labor, especially the AFL-CIO, was behind the Burke-Hartke legislation.").

[127] STANLEY H. RUTTENBURG & ASSOC., NEEDED: A CONSTRUCTIVE FOREIGN TRADE POLICY 3 (1971).

[128] *Id*.

[129] *Id*. at 61.

[130] *Id*.

[131] *Id*.

[132] *See, e.g.,* Salvatore, *supra* note 77, at 1 (discussing the rise of new protectionism in the mid-1970s); Balassa, *supra* note 74, at 416-18 (1978) (arguing that due to the Trade Act of 1974, "possibilities provided for the use of protective measures that have come to be increasingly utilized.").

[133] *See* Salvatore, *supra* note 77, at 1. For the "unique status" of the TPA procedure in U.S. law, *see* Claussen, *supra* note 13, at 332-333.

[134] TRADE ACT OF 1974, *supra* note 16, at § 151 (1975).

[135] *Id*.

identifying the necessary trade objectives that the Executive must negotiate to obtain Congressional approval.[136]

Second, the Act identified labor rights as a negotiating objective, albeit one that was limited to negotiation within the GATT. Critically, the Act linked "the adoption of international fair labor standards" to "principles promoting the development of an open, nondiscriminatory, and fair world economic system…".[137] It consequently codified Congressional concerns that violations of labor standards in trade-partner countries could "substantially disrupt or distort trade."[138]

Shortly thereafter, during the early to mid-1980s, Congress passed several unilateral trade instruments (not trade agreements) linking trade benefits to worker rights.[139] The 1984 Caribbean Basin Initiative (CBI), for instance, eliminated tariffs for most products exported into the United States[140] based on seven mandatory criteria[141] and additional 11 discretionary criteria.[142] One discretionary criterion examines whether beneficiary governments afford workers "reasonable workplace conditions" and "the

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[136] *Id*. *See also* IRWIN, *supra* note 48, at 554.

[137] TRADE ACT OF 1974, *supra* note 16, at § 121.

[138] *See* Carol Pier, *Workers' Rights Provisions in Fast Track Authority, 1974-2007: An Historical Perspective and Current Analysis*, 13 IND. J. GLOBAL LEG. STUDIES 77, 79-80 (2006) (describing concerns expressed in the Senate Finance Committee during the adoption of the Trade Act of 1974 that governments should have a mechanism by which to hold one another accountable concerning labor conditions with a view to fair competition).

[139] Those instruments included the Caribbean Basin Initiative, the Generalized System of Preferences (as renewed in 1984) (GSP), and the Overseas Private Investment Corporation (OPIC). For a comprehensive examination of this legislation, *see* Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L. 253, 259-271 (1988); Lance Compa, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy under GSP and NAFTA*, 10 Conn. J. Int'l L. 337, 340-342 (1995) (describing legislative initiatives behind the GSP to link trade to worker rights.

Concerning the renewal of GSP, although not yet in the majority discourse, some members of Congress supported the new international labor criteria out of concern for the conditions of foreign workers. *See, e.g.,* Congressman Don J. Pease & J. William Goold, *The New GSP: Fair Trade with the Third World*, 2 WORLD POLY' J. 351, 358 (1985) ("The capacity to form unions and to bargain collectively to achieve higher wages and safer, healthier working conditions is essential to the overall struggle of working people everywhere to achieve minimally decent living standards and to overcome hunger and poverty."). Other Congressional members, most notably Don Pease (D-OH) were early proponents of international labor and human rights protections in trade agreements. *See* Alisa DiCaprio, *Are Labor Provisions Protectionist?: Evidence from Nine Labor-Augmented U.S. Trade Arrangements*, 26 COMP. LAB. L. & POL'Y J. 1, 21-23 (2004) (describing early albeit unsuccessful efforts to champion labor rights in early trade instruments).

[140] TRADE ACT OF 1974, *supra* note 16, at § 211.

[141] *Id*. at §212(b).

[142] *Id*.

right to organize and bargain collectively."[143] The CBI did not elaborate on this criterion, however,[144] and Congress made clear that it was "not the authority or responsibility of the U.S. to interpret or enforce ILO standards…"[145] The Generalized System of Preferences (GSP) was amended in 1984 to similarly introduce "internationally recognized worker rights" as a criterion for eligibility.[146] The definitions of those rights were "entirely a product of the U.S. legislative process," however, and like the CBI, the GSP makes no reference to the ILO's international rights.[147]

Although Congress took steps through trade preference programs to require labor rights commitments, it continued to debate the appropriateness of those commitments in U.S. trade legislation. The discourse around the Omnibus Trade and Competitiveness Act of 1988, for instance, revealed ongoing discomfort with taking economic action to demand compliance with labor-rights infringements that took place in other countries.[148]

4. America's Modern Protectionism

On the cusp of NAFTA negotiations in 1991, U.S. policymakers demanded a link in the agreement to worker rights provisions as a way of offering "U.S. workers at least some shelter against competition based on lower wages and lack of worker rights in developing countries."[149] That demand culminated into trade debates still known as "one of the most contentious and divisive trade-policy debates in U.S. history."[150] Labor concerns were chief among them.[151]

In its testimony to Congress in 1991, the AFL-CIO argued that any

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[143] *Id*. at §212(c)(8).

[144] *See* Perez-Lopez *supra* note 139, at 261.

[145] *Id*. (citations omitted). Professor Steve Charnovitz, a program analyst for the Department of Labor (DOL) at that time, explains that the primary purpose of the worker rights criterion nevertheless was to strengthening international labor rights in beneficiary countries. *See* Steve Charnovitz, *Caribbean Basin Initiative: setting labor standards*, MONTHLY LAB. REV. (pre-1996) (Nov. 1986) ("The primary reason for the labor criterion is a concern that the labor laws and conditions in some countries would prevent the benefits from the [CBI] from reaching the workers.").

[146] *See* 19 U.S.C.A. § 2642(a)(4)(West 1984).

[147] *See* Compa, *supra* note 139, at 342 (describing the GSP's origins and labor rights).

[148] *See, e.g.,* CONGRESSIONAL RECORD S10688 (August 3, 1988) (remarks of Senator Wallop cautioning that linking international worker rights to trade sanctions would obstruct trade with countries that would otherwise be profitable to America).

[149] *See* Mary Jane Bolle, CRS REP. FOR CONG., *NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate*, CRS-2 (2001).

[150] *See* IRWIN, *supra* note 48, at 627.

[151] *Id*. at 627 ("Furious about the prospect of expanded trade with Mexico, labor unions led the opposition.").

trade agreement with Mexico should avoid "perpetuating exploitation of workers and inflicting widespread damage on the environment in Mexico."[152] It noted the inevitability "that Mexican workers' wages, their working conditions, and their living standards are going to stay right about where they are…But during that time, our hopes will follow our jobs into Mexico."[153]

When he entered into office in 1992, President Clinton inherited a contentious trade agreement. During his election campaign, he promised labor unions that he would only support NAFTA if the agreement added enforceable workers' rights and minimum environmental protections.[154] Following up on that promise, in 1993, the United States entered into negotiations for a NAFTA side agreements addressing those issues.[155]

The resulting North American Agreement on Labor Cooperation (NAALC), which entered into force in January 1994, contains the first U.S. labor provisions.[156] It requires each trade party to enforce their own national labor and employment laws while promoting eleven principles concerning international worker rights.[157] To bring a complaint, a party had to allege a

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[152] *See* HEARINGS BEFORE THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, HOUSE OF REPS., 102ND CONG., 1st Sess. (Feb. 20, 1991), Testimony of Lane Kirkland, American Federation of Labor and Congress of Industrial Organizations before 936 (May 16, 1991).

[153] *See* HEARING BEFORE THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, SENATE, 103RD CONG., 1st Sess. (May 6, 1993) 55, Statement of the AFL-CIO Council on the North American Free Trade Agreement (Feb. 17, 1993). The AFL-CIO's comments were received by a Congressional audience that remained divided on labor standards. Some members agreed with the need to "reduce corruption in Mexico, reduce exploitation of Mexican workers, and encourage true democracy to Mexico…". *Id*. at 3 (opening statement of Senator Hollings). Others, on the other hand, viewed labor provisions in trade as converting "something that will be very beneficial for American commercial interests and American jobs…into something that is highly undesirable." *Id*. at 10 (opening statement of Senator Danforth).

[154] *See* Governor Bill Clinton, *Town Hall Meeting with Arkansas Governor Bill Clinton*, The White House, June 12, 1992 (*quoted in* JOHN R. MACARTHUR, SELLING FREE TRADE: NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY 158 (2000)); Governor Bill Clinton, Address Before North Carolina State University (Oct. 4, 1992); *see also* HAFNER-BURTON, *supra* note 32, at 121 (discussing Clinton's threat to prevent NAFTA's passage once in power without labor-rights language).

[155] The NAFTA text could not, itself, be renegotiated to include labor provisions; it had already been signed by President Bush in December 1992.

[156] *See* Kate E. Andrias, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 UNIV. SAN. FRAN. L. REV. 521, 523 (2002) ("NAALC represents the first time in the modern trading era that an international agreement on labor was linked both politically and legally to a trade agreement.") (internal citations omitted).

[157] NORTH AMERICAN AGREEMENT ON LABOR COOPERATION, U.S.-CAN.-MEX., arts. 2-3 Sept. 14, 1993, 32 I.L.M. 1499 ("[E]ach Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity

"trade-related" failure of enforcement by demonstrating a "persistent pattern of failure by the Party complaints against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards."[158]

Reception of the NAALC was tepid, at best. The AFL-CIO criticized the side agreement for failing to incorporate binding international labor rights[159] and failing to provide a coherent system of sanctions.[160] Telegraphing broader concerns, the AFL-CIO also accused the U.S. government of ignoring the conditions of foreign workers that U.S. unions, increasingly, viewed more as labor partners than as labor competitors.[161]

In 1998, the ILO adopted a non-binding instrument, the 1998 Declaration on Fundamental Principles and Rights at Work ("1998 Declaration"). The 1998 Declaration is, by its terms, applicable to all of its members (including the United States).[162] It requires governments "to respect, to promote, and to realize…the principles concerning the fundamental rights" even if those governments have not ratified the corresponding ILO conventions.[163]

Meanwhile, frustrations over NAFTA negotiations resulted in an eight-year lapse in fast-track authorization.[164] Partially owing to the growing attention placed on international labor standards in trade agreements,

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workplaces, and shall continue to strive to improve those standards in that light .. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action ...") [hereafter, "NAALC"].

[158] *Id*. at art. 36 § 2(b),

[159] *See* Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 924 (1993) (describing earlier drafts that would have committed the parties to respecting the "internationally recognized worker rights" defined by the ILO, which were disregarded because the United States has not ratified the relevant ILO conventions).

[160] *See, e.g.,* Philip Alston, *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 13 Eur. J. Int'l L 457, 500 (2004) (noting the complaints concerning the NAALC); I.M DESTLER & PETER H. BALINT, THE NEW POLITICS OF AMERICAN TRADE: TRADE, LABOR, AND THE ENVIRONMENT 19 (Institute for International Economics 1999).

[161] *See* DESTLER ET AL., *supra* note 138, at 19 (arguing that NAFTA "galvanized" the anti-trade labor movement); Lance Compa, *Free Trade, Fair Trade, and the Battle for Labor Rights*, *in* REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE 21ST CENTURY 316 (L. Turner, H. Katz & R. Hurd, eds. 2001) ("starting in the mid-1990s, a revitalized labor movement, allied with environmental, human rights, farmers, consumers, and other social action communities, began breaking the Washington Consensus train."); Compa, *supra* note 139, at 337 (characterizing the 1990s as "a period of growing international concern about the 'linkage' between labor rights and trade.").

[162] *See* 1998 DECLARATION, *supra* note 2.

[163] *Id*.

[164] *See* Pier, *supra* note 138, at 83 (discussing how the "president did not enjoy fast track authority" from 1994 until 2002).

Congress finally renewed fast-track authority in the Bipartisan Trade Promotion Act of 2002 ("2002 TPA"). This time, Congress shifted the Executive's principal negotiating objectives from the GATT's multilateral framework set out in the 1988 Omnibus to the general trade level.[165] That expansion, notably, introduced enforceable labor rights directly into U.S. trade agreements.[166]

The 2002 TPA also, for the first time, subjected those labor rights to the same dispute settlement mechanisms, procedures, and remedies as all other negotiating objectives.[167] Nevertheless, like the NAALC, those rights were subject to enforcement if a trade party failed "to effectively enforce…its labor laws, through a sustained or recurring course of action or inaction, *in a manner affecting trade* between the United States and that party."[168]

On May 10, 2007, a bipartisan group of congressional leaders and the Bush Administration released a joint statement colloquially known as the "May 10th Agreement."[169] That agreement, which Congress later codified in the 2015 TPA, explicitly tied the labor-standards negotiating to the ILO's 1998 Declaration.[170] Since then, all U.S. trade agreements have incorporated the 1998 Declaration by reference.[171] They also have continued to limit the enforceability of those rights to a derogation carried out "in a manner that affects trade."[172]

By the time the United States launched negotiations for the Trans Pacific Partnership Agreement (TPP) in 2008,[173] international labor rights had taken center stage in U.S. trade policy debates. To address labor concerns, the proposed TPP labor chapter sought to strengthen rights set out in the May 10th Agreement.[174] It contained enforceable side agreements with Vietnam, Malaysia, and Brunei that stipulated to specific, *ex ante* legislative

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[165] 19 U.S.C. § 3802(a)(6) (Supp. II 2002); *id* (pointing out that the 2002 TPA "establishes a number of overall and principal negotiating objectives on workers' rights…").

[166] *See* Pier, *supra* note 138, at 83.

[167] 19 U.S.C. § 3802(b)(12)(G).

[168] 19 U.S.C. § 3802(b)(11)(A) (emph. added).

[169] *See* USTR, *Trade Facts: Bipartisan Trade Deal*. Bipartisan Agreement on Trade Policy (May 2007).

[170] *Id*.

[171] *See* Agustí-Panareda, et al., *supra* note 23.

[172] 19 U.S.C. § 3802(b)(11)(A)("to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries.").

[173] *See* USTR, *Trans-Pacific Partners and United States Launch FTA Negotiations* (Sept. 22, 2008).

[174] *See* TRANS-PACIFIC PARTNERSHIP AGREEMENT, ch. 19 (Labor),https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

amendments to national labor legislation.[175] In January 2017, however, as one of his first official acts as President, Trump withdrew the United States from the TPP and, by default, nullified the three side agreements.[176]

In July 2020, the United States entered into the USMCA, which advances labor provisions beyond the May 10th Agreement and the TPP in some respects. Notably, USMCA labor provisions include new commitments related to violence against workers, forced labor, and migrant workers.[177] Similar to the TPP, USMCA also contains a side agreement with Mexico stipulating to specific *ex ante* national legislative amendments to protect the right to collective bargaining. It also introduces a new "Facility-Specific Rapid Response Labor Mechanism" (RRLM).[178] The RRLM enables the parties to "impose remedies" and "ensure remediation"[179] at covered facilities based on a good faith belief that workers have been denied the right of freedom of association and collective bargaining.[180] USMCA is thus the first U.S. trade agreement that creates binding rights obligations at the firm level and enables enforcement against an individual firm, a far cry from the lackluster enforcement mechanisms contemplated in NAFTA.

## II. CHARACTERIZING INTERNATIONAL RIGHTS IN U.S. TRADE POLICY

Given the gradual success of the AFL-CIO and other labor-rights advocates to gain traction in the U.S. trade agenda, trade law is an appealing forum to govern rights. Rights advocates and scholars are therefore reasonably confused and frustrated by the United States' refusal to incorporate a broader spectrum of rights within its trade ambit.

This Part explains that refusal. It does so by drawing lessons from the labor movement and applying those lessons across environmental and human rights advocacy. Specifically, I argue that labor and environmental advocates have demonstrated a palpable impact of those rights on production costs in tradeable sectors. Human rights advocates, by contrast, have not

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[175] *See, e.g.,* LABOUR CONSISTENCY PLAN, MALAY.-U.S., Nov. 2015, https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labor-Consistency-Plan.pdf.

[176] *See* USTR Press Release, *The United States Officially Withdraws from the Trans-Pacific Partnership*, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP.

[177] *See*, USMCA, *supra* note 31, ch. 23 (Labor), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23-Labor.pdf.

[178] *See* PROTOCOL OF AMENDMENT TO THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA, Annex 31-A.

[179] *Id*. at art. 31-A.1(2).

[180] *Id*. at art. 31-A.2.

demonstrated a clear connection to trade conditions. Consequently, labor rights and environmental standards, which have proven germane to trade, are regulated through trade-plus provisions that omit human rights protections.

### *A. Drawing Lessons from Labor*

The relationship between trade and labor in the current literature is confusing. Scholars describe the trade-rights linkage but fail to disentangle the extraterritorial reach of labor provisions from their inherently national objectives. The opposing theories surrounding the role of the State to protect welfare through trade, and the prevalence of the negative association with protectionist motives, sheds light on that disconnect.

As mentioned, rights scholars attempt to legitimize labor provisions in trade agreements through alternative objectives.[181] They argue, for instance, that policymakers intended to prevent a "race to the bottom" whereby countries seek to lower labor protections to maintain their comparatively advantageous costs of production. Although protection plays an attenuated role in this argument, its crux is that policymakers intend to protect foreign working conditions and not on U.S. interests.[182]

Professor Kevin Kolben argues that, had policymakers incorporated labor provisions out of U.S. protectionist concerns, they would not have incorporated the ILO's 1998 Declaration. That Declaration was "specifically formulated not to serve protectionist ends, but rather to promote broadly accepted … rights and principles."[183] He argues that protectionist policymakers would have chosen provisions that "more directly result in higher production costs – such as specified wage levels, health and safety regulations, or certain benefits…."[184] He also argues that the fundamental labor rights in the ILO's 1998 Declaration are grounded in the ILO's process-oriented principles, not in costs of production, and thus do not focus on "rais[ing] labor costs in trading partner countries." [185] He concludes that "a

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[181] *See, e.g.,* Kevin Kolben, *A New Model for Trade and Labor? The Trans Pacific Partnership's Labor Chapter and Beyond*, 49 NYU J. INT'L L. & POL. 1063, 1065 (2017) ("The first argument in favor of labor provisions n trade agreements, and by far the least persuasive, is protectionism.").

[182] *See, e.g.,* HAFNER-BURTON, *supra* note 32, at 39 ("Governments employ [labor] rights trade regulations with varying degrees of success to protect people…").

[183] *See* Kolben, *supra* note 181, at 1068.

[184] *Id*.

[185] *Id.* at 1066 ("The economic argument for protectionism, while enjoying a popular political resurgence, is largely discredited by economists."). *See also* Christopher L. Erickson & Daniel B. Mitchell, *The American Experience with Labor Standards and Trade* Agreements, 3 J. SMALL & EMER. BUS. L. 41, 43 (1999) (arguing that "[t]he level of wages

more compelling argument for labor and trade linkage is not economic, but rather political – trade agreements must be seen as fair for them to be politically acceptable."[186]

Professor Kolben aptly explains the process-oriented intentions within the ILO but fails to address the legislative history and the purpose of labor provisions within the United States. As Part I.B. demonstrated, policymakers incorporated labor provisions to protect against unfair labor practices in trade-partner countries that could "substantially disrupt or distort trade"[187] at the expense of American businesses and jobs. They did not do so out of concerns over fairness for foreign workers.

Rather than identify the United States' legitimate purpose of protecting its national actors in trade agreements, scholars like Kolben mischaracterize the nature of labor provisions in U.S. trade agreements. Those provisions *do* raise the costs of production.[188] For instance, the fundamental right to freedom of association includes trade union participation. There is a veritable mountain of economic data linking the higher wages associated with trade union participation,[189] as well as prohibitions of forced and child labor,[190] to increased production costs.

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in a country and its labor standards are not the same thing, at least in the context of the raging debate over incorporating such standards into trade agreements."); HAFNER-BURTON, *supra* note 32, at 39-40 (arguing that "economists will explain that there are almost certainly better ways to achieve [high labor standards].").

Economists opposed to protectionism, in general, have argued similarly that America's trade deficit is not due to imports from low-wage countries. Lawrence and Litan, for instance, examined the share of imports lost to developing countries across U.S. domestic markets between 1981 and 1986. *See* Robert Z. Lawrence & Robert E. Litan, *The Protectionist Prescription: Errors in Diagnosis and Cure*, *in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY 290-91 (1987). Focusing on competition between U.S. products and foreign products made with cheap labor, they conclude that the share of imports from developing countries in 1986 "was about the same as the share in 1981." *Id*. at 291.

[186] *See* Kolben, *supra* note 181, at 1069.

[187] *See infra*.

[188] *See* Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORD. INT'L LJ 607, 643 (2000) (arguing that the procedural nature of international labor rights programs such as rights to asocial and collectively bargain render their benefits less apparent than, say, environmental rights).

[189] *See, e.g.*, Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L 61, 68 (2001) (conceding that while fundamental labor rights such as the prohibition against child labor and discrimination do not impact wages and thus not comparative advantage of developing countries, "[o]bservance of the right to organize and bargain collectively may ultimately have more impact on wage rates…").

[190] *See, e.g.,* Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE L.J. 361, 364 (1995)

Indeed, the link between labor rights and trade has been omnipresent throughout the history of the U.S. trade agenda. By their terms, labor provisions may only benefit from the "teeth" of U.S. dispute settlement machinery if their derogation has been carried out "in a manner affecting trade."[191] That explicit link was required in the NAALC[192] and in more recent trade agreements such as USCMA.[193] During USMCA negotiations, the AFL-CIO lobbied explicitly to remove the "manner affecting trade" criterion.[194] The United States made no such effort. Instead, and in keeping with the negotiating objectives outlined in the TPA 2015,[195] it merely shifted the burden of proof onto the defendant party to prove that a failure to enforce labor laws was *not* carried out "in a manner affecting trade."[196]

Trade and rights scholars should become comfortable with U.S. protectionist objectives. The predictions of Bhagwati[197] and others[198] that trade-plus provisions would be used as disguised trade arsenal have not come to fruition.[199] On the contrary, labor rights advocates complain that USTR

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(arguing that violations of international labor standards concerning forced and child labor "constitute a state subsidy to the producers of those goods and thereby give the violating state an unfair competitive advantage in its trading relations with other countries.").

[191] For a chronology of labor chapters in U.S. trade agreements, including their consistent reference to "in a manner affecting trade," *See* Mary Jane Bolle, *Overview of Labor Enforcement Issues in Free Trade Agreements*, CONG. RES. SERV. 1-4 (Feb. 22, 2016). Most recently, USMCA reproduced this requirement. *See* USMCA, *supra* note 31, art. 23.3(1) n 4 ("A failure to comply with an obligation under paragraphs 1 or 2 must be in a manner affecting trade or investment between the Parties.")

[192] Although the exact term "manner affecting trade" criterion was not included in the NAALC or the agreement that followed, the Israel-US Free Trade Agreement, recourse to dispute settlement was restricted to a "trade-related" failure of enforcement. *See* NAALC, *supra* note 157, at art. 36.

[193] *See* USMCA, *supra* note 31, at art. 23.3(1) n 4.

[194] *See, e.g.*, AFL-CIO, Mexico's Labor Reform: Opportunities and Challenges for an Improved NAFTA, (June 25, 2019), at https://aflcio.org/testimonies/mexicos-labor-reform-opportunities-and-challenges-improved-nafta.

[195] *See* Kathleen Claussen, *Reimagining Trade-Plus Compliance: The Labor Story*, 23 J. Int'l Econ. L 1, 16 (2020) (observing that it would have been difficult for the United States to delete the "manner affecting trade" phrase given the language of the May 10 Agreement and TPA legislation).

[196] *See* USMCA, *supra* note 31, at art. 23.3(1) n 5 ("For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise.")

[197] *See supra* pp 13-15.

[198] *See supra* n 74 and accompanying text.

[199] *See* DiCaprio, *supra* note 139, at 32 (noting that labor advocates have become "disillusioned with the leverage potential that labor criteria [in trade agreements] could provide" given their disuse).

does not bring *enough* complaints under the labor chapters,[200] not that USTR uses labor rights litigation too liberally or incorrectly. Furthermore, American workers and businesses deserve to be protected. As reports note, unfettered trade displaces national workers and renders them vulnerable to business interests.[201] By accepting that labor provisions are intended to protect national interests while facilitating trade, scholars and policymakers could better engage on ways to improve those provisions to ensure comity across domestic and foreign rights while respecting trade objectives.

### *B. Lessons from Other International Rights Models*

From the above, we might conclude that labor was successfully situated within the U.S. trade agenda because labor rights directly impact production costs. Those costs of production, in turn, affect the terms of competition and the welfare of U.S. workers and businesses. Binding and sanctionable labor-rights provisions have been included in U.S. trade agreements to protect those national actors.

The trajectory of labor rights is not necessarily indicative of all international rights in U.S. trade policy, however. To better elucidate a methodological understanding of international rights in trade, the following sections broaden the examination to include two alternative rights models: one that enjoys similar traction as labor rights in U.S. trade, environmental standards, and one that is omitted from U.S. trade agreements, human rights. That examination confirms that advocates and policymakers have focused on the demonstrable impact of environmental standards on production costs. By contrast, advocates have failed to demonstrate the same impact of human rights on production costs. Because only some rights are demonstrably germane to trade conditions, and thus to national interests, the U.S. trade agenda treats the broad corpus of international rights disparately by including some and not others.

#### 1. U.S. Trade and Environmental Standards

The trajectory of environmental standards in U.S. trade law bears a strong resemblance to that of labor rights. Like labor rights, the United States incorporated its first environmental standards in a NAFTA side agreement in the early 1990s.[202] Until then, and again like labor rights, environmental

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[200] *See, e.g.,* POLASKI, ET AL., *supra* note 40 at 33 (Institute for Policy Studies, 2020) ("the U.S. has included labor chapters in all of its trade agreements over the last 25 years, but they have seldom been enforced by the U.S. or other governments."

[201] *See* POLASKI, ET AL., *supra* note 40 at 33.

[202] *See* NAALC, *supra* note 157.

standards had not been considered germane to the U.S. trade agenda.[203]

Like labor-rights advocates, environmental advocates in the 1990s succinctly demonstrated that environmental standards impact trade conditions. They did so by consistently raising awareness of the environmental implications of free trade with Mexico,[204] demonstrating that Mexico's weaker regulations made it easier and cheaper for firms to do business in Mexico.[205]

The United States negotiated the North American Agreement on Environmental Cooperation (NAAEC) to address those concerns.[206] The Commission for Environmental Protection (CEC), which was established by Canada, Mexico, and the United States to address transboundary environmental concerns in North America,[207] summarized the purpose of environmental protections in the NAAEC. It noted allegations that "[p]oor enforcement of environmental regulations can exacerbate competitive imbalances within the US-Mexico-Canada trade relationship as firms gain

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[203] *See, e.g.,* Ignacia S. Moreno, James W. Rubin, Russell F. Smith III, & Tseming Yang, *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENTL. L. J. 405, 410 (1999) (noting that, before NAFTA negotiations, "the effects of free trade on the environment had not been a major concern…"). And yet, also like labor rights, advocates had long raised concerns over the impact of environmental issues on U.S. trade. As early as the 1960s, environmentalists became alarmed by the exodus of American businesses to Mexico. Those companies, incidentally the same "maquiladoras" named in the AFL-CIO's 1971 report, were accused of generating hazardous waste and contributing to deteriorating air and water conditions "that affected not only the Mexican side of the border, but also the environment of the United States." *Id*. at 412.

[204] *Id*.; *see also* Scott Wilson, *NAFTA's Legacy: An Explanation of Why the Free Trade Area of the Americas is Good for International Environmental Law*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 551, 557 (2005) (describing domestic pressure in the U.S. during NAFTA negotiations with respect to the environment, observing that "[e]nvironmental groups wanted better environmental law enforcement, greater transparency and funding, and a commitment to democratic processes to be included in the agreement.").

[205] *See* Moreno, et al., *supra* note 178, at 411; Andrea N. Anderson, *The United States Jordan Free Trade Agreement, United States Chile Free Trade Agreement and the United States Singapore Free Trade Agreement: Advancement of Environmental Protection?*, 29 BROOKLYN J. INT'L L. 1221, 1223-1224 (2004) (describing the environmentalist position that trade agreements should contain stronger environmental protections to prevent a race to the bottom

[206] North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (1993). *See* Moreno, et al., *supra* note 178, at 420-421; David Gantz, *Addressing Environmental Protection in the United States-Mexico-Canada Agreement (USMCA)*, *in* WORLD TRADE AND LOCAL PUBIC INTEREST: TRADE LIBERALIZATION AND NATIONAL REGULATORY SOVEREIGNTY 71 (Csongor István Nagy, ed. (2020) (discussing the pressure placed on the Clinton Administration by Congress "and other elected officials on the U.S. side of the Mexican border" that environmental protections were necessary).

[207] *See* Commission for Environmental Cooperation, Potential NAFTA Effects: Claims and Arguments 1991-1994 (Apr. 1996), http://www3.cec.org/islandora/en/item/1692-nafta-effects-potential-nafta-effects-claims-and-arguments-1991-1994-en.pdf.

economic subsidies by exploiting pollution havens."[208] It further cited concerns that firms would feel pressure to avoid environmental laws to remain competitive.[209]

Unlike with international labor conventions, the United States has ratified many applicable international and regional environmental instruments, such as the Convention on International Trade in Endangered Species of Wildlife Fauna and Flora.[210] The May 10th Agreement referenced earlier also ensured that those "various multilateral environmental agreements (MEAs)"[211] would be incorporated into all U.S. trade agreements.

Since it adopted the NAAEC, the United States has consistently strengthened its trade agreements' environmental provisions.[212] Recently, USMCA added new environmental provisions, including obligations to combat trafficking in wildlife, timber, and fish.[213] Like labor, those provisions are subject to the same dispute resolution mechanisms and potential sanctions as the other provisions in the agreement. [214] And, like labor, to be enforceable, derogations must have been carried out "in a manner affecting trade or investment between the Parties."[215]

2. U.S. Trade and Human Rights

Unlike labor rights and environmental standards, U.S. trade policymakers have not incorporated human rights into U.S. trade agreements. [216] The

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[208] *Id*. at 10 (citing Senate testimony from 1992).

[209] *Id*. (citing U.S. media reports).

[210] *See* USTR, *Multilateral Environmental Agreements*, https://ustr.gov/issue-areas/environment/multilateral-environmental-agreements.

[211] The May 10th Agreement states: "The list includes (with abbreviated titles) the Convention on International Trade in Endangered Species (CITES), Montreal Protocol on Ozone Depleting Substances, Convention on Marine Pollution, InterAmerican Tropical Tuna Convention (IATTC), Ramsar Convention on Wetlands, International Whaling Convention (IWC), and Convention on Conservation of Antarctic Marine Living Resources (CCAMLR)." *See* USTR, *Bipartisan Trade Deal* 2 (May 2007), https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

[212] *See* Wilson, *supra* note 204, at 568-573 (mapping out subsequent environmental provisions in U.S. trade agreements).

[213] *See* USTR, *UNITED STATES–MEXICO–CANADA TRADE FACT SHEET Modernizing NAFTA into a 21st Century Trade Agreement*, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing.

[214] *Id*.

[215] *See* Trade Promotion Authority, H.R. 3009, 107th Cong (2002); § 2102(b)11(A); 19 U.S. CODE §3802(b)(11)(A) USMCA, *supra* note 31, at art. 24.2(1).

[216] *See* HAFNER-BURTON, *supra* note 32, at 39 (arguing that U.S. trade agreements "ignore" human rights even though they aim to protect labor rights). Trading blocs like the

United States has omitted those provisions despite numerous reports demonstrating the deleterious impact of trade liberalization on the realization of human rights.[217]

In the late 1990s and early 2000s, when trade-plus provisions were picking up steam, studies and literature by Nongovernmental Organizations (NGOs), U.N. institutions, and academics calling for greater human rights protections in trade began to gain momentum.[218] This momentum ignited an "explosion of conferences, edited collections and monographs looking at the impact of international trade on a wide range of human rights" and the potential of trade to protect those rights.[219] Pointing to the nondiscrimination principles under the GATT, that literature accused the current system of restricting the policy space to impose human-rights obligations.[220] Unlike advocacy efforts for labor rights and environmental standards, these arguments did not gain traction with U.S. trade policymakers.

Expressing frustration with the residual refusal of U.S. trade policymakers to incorporate human rights protections, Andrew Lang blames advocates for failing to consider what "human rights actors and human rights language contribute to trade policy debates – what function they perform and what distinctive 'value-added' they bring."[221] Conceding that human rights advocates "are not trade experts," Lang questions whether "the human rights

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European Union have incorporated some human rights considerations into their sustainable development chapters, but countries such as the United States have consistently refused to do so.

[217] *See, e.g.,* HIGH COMM'R FOR HUMAN RIGHTS, GLOBALIZATION AND ITS IMPACT ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, U.N. DOC. E/CN/4/RES/1999/59 (Apr. 28, 1999); and the General Assembly resolution of the same name, G.A. Res. 54/165, U.N. Doc. A/RES/54/165 (Feb. 24, 2000). Oloka-Onyango, a human rights advocate, has co-authored numerous reports for the United Nations and in the academic scholarship ridiculing the WTO for failing to protect human rights in trade. *See, e.g.,* U.N. ECON. & SOC. COUNCIL [ECOSOC], SUB-COMM. ON THE PROMOTION & PROT. OF HUMAN RIGHTS, *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights,* Preliminary Report, U.N. Doc. E/CN.4/Sub.2/2000/13 (June 15, 2000) (prepared by J. Oloka-Onyango & Deepika Udagama); ECOSOC, SUB-COMM. ON THE PROMOTION & PROT. OF HUMAN RIGHTS, *Globalization and Its Impact on the Full Enjoyment of Human Rights*, Progress Report, U.N. Doc. E/CN.4/Sub.2/2001/10 (Aug. 2, 2001) (prepared by J. Oloka-Onyango & Deepika Udagama); ECOSOC, SUB-COMM. ON THE PROMOTION & PROT. OF HUMAN RIGHTS, *Globalization and Its Impact on the Full Enjoyment of Human Rights*, Final Report, U.N. Doc. E/CN.4/Sub.2/2003/14 (June 25, 2003) (prepared by J. Oloka-Onyango & Deepika Udagama).

[218] *See* Andrew T.F. Lang, *Re-thinking Trade and Human Rights*, 15 TUL. J. INT'L & COMP. L. 335, 337-339 (2007).

[219] *Id*. at 342.

[220] *Id*. at 343.

[221] *Id*. at 335.

movement can ever instigate genuinely transformative change."[222]

As Lang's article correctly notes, the human rights scholarship has missed the mark in U.S. trade policy. Its singular focus on the impact of trade on human rights fails to contemplate and identify the effects of human rights on trade. It therefore also fails to demonstrate the impact on U.S. actors or explain why the U.S. trade agenda should intervene. Given that Congress has been hesitant to include rights even where they have a clear impact on trade conditions, its omission of human rights comes as no surprise.[223]

## III. IMPLICATIONS FOR INTERNATIONAL RIGHTS AND TRADE

Trade-plus provisions protect the conditions of trade, labor rights, and environmental standards in America and abroad. This Part now turns to my normative claim that U.S. trade policymakers should not broaden trade-plus provisions to include other rights absent a clear nexus to trade conditions.

Scholars alternatively applaud and critique the potential expansion of trade law governance into additional international rights.[224] Oona Hathaway, for instance, argues that governments as rational actors "largely motivated by an assessment of costs and benefits" should not "care much about" the behavior of foreign governments towards their citizens.[225] Whether or not other governments respect their international rights commitments does not

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[222] *Id*. at pp 376-77.

[223] Although human rights are not incorporated in the TPA or in any U.S. trade agreements, they are included in one U.S. trade instrument: the Africa Growth and Opportunity Act (AGOA), which was enacted during the Clinton Administration because "the United States [could not' afford to neglect a vast region that contains almost ten percent of the world's population and a wealth of untapped natural resources…". *See* J.M. Migai Akech, *The African Growth and Opportunity Act: Implications for Kenya's Trade and Development*, 33 NYU J. INT'L POL. 651, 652 n 6 (2001) (quoting UNITED STATES TRADE REPRESENTATIVE, A COMPREHENSIVE TRADE AND DEVELOPMENT POLICY FOR THE COUNTRIES OF AFRICA (1997)). AGOA thus requires that an eligible country "does not engage in gross violations of internationally recognized human rights or provide support for acts of international terrorism and cooperates in international efforts to eliminate human rights violations and terrorist activities." *See* AFRICAN GROWTH AND OPPORTUNITY ACT, § 104(A)(1)(F)(3).

The human rights criterion has received scant academic attention, perhaps confirming the lackluster focus during Congressional preparatory conferences. *See* Akech, *supra* note 223, at 664. Since its passage, human rights advocates have complained of inadequate enforcement of the human rights criteria against non-complying beneficiaries. *See* David Fuhr & Zachary Klughaupt, *The IMF and AGOA: A Comparative Analysis of Conditionality*, 14 DUKE J. COMP. & INT'L L. 125, 142.

[224] *See, e.g.,* Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. Rev. 347, 348-349 (2004) (describing the conflicting scholarship concerning the trade-rights linkage).

[225] *See* Oona Hathaway, *The Cost of Commitment*, 55 Stand. L. Rev. 1821, 1823 (2003).

"affect the national interests" of the United States.[226] Even worse, she argues, extraterritorial rights regulation "invites intrusion …into the domestic arena and in particular into the relationship between the state and its citizens…"[227]

Not all scholars agree with Hathaway's skepticism. Jack Goldsmith and Eric Posner, for example, counter that governments may have legitimate interests in the well-being of foreign citizens.[228] They point out that religious affiliations, ethnicities, and other cultural constructs cross borders and, in doing so, link individuals of various citizenry that "translate[s] into governmental interest and action."[229] Governments may also have an interest in the well-being of foreign citizens "in order to expand trade, minimize war, and promote international stability."[230] Goldsmith and Posner nevertheless acknowledge that national concerns over extraterritorial well-being are "weaker than the state's interest in local economic or security matters."[231] In other words, national citizens and governments have legitimate interests in broader welfare, but only up to a point.

In the trade and rights context, concerns over the well-being of domestic and foreign interests are coterminous so long as the international rights at stake improve trade. In that context, national interests in the domestic economy are compatible with national interests in foreign welfare and do not require a cost-benefit compromise. Once trade provisions begin to regulate international rights that are decoupled from trade, however, that unilateral regulation begins to look a lot less like a legitimate trade objective and a lot more like an intrusion into the domestic process of trade-partner countries or, worse, the type of disguised arsenal referenced earlier.

By narrowing its trade-plus provisions to those rights that are linked to trade, U.S. trade policy inadvertently treats international rights disparately. That treatment, which I view as a cost, is outweighed by the benefit of reducing the potential perilous effects of an overreaching trade regime. Of course, that incoherence remains a possibility in labor rights and environmental standards, as well. As demonstrated in the labor context, described below, incoherence in trade and international rights regimes implicates constitutional processes; conflict of laws; and the exportation of international rights law. Nevertheless, some degree of incoherence may be a necessary drawback of embedding trade-related rights in trade law. In the limited context of trade-relevant rights, incoherence is a risk worth taking to

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[226] *Id*.

[227] *Id*.

[228] *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 109-110 (2005) (arguing that although States are mainly interested in the well-being of their own citizens, they have a weaker interest in the well-being of others).

[229] *Id*. at 109.

[230] *Id*. at 110.

[231] *Id*.

protect workers and the environment from the demonstrable costs of trade. Given that incoherence, I propose that rights governance in trade remain limited in a manner described in Part IV.

### *A. Constitutional Processes*

Constitutional scholars have long emphasized the critical importance of the Treaty Clause. Once ratified, the Constitution proclaims treaties the "supreme law of the land,"[232] raising additional concerns among Senate members over federal[233] and State[234] law preemption.[235] The Treaty Clause thereby maintains the separation of powers necessary for a well-functioning federal system.[236] By enabling the Executive to circumvent the Treaty Clause and incorporate the substance of international treaties into binding commitments

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[232] U.S. CONST. art. VI, cl. 2. *See* John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 4, 1287, 1300 (1993) (describing the role of the Supremacy Clause within the framework of U.S. treaty ratifications). As such, those instruments may not be contradicted by international treaties. As criticized by Steve Charnovitz, this Clause has prevented the United States Senate from ratifying many human rights treaties given their potential for requiring changes in U.S. laws and practices. *See* Steve Charnovitz, *The ILO Convention on Freedom of Association and its Future in the United States*, 102 AM. J. INT'L L. 90, 114 & n 74 (2008) (internal citations omitted).

[233] *See, e.g.,* EXEC. REP. 107-9, 107TH CONG., 2nd Sess., Convention on the Elimination of All Forms of Discrimination Against Women (Sept. 6, 2002) (Testimony of Senator Frist, raising concerns that CEDAW would conflict with the Supremacy Clause).

[234] Constitutional scholars have examined the implications of the Supremacy Clause for state sovereignty and ague that separation of powers between federal and state lawmaking do not permit Congress to preempt state laws through treaty. For an analysis of the application of the Supremacy Clause to state laws, *see* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 289-89 (2007) (arguing that art. VI of the Constitution does not grant Congress the authority to preempt state laws); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (noting that the Supreme Court has invoked separation of powers to invalidate federal action that infringed on state actions).

[235] The Senate's refusal to ratify international human rights treaties has evolved over time. As explained by Oona Hathaway, in the 1950s, the Senate proposed a number of amendments to the Constitution to prevent the United States from ratifying international human rights treaties out of fears that those international commitments would challenge domestic policies such as segregation and Jim Crow laws. *See,* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1240 (2008) ("The controversy ended in a 'compromise' in which the amendment was defeated at the cost of future human rights agreements…").

[236] For a discussion of the relationship of the Supremacy Clause and the commitments undertaken through trade law, *see* Julie Long, *Ratcheting Up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Agreements*, 80 MINN. L. REV. 231, 232-33 (1995) (arguing that trade agreements "challenge[] traditional state powers in the name of free international trade in a way that never before has been accomplished.").

when it transposes their terms (if not their titles) into the framework of U.S. trade agreements, the congressional-executive process risks undermining those constitutional protections.

For instance, the ILO's 1998 Declaration enables the United States to incorporate the ILO's fundamental labor rights into U.S. trade agreements. The United States (through the Executive) includes those rights even though the government has not ratified the fundamental conventions that are subjects of the Declaration. Labor-rights advocates view these trade-plus provisions as necessary to ensure that trade does not undermine the ILO's fundamental labor rights.[237] Nevertheless, as the ILO points out,[238] U.S. federal and State laws do not fully comply with those rights. By incorporating these international rights into U.S. trade agreements, the Executive is making trade commitments that are not compatible with federal or State laws.

The incorporation of international rights in trade agreements that are inconsistent with federal[239] and State law[240] arguably threatens the constitutional protections concerning the separation of powers.[241] Hathaway notes that Congress has further diminished its role by gradually delegating broad fast-track authority to the executive to negotiate the terms of trade agreements. She argues that "[n]ot only did the effect of each individual delegation grow over time, but the cumulative effect of multiple delegations also became more significant with each additional delegation."[242] The imbalance in lawmaking authority, she argues, provides "a means for presidents to bypass the other branches of government in pursuing core policy aims."[243]

Hathaway's caution is refuted by other trade scholars, most recently by

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[237] *See, e.g.,* POLASKI, ET AL., *supra* note 40, at 33.

[238] *See infra* pp. 40-42

[239] For a discussion of state obligation under U.S. trade agreements, *see* Charnovitz, *supra* note 11, at 26 (arguing that, traditionally, "it has been assumed that whether federal laws provide for a high level of protection, or a low level of protection, is a matter for Congress to decide.").

[240] *See, e.g., id.* at 25 (speculating on the impact of new legal obligations under trade agreements on state laws); Kenneth J. Cooper, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. INT'L L. 143, 143 (1993) ("It is well settled that the federal government can legally preempt state laws that are inconsistent with international trade agreements."). *Compare with* Long, *supra* note 209, at 242 (arguing that "because of strong federalist concerns, [the Supreme Court] has hesitated to preempt state laws.") (and citations therein).

[241] U.S. CONST. art. VI, § 2 (under the Supremacy Clause, treaties preempt state law). *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 233-40 (1824) (Chief Justice Marshall, recognizing the hierarchy of the federal system).

[242] *See* Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 Yale L.J. 140, 146 (2009).

[243] *Id*.

Professor Kathleen Claussen, who argues that "TPA legislation has nearly consistently allocated *more* power to Congress and less space to the Executive."[244] Pointing to the labor provisions in U.S. trade agreements, Claussen argues that the same "model" language contained in legislation such as TPA and the May 10th Agreement proves that Congress holds the reins.[245]

While Claussen correctly observes that Congress retains the authority to identify which rights are contained in trade agreements, she fails to confront the Executive's role in defining those rights. For example, during recent USMCA negotiations, House Democrats had a "slew of USMCA concerns" throughout the negotiation, but USTR remained responsible for drafting compromise text.[246] That text includes a new right that protects controversial strike action. This addition is significant in light of ILO jurisprudence criticizing U.S. federal and State labor laws limiting the right to strike.[247] Moreover, suppose Claussen is correct and it is Congress that decides trade policy. In that case, Congress (and not the Executive) is sidestepping the Treaty Clause's steep requirements by adopting international law through trade law rather than through treaty. In doing so, Congress is shifting responsibility from the Senate to both houses. Either way, the Treaty's Clause's process has been abdicated.

### *B. Conflicts of Law*

Although rights advocates urge the incorporation of international rights to ensure the advancement of rights in trade-partner countries, they also hope that the incorporation of those rights will improve domestic laws and protections.[248] Reverting to the labor model, we see that, contrary to those

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[244] *See* Claussen, *supra* note 13, at 318 ("Since it was first applied in 1974, subsequent TPA legislation has nearly consistently allocated more power to Congress and less space to the Executive.").

[245] *Id*. at p 323.

[246] *See, e.g.,* INSIDE U.S. TRADE, *Pelosi says USMCA moving forward despite impeachment; Trump alleges 'camouflage'* (Oct. 4, 2019).

[247] Moreover, after trade agreements such as USMCA enter into force, Congress allocates funding for the implementation of the agreement. That funding is distributed to relevant Executive agencies and, as Congressional members have recently complained, is implemented outside of congressional control. *See, e.g.,* INSIDE U.S. TRADE, *Ways & Means Democrats: USMCA funding 'not being used as intended,'* (July 31, 20202) (describing a July 23, 2020 letter signed by congressmembers to USTR and the Department of Labor citing their "significant concerns" that money assigned under the implementing bill "will not be deployed where [it is] most needed…").

[248] *See* Lance Compa, *Advancing Global Labor Standards: Potential and Limits of International Labor Law for Worker-Rights Advocacy in the United States*, *in* U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 277-279 (eds. Richard Bales & Charlotte Garden 2020) (discussing efforts to improve U.S. labor laws through NAFTA).

hopes, the ILO's supervisory bodies have consistently and repetitively criticized U.S. federal and state laws and practices for failing to comply with its fundamental labor rights, despite incorporation of those rights in U.S. trade agreements.[249] U.S. federal and State law have proven incredibly resilient to that criticism.[250]

On the federal level, in 2002, the Supreme Court ruled in *Hoffman Plastics v. NLRB*[251] that an undocumented worker, owing to his immigration status, was not entitled to backpay for lost wages after being illegally fired for union organizing.[252] Shortly thereafter, the AFL-CIO, in partnership with the Confederation of Mexican Workers (CTM), brought a complaint to the ILO alleging that *Hoffman* violated the ILO's standards prohibiting discrimination based on workers' immigration status.[253] The ILO agreed with the unions. It found that, by limiting the remedies available to undocumented workers who were dismissed for attempting to exercise their trade union rights, the remaining remedial measures under national law were "inadequate to ensure effective protection against acts of anti-union discrimination."[254] It directed the United States to take measures "including amending the legislation to bring it into conformity with freedom of association principles…."[255]

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[249] *See generally* Susan Kang, *Forcing Prison Labor: International Labor Standards, Human Rights and the Privatization of Prison Labor in the Contemporary United States*, 31 NEW POL. SCI. 137, 150-156 (2009) (arguing that U.S laws and practices concerning private prison labor infringe upon the prohibitions of forced labor contained in the ILO conventions.).

[250] Although the United States has withstood pressure to ratify the ILO's conventions or to amend its national labor and employment laws to harmonize with the ILO's standards, Lance Compa aptly draws attention to a subtler harmonization in regimes. *See* Lance Compa, *The ILO Core Standards Declaration: Changing Climate For Changing the Law*, 7 PERSPECTIVES ON WORK 24, 25 (2003). Compa notes, in particular, the proclivity among U.S. trade negotiators to use ILO norms to define labor rights and to interpret their meanings. *Id*. While that cross-over is voluntary and at the discretion of trade negotiators, it marks a potential avenue for the reconciliation of normative interpretations and rules.

[251] 535 U.S. 137 (2002).

[252] *See id*. at 150 ("Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.").

[253] *See* ILO COM. ON FREEDOM OF ASSOCIATION, Case No. 2227 (United States of America), Rep. No. 332, para. 554 (Nov. 2003) [hereafter, "ILO Case No. 2227"]. Notably, the U.S. government defended itself on grounds that the ILO had no jurisdiction to hear the complaint given that the United States had not ratified either of the conventions governing freedom of association and collective bargaining. *Id*. at para. 578. The ILO responded by pointing out the mandate of the Committee on Freedom of Association, which expressly authorizing the Committee to "examine complaints alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions." *Id*. at para. 600.

[254] *Id*. at paras 609-610.

[255] *Id*. at para. 613.

To date, *Hoffman* continues to authorize restrictive remedies for undocumented workers[256] who should enjoy the same remedies as any other worker under the ILO's norms.[257] The ILO has also raised concerns with respect to the United States' treatment of graduate and teaching assistants[258] and public sector workers,[259] and its interpretation of the definition of "supervisor."[260]

On the state level, two out of the most recent six complaints against the United States before the ILO's supervisory bodies concerned laws that allegedly restricted freedom of association and the right to bargain collectively.[261] One case involved a New York State law restricting the right to strike for public servants.[262] The other dealt with a North Carolina law that prohibited public sector employees from entering into a collective bargaining agreement with any city, town, county, or municipality.[263] In both cases, the ILO asked the U.S. government "to take steps aimed at bringing the state legislation into conformity with freedom of association principles…".[264] To date, the governments have taken none of those steps.

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[256] Federal agencies such as the Department of Labor have distinguished the backpay remedies provided under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) from those under the Immigration Reform and Control Act of 1986 (IRCA), the statute interpreted in *Hoffman*, thereby narrowing the scope of that decision. *See* Amy K. Myers, *What Non-Immigration Lawyers Should Know about Immigration Law*, 66 ALA. LAW. 436, 436 (2005) (describing efforts of various federal agencies to distinguish backpay remedies under immigration statutes from IRCA following *Hoffman*).

[257] *See* ILO Case No. 2227, *supra* note 252, at 609-613.

[258] *See, e.g.,* ILO COM. ON FREEDOM OF ASSOCIATION, Case No 2547 (United States of America), Rep. No. 350, para. 804 (June 2008) (disagreeing with the exclusion of graduate students and research assistants from the protections afforded under the National Labor Relations Act).

[259] *See, e.g.,* ILO COM. ON FREEDOM OF ASSOCIATION, Case No. 2683 (United States of America), Rep. No. 343, para. 794 (Nov. 2006) (expressing concerns with the exclusion of airline workers from freedom of association protections).

[260] *See, e.g.,* ILO COM. ON FREEDOM OF ASSOCIATION, Case No. 2524 (United States of America), Rep. No. 356, para. 70 (expressing concern that the expanded definition of "supervisor" decided by the National Labor Relations Board "potentially exclude large categories of workers from the protection of the right to organize and bargain collectively…").

[261] For a list of all allegations against the United States before the ILO, *see* ILO: NORMLEX – Freedom of Association Cases (United States), https://www.ilo.org/dyn/normlex/en/f?p=1000:20060::FIND:NO:::.

[262] *See* ILO COM. ON FREEDOM OF ASSOCIATION, Case No 2741, Rep. No. 383 (United States of America) (Oct 2014) [hereafter "Case No 2741"].

[263] *See* ILO COM. ON FREEDOM OF ASSOCIATION, Case No 2460, Rep. No. 344 (United States of America) (March 2007) [hereafter "Case No 2460"].

[264] *Id*. at para 998; Case No. 2741, *supra* note 261, at para 21.

### *C. The Exportation and Enforcement of U.S. Rights*

By incorporating international rights in its trade agreements, the United States exports and enforces those rights along with goods and services. I have already argued that the United States treats rights in trade disparately in a *vertical* sense: some rights are incorporated and others are excluded. Here I argue that US trade agreements also treat rights in trade disparately in a *horizontal* sense: some aspects of rights will be enforced while other aspects will not be enforced.

USMCA contains new provisions that, like the TPP before it, prescribe specific legislation (with exact language[265]) for laws and constitutions.[266] In doing so, the United States is exporting its interpretations of those rights. It is also committing governments to legislation and policies that are decided by the United States and not by the actors in those countries. The exportation of prescribed rights raises two significant implications.

The first significant implication concerns the prescription, itself. The ILO's international labor rights, as Kevin Kolben aptly describes,[267] are process-oriented. The ILO does not prescribe language, numerical values, or labor-market policies. Instead, its rights and standards require governments to translate the ILO's standards into national laws and practices through consultations with representatives of national workers and employers. For example, the ILO's standards concerning minimum wages do not set out the minimum wage for state parties. Instead, they require a "minimum wage-fixing machinery" that includes consultations with workers and employers.[268] This tripartite process would be incompatible with prescribed minimum wage values under trade agreements.

The second implication concerns the enforcement of those exported rights. The ILO has expressed its dissatisfaction with U.S. laws and jurisprudence for failing to implement the ILO's rights.[269] The United States'

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[265] *See* United States – Vietnam Plan for Enforcement of Trade and Labour, § B(4) [hereafter, "US-VN Plan"] [266] *See, id*. (Noting that the Constitution of Viet Nam recognizes only labour unions affiliated with the VGCL as 'socio-political organizations', Viet Nam shall ensure that its law will not require labour unions registered with the competent government body to have mandatory political obligations and responsibilities that are inconsistent with the labour rights as stated in the ILO Declaration.").

[266] *See, id*. (Noting that the Constitution of Viet Nam recognizes only labour unions affiliated with the VGCL as 'socio-political organizations', Viet Nam shall ensure that its law will not require labour unions registered with the competent government body to have mandatory political obligations and responsibilities that are inconsistent with the labour rights as stated in the ILO Declaration.").

[267] *See supra* pp. 29-30.

[268] *See, e.g.,* ILO, MINIMUM WAGE FIXING CONVENTION, 1970 (No. 131), art. 4 (calling for "full consultation with representative organisations of employers and workers…").

[269] *See supra*, Part II.

prescription of labor laws, as those laws are drafted by the United States, thus threatens to decouple the laws of its trade partners from the international legal regime and from the international commitments that those partners may have undertaken within the ILO.[270]

Although the ILO has not publicly protested the expropriation of its fundamental labor rights, it also never intended for this to happen.[271] Instead, it intended for governments to implement the rights contained in the 1998 Declaration within the supervision of its unique tripartite system.[272] That system requires the input of governments, workers, and employers.[273] Within the ILO, governments are held accountable to their commitments under an umbrella of multilateral consensus and social-partner participation.[274] By (stark) contrast, the negotiation and supervision of those same rights within the trade context is carried by USTR, without the input of other governments or stakeholders, in a closed-door, secretive process.[275]

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[270] Following the ratification of USMCA, Mexican labor unions filed over 100 petitions in district courts, which are set to be considered by the Mexican Supreme Court. Those petitions challenge the constitutional bases for the USMCA-driven legislative reforms. *See* INSIDE U.S. TRADE, *Mexican Supreme Court to consider challenges of new labor law* (June 2020). For further discussion of the incoherency between trade agreements and the ILO's supervisory machinery, *see* Agustí-Panareda et al., *supra* note 23, at 361-67.

[271] *See generally* Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 Declaration for the Universal Protection of Workers' Rights*, 16 EUR. J. INT'L L. 439, 449-451 (2005) (arguing that the Declaration's reference to fundamental principles was anchored in the ILO's conventions and did not establish, consequently stand-alone norms).

[272] *Id*. at 445 (explaining that the ILO's supervisory machinery was charged with reviewing the implementation of the ILO's fundamental rights pursuant to the terms of the Declaration's follow-up provisions). Maupain nevertheless recognizes that the 1998 Declaration may be extracted from the ILO's halls and placed into trade agreement, an unintended consequence of the Declaration's vague drafting. *Id*. at n 56. He concludes that such a use may result in a "potentially positive impact …on a more coherent approach to [labor] rights…[given that] enforcement mechanisms in most trade agreements resort to negative incentives for deterrence, and to penalties as a last resort." *Id*. That potential, however, was linked to the ILO's role in monitoring the compliance under the trade agreement. *Id*.

[273] *Id*. (describing the "political compromise" of the 1998 Declaration). For a review of the ILO's system of supervision, unique to even the UN system, *see* ILO: RULES OF THE GAME: AN INTRODUCTION TO THE STANDARDS-RELATED WORK OF THE INTERNATIONAL LABOUR ORGANIZATION 105-109 [hereafter, "RULES OF THE GAME"] (rev. ed. 2019); *see also* Lee Sweptson, *Crisis in the ILO Supervisory System*, 29 INT'L J. COMP. LAB. L & IND. REL. 199, 201-203, 214-217 (2013) (highlighting the potential drawback of a supervisory machinery that requires consensus to function).

[274] RULES OF THE GAME, *supra* note 272, at 105-109.

[275] *Id*. at 144 (arguing that U.S. trade negotiation "are made by the President alone and are quietly revealed to Congress and the public months after they have already entered force."); Michelle Limenta, *Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation*, 10 N. ZEAL. YRBK. INT'L L. 73,

Even within the ILO, the application of commitments under conventions varies significantly. The ILO deliberately affords significant flexibility to enable state participation at various development levels and respect different cultural and normative values.[276] The United States, on the other hand, may enforce the commitments to the ILO's fundamental labor rights as strictly as it pleases.[277] The resulting differences in ILO and USTR enforcement could require governments to answer to two different authorities, one that rests on multilateral consensus and the other that rests on the threaten of economic sanctions.

Despite my pessimistic predictions of inevitable conflict, the United States has, thus far, enforced its labor provisions in complement to the ILO's system of rights. Under its trade agreement, for example, the United States negotiated a Columbian Action Plan Related to Labor Rights (Columbian Action Plan).[278] That Action Plan resulted in new national legislation sanctioning employers for rights infringements, among other labor-rights improvements.[279] USMCA enshrines the right to strike that remains the subject of terse discord within the ILO. The list of labor-rights progress in trade partner countries goes on.[280] Nevertheless, the potential for the disparate treatment of international rights – that the United States would only enforce those elements of international rights that are compatible with its laws – exposes additional underexplored drawbacks of regulating international rights through trade.

## IV APPLYING THE LESSONS TO GENDER RIGHTS

73 (2012) (describing a letter sent by legal scholars to USTR criticizing "the lack of transparency in the … negotiating process.") (internal citations omitted); Margot E. Kaminski, *The U.S. Trade Representative's Democracy Problem: The Anti-Counterfeiting Trade Agreement (ACTA) as a Juncture for International Lawmaking in the United States*, 35 SUFF. TRANSNT'L L. REV. 519, 521 (2012); Rodrik, *supra* note 40, at 84 (arguing that trade "negotiations are typically secret—a feature that draws the ire of labor, public-interest groups, and many politicians.").

[276] *See* ELLIOTT, ET AL., *supra* note 25, at 17 ("The application of core labor standards differs widely among advanced countries, and the ILO conventions defining the core standards allow for broad flexibility in implementation.").

[277] *See* Alston, *supra* note 23, at 8 (arguing that U.S. labor provisions enable the relevant U.S. government agencies "to opt for whatever standards they choose to set in any given situation."); Agustí-Panareda, et al., *supra* note 23, at 361-67 (discussing the implications of the incorporation of ILO standards in trade agreements for coherence).

[278] *See* USTR, *Colombian Action Plan Related to Labor Rights: Accomplishments to Date,* https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/june/colombian-action-plan-related-labor-rights-accomplishmen.

[279] *Id.*

[280] For a review of trade related labor-rights accomplishments during the Obama Administration, *see generally* STANDING UP FOR WORKERS, *supra* note 36.

Where do gender rights fit into the rights and trade story? This Article began by noting the recently unsuccessful attempts to incorporate new gender protections in USMCA. Assuming that rights advocates are undeterred by the drawbacks explained above, this Part now turns to the merits of their arguments in support of including gender-rights protections as binding and sanctionable provisions in trade agreements. To do so, it first explores whether those arguments demonstrate a link between gender rights and trade with the United States. Those arguments, as currently framed, fail to demonstrate that link. There are ways, however, that those arguments could be resituated within the trade framework. I offer two preliminary examples below.

Before doing so, I concede that the data supporting my examples is far from conclusive. I also find that many of the policy drawbacks in the labor context equally apply to the gender context. There are significant tensions between international and U.S. laws concerning gender rights. These drawbacks and the weak data outweigh the potential benefits of enhanced protections. My conclusion is bolstered by two alternative ways to protect gender rights in trade law – mandatory cooperative provisions and technical assistance – that would leave international gender norms intact.

### *A. Current Strategy*

Just as the perils of trade liberalization incited campaigns to protect workers, citizens, and the environment, they have also incited a campaign to protect women. That campaign comprises academics and, increasingly, multilateral organizations such as the WTO,[281] the World Bank,[282] the United Nations,[283] and the Organization for Economic Co-operation and Development (OECD),[284] all of which have established gender and trade working groups.

Collectively, those gender-rights advocates argue that trade agreements should ensure that women and men benefit equally from global trade.[285] By regulating gender rights, trade law could remove obstacles and

[281] *See* WTO, *Women and Trade*, https://www.wto.org/english/tratop_e/womenandtrade_e/womenandtrade_e.htm.

[282] *See* World Bank, *Trade & Gender*, https://www.worldbank.org/en/topic/trade/brief/trade-and-gender.

[283] *See, e.g.,* UN Women, Trade, gender and development: Advocating inclusive and gender-sensitive economic development on a global level, https://www.unwomen.org/en/docs/2013/7/trade-gender-and-development-inclusive-and-gender-sensitive-economic-development; UNCTAD, *Gender and Trade*, https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2743.

[284] *See* OECD, *Trade and Gender*, https://www.oecd.org/trade/topics/trade-and-gender/.

[285] *See, e.g.,* Susan Joekes, *A Gender-Analytical Perspective on Trade and Sustainable*

redistribute trade's benefits.[286] In its 2014 report, for instance, the U.N. examined various national trade policies and highlighted the "gender-differentiated outcomes of trade policy."[287] It concluded that "' [g]ender blind' trade and macroeconomic policies will no doubt exacerbate existing gender inequalities instead of solving them."[288] The U.N. and others thus call on trade negotiators to pursue their trade-agreement objectives and language through a "gender lens" and to "bind themselves to certain minimum legal standards" to ensure adequate policies.[289]

More specifically, the gender-rights literature has crafted five main arguments to justify new rights protections in trade agreements. None of those arguments imply that derogations of gender rights create unfair trade conditions for the United States or otherwise disadvantage American firms or citizens. Instead, they characterize trade as the means to achieving the ends of rights, just as human rights advocates have formed their advocacy campaign.

First, the gender-rights literature argues that trade agreements must be gender inclusive to enable broader economic development in developing countries.[290] The WTO's Women and Trade campaign argues, for example,

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*Development*, *in* Trade, Sustainable Development and Gender, United Nations Conference on Trade and Development 33 (1999); World Bank / WTO, *Women and Trade: The Role of Trade in Promoting Gender equality* x (2020) [hereafter, "World Bank/WTO Joint Report"] ("opportunities…can be seized by making trade more inclusive.").

[286] *See, e.g.,* Barnali Choudhury, *The Façade of Neutrality: Uncovering Gender Silences in International Trade*, 15 WM. & MARY J. OF WOMEN & L. 113, 118 (2008) ("if international trade agreements are to meet their stated objectives [to raise standards of living and to promote sustainable development], gender inequality must be addressed.").

[287] United Nations Conference on Trade and Development (UNCTAD), *Looking at Trade Policy Through a "Gender Lens:" Summary of Seven Country Case Studies Conducted by UNCTAD* 4 (2014), https://unctad.org/en/PublicationsLibrary/ditc2014d3_en.pdf.

[288] *Id*. at 22.

[289] *See, e.g.,* Amiri Bahri, *Mainstreaming Gender Considerations in Free Trade Agreements: "Building Back Better" in Post-COVID-19 World*, *in* ONLINE REPOSITORY OF CONTRIBUTIONS TO THE POLICY HACKATHON ON MODEL PROVISIONS FOR TRADE IN TIMES OF CRISIS AND PANDEMIC 7 (UN Econ. & Soc. Com. for Asia & the Pac. 2020).

[290] *See* WTO, *Gender-Aware Trade Policy: A Springboard for Women's Economic Empowerment* 4, https://www.wto.org/english/tratop_e/devel_e/a4t_e/gr17_e/genderbrochuregr17_e.pdf ; Jane Korinek, *Trade and Gender: Issues and Interactions*, OECD Trade Policy Working Paper No. 24, pp 7-8 paras 26-29 (2005) (summarizing the literature that establishes "an inverse relationship between gender inequality and growth."), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.523.952&rep=rep1&type=pdf. *See, e.g.,* Diane Elson, Caren Grown, & Irene van Staveren, *Introduction: Why a Feminist Economics of Trade?*, *in* THE FEMINIST ECONOMICS OF TRADE 1 (Irene Van Staveren, et al., eds. 2007) (arguing that policies such as trade appear to be "gender neutral" but "will be

that "giving women the same opportunities as men improves a country's competitiveness and productivity, which in turn has a positive impact on economic growth and poverty reduction."[291] An IMF study on the manufacturing sector of emerging-market developing countries similarly offers that "high-female-share industries grow relatively faster in countries that are more gender equal."[292]

Second, it argues that trade exacerbates the wage gap between women and men, particularly in export-oriented sectors.[293] According to the ILO, for instance, women on average earn 20 percent less than men.[294] The wage gap, rights advocates argue, reflects gender discrimination rather than differences in education, skills,[295] or productivity.[296]

Third, it argues that that societal constructs prevent women from participating equally in trade.[297] Restrictions in access to education[298] and deep-rooted employment bias deter women from accessing jobs in tradeable

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gender biased it if fails to take into account the gender differences that permeate economies.").

[291] *See* WTO, *Women and Trade*, https://www.wto.org/english/tratop_e/womenandtrade_e/womenandtrade_e.htm.

[292] *See* Ata Can Bertay, Ljubica Dordevic, & Can Sever, IMF Working Paper, *Gender Inequality and Economic Growth*, 21 (2020.

[293] *See, e.g.,* Robert A. Blecker & Stephanie Seguino, *Macroeconomic Effects of Reducing Wage Inequality in an Export-Oriented, Semi-Industrialized Economy*, *in* THE FEMINIST ECONOMICS OF TRADE 91 ("A large literature argues that women's low wages have been a stimulus to growth in many of the most successful cases of export-led development, such as South Korea, Hong Kong, and Taiwan.") (internal citations omitted); *See* World Bank/WTO Joint Report, *supra* note 284, at 146-48 (describing residual gaps in gender wages across countries and sectors).

[294] ILO, *World Employment Social Outlook* 11 (2018), https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/publ/documents/publication/wcms_619577.pdf..

[295] *See, e.g.,* Shaianne Osterreich, *Gender, Trade, and Development*, *in* THE FEMINIST ECONOMICS OF TRADE 58-59 (2007).

[296] *See* Blecker, et al. *supra* note 292, at 91.

[297] *See, e.g.,* Rohini Acharya et al., *Trade and Women – Opportunities for Women in the Framework of the World Trade Organization*, 22 J. INT'L ECON. L., 323, 324 (2019) (arguing that more than 90% of countries have laws in place that limit women's participation in trade.") (internal citations omitted); World Bank/WTO Joint Report, *supra* note 284, at 105 ("Many of the barriers that prevent them from accessing the benefits of trade are rooted in social, cultural, and behavioral phenomena that legal and regulatory reforms can affect only over time.").

[298] *See, e.g.,* Bahri, *supra* note 288, at 19 (discussing impediments to women's access to education online stemming from their lack of access to the necessary technological equipment); World Bank/WTO Joint Report, *supra* note 284, at 96-97 ("Women are frequently excluded from the benefits of trade because they lack the skills or education required, particularly in developing countries.").

sectors.[299] Consequently, job opportunities for women in many developing countries are limited to low-skilled[300] and low-paying jobs[301] or the informal sector.[302] The informal sector is more precarious, and the women working in them suffer from resource constraints and obstacles to skill development, trade information, and professional networks.[303] These constraints and obstacles also ensure that women cannot transition into higher-skilled, higher-paying jobs.[304]

Fourth, the literature argues that women are less likely to own or use a phone in developing countries, inhibiting them from receiving quick information and updates concerning markets and trade.[305] If women do not have access to trade-relevant information, they cannot benefit from trade opportunities.[306] And because they will be less informed, women will be less likely to propose any measures or clauses to counter the gender-distributional effects of trade agreements or participate in trade consultations.[307]

Fifth, it notes that governments engaged in international trade often

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[299] *See, e.g.,* Barbara Bailey, *Coordinating Compliance between Gender Rights and Trade: Issues and Opportunities. CEDAW and the Issue of Trade Policies* in GENDER EQUALITY RIGHTS AND TRADE REGIMES 5 (Pitman B Potter, Heather Gibb & Erika Cedillo, eds., 2012) (with reference to CEDAW, acknowledging "that the promotion of women's rights is influenced by culture and tradition which, in many respects, reflect patriarchal norms and give rise to legal, political and economic constraints restricting women's enjoyment of their fundamental rights and the overall advancement of women in society."); *See* World Bank/WTO Joint Report, *supra* note 284, at 11 ("women still face a wide range of barriers that prevent them from gaining from greater trade opportunities.").

[300] *See* World Bank/WTO Joint Report, *supra* note 284, at 11 ("Because women hold a disproportionate share of lower-skill jobs, they can be particularly vulnerable to trade-related shocks….").

[301] *See, e.g.,* Anh-Nga Tran-Nguyen & Americo Beviglia Zampetti, TRADE AND GENDER OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES x (UNCTAD 2004), http://www. unctad.org/en/docs/edm20042 en.pdf.

[302] *See, e.g.,* Heather Gibb, *Gender Equality and Trade: Coordinating Compliance Between Regimes*, in GENDER EQUALITY RIGHTS AND TRADE REGIMES xxxii (Pitman B Potter, Heather Gibb & Erika Cedillo, eds., 2012) ("When trade arrangements further marginalize women, who typically work in at-risk economic sectors or are less able to change jobs to adapt to new economic realities, everyone loses.").

[303] *See* Bertay, et al., supra note 291, at 8.

[304] *See, e.g.,* Korinek, *supra* note 289, at p 4, para 2. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.523.952&rep=rep1&type=pdf.

[305] *Id*. at 11. *See also* VON HAGEN, *supra* note 3, at 22 (arguing that women are disadvantaged because they do not have access to information concerning their rights and duties in relation to cross-border trade); World Bank/WTO Joint Report, *supra* note 284, at 99-100 ("women have less access to digital technologies than men.").

[306] *See* VON HAGEN, *supra* note 3, at 22.

[307] *See* Korinek, *supra* note 289, at 15.

cut taxes and tariffs to attract investment and exports.[308] The associated reduction in state revenue and public services, it argues, has an unequal impact on women who "in their role as carers…are usually the ones benefiting most from social services and consequently suffer most from cuts."[309]

To date, these arguments have not resonated in U.S. trade policy. Applying the lessons from Part II, the reasons for the missing resonance becomes clearer. By falsely assuming that rights take precedence over the overarching objective to regulate market competition, those scholars have gotten it exactly backwards.

In addition to mischaracterizing trade's objectives, current gender scholarship fails to provide a specific proposal. One popular refrain is that trade negotiators need to begin viewing the process and outcome of negotiations "through a gender lens."[310] As a woman who spent several years negotiating trade agreements on behalf of the United States, may I be the first to admit that the term "gender lens" is confusing. Do women negotiators automatically view matters through a gender lens, or do they, like men, require a new, deliberate mindset? And if the latter, what does that thinking entail, exactly?

Gender-rights advocates have also been unclear as to what specific gender rights would be subject to dispute settlement.[311] Suzanne Zakaria, for example, proposes a "sanctions enforcement mechanism" for model gender equality agreements.[312] In doing so, however, she merely references "internationally and domestically recognized gender equality rights" as the legal standard and thus provides no substance in her otherwise detailed model.[313]

Moreover, even the primary argument– that trade harms women – suffers from certain weaknesses. That argument presupposes causation between

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[308] *Id*. at 14.

[309] *Id*.

[310] *See, e.g.,* Constance Z. Wagner, *Looking at Regional Trade Agreements Through the Lens of Gender*, 31 ST. LOUIS. UNIV. PUB. L. REV. 497 (2012) (despite its title, Wagner provides no definition of the term "gender lens"); Kate Andras, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 UNIV. SAN FRAN. L REV. 521, 543 (2002) (describing how the NAALC would be interpreted "though a gender lens" and, later, clarifying that this interpretation applies to analysis "with respect to gender.").

[311] *See, e.g.,* Padideh Ala'i & Renata Vargas, *The Importance (and Complexity) of Mainstreaming Gender in Trade Agreements*, Centre for International Governance Innovation (arguing that most "gender-related provisions are couched in best endeavour and cooperation language; they appear in a variety of places in text and are not enforceable."), available at https://www.cigionline.org/articles/importance-and-complexity-mainstreaming-gender-trade-agreements.

[312] *See* Zakaria, *supra* note 25, at 262-263.

[313] *Id*. at 262-263.

trade and distributional injustice when the data suggests societal and behavioral norms are far more complex.[314] As international legal scholar Steve Ratner points out, because criticisms of distributional injustice often lack the quantitative measurements to identify issues of causation, they also often:

> fail to consider whether the rule [that they are proposing] is the right *institutional site* for carrying out distributive justice, in terms of the feasibility of the reform, the effectiveness of the reform in improving the status quo, and the possible downsides to reforming the current rule.[315]

To Ratner's point, the literature advocating for new gender rules in trade fails to consider thorny data issues such as causation. It consequently fails to ask whether the proposed solution – trade law – is the best legal apparatus to achieve distributional equity.

Instead, the gender-rights literature appears to blame the residual lack of gender rights on the gendered biases of trade policymakers and the policymaking process. For instance, some scholars point to the lack of female presence in U.S. trade policymaking, either at the level of stakeholder participation[316] or level of trade negotiation.[317] If more women were involved, they argue, U.S. trade policy would be more responsive to the treatment of women around the world and would incorporate the necessary

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[314] *See generally* Steve Ratner*, International law and political philosophy: Uncovering new linkages*, 14 PHILOSOPHY COMPASS, 1 6-7 (2018) (arguing that one of the flaws in distributional injustice literature is that it fails to discern patterns of causation).

[315] *Id*. at 7.

[316] *See* Andras, *supra* note 309, at 531 ("Notably absent from the ensuing public debate around NAFTA in the United States were leading women's rights groups…."); Zakaria, *supra* note 25, at 256 (comparing the ability of women to advocate through "national advocacy group model of U.S. groups" to the more successful "loose coalition structure of Canadian women's groups…); VON HAGEN, *supra* note 3, at 19-20 ("within specific negotiations of TAs/RTAs women are not sufficiently included and consulted.").

[317] *See, e.g.,* Jan Yves Remy, *Closing the Gender Divide Through Trade Rules*, Centre for International Governance Innovation (2019) (arguing that, at least in the context of e-commerce, "[h]aving women in leadership roles in negotiation processes … could greatly assist in raising awareness of gender-related issues in the digital era.") *at* https://www.cigionline.org/articles/closing-digital-gender-divide-through-trade-rules. *See also* World Bank, *Trade & Gender* (March 8, 2019) ("Women's involvement in trade consultation and negotiations is key to ensure women fully gain from trade and that their voices and entrepreneurial interests are taken into account."), *at* https://www.worldbank.org/en/topic/trade/brief/trade-and-gender; TRADE AND GENDER – EXPLORING A RECIPROCAL RELATIONSHIP 20 (2014) ("women and gender experts should be included in trade negotiations and prior consultations in order to mainstream gender perspectives into the agreements."), https://www.oecd.org/dac/gender-development/GIZ_Trade%20and%20Gender_Exploring%20a%20reciprocal%20relationship.pdf [hereafter, TRADE AND GENDER].

protections through trade legislation.[318]

Contrary to that theory,[319] women are well represented both within U.S. trade lobbying and in negotiations. USTR, which, again, is the executive agency charged with developing and coordinating U.S. trade,[320] has been led by three women, and President-Elect Biden has just nominated Katherine Tai as the new agency leader.[321] Many USTR deputies and directors who oversee the legal and policy trade offices have been women, including the lead negotiator for multilateral affairs.[322] Furthermore, trade unions and other trade lobbyists are healthily composed of women.[323]

### *B. Resituating the Gender Debate*

The following sections offer two preliminary examples of how current gender-rights arguments might be resituated within the framework of trade. This Article does not attempt to reconcile all of the inconsistencies and

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[318] *See, e.g.,* TRADE AND GENDER, supra note 316, at 11 (noting that "[t]he impacts of gender (in)equality on trade outcomes are still underexplored.").

[319] Notably, the theory of gender underrepresentation in the process of trade negotiations fails to characterize trade negotiators in the United States, but may well hold true for some developing countries.

[320] *See* USTR, *About USTR: Mission of the USTR*, *at* https://ustr.gov/about-us/about-ustr.

[321] Carla Hills (1989-1993), Charlene Barshefsky (1997-2000), and Susan Schwab (2006-2009). Ambassador Hills was central to the North America Free Trade Agreement negotiations, which were finalized in 1994. During Ambassador Schwab's term, the United States entered into the United States-Bahrain FTA, the United States-Peru FTA, the United States-Oman FTA, and several countries joined the Central American Free Trade Agreement (CAFTA-DR). Katherine Tai was nominated in early December, 2020. *See* C-SPAN, *Biden Cabinet Nominations Announcement*, (Dec. 11, 2020), https://www.c-span.org/video/?507202-2/biden-cabinet-nominations-announcement&live=&vod=.

[322] *See* Debra Steger, *Gender Equity in the WTO: The Need for Women Leaders, in* RESHAPING TRADE THROUGH WOMEN'S ECONOMIC EMPOWERMENT 57 (Centre for International Governance Innovation, Special Report 2018) ("The United States has led the way with women trade representatives…"). *See also* USTR, *Biographies of Key Officials* (in June 2020, five out of 22 Assistant United States Trade Representatives were women), https://ustr.gov/about-us/biographies-key-officials.

[323] *See generally* MINCHIN, *supra* note 112, at 241-44 (2017) (discussing the rise in the participation of within in lobbying efforts in the AFL-CIO, the federation of labor unions that have been critically active in U.S. trade policymaking). Women in leadership roles in various corporations have also lobbied the United States government to strengthen gender protections in U.S. trade agreements. *See supra*, n 3. Nevertheless, I recognize the literature evidencing that women's groups, broadly, are growing at a slower rate than other interest groups. *See* James M. Strickland, *Bifurcated Lobbying in America: Group Benefits and Lobbyists Selection*, 9 INTEREST GROUPS & ADVOCACY 131, 151 (2020). However, the relatively low prevalence of women-devoted lobbying groups does not negate the critical and growing role of women within broader interest groups – such as labor – that are actively engaged in trade lobbying.

unanswered questions of the gender movement. Instead, it aims to flag potential avenues for future scholarship by scholars far better versed in economic theory than I am. My intention is to show how, ultimately, derogations of gender rights in trade-partner countries could unfairly benefit the competition, thereby warranting U.S. trade protections.

My first example builds on the current gender argument that, owing to trade-related inequities, women must increasingly turn to informal sectors for employment opportunities. I would restructure that argument. I would begin by highlighting that informal sectors produce tradeable goods, including "many export sectors dominated by global value chains."[324] I would argue that informal work enables firms to "shift the costs and risks of production…onto workers."[325] Consequently, because "women are more likely to be concentrated in informal work,"[326] I would argue that efforts should be made under the trade agenda to ensure that women have equal access to employment opportunities in the formal sector. Otherwise, competitor foreign firms unfairly benefit from the cheaper costs of informal-sector production chains.

My second example builds on the wage-gap argument.[327] Rather than focusing on the impact of disparate pay on women workers, I would focus on the effects of lower wages on the costs of production and competition. The World Bank has recently studied the impact of wage gaps and has confirmed that "[c]ountries with larger gender wage gaps have been shown to have higher comparative advantage in labor-intensive production…".[328] I would argue that wage gaps are prominent in manufacturing, where research has shown that "the low wages paid to women workers have allowed the final product prices to be lower than they would otherwise have been…"[329] Further, as Susan Joekes points out, similar gender gaps exist in other trade sectors such as agriculture[330] and services.[331] I would conclude that trade provisions should promote gender-related regulatory standards to decrease wage discrimination and the associated profits to discriminating foreign

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[324] *See* Stephanie Barrientos, Naila Kabeer, and Naomi Hossain, *The Gender Dimensions of the Globalization of Production* 1 (Policy Integration Department, World Commission on the Social Dimension of Globalization, International Labour Office, Working Paper No. 17, 2004).

[325] *Id*.

[326] *Id*.

[327] *See, e.g.,* Osterreich, *supra* note 294, at 58-59.

[328] *See* World Bank, *Women and Trade: The Role of Trade in Promoting Gender Equality* 47 (2020); s*ee also* World Bank/WTO Joint Report, *supra* note 284, at 47 ("Countries with larger gender wage gaps have been shown to have higher comparative advantage in labor-intensive production.").

[329] *Id*. at 59 (quotations omitted).

[330] *See* Joekes, *supra* note 284, at 40.

[331] *Id*. at 41.

firms.

These attempts are difficult. Significant holes remain in the data and, in particular, the types of trade provisions that could sufficiently counter discriminatory practices, particularly given that those practices are less about government-controlled national laws than they are about firm-level behavior. The recent innovation in USMCA extending labor-rights enforcement at the firm level provides some hope of future firm regulation but only time will tell how those provisions play out in practice. A more significant obstacle to refining these trade-related arguments, however, is that it requires a showing that women's equality raises the costs of production. That is an uncomfortable exercise, particularly for rights advocates who argue that women's equality is in the interests of all stakeholders.

### *C. Tensions between international rights law and U.S. gender norms*

The above sections argue that, to be successful in U.S. trade policy, gender-rights advocates must resituate gender arguments in terms germane to trade. I concede that my proposals are hardly conclusive and, standing alone, are unlikely to present a successful case of rights inclusion. The scales are further tipped against inclusion when policy considerations are taken into account. More concretely, the potential for incoherence described in Part III is significant in the gender context.

To illustrate that incoherence, the following sections describe the conflicting legal standards contained in international rights instruments, in this case, those contained in CEDAW and the ILO's Equal Remuneration Convention (No. 100) ("ILO Convention No. 100"), and U.S. domestic legislation and jurisprudence.[332] Those conflicts center on definitions of equal pay, policies concerning data and privacy rights, and scope of legal protection.

#### 1. Definitions of Equal Pay

Both international rights instruments, ILO Convention No. 100 and CEDAW, regulate equal pay within the framework of nondiscrimination and gender. They each define equal pay as "equal remuneration for work of equal

[332] For a critique of the Trump Administration's policy agenda, *see generally* Helen Hershkoff & Elizabeth M. Schneider*, Sex, Trump and Constitutional Change*, 34 CONST. COMMENT 43 (2019).

value."[333] The United States flatly disagrees with this definition.[334]

The U.S. Equal Pay Act of 1963 (EPA)[335] prohibits discrimination by employers on the basis of sex in the wages paid for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions…"[336] Rather than examine whether jobs of equal value provide equal pay, U.S. federal courts have consistently held that claims of "equal value" are not cognizable under the EPA.[337] Courts instead examine whether the pay was for "substantially equal work,"[338] a standard criticized by scholars for providing "weaker protection" than provided for under the ILO Convention No. 100.[339]

Scholars have also pointed to numerous procedural obstacles to the enforcement of pay equity in the United States,[340] including the ease and prevalence of case dismissal under summary judgment[341] and the high evidentiary thresholds in federal court.[342] The concept of equal pay is a crucial element to the gender movement. Significant divergencies in the applicable standards to equal pay will have severe consequences on gender objectives and legal obligations.

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[333] ILO, EQUAL REMUNERATION CONVENTION, 1951 (NO. 100) art. 1(b) [hereinafter, "CONVENTION NO. 100"]; CEDAW*, supra* note 2, at art. 1.

[334] For a comparison of U.S. laws to ILO Convention No. 100, *see also* Weissbrodt et al., *supra* note 39, at 1874-1875.

[335] 29 U.S.C. § 206(d)(1).

[336] 29 C.F.R. §1620.13(a) (2013).

[337] *See, e.g.,* Gerlach v Mich. Bell Tel. Co., 501 F. Supp. 1300, 1316 (6th Cir. 1980) (dismissing Title VII claim of discrimination on the basis of an "equal value" claim because it did not provide a cognizable theory under the EPA); *Waterman v NY Tel. Co.* 1984 U.S. Dist. LEXIS 19093 at 11-12 (2nd Cir. 1984) (rejecting plaintiff's assertion that equal value to employer of services of two employees rendered their positions substantially equal). *See also* Sandra J. Libeson, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L. 358, 377-78 (1995) (comparing the U.S. "comparable worth" standard under the EPA to the "equal work of equal value" standard in the European Community); Carin Ann Clauss, *Comparable Worth – The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REFORM 7, 19 (1986) ("Unlike an equal value concept, nondiscrimination does not mandate equal wages for work of equal value but instead prohibits disparate wage treatment on the basis of sex or race.").

[338] See 29 C.F.R. § 1620.13 (2013) ("The equal work standard does not require that compared jobs be identical, only that they be substantially equal.").

[339] *See, e.g.,* Weissbrodt et al., *supra* note 39, at 1875.

[340] *See, e.g.,* Hershkoff, et al., *supra* note 331, at 68-71 (describing efforts by the Trump administration to undermine pay equity laws and policies); Sylvia A. Law, *Income Disparity, Gender Equality, and Free Expression*, 87 FORD. L REV. 2479, 2489-90 (2019).

[341] *See* FED. R. CIV. P. 56(a) (entitling parties of civil claims to summary judgment, as a matter of law, if no genuine issue of material fact and law is clear).

[342] *See* Law, *supra* note 339, at 2489-90.

2. Policies Concerning Data and Privacy Rights

CEDAW and ILO Convention No. 100 both call on governments to collect and analyze statistics disaggregated by sex. Although neither instrument expressly requires the accumulation of such data, both international supervisory committees[343] have explained that the obligation of data collection is implicit in enabling effective policies to overcome discriminatory salaries and employment practices.

Scholars have similarly stressed the importance of collecting disaggregated gender data to inform trade impact assessments and policies.[344] Studies have shown success in accumulating gender data through poverty impact assessments and other *ex-ante* or *ex-post* assessments of trade agreements.[345] However, those studies turn on the willingness of governments to require businesses to provide that information. Despite their calls for gender analyses across employment sectors, that data remains scarce.[346]

Contrary to efforts under CEDAW and Convention No. 100, the Trump Administration rolled back federal authority to collect data disaggregated by

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[343] *See, e.g.,* ILO, Committee on the Examination and Application of Conventions and Recommendations (CEACR), Equal Remuneration Convention, 1951 (No. 100 – Montenegro, 107th ILC Sess. (2019) ("The Committee asks the Government to take the necessary steps to collect and analyse statistics disaggregated by sex on the levels of remuneration received by men and women in the public and private sector…"); UN Women, CEDAW, General recommendations made by the Committee on the Elimination of discrimination against women, General Recommendation No. 9 (8th Sess. 1989) [hereafter, "CEDAW, General Recommendation No. 9 "] (advising governments to "make every effort to ensure that their national statistical services responsible for planning national censuses and other social and economic surveys formulate their questionnaires in such a way that data can be disaggregated according to gender, with regard to both absolute numbers and percentages, so that interested users can easily obtain information on the situation of women in the particular sector in which they are interested.").

[344] *See, e.g.,* TRADE AND GENDER, *supra* note 316, at pp. 8, 45 ("The absence of gender-differentiated data and the difficulty of disentangling the effects of trade openness from other simultaneous changes make it even more difficult to assess all the empirical evidence.") (internal citations omitted); VON HAGEN, *supra*, note 3 at 35-38 (discussing the critical need for sex-disaggregated data in trade); Lisa Eklund & Siri Tellier, *Gender and international crisis response: do we have data, and does it matter?*, *in* DISASTERS 7 (2012) (discussing the lack in data sets disaggregated by sex despite its important to formulating humanitarian responses to crises).

[345] *See, e.g.,* TRADE AND GENDER, *supra* note 316, at 15-16.

[346] *See* World Bank/WTO Joint Report, *supra* note 284 at 20 ("A lack of sex-disaggregated data has hampered research into trade and gender links."); Sen, *supra* note 21, at 28, 35 (noting the "major gaps in gender data, a problem of poor quality and non-comparability of data over time and across countries, and uneven coverage of gender-specific indicators.").

sex.[347] Citing privacy rights, the Administration rescinded efforts by the Equal Employment Opportunity Commission (EEOC) to collect summary pay data, disaggregated by sex (and race).[348] The Federal Bureau of Information also removed data tables under the Trump Administration, contained in previous reports, concerning statistics regarding the sex, race, age, and ethnicity of victims.[349] The Administration also curtailed federal agency efforts to collect data collection from LGBTQ+ communities.[350] Given that these policies turn on the executive's preferences, the Biden Administration could resolve this conflict, although it may face opposition from business interests in the process.

3. Scope of application: Implications of *Bostock*

In the United States, the term "gender" is used synonymously with the term "sex."[351] Professor Mary Anne Case examines the distinction of those terms within the framework of U.S. gender discrimination laws and concludes that they "have long had distinct meanings, with gender being to sex what masculine and feminine are to male and female."[352] By not capturing the meaning of gender, U.S. laws have "imperfectly disaggregated…sex on the one hand and sexual orientation on the other."[353]

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[347] *See, e.g.,* Hershkoff, et al., *supra* note 331, at 68 (describing the Trump Administration's order to revise federal questionnaires to companies with over one hundred employees concerning pay rates by gender, race, ethnicity, and job category); *see also* Juli Adhikari & Jocelyn Frye, *Who We Measure Matters: Connecting the Dots Among Comprehensive Data Collection, Civil Rights Enforcement, and Equality* (Center for American Progress 2020); THE LEADERSHIP CONFERENCE EDUCATION FUND, MISINFORMATION NATION: THE THREAT TO AMERICA'S FEDERAL DATA AND CIVIL RIGHTS 4-5 (2017) [hereafter "THE THREAT TO AMERICA'S FEDERAL DATA AND CIVIL RIGHTS "] (describing recent efforts of the Trump Administration to roll back federal efforts to collect data).

[348] Letter from Neomi Rao, Administrator, Office of Information & Regulatory Affairs, Office of Management & Budget, to Victoria Lipnic, Acting Chair, Equal Employment Opportunity Commission (Aug. 29, 2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf; THE THREAT TO AMERICA'S FEDERAL DATA AND CIVIL RIGHTS, *supra* note 317, at 4.

[349] *See* Clare Malone & Jeff Asher, *The First FBI Crime Report Issued Under Trump is Missing a Ton of Info*, FiveThirtyEight.com (Oct. 27, 2017), https://fivethirtyeight.com/features/ the-first-fbi-crime-report-issued-under-trump-is-missing-a-ton-of-info/.

[350] *See, e.g.,* U.S. COMMISSION ON CIVIL RIGHTS, ARE RIGHTS A REALITY: EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT, Nov. 19 STAT. REP. 66 (2019).

[351] *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 1(1995).

[352] *Id*.

[353] *Id*.

During USMCA negotiations, advocates for gender, sexual orientation and gender identity (SOGI), and LGBTQ+ rights grew optimistic[354] when the United States adopted a new provision to eliminate discrimination in employment "on the basis of … sexual orientation, gender identity, and caregiving responsibilities….[355] Scholars hoped that this commitment would incentivize stronger legislative protections[356] concerning gender identity than provided under Title VII of the Civil Rights Act of 1964 ("Title VII"), a statute whose inadequacies in that area have long attracted criticism.[357]

To stay any expectation of legislative reform, however, the United States also included a footnote to the text stipulating that:

> The United States' existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article.[358]

In other words, although the USMCA adopted "new" protections concerning SOGI discrimination, the Trump Administration took pains to preserve nations laws and jurisprudence.[359]

The attempt to limit USMCA's SOGI commitments by footnotes could not have come at a worse time for the Trump Administration. While USTR was negotiating USMCA, in October 2019, the Supreme Court considered three related cases, combined into one decision, *Bostock v. Clayton County*.[360] Those cases commonly addressed whether Title VII's ban

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[354] *See* Jean Galbraith & Beatrix Lu, Gender-Identity Protection, Trade, and the Trump Administration: A Tale of Reluctant Progressivism, YALE L. J. FORUM 49- 51 (2019) (discussing initial optimism surrounding USMCA's new discrimination provision).

[355] *See* UMCA, *supra* note 31, at art. 23.9.

[356] *See infra*, Part IV.C(3).

[357] For scholarship demanding broader gender protections in Title VII, *see* Derek Demeri, *Who Needs Legislators? Discrimination Against Sex Workers is Sex Discrimination Under Title VII*, 72 Rutgers L. Rev. [forthcoming] (2020) (proposing that discrimination against sex workers be protected against under Title VII); Regina Lambert Hillman, *LGBT Employees: The Need for Consistency, Certainty & Equality Post*-Obergefell, 6 Belmont L. Rev. 1, 4 (2019); Kris Franklin, Sarah Chinn, *Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases*, 32 BERK. J. GENDER, L. & JUST. 1, 13 ("One of the more fraught areas of law around transgender people and their rights at present remains those claims rooted in Title VII.") (2017). *See, e.g.,* Tara Law, *Trump Administration Asks Supreme Court to Permit Employment Discrimination against Transgender Workers*, 2019-2020 SUP. CT. PREV. 569, 569 (2019) (discussing efforts by the Department of Justice to prompt the Supreme Court to hold that Title VII does not protect transgender workers.).

[358] *See* UMCA, *supra* note 31, at art. 23.9, n. 15.

[359] For a discussion of the implications of *Bostock* for USMCA, *see infra* Part IV.C(3).

[360] *Bostock*, 140 S. Ct. 1731 (2020).

on sex discrimination in the workplace protects against discrimination on the basis of sexual orientation and gender identity. In its amicus brief filed in August 2019, the United States government urged the Supreme Court to deny petitioners' claims.[361] In forming its argument against inclusion, the Trump Administration argued that "[t]he ordinary meaning of 'sex' is biologically male or female; it does not include sexual orientation."[362] It urged the Court to hold that Title VII's "plain language" made clear that Congress did not intend to extend protections to employment discrimination because of sexual orientation.[363]

The Supreme Court disagreed.[364] Instead, it held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."[365] Reversing precedent, the Court held that "[a]n employer who fires an individual merely for being gay or transgender defies the law."[366]

The procedural impact of *Bostock* on USMCA's SOGI protections is unclear. On behalf of the Administration, USTR finalized the text of the USMCA, including its footnote incorporating Title VII protections, and submitted the implementing legislation to Congress on December 13, 2019.[367] USMCA was thus out of the Administration's hands. Congress enacted the implementing bill for USMCA on January 29, 2020, which expressly endorses the labor-rights commitments, and presumably the accompanying footnotes in the Labor Chapter of USMCA.[368] The Supreme Court issued its *Bostock* decision on June 15, 2020. USMCA entered into force two weeks later, on July 1, 2020,[369] without comment or further changes.

The Court's holding in *Bostock* has important implications for the United States under USMCA. The commitment to implement policies to

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[361] *See* Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No 17-1623, at 3 [hereafter, "US Amicus Brief"].

[362] *Id*. at 9.

[363] *Id*. at 12.

[364] *Bostock*, 140 S. Ct. 1747.

[365] *Id*.

[366] *Id*. at 1754.

[367] *See* USMCA, *supra* note 31.

[368] Pub. L. 116-113 §701 (Jan. 29, 2020) (expressly incorporating "the obligations under chapter 23 of the USMCA (relating to labor)."). U.S. courts have held that trade agreements such as USMCA are considered final once their implementing bills have been submitted to Congress. *See, generally* Public Citizen v. U.S.T.R., 5 F.3d 549, 553 (1993)(holding that the President has not taken final action until it submits implementing legislation to Congress).

[369] *See* WHITE HOUSE, Proclamation to Take Certain Actions Under the United States-Mexico-Canada Agreement Implementation Act and for Other Purposes, para 2 (June 29, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-take-certain-actions-united-states-mexico-canada-agreement-implementation-act-purposes/.

protect workers against discrimination on the basis of gender identity are binding.[370] If the United States fails to apply Title VII to protect workers per *Bostock* in the future, a trade partner could, depending on trade nexus, bring a case to dispute settlement under USMCA.[371]

Did the Administration not have time to remove its footnote reference? If it did have time, did its failure to add further language telegraph an acceptance of the holding for U.S. trade law purposes? Or did that failure telegraph the Executive's assumption that *Bostock* has no bearing on the statutory references in its trade agreements? At the time of writing, the Administration has not issued any clarifications about *Bostock*'s impact on USMCA or its trade policy moving forward.

### *D. Cooperation and Technical Assistance*

The above sections demonstrate potential drawbacks of incorporating gender rights as binding and sanctionable commitments in U.S. trade law, particularly given the risk that those rights would reflect U.S. laws and jurisprudence and not the rights set out in CEDAW and Convention No. 100. Perhaps acknowledging that those risks exist within their national frameworks, Canada and Chile – both staunch advocates of gender rights protections in trade agreements – have exempted their gender chapter from their agreement's dispute settlement machinery.[372] Their approach demonstrates the appropriate middle ground between the binding and sanctions-based provisions advocated in the current discourse and refraining from any gender-rights protections.

Rather than focus on the enforcement side of trade, gender-rights advocates should focus on trade's ability to redistribute resources and its potential to accumulate data. Doing so would allow them to focus on inequality without the risk of undermining international rights law through competing standards. It might also absolve rights advocates of having to conceptualize and advance economic arguments of unfair competition. Below, I explain those alternative approaches.

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[370] *See* USMCA, *supra* note 31, at art. 23.9 ("each Party *shall* implement policies…") (emph. added).

[371] *See id*. at art. 31.2; 31.8(3) (indicating that commitments under the Labor Chapter are subject to dispute settlement unless otherwise stated).

[372] *See* AGREEMENT TO AMEND THE FREE TRADE AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE REPUBLIC OF CHILE, CAN.-CHILE (June 5, 2017). Currently, however, U.S. trade agreements subject all of the rights it incorporates – labor and environmental – to the same dispute mechanism as any other provision in the agreement. If the United States followed the Canada-Chile example and included a gender chapter but excluded it from dispute settlement, it would continue to treat rights within its trade agreements disparately.

1. Mandatory Cooperative Provisions

When the United States negotiated the USMCA Labor Chapter, it introduced several provisions to facilitate and formalize cooperation between the trade partners on labor-related matters.[373] Some of those provisions focus specifically on gender rights within the principle of nondiscrimination based on gender in employment.[374] Specifically, under Article 23.12 (Cooperation), paragraph 5(j), the trade parties agree that they "may develop cooperative activities in the following areas":

> (j) addressing gender-related issues in the field of labor and employment, including:
>
> (i) elimination of discrimination on the basis of sex in respect of employment, occupation, and wages,
>
> (ii) developing analytical and enforcement tools related to equal pay for equal work or work of equal value,
>
> (iii) promotion of labor practices that integrate and retain women in the job market, and building the capacity and skills of women workers, including on workplace challenges and in collective bargaining,
>
> (iv) consideration of gender issues related to occupational safety and health and other workplace practices, including advancement of child care, nursing mothers, and related policies and programs, and in the prevention of occupational injuries and illnesses, and
>
> (v) prevention of gender-based workplace violence and harassment;

Those provisions illustrate a greater comfort in aligning U.S. laws and practices with international norms on a *cooperative* basis. For example, its reference in subparagraph (ii) to develop tools related to "work of equal value," a term that is, once again, not cognizable under U.S. domestic law.[375]

Rather than transpose these provisions into binding and sanctionable commitments, U.S. policymakers should expand and improve them. First,

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[373] *See* USMCA, *supra* note 31, art. 23.12.
[374] *Id*.
[375] *See supra* Part IV.C(a).

they should make these commitments mandatory.[376] Doing so would remove the discretionary nature of voluntary cooperation agreements that, in their current form, ignite political sensitivities and power balances. If they are mandatory, those commitments would be institutionalized.

Second, policymakers should include cooperation on the additional barriers to women's participation in trade referenced earlier. That cooperation could entail exploring ways to: (i) remove barriers to accessing technology such as cell phones; (ii) generate sex-aggregated data in employment sectors; (iii) advance studies on culturally-appropriate, affirmative-action programs; and (iv) provide targeted assistance to encourage the formalization of informal sectors of employment.

2. Side Agreements for Support Mechanisms

In the labor context, recent U.S. trade agreements include side agreements containing binding, prescriptive legislative commitments *ex ante* to protect rights. Beyond those commitments, side agreements have also enabled the parties to identify specific support mechanisms to facilitate rights observance. In the United States-Vietnam side agreement to the TPP,[377] for example, the parties agreed to establish a mandatory government review mechanism,[378] an expert committee that included a member of the ILO,[379] and a specific provision for funding technical assistance in Vietnam.[380]

In future agreements, the United States could negotiate similar side agreements devoted to supporting mechanisms concerning gender rights. Those mechanisms could stipulate to a committee of experts composed of representatives of the governments and representatives of the ILO, CEDAW, and other relevant U.N. organizations to facilitate cohesion with international rights. They could also include the participation of multilateral organizations such as the previously mentioned gender-trade groups at the World Bank and the OECD to align efforts with contemporary research and initiatives. Finally, the United States could offer to fund technical assistance programs to enhance women's participation in trade sectors.

Although the above recommendations focus on a potential gender chapter, they would also benefit extant trade-plus provisions. For example, the incoherence between the ILO's body of international labor law and U.S. laws and practices described earlier could be mitigated by a committee of

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[376] *See, e.g.,* USMCA, *supra* note 31, at art. 23.12(5) ("The Parties *may* develop cooperative activities…".).

[377] US-VN Plan, *supra* note 264.

[378] *Id*. at sec. V.A.

[379] *Id*. at sec. V.B.3.

[380] *Id*. at sec. VI.

experts that included ILO representatives.

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The U.S. trade agenda is concerned with protecting its citizens and industries from unfair competition and, as a result, incorporates certain limited rights as binding and sanctionable commitments. By focusing on rights as the ends and not as the means, advocates currently fail to situate gender rights within that concern. And yet, they have persuasively made the case that trade exposes and may amplify distributional inequalities between women and men. Beyond the framework of binding and sanctionable commitments, there is space and opportunity for gender-rights protection in trade law. Through mandatory cooperative provisions and trade side agreements, U.S. trade agreements may complement the international rights regime by redistributing some of trade's gains.

At the time of writing, U.S. trade policy is not focused on sharing its benefits but rather on punishing its trade competitors.[381] That could soon change. The Biden Administration has already signaled its intention of taking a more inclusive approach to trade. Some Congressional members have already taken tentative steps to protect gender rights in trade,[382] including a proposed bill to amend the GSP program to include new eligibility criteria for human rights and gender equality.[383] Those efforts may face resistance, however. In its recent report,[384] the U.S. Government Accountability Office (GAO) noted the testimony of USTR officials that U.S. trade policies "focus on expanding access and opportunity to trade for all people, regardless of their sex."[385] Those officials, according to the report, did not plan to "alter their approach."[386]

The Biden Administration might nevertheless provide new opportunities

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[381] *See* Meyer, *supra* note 58 at 190 (discussing the Trump Administration's attempts to mitigate the effects of its "trade war with China."); Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STANFORD L. REV. 1097, 1117 (2019) (describing the Trump Administration's use of tariffs); Cherie O. Taylor, *Twenty-First Century Trade Policy: What the U.S. Has Done & What it Might do*, 23 CURRENTS INT'L TRADE L.J. 49, 51-54 (2019) (reviewing the Trump Administration's aggressive use of trade arsenal).

[382] *See, e.g.,* Rep. Loretta Sanchez, *When it Comes to Free Trade Policy, Human Rights should be a Game Changer*, 52 HARV. J. ON LEGIS 343, 344 (2015) ("The United States's fundamental national values demand that it makes human rights central to trade policy.").

[383] *See* 116TH CONG., 2ND Sess., ''Women's Economic Empowerment in Trade Act of 2020'' (introduced by Senators Casey and Cortez Masto).

[384] GOVERNMENT ACCOUNTABILITY OFFICE, OBSERVATIONS ON WHETHER WOMEN'S RIGHTS AND ECONOMIC INTERESTS ARE PROTECTED OR PROMOTED BY U.S. TRADE PREFERENCE PROGRAMS, GAO-21-190 (Dec. 2020).

[385] *Id*. at 14.

[386] *Id*. at 27.

for rights advocates. It is thus all the more critical for the policy that undergirds trade law to be deliberate and correct. There is potential to advance rights through trade agreements, but there is also potential to weaken the international rights regime. Policymakers must consider and weigh those possibilities. Potential for conflict across legal regimes should render rights governance through sanctionable trade commitments the exception and not the norm.

## CONCLUSION

International rights governance is complex. Trade law offers teeth and legitimacy that international rights law lacks. It also, however, threatens the governance of rights, both horizontally and vertically, as governments grapple with reconciling incoherent and potentially competing legal standards.

The U.S. trade agenda has never claimed to be an international-rights platform. It seeks to regulate trade to ensure fair competition and protect its national industries and workers. Consequently, the United States incorporates international rights only if those rights are germane to its trade objectives. That restriction ensures that trade does not encroach upon and risk undermining the international rights regime, constitutional procedures, and democratic processes. That restriction is thus critical and significant, even though its results in a disparate treatment of rights in trade legislation.

I am not proposing a rights-trade divorce. But we must stop trying to inject international rights law into binding and sanctionable trade law beyond the rights intrinsically linked to trade and to national interests. By exploring alternative trade provisions such as capacity building and cooperative exchanges, we will find better ways to legitimize international rights while preserving the integrity of our rights and trade systems. Meanwhile, U.S. trade law may redistribute resources and collect data concerning a broader spectrum of rights, all while sticking to its own governance lane.