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The Disparate Treatment of Rights in U.S. Trade

Desirée LeClercq

Cornell University, School of Industrial and Labor Relations & Cornell Law School

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THE DISPARATE TREATMENT OF RIGHTS IN U.S. TRADE

*Desirée LeClercq**

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 into U.S. trade agreements, they have refused to incorporate gender rights and broader human rights. The rationale behind the United States's 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 into U.S. trade policy. Properly understood, U.S. policymakers incorporate some rights into 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 domestic 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.

* Proskauer Employment and Labor Law Assistant Professor of International Labor Law, Cornell University, School of Industrial and Labor Relations & Associate Member of the Law Faculty, Cornell Law School. The author would like to thank Renata Amaral, Steve Charnovitz, Lance Compa, Gary Fields, Jack Getman, Ed Gresser, Kevin Kolben, Simon Lester, Sandra Polaski, Jan Yves Remy, Bob Shepard, Paula Tavares, and Chantal Thomas for helpful discussions on early drafts, as well as participants at the Midyear Meeting of the American Society of International Law (ASIL), the Cornell ILR School faculty workshop, and the International Business Law Scholars' Roundtable hosted by Brooklyn Law School and ASIL's International Economic Law Interest Group. I would also like to thank Suzanne Amy Cohen for her invaluable library assistance. Finally, I would like to thank the fantastic editors at the *Fordham Law Review* who worked tirelessly on improving this piece while juggling other responsibilities during a global pandemic. Any remaining errors are my own. Nothing in this Article is reflective of the views of any institution within which I have worked.

I wouldn't really say that we started a lot of trade wars. I don't think that's accurate. We really have 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 Representative¹

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1. Faisal Islam, *We're Proud of What We've Done, Says Trump's Trade Chief*, BBC NEWS (Dec. 17, 2020), <https://www.bbc.com/news/business-55345826> [<https://perma.cc/Q9ND-D4TA>] (quoting former United States Trade Representative Robert Lighthizer).

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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, such as by protecting the equal opportunities of women and 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 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

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.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (describing "human rights"); INT'L LAB. ORG., DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW-UP 7 (2d ed. 2010) (June 18, 1998), 37 I.L.M. 1237, 1237-38 (1998) [hereinafter 1998 DECLARATION] (describing labor rights); United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979), 1249 U.N.T.S. 13 (1979) [hereinafter CEDAW], <https://www.un.org/womenwatch/daw/cedaw/cedaw.htm> [<https://perma.cc/98MH-E78D>] (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.*, *The United States and Environmental Protections in the TPP*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Jan. 2014), <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/January/The-US-and-Environmental-Protections-in-the-TPP> [<https://perma.cc/4PXB-67K5>] ("[W]e can continue to call on TPP partners to join us in achieving the high environmental standards being proposed and advocated by the United States."). Collectively, this Article refers to rights and standards as "international rights." I acknowledge that trade agreements regulate other nontraditional 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 AFFS. 209, 215 (2011). This Article focuses exclusively on the disparate treatment of social rights.

3. *See generally, 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 (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 IMPACTS 1* (Mattia Wegmann et al. eds., 2014) ("Economic policy, including trade policy and trade policy related instruments . . . have often impacted and benefited men and women differently.").

4. *See infra* Part III.

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 to be intuitive, but it 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 on which they track, namely, between the State’s role to mitigate harm within its borders 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 both domestically and abroad)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 policy 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 implications for broader rights advocacy, such as gender rights, 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 the requirements for international treaties.¹¹ The Treaty Clause

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.

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 Treaty-making*, 8 TEMP. INT’L & COMPAR. L.J. 257, 299–300 (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”).

prescribed by Article II of the Constitution¹² 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” authority or Trade Promotion Authority (TPA), Congress has agreed to vote either in favor of or in opposition to trade agreements entered into by the executive, further simplifying that process.¹⁶

Those bifurcated procedures¹⁷ 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 insuring against conflict of laws and making the process more politically palpable for Congress than the treaty process.¹⁸ However, doing so raises two fundamental yet underexplored drawbacks, both of which cast a new and foreboding light on the current efforts to inject a greater spectrum of international rights in trade law.

First, the consequences of the United States’s 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

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, 330 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 287–88 (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 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. Pub. L. No. 93-618, §§ 151–153, 88 Stat. 1978, 2001–08 (1975) (codified as amended at 19 U.S.C. §§ 2191–2193). For a comparison of processes between treaties, including self-executing and non-self-executing and congressional-executive agreements, see Hathaway, *supra* note 15, at 1317–23.

17. See Hathaway, *supra* note 15, at 1238 (“[T]he 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.”).

18. See LUISA BLANCHFIELD, CONG. RSCH. SERV., RL33652, *THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): CONGRESSIONAL ISSUES 4* (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 III.

(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 negotiations and enforcement—often criticized for being secretive and exclusive of stakeholder participation²⁴—raises serious issues of democratic subjugation.

By failing to acknowledge these drawbacks, rights advocates continue to ask Congress and the executive to juxtapose international rights law's normative content with trade law's economic and enforcement

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 1237–38.

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 COMPAR. LAB. L. & POL'Y J. 347, 361–67 (2015); Philip Alston, *Labor Rights Provisions in US Trade Law: "Aggressive Unilateralism,"* 15 HUM. RTS. Q. 1, 18 (1993) (raising the possibility that the United States would hold trade partners to lower standards than would be judged at the ILO). *But see* Stacie E. Martin, *Labor Obligations in the U.S.-Chile Free Trade Agreement*, 25 COMPAR. LAB. L. & POL'Y J. 201, 203–04 (2004) (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 poised to influence the standard for labor to a significant degree").

24. Recently, the Labor Advisory Committee for Trade Negotiations and Trade Policy, which advises the Office of the United States Trade Representative (USTR), complained that the Trump administration was not following its own guidelines to engage with outside advisers. See *Labor Advisers: Administration Not Following Consultation Rules on UK Talks*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE (July 16, 2020, 1:44 PM), <https://insidetrade.com/daily-news/labor-advisers-administration-not-following-consultation-rules-uk-talks> [<https://perma.cc/P5RZ-GMQF>]; see also Alston, *supra* note 23, at 22 (criticizing the manner in which the United States evaluates the compliance of its trade partners to rights commitments in free trade agreements 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.

entitlements,²⁵ or “teeth.”²⁶ Most recently, during the “NAFTA 2.0” negotiations,²⁷ 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

25. See 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” with rights advocates’ “hav[ing] only moral suasion to carry their message . . .”); 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* 1, 31–35 (Thomas Risse et al. eds., 1999) (describing rule-consistent behavior as the final phase in movement for rights change); Raj Bhala & 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 & COMPAR. L. 299, 302 (2019) (advocating for stronger trade provisions that establish binding and enforceable “hard law” obligations to respect the rights of LGBTQIA+ persons); Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT’L ORG. 593, 594–95 (2005) (proposing that rights enshrined in trade agreements are an attractive alternative to human rights agreements); Suzanne 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, 249–50 (2018).

26. See generally Susan Ariel Aaronson, *Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO*, 6 WORLD TRADE REV. 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. See Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 L. & POL’Y INT’L BUS. 165, 166–67 (1993) (discussing the economic incentives derived from trade that encourage firms to exploit rights); Hafner-Burton, *supra* note 25, at 595; Harlan Grant Cohen, *What is International Trade Law For?* 336–39 (Inst. Int’l L. & J., Working Paper No. 2018/6, 2019).

27. See Press Release, U.S. Trade Representative, USTR Releases Updated NAFTA Negotiating Objectives (Nov. 17, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/november/ustr-releases-updated-nafta> [<https://perma.cc/N83W-UKDQ>].

28. See *Trade and Gender in Free Trade Agreements: The Canadian Approach*, GOV’T OF CANADA, https://www.international.gc.ca/trade-commerce/gender-equality-egalite-genres/trade_gender_fta-ale-commerce_genre.aspx?lang=eng [<https://perma.cc/NY3V-24U4>] (last visited Aug. 9, 2021); Chrystia Freeland, Canadian Foreign Affs. Minister, Address on the Modernization of the North American Free Trade Agreement (NAFTA) (Aug. 14, 2017) (advocating making NAFTA “more progressive” by “adding a new chapter on gender rights, in keeping with our commitment to gender equality”).

29. See *UPS Pushes WTO Plurilateral Initiative to Combat Gender Discrimination*, INSIDE U.S. TRADE’S WORLD TRADE ONLINE (Aug. 28, 2019, 5:17 PM), <https://insidetrade.com/daily-news/ups-pushes-wto-plurilateral-initiative-combat-gender-discrimination> [<https://perma.cc/X36B-URQQ>] (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”). For a description of feminist engagement behind multilateral efforts to advance gender rights through various fora, see Gita Sen, *Gender Equality and Women’s Empowerment: Feminist Mobilization for the SDGs*, 10 GLOB. POL’Y 28, 30–32 (2019). For further information concerning multilateral efforts to advance women’s rights in trade, see *infra* Part IV.

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

30. *About USTR: Mission of the USTR*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/about-ustr> [<https://perma.cc/KH7X-8Q5U>] (last visited Aug. 9, 2021).

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). See United States-Mexico-Canada Agreement, art. 25.2(b), July 1, 2020 [hereinafter USMCA], <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/2PLC-QRHV>]. Recently, the Canadian government explained the various ways in which USMCA provides further, albeit indirect, benefits for women. See *Ambassadors, Commerce Official Tout USMCA's Benefits for Women Entrepreneurs*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE (July 28, 2020, 4:22 PM), <https://insidetrade.com/trade/ambassadors-commerce-official-tout-usmca%E2%80%99s-benefits-women-entrepreneurs> [<https://perma.cc/7RX2-DFFD>].

32. See, e.g., Hoe Lim, *Trade and Human Rights: What's at Issue?*, 35 J. WORLD TRADE 275, 275 (2001) (referencing the expansive literature advancing various "theoretical, empirical and policy issues" concerning the relationship between trade and human rights); 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). Some scholarship includes labor rights under the broader umbrella of human rights. See, e.g., EMILIE M. HAFNER-BURTON, *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. GLOB. L. BUS. 91, 97 (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 of which are currently regulated through labor-rights provisions. See USMCA, *supra* note 31, 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. 113, 113 (2000) (examining "the doors [trade] agreements may open for the enforcement of indigenous rights").

34. See, e.g., Comm'n on Hum. Rts., *Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. Doc. E/CN.4/2002/54, at 11–17 (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., Stephen Kim Park, *Talking the Talk and Walking the Walk: Reviving Global Trade and Development After Doha*, 53 VA. J. INT'L L. 365, 400–13 (2013); Chantal Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT'L L. REV. 1399, 1400 (2003) ("This essay stakes a claim for attentiveness to the complexities of globalization in the contemporary, and of trade as a solution to poverty.").

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 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 disagreement³⁸—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, but 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 into U.S. trade law and demonstrates that policymakers incorporated labor provisions to protect American workers and businesses from unfair competition.

36. See DEP'T OF LAB. & OFF. OF U.S. TRADE REPRESENTATIVE, *STANDING UP FOR WORKERS: PROMOTING LABOR RIGHTS THROUGH TRADE* 14–48 (2015) [hereinafter *STANDING UP FOR WORKERS*] (describing the legislative and practical advancements in trade-partner countries to promote and respect international labor rights). See generally Alston, *supra* note 23, at 23 (acknowledging that rights advocates “remain supportive” of the incorporation of rights into U.S. trade agreements despite the procedural drawbacks).

37. See *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 walkout 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 R. Bellace, *The ILO and the Right to Strike*, 153 INT'L LAB. REV. 29, 56–59 (2014).

39. See USMCA, *supra* note 31, art. 23.3(1)(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, 1868–72 (2014) (pointing out inconsistencies between the U.S. and ILO interpretations of the right to strike).

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.

Part III pivots to my normative claim, which is rooted in broader concerns of incoherence across the trade and rights regimes. It argues that if 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 U.S. TRADE AGENDA

Over the years, rights advocates have 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 theorists⁴³ 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 these recent attempts, for example, shed critical light on the potential benefits of trade-plus provisions, they remain anchored in dominant

40. See, e.g., SANDRA POLASKI ET AL., HOW TRADE POLICY FAILED U.S. WORKERS—AND HOW TO FIX IT 33–36 (2020) (criticizing labor provisions for failing to adequately protect workers while advocating that those provisions be strengthened).

41. *Id.* at 8–26 (describing how trade agreements have harmed U.S. workers).

42. See *supra* notes 32–35 and accompanying text.

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, 387–94 (2008). But see Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 OXFORD J. LEGAL STUD. 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 justify the legal regime to those who live with and under it, thus embedding the rules within a particular society and its politics.”).

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 rights, under a cloud of uncertainty, when the incorporation of those rights in trade could strengthen rights in trade-partner countries.

A. The Theories of U.S. Trade

After the Civil War, U.S. trade policy developed 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 has 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 toward 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.

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

47. *See infra* Part I.B.1.

48. *See* DOUGLAS A. IRWIN, *CLASHING OVER COMMERCE* 1 (2017).

49. *Id.*

50. *Id.* at 62.

51. *See* U.S. CONST. art. I § 8, cls. 1, 3.

52. *Id.* art. II, § 2, cl. 2.

industries a competitive advantage.⁵³ It is a neoliberal, hands-off approach to trade. At its core, the theory of free trade relies on the notion that unfettered trade will lift all sectors (or, as Presidents John F. Kennedy and Bill 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 compared to other products.⁵⁶

Free trade enables countries to specialize in producing those goods and services to subsequently 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 production 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 World Trade Organization (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 an idea, difficult to translate into pocketbook benefits or increased opportunities.”⁵⁹ The abstract promises of free trade left too many tangible costs to “the other interests that were being trampled in the rush towards 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

53. See, e.g., Dani Rodrik, *What Do Trade Agreements Really Do?*, 32 J. ECON. PERSPS. 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 AFFS. 1, 1 (1994) (describing concerns with the “disastrous isolationist trend” in U.S. economic policy and its relationship to trade wars).

54. See Hal S. Shapiro, *A New Liberal Trade Policy Foundation*, 9 ILSA J. INT’L & COMPAR. L. 431, 437 (2003) (citing President John F. Kennedy, Address in the Assembly Hall at the Paulskirche in Frankfurt (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, 55 U.N.T.S. 194, art. I [hereinafter GATT].

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

60. *Id.*

61. See, e.g., POLASKI ET AL., *supra* note 40, at 4 (advocating for new “key priorities” for the Biden administration, including the renegotiation “of all trade rules that constrain pro-worker and pro-environment domestic policy agendas”).

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 Postwar trade policymakers began to recognize the importance of the State’s role 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 also had an *obligation* to act as mediators⁶⁴ 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 did not similarly incorporate human rights.⁷⁰ Instead, governments regulated rights through a parallel tract of international legal instruments, primarily through treaties adopted by the United Nations 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, the United States in the 1990s began to incorporate certain rights protections into its trade agreements—

62. See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379, 385–88 (1982) (drawing from Karl Polanyi’s work).

63. *Id.* at 385.

64. *Id.* at 391–93.

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.* at 337–38 (discussing the “international economic law machinery” that grew apart from human rights norms and advocating for “the developed world to rediscover the normative vision of international human rights law and make it its own”).

71. *Id.*

72. See *supra* Part I.A.1.

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’ theories 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 into trade instruments by countries, such as the United States, simply reflect a fear that “trading with the South and its abundance of unskilled labor” puts their “own unskilled at risk.”⁷⁵ Other economists, such as Dani Rodrik⁷⁶ 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 discourse. The term “protection” and the conception of embedding social rights to serve national interests have become inherently 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 inclusion of rights to the detriment of the rights 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 in trade policy.

73. See Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151, 157–58 (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 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., ELLIOTT & FREEMAN, *supra* note 25, at 17 (acknowledging the concern of developing countries that “higher labor standards could reduce growth by threatening the trade prospects of poor countries”); Dani Rodrik, *How to Save Globalization from Its Cheerleaders* 26 (Ctr. for Econ. Pol’y Rsch., Working Paper No. 6494, 2007).

77. See Dominick Salvatore, *Protectionism and World Welfare: Introduction*, in PROTECTIONISM AND WORLD WELFARE 2 (1993) (discussing the rise of new protectionism in the mid-1970s).

78. See *infra* Part II.A.

B. Labor Rights Protection in U.S. Trade

The below sections trace the adoption of international labor rights in U.S. trade law. I will 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 eighteenth 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 manufacturing 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 a key trade lobbyist,⁸² was internally conflicted. Individual unions prioritized the interests of their specific industries, resulting 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 Great Depression.⁸⁵ That policy only began to change in the wake of war, when competing concerns such as access to foreign markets and the

79. See Alexander Hamilton, *Report on the Subject of Manufactures*, in STATE PAPERS AND SPEECHES ON THE TARIFF 1, 1 (1892).

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 Albert Gallatin, *Memorial of the Committee of the Free Trade Convention*, in STATE PAPERS AND SPEECHES ON THE TARIFF 108, 144–45 (1892).

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

82. See *infra* Part I.B.3.

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 (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).

achievement of global peace outweighed the need for domestic market protection.⁸⁶

2. The Free Trade Era

The twentieth century brought profound changes to U.S. trade policy. The protectionist policies underlining the post–Civil War years of the U.S. trade agenda clashed with new policies designed 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

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

86. *Id.* at 455 (describing the postwar U.S. 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 214, 226–27 (1893) (disagreeing with the proponents of high tariffs that protectionism was needed to augment wages and 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).

90. *See id.* at 57; IRWIN, *supra* note 48, at 7.

91. Protecting domestic industries has been a pronounced objective throughout the United States’s 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 wage 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 the 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.

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 the postwar recession.⁹⁶ The United States suffered from intense deflation; unemployment rose and imports and exports fell sharply.⁹⁷ Its trade policy quickly reverted to tried-and-true protectionism and culminated in the Smoot-Hawley Act, which remains the most controversial piece of legislation in American trade policy.⁹⁸

The Smoot-Hawley Act⁹⁹ increased tariff rates by approximately 42 and 59 percent.¹⁰⁰ This increase had a catastrophic impact on global trade as trade partners competed to out-tariff one another.¹⁰¹ 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.¹⁰² Soon after enacting the Act, however, other countries began to retaliate by enacting their own tariffs. Global trade came to a stop.¹⁰³ The United States’s deficit grew and exports plunged, all while the economy stumbled under the weight of the Great Depression.¹⁰⁴

3. The Embedded Liberalist Era

The Great Depression and postwar era set the stage for “the most momentous shift in US trade policy since the nation’s founding.”¹⁰⁵ President Franklin D. Roosevelt used his 1944 State of the Union address to emphasize the critical importance of trade in raising global standards of

93. *Id.* at 277.

94. *Id.* at 324 (quoting the former chairman of the Committee on Finance, 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 332 (quoting the Democratic platform, which was urging President Woodrow Wilson to lower tariffs in 1909).

96. *Id.* at 349.

97. *Id.*

98. *Id.* at 371.

99. Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930) (codified as amended in scattered sections of 19 U.S.C.).

100. See GRESSER, *supra* note 89, at 75.

101. See, e.g., *id.* at 78 (discussing retaliation against the increased tariff on eggs by “dozens” of countries, including Canada).

102. See, e.g., *id.* at 65 (“The tariff still provided half the government’s revenue in 1912.”).

103. *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.”).

104. Although scholars associate the Smoot-Hawley Act with the Great Depression, such 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.”); see also IRWIN, *supra* note 48, at 394.

105. See IRWIN, *supra* note 48, at 489.

living and lowering the possibility of war and injustice.¹⁰⁶ He urged Congress to support a trade policy that would form “the economic basis for the secure and peaceful world we all desire.”¹⁰⁷ Roosevelt’s trade agenda thus shifted from focusing narrowly on the conditions of competition to a broader focus on peace,¹⁰⁸ awakening the potentials of a socially conscious trade policy.¹⁰⁹

That socially conscious trade policy manifested in efforts to gain effective rights protections on a multilateral platform. Rather than focus on unilateral efforts, as is prominent today, the United States participated in the 1948 Havana Charter for an International Trade Organization.¹¹⁰ That draft charter recognized “that unfair labour conditions, particularly in production for export, create difficulties in international trade, and [that] accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.”¹¹¹ Efforts to adopt the International Trade Organization (ITO) failed, however, and the United States’s efforts to include similar multilateral commitments in the GATT were similarly unsuccessful.¹¹²

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.¹¹³ The merger unified the positions and interests of its diverse trade union membership and enabled the labor movement to capitalize on Roosevelt’s trade agenda.¹¹⁴ Out of the gate, the AFL-CIO supported the gradual removal of trade barriers on two conditions.¹¹⁵ First, workers adversely impacted must be granted adjustment assistance. Second, trade negotiations must comply with “international labor affairs.”¹¹⁶

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

106. 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 [T]hey had virtually no foreign competitors.”).

107. See GRESSER, *supra* note 89, at 23, n.16 (quoting PUB. PAPERS, Franklin Roosevelt, *The President Urges the Congress to Strengthen the Trade Agreements Act* (1945)).

108. See IRWIN, *supra* note 48, at 495 (“[F]oreign policy was arguably a crucial factor behind the political support for the postwar trade agreements program.”).

109. 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.”).

110. U.N. Conference on Trade and Employment, *Havana Charter for an International Trade Organization*, U.N. Doc. E/Conf.2/78 (Mar. 24, 1948).

111. *Id.* ch. 2, art. 7.

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

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

114. *Id.*

115. See Daniel J.B. Mitchell, *Labor and the Tariff Question*, 9 INDUS. RELS. 268, 271–72 (1970).

116. *Id.* at 271.

interests in protecting its national union members. However, that concern would not permeate in trade policy or advocacy for another forty years. Instead, efforts to invoke international standards were actually intended to “tak[e] wages out of [the] competition.”¹¹⁷ Reference to international labor standards was, counterintuitively, a nationally focused nomenclature.¹¹⁸

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-agreement powers.¹¹⁹ In 1962, Congress removed authority to negotiate trade agreements from the U.S. Department of State 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.”¹²⁰ The State’s role in regulating social rights fell to the wayside, eclipsed by interagency power battles.¹²¹

By the mid-1960s and into the 1970s,¹²² it was clear to Americans, including labor unions, that the U.S. trade agenda had not lived up to its potential to improve living standards.¹²³ Increased imports, particularly from Japan and Germany,¹²⁴ threatened American jobs and firms while simultaneously incentivizing many assembly operations to relocate to other countries—for example, to Mexico.¹²⁵ As a result, workers were displaced and union organizing, despite efforts to the contrary, began to decline.¹²⁶

117. *Id.* at 272.

118. 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.” *Hearings Before the Committee on Ways and Means, House of Representatives*, 91st Cong. 2d Sess. on Tariff and Trade Proposals, 1726–27 (1970).

119. See Claussen, *supra* note 13, at 330.

120. IRWIN, *supra* note 48, at 526.

121. *Id.*

122. See, e.g., Jefferson Cowie, *National Struggles in a Transnational Economy: A Critical Analysis of US Labor’s Campaign Against NAFTA*, 21 LAB. STUD. 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.”).

123. 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 417 (attributing Carter’s protectionist measures in the 1970s to “increased protectionist pressures emanating largely from labor”).

124. 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).

125. *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 113, at 29 (discussing the range of companies that moved production to Mexico due to the lower wages there).

126. 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

Recognizing that America's world trade position had properly become an issue of increasing public "concern," the AFL-CIO became more involved in trade lobbying in the 1970s.¹²⁷ It heavily influenced new legislation to prevent the loss of any American jobs due to offshoring.¹²⁸ It also released a 1971 report¹²⁹ cautioning that, unless trade policy changed, the United States would become "a permanent debtor in the world market within a very few years."¹³⁰ Among other policies, the report described Mexico's maquiladora program,¹³¹ under which U.S. companies received financial incentives so long as they only hired Mexican workers and exported products from Mexico.¹³² Citing 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."¹³³

The 1970s thus witnessed an resurgence of trade restrictions and protectionism, albeit with a new trade arsenal.¹³⁴ 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.¹³⁵

The resulting Trade Act of 1974¹³⁶ 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" authority or TPA.¹³⁷ 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 ninety days of submission.¹³⁸ In delegating its authority, however, Congress maintains some control over trade substance by identifying the necessary trade

neighbors Korea and Taiwan; then, more powerfully, as Japanese heavy industry pressed upon American steel, electronics, and cars."); MINCHIN, *supra* note 113, at 16.

127. See MINCHIN, *supra* note 113, at 29–30 (describing the "dissonance between labor and the White House over trade" in the early 1970s).

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

129. INDUS. UNION DEP'T, NEEDED: A CONSTRUCTIVE FOREIGN TRADE POLICY 3 (Stanley H. Ruttenburg & Assocs. eds., 1971).

130. *Id.*

131. See *id.* at 61.

132. See *id.*

133. *Id.*

134. 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 (arguing that as a result of the Trade Act of 1974, "possibilities provided for the use of protective measures that have come to be increasingly utilized").

135. 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 332–33.

136. Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended in scattered sections of the U.S.C.).

137. *Id.* §§ 151–153.

138. *Id.*

objectives that the executive must negotiate to obtain congressional approval.¹³⁹

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”¹⁴⁰ It consequently codified congressional concerns that violations of labor standards in trade-partner countries could “substantially disrupt or distort international trade.”¹⁴¹

Shortly thereafter, Congress in the early 1980s passed several unilateral trade instruments—not trade agreements—linking trade benefits to worker rights.¹⁴² For example, the 1984 Caribbean Basin Initiative (CBI) eliminated tariffs for most products exported into the United States¹⁴³ based on seven mandatory criteria¹⁴⁴ and eleven additional discretionary criteria.¹⁴⁵ One discretionary criterion examines whether beneficiary governments afford workers “reasonable workplace conditions” and “the right to organize and bargain collectively.”¹⁴⁶ The CBI did not elaborate on this criterion, however,¹⁴⁷ and Congress made clear that it was “not the authority or

139. *Id.*; see also IRWIN, *supra* note 48, at 554.

140. 19 U.S.C. § 2131.

141. See Carol Pier, *Workers' Rights Provisions in Fast Track Authority, 1974–2007: An Historical Perspective and Current Analysis*, 13 *IND. J. GLOB. LEGAL STUD.* 77, 79–80 (2006) (quoting S. REP. NO. 93-1298, at 7233–34 (1974)) (describing concerns expressed in the Senate Committee on Finance 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).

142. As opposed to trade agreements, which entail mutual obligations and market incentives, unilateral agreements involve the opening of one market—in these cases, the U.S. market—on the condition that certain criteria are met. Those instruments included the Caribbean Basin Initiative, the Generalized System of Preferences (GSP) (as renewed in 1984), and the Overseas Private Investment Corporation (OPIC). For a comprehensive examination of this legislation, see Lance Compa, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy Under GSP and NAFTA*, 10 *CONN. J. INT'L L.* 337, 340–42 (1995) (describing legislative initiatives behind the GSP to link trade to workers' rights); Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 *COMPAR. LAB. L.J.* 253, 259–71 (1988). 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., Don J. Pease & J. William Goold, *The New GSP: Fair Trade with the Third World?*, 2 *WORLD POL'Y 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 (Democrat of Ohio), 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 *COMPAR. LAB. L. & POL'Y J.* 1, 21–23 (2004) (describing early albeit unsuccessful efforts to champion labor rights in early trade instruments).

143. Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, tit. 2, 97 Stat. 369, 384–98 (codified as amended in scattered sections of 19, 26, and 33 U.S.C.).

144. *Id.* § 212(b).

145. *Id.* § 212(c).

146. *Id.* § 212(c)(8).

147. See Perez-Lopez, *supra* note 142, at 261.

responsibility of the U.S. to interpret or enforce ILO standards.”¹⁴⁸ The Generalized System of Preferences (GSP) was amended in 1984 to similarly introduce “internationally recognized worker rights” as a criterion for eligibility.¹⁴⁹ 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.¹⁵⁰

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. For instance, the discourse around the Omnibus Trade and Competitiveness Act of 1988 (“1988 Omnibus”) revealed ongoing discomfort with taking economic action to demand compliance with labor-rights infringements that took place in other countries.¹⁵¹

4. America’s Modern Protectionism

On the cusp of North American Free Trade Agreement (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.”¹⁵² That demand culminated into trade debates still known as “one of the most contentious and divisive trade-policy debates in US history.”¹⁵³ Labor concerns were chief among them.¹⁵⁴

In its testimony to Congress in 1991, the AFL-CIO argued that any trade agreement with Mexico should avoid “perpetuating exploitation of workers and inflicting widespread damage on the environment in Mexico.”¹⁵⁵ It noted the inevitability “that Mexican workers’ wages, their working

148. *Id.* Professor Steve Charnovitz, a program analyst for the Department of Labor (DOL) at the time, explains that the primary purpose of the workers’ rights criterion nevertheless was to strengthen international labor rights in beneficiary countries. *See* Steve Charnovitz, *Caribbean Basin Initiative: Setting Labor Standards*, MONTHLY LAB. REV., Nov. 1984, at 54, 54 (“The primary reason for the labor criterion is a concern that the labor laws and conditions in some countries would prevent the benefits of the [CBI] from reaching the workers.”).

149. *See* Pub. L. No. 98-573, 98 Stat. 2948, 3020 (codified as amended at 19 U.S.C. § 2462(c)(7)).

150. *See* Compa, *supra* note 142, at 342 (describing the GSP’s origins and labor rights).

151. *See, e.g.*, 134 CONG. REC. 20,058–60 (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).

152. *See* MARY JANE BOLLE, CONG. RSCH. SERV., 97-861 E, NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE 2 (2001).

153. *See* IRWIN, *supra* note 48, at 627.

154. *Id.* (“Furious about the prospect of expanded trade with Mexico, labor unions led the opposition.”).

155. *See* *Hearings Before the Comm. on Pub. Works and Transp.*, 102d Cong. (1991) (testimony of Lane Kirkland, American Federation of Labor and Congress of Industrial Organizations).

conditions, and their living standards are going to stay right about where they are . . . [b]ut during that time, our hopes will follow our jobs into Mexico.”¹⁵⁶

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 worker rights and minimum environmental protections.¹⁵⁷ Following up on that promise, in 1993, the United States entered into negotiations for NAFTA side agreements addressing those issues.¹⁵⁸

The resulting North American Agreement on Labor Cooperation (NAALC), which entered into force in January 1994, contains the first U.S. labor provisions.¹⁵⁹ It requires each trade party to enforce its own national labor and employment laws while promoting eleven principles concerning international worker rights.¹⁶⁰ To bring a complaint, a party had to allege a “trade-related” failure of enforcement by demonstrating a “persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards.”¹⁶¹

Reception of the NAALC was tepid, at best. The AFL-CIO criticized the side agreement for failing to incorporate binding international labor rights¹⁶² and failing to provide a coherent system of sanctions.¹⁶³ Telegraphing

156. See *Hearing Before the Comm. on Com., Sci., and Transp.*, 103d Cong., 1st Sess. 51 (1993) (statement of Thomas Donahue). 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).

157. See Bill Clinton, Governor of Arkansas, Clinton Campaign Town Meeting in Pennsylvania (June 12, 1992); Bill Clinton, Governor of Arkansas, 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).

158. The NAFTA text could not, itself, be renegotiated to include labor provisions; it had already been signed by President George H.W. Bush in December 1992.

159. See Kate E. Andrias, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 UNIV. SAN. FRAN. L. REV. 521, 523 (2003) (“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.”).

160. North American Agreement on Labor Cooperation arts. 2–3, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC] (“[E]ach Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity 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 . . .”).

161. *Id.* art. 36, § 2(2).

162. See Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 924 (1994) (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 had not ratified the relevant ILO conventions).

163. See, e.g., I.M. DESTLER & PETER H. BALINT, *THE NEW POLITICS OF AMERICAN TRADE: TRADE, LABOR, AND THE ENVIRONMENT* 19 (1999); Philip Alston, ‘Core Labour Standards’

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.¹⁶⁴

In 1998, the ILO adopted a nonbinding 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.¹⁶⁵ 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.¹⁶⁶

Meanwhile, frustrations over NAFTA negotiations resulted in an eight-year lapse in fast-track authorization.¹⁶⁷ Partially owing to the growing attention placed on international labor standards in trade agreements, Congress finally renewed fast-track authority in the Bipartisan Trade Promotion Authority Act of 2002 (“2002 TPA”).¹⁶⁸ 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.¹⁶⁹ Notably, that expansion introduced enforceable labor rights directly into U.S. trade agreements.¹⁷⁰

In addition, the TPA for the first time subjected those labor rights to the same dispute settlement mechanisms, procedures, and remedies as all other negotiating objectives.¹⁷¹ 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.”¹⁷²

On May 10, 2007, a bipartisan group of congressional leaders and the Bush administration released a joint statement colloquially known as the “May

and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457, 500 (2004) (noting the complaints concerning the NAALC).

164. See 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 314, 316 (Turner et al. eds., 2001) (“[S]tarting in the mid-1990s, a revitalized labor movement, allied with environmental, human rights, farmers, consumers, and other social action communities, began braking the Washington Consensus train.”); DESTLER ET AL., *supra* note 163, at 19 (arguing that NAFTA “galvanized” the antitrade labor movement); Compa, *supra* note 142, at 337 (characterizing the 1990s as “a period of growing international concern about the ‘linkage’ between labor rights and trade”).

165. See generally 1998 DECLARATION, *supra* note 2.

166. *Id.* at 7.

167. See Pier, *supra* note 141, at 83 (discussing how the “president did not enjoy fast track authority” from 1994 until 2002).

168. Pub. L. No. 107-120, 116 Stat. 933 (codified as amended in scattered sections of the U.S.C.).

169. 19 U.S.C. § 3802(a)(6); Pier, *supra* note 141, at 86 (pointing out that the 2002 TPA “establishes a number of overall and principal negotiating objectives on workers’ rights”).

170. See Pier, *supra* note 141, at 83.

171. 19 U.S.C. § 3802(b)(12)(G).

172. 19 U.S.C. § 3802(b)(11)(A) (emphasis added).

10th Agreement.”¹⁷³ That agreement, which Congress later codified in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015¹⁷⁴ (“2015 TPA”), explicitly tied the labor-standards negotiating to the ILO’s 1998 Declaration.¹⁷⁵ Since then, all U.S. trade agreements have incorporated the 1998 Declaration by reference.¹⁷⁶ They also have continued to limit the enforceability of those rights to a derogation carried out “in a manner affecting trade.”¹⁷⁷

By the time the United States launched negotiations for the Trans-Pacific Partnership Agreement (TPP) in 2008,¹⁷⁸ 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.¹⁷⁹ It contained enforceable side agreements with Vietnam, Malaysia, and Brunei that stipulated to specific ex ante legislative amendments to national labor legislation.¹⁸⁰ In January 2017, however, as one of his first official acts, President Donald J. Trump withdrew the United States from the TPP and, by default, nullified the three side agreements.¹⁸¹

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.¹⁸² 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.¹⁸³ It also introduces a new “Facility-Specific

173. See OFF. OF THE U.S. TRADE REPRESENTATIVE, TRADE FACTS: BIPARTISAN TRADE DEAL (2007), https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf [<https://perma.cc/6TDU-WCZE>].

174. Pub. L. No. 114-26, 129 Stat. 319 (codified as amended in scattered sections of 19 and 26 U.S.C.).

175. *Id.*

176. See generally Agustí-Panareda et al., *supra* note 23.

177. 19 U.S.C. § 3802(b)(11)(A) (listing as an overall trade objective: “ensur[ing] 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.”).

178. See Press Release, Off. of the U.S. Trade Representative, Trans-Pacific Partners and United States Launch FTA Negotiations (Sept. 22, 2008).

179. See Trans-Pacific Partnership, ch. 19, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/Y53M-8UD2>] (last visited Aug. 9, 2021).

180. See, e.g., Malaysia-United States Labour Consistency Plan, Malay.-U.S., Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labour-Consistency-Plan.pdf> [<https://perma.cc/7HPJ-7VB8>].

181. See Press Release, Off. of the U.S. Trade Representative, The United States Officially Withdraws from the Trans-Pacific Partnership (Jan. 1, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> [<https://perma.cc/P88U-2Z92>].

182. See, USMCA, *supra* note 31, ch. 23.7.

183. *Id.* Annex 23-A.

Rapid Response Labor Mechanism” (RRLM).¹⁸⁴ The RRLM enables the parties to “impose remedies” and “ensure remediation”¹⁸⁵ at covered facilities based on a good-faith belief that workers have been denied the right of freedom of association and collective bargaining.¹⁸⁶ 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 in gaining 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’s 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, this part argues 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 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 in protecting welfare through trade and the prevalence of the negative association with protectionist motives shed light on that disconnect.

As mentioned, rights scholars attempt to legitimize labor provisions in trade agreements through alternative objectives.¹⁸⁷ 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 U.S. interests.¹⁸⁸

184. See Protocol of Amendment to the Agreement Between the United States of America, the United Mexican States, and Canada, at Annex 31-A.

185. *Id.* art. 31-A.1(2).

186. *Id.* art. 31-A.2.

187. See, e.g., Kevin Kolben, *A New Model for Trade and Labor?: The Trans-Pacific Partnership’s Labor Chapter and Beyond*, 49 N.Y.U. J. INT’L L. & POL. 1063, 1065 (2017) (“The first argument in favor of labor provisions in trade agreements, and by far the least persuasive, is protectionism.”).

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

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.¹⁸⁹ That declaration was "specifically formulated not to serve protectionist ends, but rather to promote broadly accepted human rights principles."¹⁹⁰ Professor Kolben 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."¹⁹¹ 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."¹⁹² He concludes that "a 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."¹⁹³

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"¹⁹⁴ 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's 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.¹⁹⁵ For instance, the fundamental right to

189. See Kolben, *supra* note 187, at 1068.

190. *Id.*

191. *Id.*

192. *Id.* at 1066, 1068 ("The economic argument for protectionism, while enjoying a popular political resurgence, is largely discredited by economists."); see also 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]"); Christopher L. Erickson & Daniel J.B. Mitchell, *The American Experience with Labor Standards and Trade Agreements*, 3 J. SMALL & EMERGING BUS. L. 41, 43 (1999) (arguing that "[t]he level of wages 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"). 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 289, 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.

193. See Kolben, *supra* note 187, at 1069.

194. See *supra* Part I.B.

195. 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 FORDHAM INT'L L. J. 608, 643 (2000) (arguing that the procedural nature of international labor-rights programs, such as rights to association and to collective bargaining, render their benefits less apparent than, say, environmental rights).

freedom of association includes trade union participation. There is a veritable mountain of economic data linking the higher wages associated with trade union participation,¹⁹⁶ as well as prohibitions of forced and child labor,¹⁹⁷ to increased production costs.

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.”¹⁹⁸ That explicit link was required in the NAALC¹⁹⁹ and in more recent trade agreements such as USMCA.²⁰⁰ During USMCA negotiations, the AFL-CIO lobbied explicitly to remove the “manner affecting trade” criterion.²⁰¹ The United States made no such effort. Instead, and in keeping with the negotiating objectives outlined in the TPA 2015,²⁰² 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.”²⁰³

Trade and rights scholars should become comfortable with U.S. protectionist objectives. The predictions of Bhagwati²⁰⁴ and others²⁰⁵ that trade-plus provisions would be used as disguised trade arsenal have not come

196. 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 do not affect the comparative advantage of developing countries, “[o]bservance of the right to organize and bargain collectively may ultimately have more impact on wage rates”).

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

198. 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, CONG. RSCH. SERV., RS22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS 1–4 (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.”).

199. Although the exact term “manner affecting trade” was not included in the NAALC or the agreement that followed, the United States-Israel Free Trade Agreement, recourse to dispute settlement was restricted to a “trade-related” failure of enforcement. See NAALC, *supra* note 160, art. 36.

200. See USMCA, *supra* note 31, art. 23.3(1) n.4.

201. See, e.g., Cathy Feingold, *Mexico’s Labor Reform: Opportunities and Challenges for an Improved NAFTA*, AFL-CIO (June 25, 2019), <https://aflcio.org/testimonies/mexicos-labor-reform-opportunities-and-challenges-improved-nafta> [<https://perma.cc/W8T5-RZ4E>].

202. See Kathleen Claussen, *Reimagining Trade-Plus Compliance: The Labor Story*, 23 J. INT’L ECON. L. 25, 40 (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).

203. See USMCA, *supra* note 31, 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.”).

204. See *supra* Part I.A.3.

205. See Salvatore, *supra* note 77; *supra* note 77 and accompanying text.

to fruition.²⁰⁶ On the contrary, labor-rights advocates complain that USTR does not bring *enough* complaints under the labor chapters,²⁰⁷ 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.²⁰⁸ 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. In the early 1990s, the United States incorporated its first environmental standards into a NAFTA side agreement, like it had done with labor rights.²⁰⁹ Until then, and again like labor rights,

206. See DiCaprio, *supra* note 142, at 32 (noting that labor advocates have become “disillusioned with the leverage potential that labor criteria [in trade agreements] can provide” given their disuse).

207. See, e.g., POLASKI ET AL., *supra* note 40, at 33 (“[T]he 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.”).

208. See *id.*

209. See NAALC, *supra* note 160, arts. 2–3.

environmental standards had not been considered germane to the U.S. trade agenda.²¹⁰

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,²¹¹ demonstrating that Mexico's weaker regulations made it easier and cheaper for firms to do business in Mexico.²¹²

The United States negotiated the North American Agreement on Environmental Cooperation (NAAEC) to address those concerns.²¹³ The Commission for Environmental Cooperation (CEC), which was established by Canada, Mexico, and the United States to address transboundary environmental concerns in North America,²¹⁴ 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 economic subsidies by exploiting pollution havens.”²¹⁵ It further cited concerns that firms would feel pressure to avoid environmental laws to remain competitive.²¹⁶

210. See, e.g., Ignacia S. Moreno et al., *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENV'T. 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.

211. *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. & ENV’T. 551, 557 (2005) (describing domestic pressure in the United States during NAFTA negotiations with respect to the environment and 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”).

212. See Moreno et al., *supra* note 210, 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 BROOK. J. INT’L L. 1221, 1223–24 (2004) (describing the environmentalist position that trade agreements should contain stronger environmental protections to prevent a race to the bottom).

213. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480; see Moreno et al., *supra* note 210, at 420–21; David Gantz, *Addressing Environmental Protection in the United States-Mexico-Canada Agreement (USMCA)*, in WORLD TRADE AND LOCAL PUBLIC INTEREST: TRADE LIBERALIZATION AND NATIONAL REGULATORY SOVEREIGNTY 67, 72 (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” regarding the necessity of environmental protections).

214. See generally COMM’N FOR ENV’T COOP., POTENTIAL NAFTA EFFECTS: CLAIMS AND ARGUMENTS 1991–1994 (1996), <https://www3.cec.org/islandora/en/item/1692-nafta-effects-potential-nafta-effects-claims-and-arguments-1991-1994-en.pdf> [<https://perma.cc/X2XG-KJHR>].

215. *Id.* at 10 (referencing Senate testimony from 1992).

216. *Id.* (referencing U.S. media reports).

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 Wild Fauna and Flora.²¹⁷ The May 10th Agreement referenced earlier also ensured that those “various multilateral environmental agreements (MEAs)”²¹⁸ 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.²¹⁹ Recently, USMCA added new environmental provisions, including obligations to combat trafficking in wildlife, timber, and fish.²²⁰ Like labor provisions, those provisions are subject to the same dispute resolution mechanisms and potential sanctions as the other provisions in the agreement.²²¹ And, like labor, to be enforceable, derogations must have been carried out “in a manner affecting trade or investment between the Parties.”²²²

2. U.S. Trade and Human Rights

Unlike labor rights and environmental standards, human rights have not been incorporated into U.S. trade agreements by U.S. trade policymakers.²²³ The United States has omitted those provisions despite numerous reports demonstrating the deleterious impact of trade liberalization on the realization of human rights.²²⁴

217. See *Multilateral Environmental Agreements*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/environment/multilateral-environmental-agreements> [<https://perma.cc/W9VD-PRFT>] (last visited Aug. 9, 2021).

218. 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).” OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 173, at 2.

219. See Wilson, *supra* note 211, at 568–73 (mapping out subsequent environmental provisions in U.S. trade agreements).

220. See *United States–Mexico–Canada Trade Fact Sheet Modernizing NAFTA into a 21st Century Trade Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing> [<https://perma.cc/M6WC-F32C>] (last visited Aug. 9, 2021).

221. *Id.*

222. Trade Act of 2002, § 2102(b)(11)(A), 116 Stat. 933, 1000 (2002) (codified as amended at 19 U.S.C. § 3802(b)(11)(A)); USMCA, *supra* note 31, art. 24.2(1).

223. 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 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.

224. See, e.g., Off. of the High Comm’r for Hum. Rts., *Globalization and Its Impact on the Full Enjoyment of All Human Rights*, U.N. Doc. E/CN.4/RES/1999/59 (Apr. 28, 1999). J. Oloka-Onyango, a human rights advocate, has coauthored 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, Sub-Comm. on the Promotion & Prot. of Hum. Rts., *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2000/13 (June 15, 2000)

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.²²⁵ 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.²²⁶ Pointing to the nondiscrimination principles under the GATT, that literature accused the current system of restricting the policy space to impose human-rights obligations.²²⁷ 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 rights 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.”²²⁸ Conceding that human rights advocates “are not trade experts,” Lang questions whether “the human rights movement can ever instigate genuinely transformative change.”²²⁹

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.²³⁰

(preliminary report prepared by J. Oloka-Onyango & Deepika Udagama); U.N. Econ. & Soc. Council, Sub-Comm. on the Promotion & Prot. of Hum. Rts., *Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2001/10 (Aug. 2, 2001) (progress report prepared by Oloka-Onyango & Udagama); U.N. Econ. & Soc. Council, Sub-Comm. on the Promotion & Prot. of Hum. Rts., *Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/14 (June 25, 2003) (final report prepared by Oloka-Onyango & Udagama).

225. See Andrew T.F. Lang, *Re-thinking Trade and Human Rights*, 15 TUL. J. INT’L & COMPAR. L. 335, 337–39 (2007).

226. *Id.* at 340.

227. *Id.* at 343.

228. *Id.* at 336.

229. *Id.* at 376–77.

230. Although human rights are not incorporated into the TPA or into 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 N.Y.U. J. INT’L L. & POL. 651, 652 n.6 (2001) (quoting U.S. 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, 19 U.S.C. § 3703(3). The human rights criterion has received scant academic attention, perhaps confirming the lackluster focus during

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.²³¹ 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.²³² Whether other governments respect their international rights commitments does not affect the national interests of the United States.²³³ 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.”²³⁴

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.²³⁵ 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.”²³⁶ Governments may also have an interest in the well-being of foreign citizens “in order to expand trade, minimize war, and promote international stability.”²³⁷ 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.”²³⁸ In other words, national citizens and governments have legitimate interests in broader welfare but only to a certain extent.

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

congressional preparatory conferences. *See* Akech, *supra*, at 664. Since its passage, human rights advocates have complained of inadequate enforcement of the human rights criteria against noncomplying beneficiaries. *See* David Fuhr & Zachary Klughaupt, *The IMF and AGOA: A Comparative Analysis of Conditionality*, 14 DUKE J. COMPAR. & INT’L L. 125, 142 (2004).

231. *See, e.g.*, Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347, 348–49 (2004) (describing the conflicting scholarship concerning the trade-rights linkage).

232. *See* Oona Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1823 (2003).

233. *Id.*

234. *Id.*

235. *See* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 109–10 (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).

236. *Id.* at 109.

237. *Id.* at 110.

238. *Id.*

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 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.²³⁹ Once ratified, the Constitution proclaims treaties the “supreme law of the land,”²⁴⁰ raising additional concerns among Senate members over federal²⁴¹ and State²⁴² law preemption.²⁴³ The Treaty Clause

239. U.S. CONST. art II, § 2, cl. 2.

240. *Id.* 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 U.S. 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, 101 n.74, 114 (2008).

241. See, e.g., S. REP. NO. 107-9, at 24–26 (2002) (testimony of Senator Frist, raising concerns that CEDAW would conflict with the Supremacy Clause).

242. Constitutional scholars have examined the implications of the Supremacy Clause for state sovereignty and argue that separation of powers between federal and state lawmaking do not permit Congress to preempt state laws through treaties. 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 (2007) (arguing that Article VI of the U.S. Constitution does not grant Congress the authority to preempt state laws). See also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (noting that the U.S. Supreme Court has invoked separation of powers to invalidate federal action that infringed on state actions).

243. 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

thereby maintains the separation of powers necessary for a well-functioning federal system.²⁴⁴ By enabling the executive to circumvent the Treaty Clause and incorporate the substance of international treaties into binding commitments 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.²⁴⁵ Nevertheless, as the ILO points out,²⁴⁶ 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 incompatible with federal or state laws.

The incorporation of international rights into trade agreements that are inconsistent with federal²⁴⁷ and state law²⁴⁸ arguably threatens the constitutional protections concerning the separation of powers.²⁴⁹ 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.”²⁵⁰ The imbalance in lawmaking authority, she argues, provides “a means for

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 . . .”).

244. 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”).

245. See, e.g., POLASKI ET AL., *supra* note 40, at 33.

246. See *infra* Part III.B.

247. For a discussion of state obligation under U.S. trade agreements, see Charnovitz, *supra* note 11, at 303 (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”).

248. Compare *id.* at 311 (speculating on the impact of new legal obligations under trade agreements on state laws), and Kenneth J. Cooper, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. GLOB. TRADE 143, 143 (1993) (“It is well settled that the federal government can legally preempt state laws that are inconsistent with international trade agreements.”) with Long, *supra* note 244, at 242 (arguing that “because of strong federalist concerns, [the Supreme Court] has hesitated to preempt state laws”).

249. U.S. CONST. art. VI, § 2 (under the Supremacy Clause, treaties preempt state law). See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 233–40 (1824) (recognizing the hierarchy of the federal system).

250. See Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 146 (2009).

presidents to bypass the other branches of government in pursuing core policy aims.”²⁵¹

Hathaway’s caution is refuted by other trade scholars, most recently by Professor Kathleen Claussen, who argues that “TPA legislation has nearly consistently allocated *more* power to Congress and less space to the Executive.”²⁵² 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.²⁵³

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.²⁵⁴ 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.²⁵⁵ 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 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.²⁵⁶ Reverting to the labor model, we see that, contrary to those

251. *Id.*

252. *See* Claussen, *supra* note 13, at 318 (emphasis added).

253. *Id.* at 323.

254. *See, e.g., Pelosi Says USMCA Moving Forward Despite Impeachment; Trump Alleges ‘Camouflage,’* INSIDE U.S. TRADE’S WORLD TRADE ONLINE (Oct. 2, 2019, 3:17 PM), <https://insidetrade.com/daily-news/pelosi-says-usmca-moving-forward-despite-impeachment-trump-alleges-camouflage> [https://perma.cc/T2AV-7TUE].

255. 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., Ways & Means Democrats: USMCA Funding ‘Not Being Used as Intended,’* INSIDE U.S. TRADE’S WORLD TRADE ONLINE (July 24, 2020, 11:52 AM), <https://insidetrade.com/daily-news/ways-means-democrats-usmca-funding-%E2%80%9998not-being-used-intended%E2%80%99> [https://perma.cc/7VSQ-EK6N] (describing a July 23, 2020, letter signed by members of Congress 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”).

256. *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

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 into U.S. trade agreements.²⁵⁷ Federal and state laws have proven incredibly resilient to that criticism.²⁵⁸

On the federal level, the U.S. Supreme Court, in 2002, ruled in *Hoffman Plastics Compounds, Inc., v. NLRB*²⁵⁹ that an undocumented worker, owing to his immigration status, was not entitled to backpay for lost wages after being illegally fired for union organizing.²⁶⁰ 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.²⁶¹ 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."²⁶² It directed the United States to take measures "including amending the legislation to bring it into conformity with freedom of association principles."²⁶³

To date, *Hoffman* continues to authorize restrictive remedies for undocumented workers,²⁶⁴ who should enjoy the same remedies as any other

LAW FOR THE TWENTY-FIRST CENTURY 268, 277–79 (Richard Bales & Charlotte Garden eds., 2020) (discussing efforts to improve U.S. labor laws through NAFTA).

257. 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, 150–56 (2009) (arguing that U.S. laws and practices concerning private prison labor infringe on the prohibitions of forced labor contained in the ILO conventions).

258. 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 PERSPS. 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 crossover is voluntary and at the discretion of trade negotiators, it marks a potential avenue for the reconciliation of normative interpretations and rules.

259. 535 U.S. 137 (2002).

260. 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.").

261. See ILO Comm. on Freedom of Association, Case No. 2227 (U.S.), Rep. No. 332, ¶ 554 (2003). 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.* ¶ 578. The ILO responded by pointing out the mandate of the Committee on Freedom of Association, which expressly authorizes the committee to "examine complaints alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions." *Id.* ¶ 600.

262. *Id.* ¶¶ 609–10.

263. *Id.* ¶ 613.

264. 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

worker under the ILO's norms.²⁶⁵ The ILO has also raised concerns with respect to the United States's treatment of graduate and teaching assistants²⁶⁶ and public sector workers²⁶⁷ and its interpretation of the definition of "supervisor."²⁶⁸

On the state level, two out of the six most recent 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. One case involved a New York state law restricting the right to strike for public servants.²⁶⁹ The other concerned a North Carolina law that prohibited public sector employees from entering into a collective bargaining agreement with any city, town, county, or municipality.²⁷⁰ 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."²⁷¹ To date, the state governments have taken none of those steps.

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

By incorporating international rights into 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 U.S. 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's provisions before it, prescribe specific legislation, with exact language,²⁷² for laws and

of that decision. See Amy K. Myers, *What Non-Immigration Lawyers Should Know About Immigration Law*, 66 ALA. LAW. 437, 439 (2005) (describing efforts of various federal agencies to distinguish backpay remedies under immigration statutes from IRCA following *Hoffman*).

265. See Case No. 2227, *supra* note 261, at 609–13.

266. See, e.g., ILO Comm. on Freedom of Association, Case No. 2547 (U.S.), Rep. No. 350, ¶ 804 (2008) (disagreeing with the exclusion of graduate students and research assistants from the protections afforded under the National Labor Relations Act).

267. See, e.g., ILO Comm. on Freedom of Association, Case No. 2683 (U.S.), Rep. No. 343, ¶ 794 (2006) (expressing concerns about the exclusion of airline workers from freedom of association protections).

268. See, e.g., ILO Comm. on Freedom of Association, Case No. 2524 (U.S.), Rep. No. 356, ¶ 70 (2010) (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").

269. See ILO Comm. on Freedom of Association, Case No. 2741 (U.S.), Rep. No. 383 (2014).

270. See ILO Comm. on Freedom of Association, Case No. 2460 (U.S.), Rep. No. 344 (2007).

271. *Id.* ¶ 998; Case No. 2741, *supra* note 269, ¶ 21.

272. See United States-Viet Nam Plan for Enhancement of Trade and Labour Relations, U.S.-Viet., art. II, § B(4), Feb. 4, 2016 [hereinafter US-VN Plan], <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labor-Relations.pdf> [<https://perma.cc/RWG2-F52K>]; see also *id.* art. II, § H(1)

constitutions.²⁷³ 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 Professor Kolben aptly describes,²⁷⁴ 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.²⁷⁵ 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.²⁷⁶ The United States's prescription of labor laws 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.²⁷⁷

Although the ILO has not publicly protested the expropriation of its fundamental labor rights, it also never intended for this to happen.²⁷⁸ Instead, it intended for governments to implement the rights contained in the 1998 Declaration within the supervision of its unique tripartite system.²⁷⁹ That

(requiring the government to include the term "debt bondage" into its labor code).

273. *See id.*

273. *See id.*

274. *See supra* Part II.A.

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

276. *See supra* Part II.

277. Following the ratification of USMCA, Mexican labor unions filed in district courts over 100 petitions, which are set to be considered by Mexico's highest court. Those petitions challenge the constitutional bases for the USMCA-driven legislative reforms. *See Mexican Supreme Court to Consider Challenges of New Labor Law*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE (June 25, 2020, 9:00 AM), <https://insidetrade.com/daily-news/mexican-supreme-court-consider-challenges-new-labor-law> [<https://perma.cc/J7PL-SVET>]. 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.

278. *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, 449–51 (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).

279. *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 a trade agreement, an unintended consequence of the declaration's vague drafting. *Id.* at 451, 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

system requires the input of governments, workers, and employers.²⁸⁰ Within the ILO, governments are held accountable to their commitments under an umbrella of multilateral consensus and social-partner participation.²⁸¹ By (stark) contrast, the negotiation and supervision of those same rights within the trade context is carried out by USTR, without the input of other governments or stakeholders, in a closed-door, secretive process.²⁸²

Even within the ILO, the implementation 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.²⁸³ The United States, on the other hand, may enforce the commitments to the ILO's fundamental labor rights as strictly as it pleases.²⁸⁴ 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 threat of economic sanctions.

Despite my pessimistic predictions of inevitable conflict, the United States has thus far enforced its labor provisions in conjunction with the ILO's system of rights. Under its trade agreement, for example, the United States negotiated a Colombian Action Plan Related to Labor Rights (“Colombian Action Plan”).²⁸⁵ The Colombian Action Plan resulted in new national

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.*

280. *Id.* at 448 (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 INT'L LAB. ORG., RULES OF THE GAME: AN INTRODUCTION TO THE STANDARDS-RELATED WORK OF THE INTERNATIONAL LABOUR ORGANIZATION 105–09 (4th ed. 2019) [hereinafter RULES OF THE GAME]. See also Lee Sweptson, *Crisis in the ILO Supervisory System: Dispute over the Right to Strike*, 29 INT'L J. COMP. LAB. L. & INDUS. RELS. 199, 201–03, 214–17 (2013) (highlighting the potential drawback of a supervisory machinery that requires consensus to function).

281. RULES OF THE GAME, *supra* note 280, at 105–09.

282. See Hathaway, *supra* note 250, at 144 (arguing that U.S. trade negotiations “are made by the President alone and are quietly revealed to Congress and the public months after they have already entered into force”); 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 SUFFOLK TRANSNT'L L. REV. 519, 521 (2012); Michelle Limenta, *Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation*, 10 N.Z. Y.B. INT'L L. 73, 73 (2012) (describing a letter sent by legal scholars to USTR criticizing “the lack of transparency in the . . . negotiating process”); Rodrik, *supra* note 53, at 84 (arguing that trade “negotiations are typically secret—a feature that draws the ire of labor, public-interest groups, and many politicians”).

283. See ELLIOTT & FREEMAN, *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.”).

284. 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”); Agusti-Panareda et al., *supra* note 23, at 361–67 (discussing the implications of the incorporation of ILO standards into trade agreements for the purpose of coherence).

285. See *Colombian Action Plan Related to Labor Rights: Accomplishments to Date*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press->

legislation sanctioning employers for rights infringements, among other labor-rights improvements.²⁸⁶ 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.²⁸⁷ Nevertheless, the potential for the disparate treatment of international rights exposes additional underexplored drawbacks of regulating international rights through trade.

IV. APPLYING THE LESSONS TO GENDER RIGHTS

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 into 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 within 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 inconclusive 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,²⁸⁸ the World Bank,²⁸⁹ the United Nations,²⁹⁰ and the Organisation for Economic Co-operation and

office/fact-sheets/2011/june/colombian-action-plan-related-labor-rights-accomplishmen [https://perma.cc/J4T5-K85D] (last visited Aug. 9, 2021).

286. *Id.*

287. For a general review of trade-related labor-rights accomplishments during the Obama administration, see *STANDING UP FOR WORKERS*, *supra* note 36.

288. See *Women and Trade*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/womenandtrade_e/womenandtrade_e.htm [https://perma.cc/6ZXH-MGHU] (last visited Aug. 9, 2021).

289. See *Trade & Gender*, WORLD BANK (Mar. 8, 2019), <https://www.worldbank.org/en/topic/trade/brief/trade-and-gender> [https://perma.cc/69QH-NSMC].

290. See, e.g., *Trade, Gender and Development: Advocating Inclusive and Gender-Sensitive Economic Development on a Global Level*, UN WOMEN, <https://www.unwomen.org/en/docs/2013/7/trade-gender-and-development-inclusive-and->

Development (OECD),²⁹¹ 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.²⁹² By regulating gender rights, trade law could remove obstacles and redistribute trade's benefits.²⁹³ In its 2014 report, the U.N. examined various national trade policies and highlighted the "gender-differentiated outcomes of trade policy."²⁹⁴ It concluded that "[g]ender blind' trade and macroeconomic policies will no doubt exacerbate existing gender inequalities instead of solving them."²⁹⁵ 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.²⁹⁶

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.²⁹⁷ The WTO's "Women and Trade" campaign argues, for

gender-sensitive-economic-development [<https://perma.cc/9XUZ-G58T>] (last visited Aug. 9, 2021); *Gender and Trade*, UNITED NATIONS CONF. ON TRADE & DEV., <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2743> [<https://perma.cc/FDW4-KTVY>] (last visited Aug. 9, 2021).

291. See *Trade and Gender*, OECD, <https://www.oecd.org/trade/topics/trade-and-gender/> [<https://perma.cc/GU7P-9H8C>] (last visited Aug. 9, 2021).

292. See generally, e.g., Susan Joekes, *A Gender-Analytical Perspective on Trade and Sustainable Development*, in UNITED NATIONS CONF. ON TRADE & DEV., *Trade, Sustainable Development and Gender, United Nations Conference on Trade and Development* 33 (July 12–13, 1999); WORLD BANK GRP. & WORLD TRADE ORG., *WOMEN AND TRADE: THE ROLE OF TRADE IN PROMOTING GENDER EQUALITY* (2020), [hereinafter World Bank/WTO Joint Report], https://www.wto.org/english/res_e/booksp_e/women_trade_pub2807_e.pdf [<https://perma.cc/AT65-Z8PX>] ("[O]pportunities . . . can be seized by making trade more inclusive.").

293. 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) ("[I]f international trade agreements are to meet their stated objectives [to raise standards of living and to promote sustainable development], gender inequality must be addressed.").

294. UNITED NATIONS CONF. ON TRADE & DEV., *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 [<https://perma.cc/V53Q-ZC7i>].

295. *Id.* at 22.

296. See, e.g., AMRITA BAHRI, *MAINSTREAMING GENDER CONSIDERATIONS IN FREE TRADE AGREEMENTS: "BUILDING BACK BETTER" IN POST-COVID-19 WORLD 7* (2020).

297. See, e.g., WORLD TRADE ORG., *GENDER AWARE TRADE POLICY: A SPRINGBOARD FOR WOMEN'S ECONOMIC EMPOWERMENT* (2017), https://www.wto.org/english/tratop_e/devel_e/a4t_e/gr17_e/genderbrochuregr17_e.pdf [<https://perma.cc/GE8Q-GM6M>]; Jane

example, 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.”²⁹⁸ An International Monetary Fund 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.”²⁹⁹

Second, it argues that trade exacerbates the wage gap, particularly in export-oriented sectors.³⁰⁰ According to the ILO, for instance, women on average earn 20 percent less than men.³⁰¹ The wage gap, rights advocates argue, reflects gender discrimination rather than differences in education, skills,³⁰² or productivity.³⁰³

Third, it argues that societal constructs prevent women from participating equally in trade.³⁰⁴ Restrictions in access to education³⁰⁵ and deep-rooted employment bias deter women from accessing jobs in tradeable sectors.³⁰⁶

Korinek, *Trade and Gender: Issues and Interactions* 7–8 (OECD Trade Policy, Working Paper No. 24, 2005) (summarizing the literature that establishes “an inverse relationship between gender inequality and growth”); Diane Elson et al., *Introduction: Why a Feminist Economics of Trade?*, in *THE FEMINIST ECONOMICS OF TRADE* 1, 1 (Irene van Staveren et al. eds., 2007) (arguing that policies such as trade appear to be “gender neutral” but “will be gender biased if it fails to take into account the gender differences that permeate economies”).

298. See *Women and Trade*, *supra* note 288.

299. See Ata Can Bertay et al., *Gender Inequality and Economic Growth: Evidence from Industry-Level Data* 21 (Int’l Monetary Fund, Working Paper No. 20/119, 2020).

300. 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, 91 (2007) (“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.”); World Bank/WTO Joint Report, *supra* note 292, at 129–31 (describing residual gaps in gender wages across countries and sectors).

301. INT’L LAB. ORG., *WORLD EMPLOYMENT SOCIAL AND OUTLOOK: TRENDS 2018*, at 11 (2018).

302. See, e.g., Shaienne Osterreich, *Gender, Trade, and Development: Labor Market Discrimination and North-South Terms of Trade*, in *THE FEMINIST ECONOMICS OF TRADE* 55, 58–59 (2007).

303. See Blecker & Seguino, *supra* note 300, at 91.

304. 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 percent of countries have laws in place that limit women’s participation in trade); World Bank/WTO Joint Report, *supra* note 292, 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.”).

305. See, e.g., BAHRI, *supra* note 296, at 19 (discussing impediments to women’s access to education online stemming from their lack of access to the necessary technological equipment); see also World Bank/WTO Joint Report, *supra* note 292, at 96 (“Women are frequently excluded from the benefits of trade because they lack the skills or education required, particularly in developing countries.”).

306. See, e.g., Barbara Bailey, *Coordinating Compliance Between Gender Rights and Trade: Issues and Opportunities*, in *GENDER EQUALITY RIGHTS AND TRADE REGIMES: COORDINATING COMPLIANCE* 3, 5 (Pitman B. Potter et al. eds., 2012) (acknowledging, with reference to CEDAW, “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”); World Bank/WTO Joint Report, *supra* note 292,

Consequently, job opportunities for women in many developing countries are limited to low-skilled³⁰⁷ and low-paying jobs³⁰⁸ or the informal sector.³⁰⁹ 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.³¹⁰ These constraints and obstacles also ensure that women cannot transition into higher-skilled, higher-paying jobs.³¹¹

Fourth, the literature argues that women are less likely to own or use a phone in developing countries; this inhibits them from receiving quick information and updates concerning markets and trade.³¹² If women do not have access to trade-relevant information, they cannot benefit from trade opportunities.³¹³ 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.³¹⁴

Fifth, it notes that governments engaged in international trade often cut taxes and tariffs to attract investment and exports.³¹⁵ 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.”³¹⁶

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

at 11 (“[W]omen still face a wide range of barriers that prevent them from gaining from greater trade opportunities.”).

307. See World Bank/WTO Joint Report, *supra* note 292, at 11 (“Because women hold a disproportionate share of lower-skill jobs, they can be particularly vulnerable to trade-related shocks . . .”).

308. See, e.g., UNITED NATIONS CONF. ON TRADE & DEV., TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES 6 (Anh-Nga Tran-Nguyen & Americo Beviglia Zampetti eds., 2004), https://unctad.org/system/files/official-document/edm20042_en.pdf [<https://perma.cc/W9LN-DPXD>].

309. See, e.g., Heather Gibb, *Gender Equality and Trade: Coordinating Compliance Between Regimes*, in GENDER EQUALITY RIGHTS AND TRADE REGIMES: COORDINATING COMPLIANCE xxiii, xxv (Pitman B. Potter et al. 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.”).

310. See Bertay et al., *supra* note 299, at 8.

311. See, e.g., Korinek, *supra* note 297, at 4.

312. *Id.* at 12. 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 292, at 99–100 (finding that “women have less access to digital technologies than men”).

313. See VON HAGEN, *supra* note 3, at 22.

314. See Korinek, *supra* note 297, at 12–13.

315. *Id.*

316. See VON HAGEN, *supra* note 3, at 20 (“[W]omen and gender experts should be included in trade negotiations and prior consultations in order to mainstream gender perspectives into the agreements.” (typeface altered)).

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."³¹⁷ 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.³¹⁸ Suzanne Zakaria, for example, proposes a "sanctions enforcement mechanism" for model gender equality agreements.³¹⁹ 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.³²⁰

Moreover, even the primary argument—that trade harms women—suffers from certain weaknesses. That argument presupposes causation between trade and distributional injustice when the data suggests societal and behavioral norms are far more complex.³²¹ 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."³²²

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.

317. See generally, e.g., Constance Z. Wagner, *Looking at Regional Trade Agreements Through the Lens of Gender*, 31 ST. LOUIS. U. PUB. L. REV. 497 (2012) (despite the article's title, Wagner provides no definition of the term "gender lens"). See also e.g., Kate Andras, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 U.S. FLA. L. REV. 521, 543 (2002) (describing how the NAALC would be interpreted "through a gender lens" and, later, clarifying that this interpretation applies to analysis "with respect to gender").

318. See, e.g., Padideh Ala'i & Renata Vargas Amaral, *The Importance (and Complexity) of Mainstreaming Gender in Trade Agreements*, CTR. FOR INT'L GOVERNANCE INNOVATION, (Oct. 10, 2019), <https://www.cigionline.org/articles/importance-and-complexity-mainstreaming-gender-trade-agreements> [<https://perma.cc/Z94D-P49U>] (arguing that most "gender-related provisions are couched in best endeavour and cooperation language" and that the provisions "appear in a variety of places in text and are not enforceable").

319. See Zakaria, *supra* note 25, at 262–63.

320. *Id.* at 263.

321. Steve Ratner, *International Law and Political Philosophy: Uncovering New Linkages*, PHIL. COMPASS, Feb. 2019, at 1, 6–7 (arguing that one of the flaws in distributional injustice literature is that it fails to discern patterns of causation).

322. *Id.* at 7.

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 participation³²³ or level of trade negotiation.³²⁴ 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 protections through trade legislation.³²⁵

Contrary to that theory,³²⁶ 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,³²⁷ has previously been led by three women³²⁸ and, at the time of writing, is led by Katherine Tai.³²⁹ Many USTR deputies and directors who oversee the legal and policy trade offices have been women, including the lead negotiator for

323. See Andras, *supra* note 317, 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 a “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 (stating that “within specific negotiations of TAs/RTAs women are not sufficiently included and consulted”).

324. See, e.g., Jan Yves Remy, *Closing the Gender Divide Through Trade Rules*, CTR. FOR INT’L GOVERNANCE INNOVATION (Oct. 9, 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”); see also VON HAGEN, *supra* note 3, at 20 (“[W]omen and gender experts should be included in trade negotiations and prior consultations in order to mainstream gender perspectives into the agreements.”); *Trade & Gender*, *supra* note 289 (“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.”).

325. See *id.* at 11 (noting that “[t]he impacts of gender (in)equality on trade outcomes are still underexplored”).

326. 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.

327. See *About USTR: Mission of the USTR*, *supra* note 30.

328. Carla Hills (1989–1993), Charlene Barshefsky (1997–2000), and Susan Schwab (2006–2009) also served as USTR. 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, and the United States-Oman FTA. Also during Ambassador Schwab’s term, several countries joined the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR). Katherine Tai was nominated in early December 2020. See *Biden Cabinet Nominations Announcement*, C-SPAN (Dec. 11, 2020), <https://www.c-span.org/video/?507202-2/biden-cabinet-nominations-announcement&live=&vod=https://perma.cc/WE8C-55EM>.

329. See *Katherine Tai, Ambassador*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/biographies-key-officials/katherine-tai-ambassador> [<https://perma.cc/VU43-H2CH>] (last visited Aug. 9, 2021).

multilateral affairs.³³⁰ Furthermore, trade unions and other trade lobbyists are healthily composed of women.³³¹

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 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. For starters, I would highlight that informal sectors produce tradable goods, including “many export sectors dominated by global value chains.”³³² Informal work enables firms to “shift the costs and risks of production . . . onto workers.”³³³ Consequently, because “women are more likely to be concentrated in informal work,”³³⁴ 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.³³⁵ 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

330. See Debra Steger, *Gender Equality in the WTO: The Need for Women Leaders*, in *RESHAPING TRADE THROUGH WOMEN’S ECONOMIC EMPOWERMENT* 57, 57 (2018) (“The United States led the way with women trade representatives . . .”); see also *Biographies of Key Officials*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/biographies-key-officials> [<https://perma.cc/8HRE-6X7T>] (last visited Aug. 9, 2021) (showing that in June 2020, five out of twenty-two assistant U.S. trade representatives were women).

331. See MINCHIN, *supra* note 113, at 241–44 (2017) (discussing the rise in the participation of women in lobbying efforts within the AFL-CIO, the federation of labor unions that has been critically active in U.S. trade policymaking). Women in leadership roles in various corporations have also lobbied the U.S. government to strengthen gender protections in U.S. trade agreements. 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 INT. GRPS. & ADVOC. 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.

332. See Stephanie Barrientos et al., *The Gender Dimensions of the Globalization of Production* 1 (Pol’y Integration Dep’t, World Comm’n on the Soc. Dimension of Globalization, Working Paper No. 17, 2004).

333. *Id.*

334. *Id.*

335. See, e.g., Osterreich, *supra* note 302, at 58–59.

that “[c]ountries with larger gender wage gaps have been shown to have higher comparative advantage in labor-intensive production”³³⁶ 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”³³⁷ Further, as Susan Joeques points out, similar gender gaps exist in other trade sectors, such as agriculture³³⁸ and services.³³⁹ I would conclude that trade provisions should promote gender-related regulatory standards to decrease wage discrimination and the associated profits to discriminating foreign 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 tipped further 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 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the ILO’s Equal Remuneration Convention, 1951 (No. 100) (“ILO Convention No. 100”)—and U.S. domestic legislation and jurisprudence.³⁴⁰ Those conflicts center on definitions of equal pay, policies concerning data and privacy rights, and the scope of legal protection.

336. World Bank/WTO Joint Report, *supra* note 292, at 47.

337. Osterreich, *supra* note 302, at 59.

338. See Joeques, *supra* note 292, at 40.

339. *Id.* at 41.

340. For a critique of the Trump administration’s policy agenda, see Helen Hershkoff & Elizabeth M. Schneider, *Sex, Trump and Constitutional Change*, 34 CONST. COMMENT 43 (2019).

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 value.”³⁴¹ The United States flatly disagrees with this definition.³⁴²

The Equal Pay Act of 1963³⁴³ (“Equal Pay Act”) 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”³⁴⁴ 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 Equal Pay Act.³⁴⁵ Courts instead examine whether the pay was for “substantially equal work,”³⁴⁶ a standard criticized by scholars for providing “weaker protection” than provided for under the ILO Convention No. 100.³⁴⁷

Scholars have also pointed to numerous procedural obstacles to the enforcement of pay equity in the United States,³⁴⁸ including the ease and prevalence of case dismissal under summary judgment³⁴⁹ and the high evidentiary thresholds in federal court.³⁵⁰ The concept of equal pay is a crucial element to the gender movement. Significant divergences in the standards applicable to equal pay will have severe consequences on gender objectives and legal obligations.

341. ILO EQUAL REMUNERATION CONVENTION, 1951 (No. 100), art. 1(b); CEDAW, *supra* note 2, art. 1.

342. For a comparison of U.S. laws to ILO Equal Remuneration Convention, see Weissbrodt & Mason, *supra* note 39, at 1874–75.

343. Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206).

344. *Id.* § 3, 77 Stat. at 57; *see also* 29 C.F.R. § 1620.13(a) (2020).

345. *See, e.g.,* Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300, 1316 (E.D. Mich. 1980) (dismissing a Title VII claim of discrimination on the basis of an “equal value” claim because a cognizable theory under the EPA was not provided); *Waterman v. N.Y. Tel. Co.*, No. 82 Civ. 1512, 1984 U.S. Dist. LEXIS 19093, at *11–12 (S.D.N.Y. Feb. 28, 1984) (rejecting plaintiff’s assertion that the equal value to an employer of the services of two employees rendered their positions substantially equal); *see also* 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.”); Sandra J. Libeson, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMPAR. LAB. L.J. 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).

346. *See* 29 C.F.R. § 1620.13(a) (2020) (“The equal work standard does not require that compared jobs be identical, only that they be substantially equal.”).

347. *See, e.g.,* Weissbrodt & Mason, *supra* note 39, at 1875.

348. *See, e.g.,* Hershkoff & Schneider, *supra* note 340, 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 FORDHAM L. REV. 2479, 2489–90 (2019).

349. *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 exists and the law is clear).

350. *See* Law, *supra* note 348, 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 committees³⁵¹ 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.³⁵² Studies have shown success in accumulating gender data through poverty impact assessments and other ex-ante or ex-post assessments of trade agreements.³⁵³ 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.³⁵⁴

Contrary to efforts under CEDAW and Convention No. 100, the Trump administration rolled back federal authority to collect data disaggregated by gender.³⁵⁵ Citing privacy rights, the administration rescinded efforts by the

351. See, e.g., ILO Equal Remuneration Convention, 1951 (No. 100), 107th ILC Sess., 2019 (“The Committee asks the Government to take the necessary steps to collect and analyze statistics disaggregated by sex on the levels of remuneration received by men and women in the public and private sectors . . .”); *General Recommendations Made by the Committee on the Elimination of Discrimination Against Women*, UN WOMEN, <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> [<https://perma.cc/E5PY-WHL6>] (last visited Aug. 9, 2021) (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”).

352. See, e.g., VON HAGEN, *supra* note 3, at 8 (“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.”). See also *id.* 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 the Data, and Does It Matter?* 36 DISASTERS 590–94 (2012) (discussing the lack of data sets that are disaggregated by sex despite the importance of this data to formulating humanitarian responses to crises).

353. See, e.g., VON HAGEN, *supra* note 3, at 15–16.

354. See World Bank/WTO Joint Report, *supra* note 292, at 20 (“A lack of sex-disaggregated data has hampered research into trade and gender links.”); Sen, *supra* note 29, at 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”).

355. Hershkoff & Schneider, *supra* note 340, 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 THE LEADERSHIP CONFERENCE EDUC. FUND, MISINFORMATION NATION: THE THREAT TO AMERICA’S FEDERAL DATA AND CIVIL RIGHTS 4–5 (2017) [hereinafter 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); Juli Adhikari & Jocelyn Frye, *Who We Measure Matters: Connecting the Dots Among Comprehensive Data Collection, Civil Rights Enforcement, and Equality*, *CTR. FOR AM. PROGRESS* (Mar. 2, 2020, 9:00 AM),

Equal Employment Opportunity Commission to collect summary pay data, disaggregated by gender and race.³⁵⁶ The Federal Bureau of Investigation also removed data tables under the Trump administration, contained in previous reports, concerning statistics regarding the sex, race, age, and ethnicity of victims.³⁵⁷ The administration also curtailed federal agency efforts to collect data collection from LGBTQIA+ communities.³⁵⁸ 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” tends to merge and become confused with the term “sex.”³⁵⁹ 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.”³⁶⁰ By not capturing the meaning of gender, U.S. laws have “imperfectly disaggregated . . . sex on the one hand and sexual orientation on the other.”³⁶¹

During USMCA negotiations, advocates for gender, sexual orientation and gender identity (SOGI), and LGBTQIA+ rights grew optimistic³⁶² when the United States adopted a new provision to eliminate discrimination in employment “on the basis of . . . sexual orientation, gender identity, and caregiving responsibilities”³⁶³ Scholars hoped that this commitment would incentivize stronger legislative protections concerning gender identity than those provided under Title VII of the Civil Rights Act of 1964³⁶⁴ (“Title

<https://www.americanprogress.org/issues/women/news/2020/03/02/481102/measure-matters-connecting-dots-among-comprehensive-data-collection-civil-rights-enforcement-equality/> [<https://perma.cc/ZN72-3DKH>].

356. See Letter from Neomi Rao, Adm’r, Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, to Victoria Lipnic, Acting Chair, Equal Emp. Opportunity Comm’n (Aug. 29, 2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf [<https://perma.cc/ESL6-Y8VD>]; see also THE THREAT TO AMERICA’S FEDERAL DATA AND CIVIL RIGHTS, *supra* note 355, at 4.

357. See Clare Malone & Jeff Asher, *The First FBI Crime Report Issued Under Trump is Missing a Ton of Info*, FIVETHIRTYEIGHT (Oct. 27, 2017, 11:19 AM), <https://fivethirtyeight.com/features/the-first-fbi-crime-report-issued-under-trump-is-missing-a-ton-of-info/> [<https://perma.cc/Y63X-FAKP>].

358. See U.S. COMM’N ON C.R., ARE RIGHTS A REALITY?: EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 66 (2019).

359. 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, 2 (1995).

360. *Id.*

361. *Id.*

362. See Jean Galbraith & Beatrix Lu, *Gender-Identity Protection, Trade, and the Trump Administration: A Tale of Reluctant Progressivism*, 129 YALE L.J.F. 44, 49–51 (2019) (discussing initial optimism surrounding USMCA’s new discrimination provision).

363. See USMCA, *supra* note 31, art. 23.9.

364. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

VII”), a statute whose inadequacies in that area have long attracted criticism.³⁶⁵

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.³⁶⁶

In other words, although the USMCA adopted “new” protections concerning SOGI discrimination, the Trump administration took pains to preserve the nation’s laws and jurisprudence.

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, Georgia*.³⁶⁷ Those cases commonly addressed whether Title VII’s ban 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.³⁶⁸ 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.”³⁶⁹ 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.³⁷⁰

365. For scholarship demanding broader gender protections in Title VII, see Derek J. Demeri, *Who Needs Legislators?: Discrimination Against Sex Workers Is Sex Discrimination Under Title VII*, 72 RUTGERS L. REV. 247 (2020) (proposing that Title VII prohibit discrimination against sex workers); Kris Franklin & Sarah E. Chinn, *Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases*, 32 BERKELEY J. GENDER, L. & JUST. 1, 13 (2017) (“One of the more fraught areas of law around transgender people and their rights at present remains those claims rooted in Title VII.”); Regina Lambert Hillman, *Title VII Discrimination Protections & LGBT Employees: The Need for Consistency, Certainty & Equality Post-Obergefell*, 6 BELMONT L. REV. 1, 4 (2019). See, e.g., Tara Law, *Trump Administration Asks Supreme Court to Permit Employment Discrimination Against Transgender Workers*, YAHOO (Aug. 17, 2019), <https://news.yahoo.com/trump-administration-asks-supreme-court-210714771.html> [https://perma.cc/S29G-TJD3] (discussing efforts by the U.S. Department of Justice to prompt the U.S. Supreme Court to hold that Title VII does not protect transgender workers).

366. See USMCA, *supra* note 31, art. 23.9, n.15.

367. 140 S. Ct. 1731 (2020).

368. See Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, at 12, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020).

369. *Id.* at 9.

370. *Id.* at 12.

The Supreme Court disagreed.³⁷¹ Instead, it held that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”³⁷² Reversing precedent, the Court held that “[a]n employer who fires an individual merely for being gay or transgender defies the law.”³⁷³

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, 2019.³⁷⁴ USMCA was thus out of the administration’s hands. On January 29, 2020, Congress enacted the implementing bill for USMCA, which expressly endorses the labor-rights commitments and presumably the accompanying footnotes in the USMCA’s chapter on labor.³⁷⁵ The Supreme Court issued its *Bostock* decision on June 15, 2020. USMCA entered into force two weeks later, on July 1, 2020,³⁷⁶ 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 protect workers against discrimination on the basis of gender identity is binding.³⁷⁷ If the United States fails to apply Title VII to protect workers per *Bostock* in the future, a trade partner could, depending on there being a trade nexus, bring a case to dispute settlement under USMCA.³⁷⁸

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.

371. See *Bostock*, 140 S. Ct. at 1747.

372. *Id.*

373. *Id.* at 1754.

374. See generally USMCA, *supra* note 31.

375. United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113 § 701, 134 Stat. 11, 80 (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. Trade Representative*, 5 F.3d 549, 553 (D.C. Cir. 1993) (holding that the president has not taken final action until the president submits implementing legislation to Congress).

376. See Proclamation No. 10053 of June 29, 2020, To Take Certain Actions Under the United States-Mexico-Canada Agreement Implementation Act and for Other Purposes, 85 Fed. Reg. 39,821 (July 1, 2020).

377. See USMCA, *supra* note 31, art. 23.9 (“[E]ach Party shall implement policies”) (emphasis added).

378. See *id.* art. 31.2, 31.8(3) (indicating that commitments under the chapter on labor are subject to dispute settlement unless otherwise stated).

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 chapters on gender from their agreements’ dispute settlement machinery.³⁷⁹ Their approach demonstrates the appropriate middle ground between the binding and sanctions-based provisions advocated for in the current discourse and refrain 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 potential to accumulate data. Doing so would allow advocates 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 for unfair competition. Below, I explain those alternative approaches.

1. Mandatory Cooperative Provisions

When the United States negotiated the USMCA chapter on labor, it introduced several provisions to facilitate and formalize cooperation between the trade partners on labor-related matters.³⁸⁰ Some of those provisions focus specifically on gender rights within the principle of nondiscrimination based on gender in employment.³⁸¹ Specifically, under paragraph 5(j) of Article 23.12 (Cooperation), 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;

379. 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 they incorporate—labor and environmental—to the same dispute mechanism as any other provision in the agreement. If the United States followed the example of Canada and Chile and included a chapter on gender but excluded it from dispute settlement, it would continue to treat rights within its trade agreements disparately.

380. See USMCA, *supra* note 31, art. 23.12.

381. *Id.*

(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 with aligning U.S. laws and practices with international norms on a *cooperative* basis. One example, is the reference in subparagraph (ii) to developing tools related to “work of equal value,” a term that is, once again, not cognizable under U.S. domestic law.³⁸²

Rather than transpose these provisions into binding and sanctionable commitments, U.S. policymakers should expand and improve them. First, they should make these commitments mandatory.³⁸³ Doing so would remove the discretionary nature of voluntary cooperation agreements that, in their current form, ignite political sensitivities and power imbalances. 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: (1) remove barriers to accessing technology, such as cell phones; (2) generate sex-aggregated data in employment sectors; (3) advance studies on culturally appropriate, affirmative-action programs; and (4) 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,³⁸⁴ for example, the parties agreed to establish a mandatory government review mechanism,³⁸⁵ an expert committee that included a member of the ILO,³⁸⁶ and a specific provision for funding technical assistance in Vietnam.³⁸⁷

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

382. *See supra* Part IV.C.

383. *See, e.g.*, USMCA, *supra* note 31, art. 23.12(5) (“The Parties *may* develop cooperative activities . . .”) (emphasis added).

384. US-VN Plan, *supra* note 272.

385. *Id.* § V.A.

386. *Id.* § V.B.3.

387. *Id.* § VI.

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 chapter on gender, they would also benefit extant trade-plus provisions. For example, a committee of experts that included ILO representatives could mitigate the incoherence between the ILO's body of international labor law and U.S. laws and practices described earlier.

The U.S. trade agenda is concerned with protecting American 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, United States trade policy is not focused on sharing its benefits but rather on punishing its trade competitors.³⁸⁸ That could soon change. The Biden administration has already signaled its intention to take a more inclusive approach to trade. Some members of Congress have already taken tentative steps to protect gender rights in trade,³⁸⁹ including a proposed bill to amend the GSP program to include new eligibility criteria for human rights and gender equality.³⁹⁰ Those efforts may face resistance, however. In its recent report,³⁹¹ the U.S. Government Accountability Office noted the testimony of USTR officials, which stated that U.S. trade policies "focus on expanding access and opportunity to trade for all people, regardless of their sex."³⁹² Those officials, according to the report, did not plan to "alter their approach."³⁹³

388. See Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. 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 J. INT'L ECON L. 49, 51–54 (2019) (reviewing the Trump administration's aggressive use of its trade arsenal).

389. See, e.g., 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.").

390. See Women's Economic Empowerment in Trade Act of 2020, S. 4007, 116th Congress, 2d Sess. (2020) (introduced by Sens. Bob Casey and Catherine Cortez Masto).

391. See generally U.S. GOV'T ACCOUNTABILITY OFF., OBSERVATIONS ON WHETHER WOMEN'S RIGHTS AND ECONOMIC INTERESTS ARE PROTECTED OR PROMOTED BY U.S. TRADE PREFERENCE PROGRAMS (2020).

392. *Id.* at 14.

393. *Id.* at 27.

The Biden administration might nevertheless provide new opportunities 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 on and create a risk of undermining the international rights regime, constitutional procedures, and democratic processes. That restriction is thus critical and significant, even though it 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.