Gender, Work, and the NAFTA Labor Side Agreement

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It has been nearly ten years since the public debate over the North American Free Trade Agreement ("NAFTA") and the advent of trade liberalization with America's neighbors to the north and south. In the years since NAFTA's signing in 1993, economic globalization has fundamentally changed our conception of the nation-state, citizenship, trade, and work.¹ Economic life in the United States now involves massive cross-border capital and labor flows, and integrated cross-border production chains, particularly with our trading partners in NAFTA.² We have seen greater trade liberalization throughout the world, the ascendance of transnational organizations like the World Trade Organization, recurrent discussions about expanding NAFTA, political negotiations around the Free Trade Agreement of the Americas, and most recently, Congress' decision to allow President George W. Bush "fast-track" trade authority.

I. Introduction

We have also witnessed increasing public protests regarding the terms and conditions of globalization in places such as Seattle, Genoa, Washington, D.C., and France.³ Labor unions, human rights activists, environmentalists, and students across the world have become increasingly organized and vocal in their opposition to the drafting of inter-


³. For a history of citizen movements to affect trade see Susan Ariel Aaronson, Taking Trade to the Streets: The Lost History of Public Efforts to Shape Globalization xiii (2001).
national trade rules without democratic participation, transparency, or accountability. As recently as April 2002, over one million people gathered in Rome to protest proposed changes to labor law brought on by globalization.

Although self-identified women's rights groups in the United States have not, as of yet, been at the forefront of these popular movements, and although American labor organizations have not effectively focused on the gendered effects of economic liberalization or on building women-led worker organizations, globalization of trade and the ever-deepening hemispheric economic integration under NAFTA have a particular impact on women. Women, especially women of color, are the most exploited laborers in the global economy generally, and in North America specifically. Women predominate among maquiladoras in export-processing zones in Mexico and in sweatshops in the United States. Female laborers, such as office cleaners and chambermaids in luxury hotels, support the American institutions of international finance, in today's "global cities." As a result of global restructuring, women participate as labor migrants both by traveling within their countries to export processing zones and by leaving their home countries to work as domestic laborers, farm workers, janitors, child-care workers, food service providers, and

4. Scholars have noted that this is not the first period of global economic, political, and social integration in our nation's history, see, e.g., DANI RODROK, HAS GLOBALIZATION GONE TOO FAR? (1997), nor is it the first time there has been popular protest over such trade policies. For example, Susan Aaronson notes the similarity between activists in Seattle in 1999 and American colonists in Boston in 1773 who organized to affect Great Britain's trade policies. See AARONSON, supra note 3, at xiii.


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health care workers. Globalization and economic restructuring have also brought increased trafficking of women in sexual slavery.

In 1994, the United States, with Canada and Mexico, signed the North American Agreement on Labor Cooperation ("NAALC"), a side agreement to NAFTA. The agreement sets forth eleven labor principles, including equal pay for men and women, non-discrimination, and the right to organize, and requires the three signatory governments to enforce their own labor laws. NAALC was borne of intense protests on the part of organized labor and other civic groups in America during the NAFTA debates. While many trade unionists, environmentalists, and consumer and human rights groups have been critical of the negotiated side agreement, 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.

8. See Joan Fitzpatrick & Katrina R. Kelly, Gendered Aspects of Migration: Law and the Female Migrant, 22 Hastings Int'l & Comp. L. Rev. 47, 84 (1998) (discussing female migration trends and noting that, "[t]he female migrant's compelling story has gone largely unheard. . . . However, globalization of the economy, easing of transportation barriers and continued disparities in wealth between the South and the North have stimulated migration and heightened its profile in both developed and developing states."); see also Hope Lewis, Universal Mother, Transnational Migration and the Human Rights of Black Women in the Americas, 5 J. Gender Race & Just. 197, 201 n.16 (2001); Sassen, supra note 7, at 81. While current globalization has brought new forms of female migration, there is a long history of women migrant laborers. See, e.g., Mary H. Blee, We Will Rise in Our Might: Working Women's Voices from Nineteenth-Century New England (1991) (describing the migration of women in nineteenth century America to shoe production towns in New England); Christine Stansell, City of Women: Sex and Class in New York, 1789-1860 (1986) (describing nineteenth century gender relations in New York City, including the experiences of woman migrants); Rosalyn Terborg-Penn, Survival Strategies Among African-American Workers, in Women, Work and Protest 139, 141 (Ruth Milkman ed., 1985) (discussing African-American women's migration from rural to urban areas, and from farm labor to domestic labor in the early part of the twentieth century).


This agreement has great relevance to the lives of workers generally, and women workers in particular, as it potentially creates a new space for civic participation, one in which to advocate for labor rights and women's equality in Mexico, Canada, and the United States. In the future, the labor side agreement could have even greater significance if NAFTA is extended to other nations in the hemisphere. Given the gendered nature of economic restructuring, however, it is important to ask: Where were women’s voices and organizations and where were concerns about gender in the debate? What does NAALC offer women workers? How effective has it been at protecting the rights of workers generally and women workers in particular, and at helping them achieve recognition as independent commercial actors with control over their own working conditions? And, as we move towards greater trade liberalization, for what should those concerned about inequality broadly, and gender inequality specifically, advocate?

In Part II of this Article, I examine the connection between gender and economic globalization. I argue that labor rights and women's equality cannot be separated, nor can they be viewed as solely local problems with a domestic solution. Part III analyzes the public debate surrounding the passage of NAALC. It demonstrates that gender was largely missing from the public discourse, as American women's groups failed to mobilize effectively around the issue, and as American unions, taking a protectionist stance, failed to focus on the rights of women workers. As a result, the agreement that emerged did not address issues of gender and labor to the extent it might have. Part IV examines the labor side agreement itself, and attempts to enforce it, through a gender lens. It shows that although the labor side agreement has expressive value, NAFTA ultimately privileges free trade over workers' rights and this has particular consequences for women. Part V argues that while NAALC is flawed as an instrument for protecting the rights of women workers, it is critical that those concerned about equality not abandon efforts at creating new labor rights agreements and improving provisions such as NAALC: such provisions are essential to the existence of democracy, labor rights, and gender equity in an increasingly transnational economy. I take the position that this effort must emphasize the development of institutional structures through which women workers, as well as all workers, can articu-
late their own priorities. That is, I argue that the focus should be on protecting the rights of workers to organize.

II. Inseparability of Gender, Work, and Globalization

Why focus on the connection between gender and NAALC, a relatively obscure side agreement to NAFTA? Such an examination is important both for those concerned about women’s equality and for those concerned about free trade, the shape of the emerging global economy, and democracy.

Although many state and federal statutes, including Title VII and the Equal Pay Act, are explicitly concerned with gender discrimination at work, too often the myriad problems facing women are framed in our current legal regime as not "economic in nature." Yet, economic structures and conditions are central to women’s equality and freedom. Crucial to any discussion of equality for women, is the recognition of women as workers, paid and unpaid, and an examination of women’s efforts to attain full economic citizenship rights.

A brief look at labor statistics reveals the highly gendered nature of work, economic power, and poverty. In general, women’s participation in the paid labor force has been rising for several decades and in most industrial nations has reached at least 60%, while male participation rates have dropped. Women universally perform a disproportionate amount of the world’s work for a very small share of the world’s resources. Women make up 45% of the world’s workforce, but they constitute 70% of the one billion poorest citizens. Third

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12. United States v. Morrison, 529 U.S. 598, 613 (2000); see also Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 Yale L.J. 619 (2001) (discussing the Supreme Court’s recent decision categorizing the problem of violence against women as “local” and “non-economic” and holding that the Violence Against Women Act unconstitutionally encroached on states’ rights). Professor Resnik points out that the Morrison Court’s categorization of violence against women as “noneconomic” is indefensible given both (1) the painful irony that “the Supreme Court has many times acknowledged that women can be treated as commodities,” and (2) the central importance of economic conditions to women’s equality: “The current economy is formed by gendered allocations of work that subordinate women. Obtaining equality for women depends upon their gaining recognition as commercial actors.” Id. at 631–33.

13. For a history of women’s efforts to attain full economic citizenship rights, see *Alice Kessler-Harris, In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in 20th Century America* (2001).


World women work at the bottom end, often in the informal economy, of internationalized production systems, such as the garment or semiconductor industries.\textsuperscript{17} In the United States as well, women, and especially women of color, are concentrated in the lowest paying and least stable sectors of the workforce.\textsuperscript{18} Women workers in the United States earn seventy-six cents for every dollar earned by a man.\textsuperscript{19} The proportion of women in the American working poor is higher than that of men.\textsuperscript{20} Women are uniquely vulnerable to workplace discrimination, sexual harassment, and abuse, and women of color face the compounded problems of race and sex discrimination.\textsuperscript{21}

Moreover, women have historically been excluded from mainstream worker organizations and they continue to face extraordinary obstacles when they seek to gain a collective voice on the job.\textsuperscript{22} They predominate in the historically non-unionized service and informal sector, and low-wage women workers who are often sole caregivers, face greater risks and losses when employers threaten retaliation for attempts at organization. Any effort to examine or advocate for gender equality, therefore, must entail an understanding of women as laborers.

A look at NAALC and gender is important, not only because of the need for greater focus on women's economic position, but because in our current system, women's inequality must be seen through a global lens. In recent years, scholars of domestic poverty law and welfare, such as Lucy Williams, Lucie White, and Frances Ansley, have argued that it is impossible to understand current changes in the na-
tion’s welfare policy or low-wage labor market without viewing those developments in the context of current global economic and political change.

Some of the worst features of the global economy look hauntingly familiar to critics of U.S. welfare policy. In country after country around the globe, whether rich or poor, highly industrialized or underdeveloped, authoritarian or liberal democratic, governments are adopting similar measures, large corporations are pushing similar agendas, and similar social effects are being felt.

Just as women’s equality in America cannot be viewed as a domestic problem or non-economic problem, neither can free trade and labor rights be viewed as gender-less issues. Feminist scholars have explored globalization’s gendered nature and have examined the connection between global economic restructuring, massive migration by women in third world countries, and the resulting feminization of wage labor. Studies commissioned by the United Nations have explored the connection between trade, economic development, and gender, concluding that “gender inequality holds back the growth of individuals, the development of countries and the evolution of societies.”

However, much of the literature examining NAFTA’s labor side agreement fails to consider gender at all. The academic writing that

23. See Frances Lee Ansley, Afterward: What’s the Globe Got to Do With It?, in HARD LABOR: WOMEN AND WORK IN THE POST WELFARE ERA 207, 210 (Joel F. Handler & Lucie White eds., 1999); see also Williams, supra note 2, at 1245.
25. See, e.g., SASKIA SASSEN, The Incorporation of Third World Women into Wage Labor, in GLOBALIZATION AND ITS DISCONTENTS supra note 7, at 111; WOMEN WORKERS AND GLOBAL RESTRUCTURING (Kathryn Ward ed., 1990); WOMEN WORKING THE NAFTA FOOD CHAIN: WOMEN FOOD AND GLOBALIZATION (Deborah Barndt ed., 1999) (discussing the role of women in the increasingly globalized agrifood system but without discussion of the NAALC); see also Moody, supra note 14, at 166–68.
does address NAALC and gender focuses almost exclusively on the plight of Mexican women, living in Mexico.28 Mexican women in the maquiladoras labor under abhorrent conditions, facing pervasive sex discrimination and enjoying virtually no right to organize.29

Yet NAALC is relevant not only to women in Mexico but also to women living in the United States. Women in America, like those in Mexico, are economic actors who have been affected by globalization. Moreover, they have experienced globalization in different ways and, at times, more adversely than their male counterparts. For example, globalization has had a significant impact on women who work in American manufacturing industries. When manufacturing companies move production offshore, women, as well as men, lose employment. In fact, the industries most likely to move are those heavily dependent on women, particularly immigrant women and women of color.30 Globalization has also resulted in a reduction of labor's bargaining power, particularly in female-dominated industries such as textiles. Employers are more likely than ever to issue credible threats that they will withdraw their capital and move south if they cannot induce sufficient concessions from their employees or municipalities. For example, when workers in the United States try to form unions, at least half


30. See NAFTA Called Greater Job Risk for Women, CHI. TRIB., Sept. 29, 1993, at H7 ("Though women make up only 33% of all manufacturing jobs in the United States, they dominate in those industries most likely to move plants—and jobs—to Mexico . . . ").
of the employers threaten to close their plants. For women, and particularly low-wage women workers who have considerable family obligations but little in the way of family support, such threats can have particular saliency.

Globalization also affects women who work in the relatively immobile service sector in the United States. Newly arrived female immigrants, pushed from their homes due to crisis conditions linked to economic restructuring, fill more and more of the low-wage service jobs in the United States. Much of this migrant labor is illegal. As a result, laws setting minimum wage, health and safety, and collective bargaining rights remain on the books, but whole sectors of the economy operate with workers unlikely to enforce their rights, for fear of INS retaliation. The Supreme Court’s recent decision in Hoffman Plastic Compounds, Inc. v. NLRB further undermines the workplace rights of undocumented immigrants. In a five-to-four majority the Court held that the NLRB lacks the authority to award back pay to undocumented non-citizens who have been illegally terminated by their employers in retaliation for union activity. Again, for women, such fear of retaliation and awareness of the absence of legal recourse have added impact: sexual harassment laws, sex discrimination laws, and even rape laws are rarely enforced among undocumented women workers.

Legal immigrants in some sectors also have limited workplace rights. Agricultural migrants, for example, work without coverage under much American domestic labor law, including the National Labor Relations Act and parts of the Fair Labor Standards Act. Moreo-

32. See Ansley, supra note 23, at 212.
33. See id.
35. See id. Immigrant advocates argue that undocumented workers will now be more afraid to report discrimination, safety violations, or abuses by employers. Even those who support restriction on immigration criticized the decision, arguing that making undocumented workers ineligible for back-pay creates an incentive for employers to hire such workers. See Stanley Mailman & Stephen Yale-Loehr, Supreme Court Denies Back Pay to Fired Undocumented Immigrants, N.Y.L.J., Apr. 22, 2002, at 3. It is unclear whether the Supreme Court’s rationale will apply to other workplace laws, such as Title VII and workers compensation.
ever, legal regulation of migration and immigration tends to reproduce and exacerbate the social and cultural inequalities that disempower female migrants in the first place. Female domestic migrants, even with proper documentation, are left vulnerable to violations of physical security and sexual abuse.

Thus, an examination of NAALC as a potential source of transnational labor rights is important not only because globalization has an impact on women, but also because domestic law, has historically failed to address adequately the issues faced by women workers. The development of transnational norms, the erosion of the state as the site for labor regulation, and the creation of transnational “human rights” could therefore be promising developments for feminists and labor rights supporters. Yet, international human rights agreements do not necessarily result in better human rights practices. In the context of globalization, it becomes critically important to examine and evaluate NAALC and the other transnational legal norms, and to question the extent to which they enforce and expand the rights of women laborers.

III. Debating and Negotiating NAFTA: Where Were the Women?

In February 1991, then-President George Bush announced that Mexico, Canada, and the United States would begin trilateral negotiations on a trade agreement. The subsequent process of negotiating

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38. See Fitzpatrick & Kelly, supra note 8, at 48.
39. For a discussion of the failure of states to protect women in the “maid trade” from sexual exploitation, see id. at 69, 76.
40. For a history of legal regulation of women at work in the United States, see KESSLER-HARRIS, supra note 13, and ALICE KESSLER-HARRIS, OUT TO WORK (1982).
41. In recent years, activists and NGOs have worked to create rights for women at a transnational level by redefining the meaning of human rights to encompass the particular experiences of women. See Jane Connors, NGOs and the Human Rights of Women at the United Nations, in THE CONSCIENCE OF THE WORLD: THE INFLUENCE OF NON-GOVERNMENTAL ORGANIZATIONS IN THE UN SYSTEM 147, 147 (Peter Willitts ed., 1996). As a result of the work of such NGOs, “large steps have been taken towards the full acknowledgement of women’s rights as human rights, while the human rights agenda of the United Nations has expanded to include areas such as violence against women, both in the public and private sphere, and other gender specific abuses.” Id. at 147.
and passing NAFTA by a majority of the United States House and Senate was highly contested, both in terms of its policy implications, and (at least among legal academics) in terms of its constitutionality.\footnote{4} In response to President Bush’s announcement, community activists, environmentalists, and development, consumer, and human rights advocates from all three countries began to form coalitions in an effort to shape the trade discussions.\footnote{45} Notably absent from the ensuing public debate around NAFTA in the United States were leading women’s rights groups, as well as an articulated gender analysis from congressional leaders, unions, and citizen groups.\footnote{46}

A. The Public Debate

In order to pursue negotiations of a free trade agreement with Mexico and Canada, President Bush first sought congressional prior approval, known as fast-track authority.\footnote{47} Many grassroots and advo-

\footnote{44. The constitutional debate over NAFTA centered on whether the agreement required approval by a two-thirds vote of the Senate, in accordance with the treaty clause, Article \textit{1II}, Section 2, rather than by a majority of both houses. \textit{See generally} Bruce Ackerman \& David Golove, \textit{Is NAFTA Constitutional?} \textit{108 Harv. L. Rev.} 799 (1995) (arguing that political events of the 1940s altered the proper understanding of the Constitution so that the Treaty Clause became optional and concluding that NAFTA, passed by a majority of both houses, is in fact constitutional); \textit{but cf.} Laurence H. Tribe, \textit{Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation}, \textit{108 Harv. L. Rev} 1221, 1225–1302 (1995) (challenging Ackerman and Golove and arguing that arguments regarding the Constitution’s instructions for treaty-making as merely optional are flawed because they are not genuinely constrained by the Constitution’s text or structure). However, no one discussed this problem publicly during the NAFTA debates. \textit{See} Ackerman \& Golove, \textit{supra}, at 802; Tribe, \textit{supra}, at 1227.}

\footnote{45. While an examination of the role of women’s groups and gender issues in the public debate in all three countries would be more useful, for the purpose of this paper I will look primarily at the public debate in the United States.}

\footnote{46. In addition, histories of the passage of NAFTA in the United States make little mention of women’s issues or gender, and they fail to discuss the relevance or impact of women’s absence. For example, in Susan Aaronson’s extensive history of the public debates around NAFTA there is no examination of the role of women’s groups or gender issues in the American NAFTA debates—nor is there any discussion of why such issues were not raised. \textit{See} Aaronson, \textit{supra} note 3; \textit{see also} Maxwell A. Cameron \& Brian W. Tomlin, \textit{The Making of NAFTA: How the Deal Was Done} (2000) (detailing the NAFTA negotiations with no examination of gender issues or the absence of organized women’s groups in the negotiations); Marise Robert, \textit{Negotiating NAFTA: Explaining the Outcome in Culture, Textiles, Autos, and Pharmaceuticals}, 22–47 (2000) (describing the political process around the passage of NAFTA without mention of women).}

cacy organizations opposed fast-track, fearing that it would allow the administration to negotiate corporate-friendly agreements, free from public scrutiny and involvement. Groups such as the Sierra Club, Friends of the Earth, and the United Auto Workers ("UAW"), demanded that Congress hold separate hearings on NAFTA's potential impact on labor, food safety, and human rights.48

Democratic congressional leaders, and some conservative protectionist legislators, in turn insisted that President Bush provide detailed predictions of NAFTA's effects on the environment, jobs, and worker rights. In response to pressure from congressional Democrats and civic organizations, in May of 1991, the administration promised that it would deal with the labor and environmental issues in a "parallel" process.49 Subsequently, despite continued opposition from civic groups, neither the House nor the Senate had enough votes to win a vote of disapproval, and fast-track authority was extended to the President.50

As NAFTA negotiations got underway, opposition escalated and the issue became central to the presidential election and the campaign of independent candidate H. Ross Perot,51 yet still no major women's groups appeared as participants in the public debate.52 Two key coalitions formed. One concentrated on working with Mexican and Canadian groups and sought to strengthen and improve the labor and environmental protections in the agreement. The other focused nationally and was concerned about the anti-democratic nature of the negotiations and American job loss; this group opposed NAFTA alto-

of his intention to begin trilateral negotiates "triggered a 60 day limitations period during which either house of Congress could have disapproved the application of 'fast-track' procedure to legislation implementing NAFTA." Id.

48. See AARONSON, supra note 3, at 118.


50. See Ansley, supra note 23, at 343-44.

51. In 1992 billionaire Perot ran for President as an independent on an anti-NAFTA platform, building a grassroots political movement. Perot became identified as the major anti-NAFTA spokesperson, even as he alienated many civic and environmental groups with his protectionist stances. See AARONSON, supra note 3, at 134–36.

52. At hearings conducted by the Trade Staff Policy Committee from August to September of 1991, speakers ranged from the Chief Executive Officers of the Gap and Bank of America to representatives from the Environmental Defense Fund, Public Citizen, the Mexican American Legal Defense Fund, and the United Auto Workers, but did not include any major women's groups. See Ansley, supra note 23, at 347 for selected testimony from the 1991 hearings.
Both coalitions included environmental advocacy and grassroots groups, labor unions, human rights groups, consumer rights groups, and civil rights groups—but no national women’s groups. Vocal proponents of NAFTA and free trade similarly did not include women’s rights organizations. Bush’s Advisory Committee on Trade Policy and Negotiations, for example, was dominated by multi-national executives. American women’s lack of effective mobilization on the issue of NAFTA stands in sharp contrast to the activism of Canadian women, as Canadian women’s groups mobilized and articulated opposition to the agreement in the language of women’s rights. Canadian wo-

53. Of the two coalitions, the Mobilization on Development, Trade, Labor and the Environment (“MODTLE”) was more policy oriented and internationalist. It included the Institute for Policy Studies, International Labor Rights Fund, Development GAP, Community Nutrition Institute, Center of Concern (affiliated with the Jesuits), National Consumers League, Presbyterian Church USA, Maryknoll Fathers, Institute for Agriculture and Trade Policy, American Agricultural Movement, and National Lawyers Guild. A second coalition, Citizens Trade Campaign (“CTC”), was more action oriented, focused on the undemocratic nature of trade agreements, and more nationalist. It included Friends of the Earth, Public Citizen, Sierra Club, Institute for Agriculture and Trade Policy, National Farmers Union, National Consumers League, United Auto Workers, Rainbow Coalition, and Americans for Democratic Action. See AARONSON, supra note 3, at 125–27.

54. See id. at 119–20.

55. There is less information available about the role of women in the Mexican debate. There, NAFTA had strong support from the elites and according to polling data, most Mexicans had little understanding of the trade agreement. See id. at 133. However, news accounts suggest that there were some grassroots organizing efforts among women workers demanding greater labor rights as part of the agreement. See, e.g., Michelle Russ, Mexican Women Seek Workers’ Rights, CLEVELAND PLAIN DEALER, May 5, 1993, at 8A [hereinafter Workers’ Rights]; Michelle Russ, Many Mexican Women Stuck in Factory Grind, CLEVELAND PLAIN DEALER, May 9, 1993, at 20A [hereinafter Factory Grind] (describing organizing in Mexico by grassroots groups such as Mujer a Mujer and the Border Women’s Worker Committee).

56. An adequate exploration of why the two feminist movements played such different roles in the trade debates is beyond the scope of this paper. Canadian feminist Marjorie Griffin Cohen points to the economic dislocation experienced by many Canadians in the 1980s to explain the increasingly economic focus of the Canadian feminist movement. She also explains that during this period leftists and trade unionists took on more leadership positions within the feminist movement. Finally, she suggests that because the Liberal Party had lost power prior to the NAFTA debates, feminists were more willing to take positions sharply critical of the government. See Marjorie Griffin Cohen, The Women’s Movement and the Canadian Economy, in CHALLENGIN(G TIMES: THE WOMEN’S MOVEMENT IN THE UNITED STATES AND CANADA 214, 220 (Constance Backhouse & David Flaherty eds., 1992) [hereinafter CHALLENGING TIMES]. In addition to the Canadian economic and political context in the early 1980s, another possible explanation for the difference lies in the movements’ structures and funding sources. Canadian women’s groups have tended to be structured as loose coalitions of local grassroots organizations, rather than as more centralized, national advocacy groups, and have therefore had greater participation from working-class women. This local focus grows out of the Canadian federalist structure of
men's groups first became involved in efforts to reshape trade agreements in the 1980s, in part because of the deep economic recession in Canada. During this period, the National Action Committee on the Status of Women ("NAC"), a coalition of women's groups whose leadership included prominent trade unionists, actively opposed the Free Trade Agreement between the United States and Canada, the precursor to NAFTA. NAC leaders explained that they saw women's issues as economic: "[U]ltimately all of the issues we were fighting for are related to the way society is constructed. . . .[W]e could not ignore the larger agenda of economic restructuring and the government's design for Canada, since they would affect virtually every issue on women's agenda for action."

Canadian women's groups were also members of a broad coalition called the Council of Canadians which saw its goal as building public awareness about ways to preserve Canada's social compact in the context of globalization. The Council focused on how trade would hurt society's most vulnerable citizens, arguing that it would cause reductions in Canada's social welfare system, including childcare services, and pointed out the gendered impact that free trade would have: "Women work in the very manufacturing and service industries that are most vulnerable in a free trade market." Canadian women continued to voice concerns about the terms of globalization during the NAFTA debates, with the National Action Committee on government under which political decision-making is rarely exercised at a national or cross-provincial level. In addition, Canadian groups have had less need to raise funds from major donors, because the largest coalition of women's groups in Canada historically has received considerable government funding. The focus of Canadian groups, therefore, has been less shaped by the elite. See Naomi Black, *Ripples in the Second Wave: Comparing the Contemporary Women's Movement in Canada and the United States, in Challenging Times*, supra, at 220. See generally id. (presenting a range of essays on the differences between the Canadian and American feminist movements). For a history of legal feminist groups in Canada more similar to contemporary American groups, see *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (1991).

57. *See Cohen, supra* note 56, at 220.
61. *See Aaronson, supra* note 3, at 113.
the Status of Women remaining in the forefront of the ultimately unsuccessful movement to stop NAFTA.\textsuperscript{63}

The comparative lack of involvement by United States women's groups must be viewed in the context of the historically uneasy relationship between mainstream American feminist groups, dominated by middle-class and elite women, on the one hand, and organized labor and working-class women on the other.\textsuperscript{64} While intermittently allied with women unionists on issues such as pay equity and reproductive rights, liberal feminist groups like the National Organization for Women ("NOW"), the National Abortion Rights Action League, and the League of Women Voters have not generally had working-class women or women of color as their base or focus. Contemporary American women's groups have tended to concentrate more on advocacy, litigation, fundraising, and lobbying, rather than on building grassroots support among the broad range of American women. Ideologically shaped by liberalism, their focus has primarily been on individual choice, personal autonomy, and equality, rather than on a structural critique of the economy.\textsuperscript{65} Moreover, with women historically marginalized in the American labor movement, the shared interests between liberal feminist groups and unions have not been naturally apparent.\textsuperscript{66}

A gender focus was missing from the American debates not only because women's groups failed to understand trade and labor as women's issues, but also because of the role of organized labor. Of the groups opposing NAFTA in the United States, the labor movement

\textsuperscript{63}. See Lebow, \textit{supra} note 57, at 1F. Unlike their American counterparts, Canadian NGOs were united in their opposition to the negotiated side agreements, which they deemed inadequate. Despite the broad coalition, when Conservatives won a majority of seats in Parliament, Canada passed NAFTA. See Aaronson, \textit{supra} note 3, at 132.

\textsuperscript{64}. For example, women unionists battled with upper-class feminist activists regarding the ERA from the 1920s to the mid 1960s, attacking the ERA's language of liberal individualism. Many women unionists saw the feminist's goal of elimination of protective legislation as threatening working-class women's hard-won gains. See Dennis A. Deslippe, \textit{Rights Not Roses: Unions and the Rise of Working-Class Feminism, 1945–1980}, 5, 138–39 (2000). In the post-World War II period, however, women unionists embraced and fought for gender equality at work, rejected protectionist legislation, and by the 1970s, endorsed the ERA and built a new but uneasy alliance with middle-class and elite feminists. In the late 1970s, divisions between liberal groups and women unionists grew again, with debates over seniority systems, which many union members supported. See generally id.


\textsuperscript{66}. See \textit{infra} note 71 and accompanying text.
was arguably the "most powerful and most vocal," and therefore had a unique ability to shape the debates. Most of organized labor's efforts around NAFTA were led by the labor movement's male-dominated manufacturing unions, and failed to involve or consider the women workers in the Mexican maquiladoras and American sweatshops, or the increasing pool of mostly female, immigrant workers in low-wage service work, except insofar as they posed a threat to American jobs. Rather than focusing on the right to organize and actively working to involve women workers, American unions engaged in the NAFTA debate focused primarily on how NAFTA would reduce men's existing manufacturing jobs.

The labor movement's protectionist focus in the NAFTA debates can be explained, at least in part, by the fact that the unions leading the opposition to NAFTA were the largely male manufacturing unions, which had historically excluded women from their ranks. Unions representing workers in industries that were more heavily female, such as education, also opposed NAFTA, yet they felt they had less of a stake in the outcome of the debate, and were not willing to expend as much political capital. According to a 1993 Washington Post article:


68. News accounts of statements made by the AFL-CIO demonstrate the protectionist focus of organized labor's opposition to NAFTA. E.g., Stuart Auerbach, *Mexico Comes Calling for Free Trade*, Wash. Post, June 10, 1990, at H1 ("A free-trade agreement is opposed by politically powerful segments of the American economy, including organized labor, which fears a hemorrhage of United States jobs to low-wage factories south of the border and 'sunset,' or declining, industries such as textile and clothing manufacturers. United States labor opposition would intensify if low-wage Mexican labor could flood legally into this country."); Clyde H. Farnsworth, *Revival of Trade Talks Stirs Political Fight in the U.S.*, N.Y. Times, Feb. 25, 1991, at D1 ("Fearing job losses and pay cuts from a trade pact with Mexico, where workers make roughly about 5 percent of what workers earn in the United States, the A.F.L.-C.I.O. has made blocking a Mexican agreement its No. 1 legislative priority. In recent congressional testimony, Thomas R. Donahue, secretary-treasurer of the labor federation, called the prospective accord "an economic and social disaster" for American workers and argued that use of fast-track "seriously limits both public and congressional involvement in discussions with Mexico and dilutes the lawmaking authority of Congress."); Peter T. Kilborn, *Hailing Health Plan but Denouncing Trade Pact*, N.Y. Times, Sept. 16, 1998, at A21 (describing union leader's concerns that NAFTA would lead to more plant closures); see also Aaronson, supra note 3, at 157 ("[U]nion officials were united in opposing NAFTA and believing it would yield lower standards, lower wages, and fewer jobs.").

69. See Peter T. Kilborn, *Unions Gird for War over Trade Pact*, N.Y. Times, Oct. 4, 1993, at A14 (reporting from the AFL-CIO convention that not a single union in attendance backs NAFTA, but that some, "like the American Federation of State County and Municipal Employees, and the American Federation of Teachers are less alarmed than others," and that at least one major union, the American Federation of Government Employees, questions
Organized labor is putting up an exceptionally unified front in its battle to defeat NAFTA, but the solid opposition of unions allied with the AFL-CIO masks a wide range of intensity. It is primarily private sector unions, especially manufacturing unions, that see NAFTA as crushing U.S. jobs and decimating their membership.\footnote{Edsall, \textit{supra} note 66, at A24.}

Just as the failure of women's groups to mobilize around NAFTA must be seen in its historical context, so too should the absence of gender from the mainstream labor agenda. Organized labor has had a contradictory history with respect to women and feminism in the United States. While unions have served as a source of power to advance the interests of working-class women and as a space in which women can organize collectively, women have also suffered acute exclusion as male-dominated unions sought to protect their standards.\footnote{See Diamond, \textit{supra} note 27, at 220.}

Although national women's groups failed to mobilize, and although organized labor was primarily focused on protecting male manufacturing jobs, some labor activists did join with some women's rights activists to raise the issue of gender. In October of 1993, for example, participants at a meeting sponsored by the Women for Economic Justice in Chicago, a newly founded coalition of local women's groups aimed at addressing issues of trade and gender, pointed out that NAFTA's proponents had "glossed over" the disparate impact NAFTA would have on women workers.\footnote{See Nancy Ryan, \textit{NAFTA Called Greater Job Risk for Women}, Chl. Trib., Sept. 29, 1993 (Business), at 1 (describing a meeting of women's rights and labor rights' activists and a study showing that industries in which women predominate would likely face the greatest job loss under NAFTA). Women for Economic Justice was founded in 1993 by a former labor organizer with the aim of promoting issues of gender in the trade debate, and appears to have disbanded in 1996.}

In the 18 years from 1975 to 1993, when the United States marketplace began to open to competition from Asia, Europe, and Latin America, membership in the steelworkers union has collapsed from 1.1 million to 421,000, the Teamsters from 2.4 million to 1.3 million, the machinists from 780,000 to 474,000 and the garment workers from 363,000 to 133,000.

women.73 A few journalists in local and regional papers detailed the exploitation of women workers in the maquiladoras and referred to women’s grassroots organizing efforts in all three countries in opposition to NAFTA.74

As the debate drew to a close, the gender issue came further to the forefront. In November of 1993, an international coordinator for Labor Notes, a United States labor rights organization, was quoted as saying, “People are just now beginning to see the tremendous impact NAFTA will have on women. . . . It’s taken a while because negotiations were so secretive.”75

B. Negotiating the Labor Side Agreement

NAFTA was signed by the heads of state of Mexico, Canada, and the United States in 1992, as the Bush administration left office. However, an environmental or labor agreement had yet to be negotiated. While Bush had alluded to support for labor and environmental protections, the real genesis of the side agreements was in the 1992 presidential campaign of Bill Clinton.76 Clinton, in an effort to balance the social concerns of his Democratic base with the market-opening policies of his economic advisers and corporate funders, pledged continued support for free trade and NAFTA but promised to negotiate side agreements that would protect labor and environmental standards.77

After winning the election, the Clinton administration began negotiations on the side agreements. However, the administration was

73. See, e.g., Elizabeth Kadetsky, The Human Cost of Free Trade: Female Factory Workers in Mexico, Ms., Jan/Feb, 1994, at 10.

74. See Michelle M. Schoenung, Groups Say Female Workers Fare Worse With NAFTA, AUSTIN AM. STATESMAN, Nov. 14, 1993, at F8; Lebow, supra note 57, at 1F, also printed in THE RECORD (Northern New Jersey), Nov. 12, 1993, at D7; Workers’ Rights, supra note 54, at 8A; Factory Grind, supra note 54, at 20A (describing organizing in Mexico by grassroots groups such as Mujer a Mujer and the Border Women’s Worker Committee).

75. Mary McGuinn, International Coordinator for Labor Notes, quoted in Michelle M. Schoenung, Groups Say Female Workers Fare Worse With NAFTA, AUSTIN AM. STATESMAN, Nov. 14, 1993, at F8. Labor Notes is a non-profit organization formed in 1979 that aims to revitalize and democratize the American labor movement. It runs a monthly newspaper, as well as conferences and workshops, and often is critical of union leadership. See Labor Notes website at http://www.labornotes.org (last visited Apr. 3, 2003).

76. See Compa, The First NAFTA Labor Cases, supra note 27, at 162; Herszstein, supra note 27. For a detailed analysis of development and negotiation of the labor and environmental side agreements see CAMERON & TOMLIN, supra note 46, at 179–207.

77. See Governor Bill Clinton, Expanding Trade and Creating American Jobs, Address at Raleigh, North Carolina (Oct. 4, 1992); see also CAMERON & TOMLIN, supra note 46, at 180 (describing the presidential debates and Clinton’s promises regarding NAFTA and the side agreements).
divided on what form such agreements should take, with some advisors taking a pro-business position and others advocating for strong labor and environmental protections.\textsuperscript{78} Though women’s groups had been major supporters of Clinton and could possibly have wielded influence over the shaping of the labor agreement, they remained off the political radar screen throughout the negotiation of the side agreements.

The notion of a labor side agreement was met with stiff resistance from the Mexican government. On the opening day of negotiations, held on March 17, 1993, Mexico made clear that it wanted respect for sovereignty, no renegotiation of NAFTA, and no trade sanctions for labor or environmental violations.\textsuperscript{79} The Mexican negotiators flatly rejected the idea of creating a supra-national commission or tribunal that might have the power to supercede Mexico’s domestic laws. They pointed to the opposition of the government-affiliated trade union, as well as business groups, to any agreement that would substantially change the existing system of industrial labor relations. While business groups feared that new standards would undermine the competitive advantage Mexico offered, the state-supported trade union feared that a strong labor side agreement might threaten its monopolistic control over organized labor.\textsuperscript{80}

After much internal discussion, the Americans initially proposed an accord that was broad in scope, covering union rights as well as technical labor violations, such as health and safety laws and minimum wage provisions. The American proposal created a higher international standard of labor rights that would apply to all three countries, and contained enforcement provisions and sanctions. Canada, however, which was represented by a newly elected conservative government, argued for an agreement with no trade sanctions and with standards based on each country’s own domestic law.\textsuperscript{81} Meanwhile, well-organized business lobbies in all three countries vigorously campaigned against language that would create enforceable labor rights.\textsuperscript{82} Still no women’s groups were involved. By midsummer, the United States backed off many of its demands, and a compromise was

\textsuperscript{78} A draft memo of three possible proposals for the side agreements reflected the divisions within the Clinton administration. See Cameron & Tomlin, supra note 46, at 184.

\textsuperscript{79} See id. at 186, 188.

\textsuperscript{80} See id.

\textsuperscript{81} See id. at 193–95.

reached that set out joint labor principles but only required the governments to enforce their own domestic laws.  

C. The Congressional Debate

The NAALC was completed in August of 1993; Clinton endorsed the package and then sent NAFTA to Congress for ratification. The ensuing congressional debate did occasionally explore how NAFTA itself might impact women. Such discussions were at most tangential—most debate revolved around whether NAFTA would result in net job losses or gains—yet the role gender played in the deliberation is nevertheless revealing: discussion focused on women's responsibilities as mothers, and for the most part, depicted women as victims, rather than as actors.

On the floor of Congress, women's issues were raised most frequently by opponents of the agreement. Senator Riegle from Michigan, for example, challenged Senator Barbara Boxer, one of six women in the Senate at the time, arguing that her support of NAFTA threatened women in particular:

I say to the Senator from California, I visited a plant recently in a town just outside of Detroit, principally a work force of women. They were making radiator hoses. That company just closed and they moved the jobs down to Mexico. They had 2 weeks to go before the plant was actually going to close. I went out there to talk to the women who were working there. They were told, by the way, by the person managing the company, that if they came out to talk to me about it, as a U.S. Senator on the sidewalk, they ran the risk of not being able to stay on and finish the last 2 weeks of work before the plant did close. That was the intimidation to keep them from talking to me. Many did come out and talk to me, despite that fact. Most of them are single, heads of households. They are just scraping by, so they may have 2 or 3 children at home, trying to hold their lives together, and they have no alternative work. Now that plant is closed. There is no other work for them to do. They cannot get an income. I mean, the notion that they can provide

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83. See infra Part IV for a detailed analysis of the NAALC's principles, structure, and procedures.


properly for their children or have health care, it is out of the question.\textsuperscript{86}

The Senator continued, drawing on traditional notions of women's roles as caregivers, and emphasizing that NAFTA would undermine women's ability to mother.

I talked to some women in Owosso, MI the other day. Their plant closed about 3 years ago. Their stories would break your heart. We sat around a coffee table in a restaurant and talked for a while. Here is what they told me. They told me that they had been so poverty stricken since their plant closed and no replacement work, that they buy virtually all their clothes at yard sales. They virtually buy no new clothes, because they cannot afford even to go to low-cost outlets, like Kmart or Sears or Penney's to buy something because they just cannot afford it. They just do not have the income. They have too many basic necessities that they have to pay for to keep food on the table and the utility bills in the winter time, and so forth. So they are buying clothing that has been used two or three times before, they are buying used shoes.\textsuperscript{87}

Unlike Barbara Boxer, some female legislators took a stand against NAFTA and expressed concern about the agreement's effect on women. Representative Marcy Kaptur, Congresswoman from Ohio, attacked NAFTA for not being democratic, and the side letters for being ineffective. She led a bipartisan delegation of eight women members of Congress on a trip to the border region and the maquiladoras in Mexico in May of 1993.\textsuperscript{88} Kaptur organized the trip of all female lawmakers to investigate how the proposed agreement would affect women and families.\textsuperscript{89} Notably, some proponents of NAFTA also invoked women workers' rights to support their position. Senator Bill Bradley of New Jersey, for example, pointed to Mexican law's guarantee of twelve weeks paid maternity leave for Mexican women workers as evidence that Mexican women were not suffering under unfair labor conditions.\textsuperscript{90}

While the plight of women workers was mentioned in Congress, there was virtually no substantive discussion of how to make the labor side agreement more effective at protecting the rights of workers generally or women workers in particular; there was no exploration of


\textsuperscript{87} Id.

\textsuperscript{88} See 139 CONG. REC. H8843-04 (daily ed. Nov. 4, 1993).

\textsuperscript{89} See Michelle Ruess, \textit{NAFTA Not Mexicans' Top Concern}, CLEVELAND PLAIN DEALER, May 2, 1993, at 4A.

\textsuperscript{90} See 139 CONG. REC. S16376-01 (daily ed. Nov. 19, 1993). Senator Sarbanes of Maryland responded, attacking Bradley's assertion as inaccurate. See id.
how NAALC would address issues of equal pay, employment discrimination, paid family leave, or women's organizing rights.

The lack of real debate regarding the terms of the labor side agreement can be explained by several factors. For one, negotiations happened behind closed doors and without congressional hearings. Congress was asked to vote on NAFTA, knowing NAALC had been negotiated, but because NAALC was an executive agreement, not integral to the trade agreement, the President did not seek legislative approval.91 Thus, Congress had no effective opportunity to challenge particular aspects of NAALC. Moreover, while there was some involvement of outside groups during its negotiation, there were no public hearings, nor was there broad civic participation in the drafting of the agreement.92

In addition, because civic groups, particularly unions, had focused primarily on trying to stop the flight of capital to Mexico—and not on creating transnational labor rights norms—even labor's staunch allies had no reason to focus on how NAALC would actually work or how it would affect women. Just as neither women's groups nor unions had framed gender issues as central to the debate, neither did the legislators. Finally, with business so staunchly opposed to a stronger labor side agreement, it was to the advantage of Congressional leaders considered allies of the labor and environmental movements but unwilling to alienate the business lobby, to point to the labor side agreement as a victory, avoiding close scrutiny of its provisions.

Ultimately, after only minimal discussion and public debate in the United States about the gender implications of NAALC or NAFTA, proponents of agreements prevailed.93 Civic groups were divided on the final product. Some, including the AFL-CIO, the Sierra Club, Public Citizen, and the International Labor Rights Fund, attacked the side agreements for being nothing more than rhetoric, useless at protecting workers' rights or the environment. Others, such as

91. See Diamond, supra note 27, at 215. The decision not to seek congressional approval for NAALC raises interesting constitutional questions. While Ackerman and Tribe, supra note 44, do not discuss the labor side agreement in their debate over the constitutionality of NAFTA, NAALC, even more than NAFTA itself, exemplifies the presidential move away from requesting approval of treaties in accordance with Article II, as the President did not even seek bicameral majority support for the side agreement.
92. See Cameron & Tomlin, supra note 46.
93. According to Aaronson, supra note 3, while the administration waged a public campaign articulating NAFTA's macroeconomic benefits to the US economy—emphasizing potential increases in number of jobs—NAFTA ultimately passed because of favor trading and pork-barrel politics. See id. at 140.
the Environmental Defense Fund and the National Wildlife Feder-
ation, thought that the side agreements would at least provide a tool to
improve Mexican regulations.\footnote{Generally, NGOs that depended on large corporate grants for the bulk of their
funding ultimately supported NAFTA, while those with a grassroots base of individual don-
In the end, NAFTA passed the House
by a margin of thirty-four votes,\footnote{See 139 \textit{Cong. Rec.} H10058 (daily ed. Nov 17, 1993).} and the Senate by sixty-one to thirty-
eight.\footnote{See 139 \textit{Cong. Rec.} S16 712–13 (daily ed. Nov. 20, 1993); North American Free
Trade Implementation Act § 101(a), 19 U.S.C. § 3311(a) (Supp. 1993).} On December 8, 1993, the President signed NAFTA and
NAALC into law.\footnote{See Aaronson, \textit{supra} note 3, at 140.}

IV. \textbf{NAALC: Interpreted Through a Gender Lens}

The labor side agreement that emerged was thus the product of
competing political pressures, few of which were explicitly about gen-
der or the rights of women workers. While Canadian and American
civic and labor groups mounted a vigorous campaign for the rights of
workers and the environment, well-organized business groups in all
three countries, the official Mexican union, and conservative forces
within the governments wielded significant influence over the negoti-
ations. The final agreement thus expresses a commitment to labor
rights demanded by labor and civic groups, at the same time as it re-
flects the organized resistance to an agreement that would limit each
government's sovereign right to determine and implement domestic
labor law or that would too greatly impinge on corporate interests.

This tension becomes particularly clear when NAALC's efficacy is
analyzed with respect to gender. The agreement articulates broad la-
bor principles critical to women workers and could serve an important
expressive function in campaigns for gender equality and labor rights,
yet it fails to provide enforceable rights for the women in the maqui-
ladoras or in the American labor force.

A. \textbf{NAALC's Labor Principles}

The preamble of NAFTA commits the three states to “create new
employment opportunities, and improve working conditions and liv-
ing standards in their respective territories; . . . and protect, enhance
and enforce basic worker rights." Building off this preamble, NAALC sets forth eleven guiding principles that the three signatories commit themselves "to promote, subject to each Party's domestic law," all of which are relevant to women workers:

- freedom of association and protection of the right to organize
- the right to bargain collectively
- the right to strike
- prohibition of forced labor
- limitation of child labor
- minimum wage, hours of work and other labor standards
- elimination of employment discrimination
- equal pay for women and men
- occupational safety and health
- workers' compensation
- migrant worker protection.

The text of NAALC makes explicit that two of the enumerated labor principles—non-discrimination and equal pay for equal work—apply to women. NAALC's non-discrimination principle, for example, supports the elimination of discrimination "on grounds such as race, religion, sex or other grounds." It also allows for affirmative action: "special measures of protection or assistance for particular groups designed to take into account the effects of discrimination." While NAALC does contain gender specific language evincing a commitment to women's rights, NAALC's aspirational goals with respect to gender equality are limited. The equal pay provision is defined as "equal wages for women and men by applying the principle of equal pay for equal work in the same establishment." Notably, it does not attempt to create wage parity for comparable work. The ban on discrimination is "subject to certain reasonable exceptions, such as, where applicable, bona fide occupational requirements or qualifica-

99. NAALC, supra note 10, at annex 1.
100. While equal pay and non-discrimination are critical to women's equality, I will argue in Part V that an effective women's rights movement must put increasing focus on the first three rights—the right to organize, to bargain collectively and to strike—so that women workers can effectively participate as economic and political citizens, and enforce their own rights.
101. NAALC, supra note 10, at annex 1 (emphasis added).
102. Id.
103. Here I mean only to look at NAALC's aspirational goals; I will examine the extent to which NAALC's labor principles shape domestic law and translate into actual protections for workers, below.
104. See NAALC, supra note 10, at annex 1.
tions and established practices or rules governing retirement ages," yet it does not specify how narrowly to interpret the exceptions.105

Furthermore, while all of NAALC's enumerated principles are critical to women, several equally important labor issues present in other international law treaties are missing. The Convention on the Elimination of Discrimination Against Women ("CEDAW"), for example, defines women's labor rights much more broadly. Unlike NAALC, CEDAW states that women workers should be guaranteed social security, equal pay for work of equal value, maternity leave with pay and without loss of benefits or seniority, and family health insurance.106 While an international human rights treaty focused exclusively on women is perhaps not the most relevant metric against which to compare NAALC—a side letter to a trade agreement applying to all workers—some of the above labor rights principles are in fact present in other international trade agreements. Article 119 of the Treaty Establishing the European Community, for example, includes the right to "equal pay for equal work."107 Unlike NAALC, the European Union Treaty does not limit the equal pay principle to work performed at the "same establishment," and has in fact been interpreted by the European Court of Justice to encompass a right to equal pay for work of equal value.108

B. NAALC's Procedural Mechanism

In addition to setting out labor principles, the accord requires each government to comply with and enforce its own labor law through governmental action.109 NAALC obligates the signatories to provide fair access to labor tribunals, requiring that each party provide a right of private action in its own courts and a measure of due process.110 Perhaps most importantly, the agreement establishes a new forum for transnational action: Article 8 of NAALC creates the Commission for Labor Cooperation ("Commission"), which serves as the main administrative body under the agreement.

105. Id.
108. See Johnson, supra note 28, at 857.
109. See NAALC, supra note 10, art. 3.
110. See NAALC, supra note 10, arts. 4, 5.
The primary activity of the Commission is to promote cooperative activities between the parties on a variety of issues, including "the equality of men and women in the workplace" and "migrant workers of the Parties." The mandate of the commission is thus broad and open-ended, includes specific reference to women, and if run by active and aggressive leaders, could perhaps have an important role in exposing labor rights abuses and gender discrimination. Yet, the Commission’s activities to date have been limited. It has led some conferences and published a few reports that specifically addressed the issues of women workers, such as the Trinational Conference on Women and Work in the 21st Century. But, there is little evidence that the Commission has tried to use its office to publicly pressure the governments in the direction of labor reform or expanded women’s rights. Beyond a few symposia and publications, the Commission has engaged in little public activity.

In addition to establishing the Commission, NAALC requires each of the three signatory countries to run a government appointed National Administrative Office ("NAO") empowered to investigate allegations of non-compliance with NAALC’s requirements alleged in either of the other countries. Under the NAALC system, organizations and individuals bring complaints to an NAO alleging ineffective enforcement of law in one of the other nations; submissions are not made in the country in which the alleged violation took place. This structure is a compromise resulting from the opposition of Mexican and Canadian negotiators to the creation of one supranational tribunal with enforcement powers, but the insistence of the United States on some transnational review. As Lance Compa has written, "As a national entity that takes up labor rights outside the national territory, the NAO is a unique institution. It has no counterpart under the

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111. Id. at art. 11. The responsibilities of the governing body of the Commission, the Council, include "promot[ing] cooperative activities between the Parties as appropriate regarding occupational safety and health; child labor; migrant workers of the Parties; . . . social programs for workers and their families; . . . labor management relations and collective bargaining procedures . . . the equality of women." Id.; see also arts. 10, 12, 13, 16.


113. See NAALC, supra note 10, at art. 15 (1).

114. See id. at art. 16. ("Each NAO shall provide for the submission and receipt, and periodically publish a list, of public communications of labor law matters arising in the territory of another Party.") (emphasis added).
NAFTA environmental side agreement, nor under any other labor rights regime in Europe or elsewhere.\textsuperscript{115}

In order to submit a complaint to an NAO, the petitioner does not have to exhaust all domestic remedies. Generally, NAOs have only required that the petitioner identify what domestic remedies have been attempted and allege that domestic labor laws are not being effectively enforced.\textsuperscript{116} Once a submission is entered, the NAO has full discretion over whether or not to accept the submission for review. While the submission does not have to involve a corporation of any particular national origin, in order to be subject to arbitration the submission does have to allege that the violation is "trade related."\textsuperscript{117} If

\textsuperscript{115} Compa, \textit{The First NAFTA Labor Cases}, supra note 27, at 159. However, when viewed in light of American federalism, the NAO system seems less strange. It is not uncommon, for example, for an American court to apply the law of another jurisdiction. \textit{See} \text{Erie R.R. v. Tompkins,} 304 U.S. 64 (1938) (requiring federal courts to apply substantive state law in diversity cases).

\textsuperscript{116} Telephone interview with Kevin Banks, Director of Office, Inter American Labor Cooperation (Apr. 16, 2002); \textit{see also} Sarah Lowe, \textit{The First American Case Under the North American Labor Agreement for Labor Cooperation}, 51 U. MIAMI L. REV. 481, 486 (1997):

\textit{The international forum available under the NAALC does not require that domestic labor law remedies be exhausted, merely that actions and remedies to enforce domestic labor laws have been initiated. Thus the NAALC forum may function as a concurrent alternative to the remedy sought in any of the member nations so long as there is some credible evidence that a signatory country is not enforcing its domestic labor laws.}

Some business groups have pushed for a greater exhaustion requirement. \textit{See} Diamond, \textit{supra} note 27, at 217; Isa, \textit{supra} note 28, at 217 n.276. A review of NAALC submissions reveals that NAOs have a great deal of discretion with regards to exhaustion. While failure to exhaust domestic remedies has not been an issue in the majority of submissions, NAOs have occasionally refused to hear a complaint because domestic procedures have not been adequately attempted. For example in the \textit{Washington State Apples Case}, Mex. NAO No. 9802, the Public Report explained:

\textit{In the case of the alleged violations of the rights of freedom of association and collective bargaining of packing plant and warehouse employees, the Mexican NAO, pursuant to NAALC article 5.8, performed no investigation. This was because the issue, as the petitioners themselves acknowledge, is still in the process of being reviewed by the NLRB.}


\textsuperscript{117} NAALC, \textit{supra} note 10, art. 29(1). Trade related is defined as "related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the Parties; or (b) that compete in the territory of the Party whose labor law was the subject of ministerial consultations under Article 22, with goods produced or provided by persons of another party." \textit{Id.} at art. 49(1).
an NAO accepts a submission for review it investigates and issues a Public Report of Review.\textsuperscript{118}

Should an NAO find that another signatory nation has failed to enforce its domestic laws in violation of NAALC’s principles, the NAO may request ministerial consultations. With the exception of violations of core labor rights—freedom of association, the right to bargain, and the right to strike—the NAO can also request an Evaluation Committee of Experts. Only for violations of occupational health and safety, child labor, or minimum wage laws can an arbitral panel can be called to resolve the dispute.\textsuperscript{119}

C. Efficacy of NAALC

Theoretically, NAALC offers women a way to challenge ineffective enforcement of gender discrimination laws or labor laws, in violation of the above principles. In the years immediately following NAALC’s establishment, there was a degree of optimism among legal scholars regarding the extent to which NAALC could serve as a vehicle for developing a regime of transnational labor rights. NAALC articulates a commitment from each party to “ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productive workplaces, and shall continue to strive to improve those standards in that light.”\textsuperscript{120} Some scholars read this to suggest “a starting point for a charter of economic development based on the protection of labor. While acknowledging the current national labor laws, [NAALC] attempts to provide a direction in which reform of those laws must move.”\textsuperscript{121} Applying this same logic, because of the articulated principles of equal pay and non-discrimination, NAALC can be read to demand that reform move in the direction of increasing women’s rights, as well as toward protecting migrant workers and the right to organize.

In addition, some scholars have suggested that NAALC provides a vehicle to develop and implement international human rights and labor standards. Clyde Summers has argued:

To the extent that international conventions become a part of internal law, they create legal obligations under Article 3 of the Agreement. The labor standards in international conventions are

\textsuperscript{119} See NAALC, supra note 10, at arts. 21–23, 29.
\textsuperscript{120} NAALC, supra note 10, at pt. 2: Obligations, art. 2.
\textsuperscript{121} Diamond, supra note 27, at 215.
largely parallel to those set out in the Labor Principles and thus become more than goals or objectives; they become legal obligations owed to the other parties to the Agreement.\textsuperscript{122}

The possibility that NAALC might incorporate international law has interesting implications for gender rights, given that Canada and Mexico, though not the United States, have ratified CEDAW. For example, in the Pregnancy Testing Case, submitted to the United States NAO in 1997 by Human Rights Watch, the International Labor Rights Fund, and Mexico’s National Association of Democratic Lawyers, the petitioners accused the Mexican government of failing to uphold NAALC anti-discrimination principles and its own domestic law by permitting widespread pregnancy-based discrimination in export-processing factories in northern Mexico.\textsuperscript{123} The United States NAO pointed to Mexico’s ratification of CEDAW in its analysis of Mexican domestic law. The NAO cited Article 11(1) of CEDAW in support of its conclusion that Mexico had discriminated against women in violation of NAALC.\textsuperscript{124}

Despite the moments of optimism regarding NAALC’s ability to expand enforceable labor and gender rights, the past years have revealed that there are serious structural flaws in NAALC that limit its ability to redress violations of labor rights or achieve greater gender equality.\textsuperscript{125} Specific cases make vivid the limits of NAALC’s usefulness

\begin{thebibliography}{9}
\bibitem{122} Summers, supra note 27, at 184. But, as Summers acknowledges, this elevation depends on whether a country has ratified international conventions. As such it is likely to have a greater impact on Mexico than on the United States, as the United States remains a non-signatory to most of the United Nations Human Rights treaties. See Hathaway, supra note 42, at 111; \textit{see also} United Nations treaties, available at http://untreaty.un.org/English/access.asp (last visited Apr. 3, 2003). Summers points out, however, that the ILO’s Declaration of Fundamental Principles and Rights at Work, adopted at its 18th annual conference in June 1998 states that all members of ILO even if they have not ratified conventions have obligations by virtue of ILO membership. “It is uncertain whether this Declaration can make specific conventions binding on the US and Canada by virtue of their ILO membership, so as to become a part of their internal law and thereby shape obligations under NAALC.” Summers, supra note 27, at 184.
\bibitem{125} Significant literature has discussed the limits of NAALC in protecting workers’ rights, though with little attention to gender. See, \textit{e.g.}, sources cited supra notes 25 and 26; \textit{see also} LESLIE ROCKENBACH, \textit{THE MEXICAN AMERICAN BORDER: NAFTA AND GLOBAL LINKAGES} (2001); \textit{Trading Away Rights, The Unfulfilled Promise of Nafta’s Labor Side Agreement}, Apr. 2001, at http://www.hrw.org/reports/2001/nafta/nafta0401-06.htm#P1075_1846188 (last visited Apr. 3, 2003). Critics have also pointed to the failure of NAFTA to allow for increase immigration as detrimental to worker rights. NAFTA, unlike the EU, does not provide for the free flow of labor across borders. This puts downward pressure on Mexican wages by restricting migration out of Mexico. Moreover, illegal migration creates downward pres-
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as a remedial tool, especially when it comes to the right to organize. For example, when the largely female workers of the Sony plant in Nuevo Laredo who had been beaten and jailed for their support of an independent union petitioned the United States NAO, the NAO responded by calling for public workshops in Mexico and private meeting between the two labor secretaries. No independent union was recognized and no workers were ever reinstated. Similarly, in the Auto Trim/Breed Case, the United States NAO ruled that Mexico had inadequately enforced health and safety laws, resulting in serious illness, including birth defects. Yet no improvements in working conditions have occurred and no sanctions have been issued.

While NAALC aspires to protect the "right to organize" and to assure workers a workplace of "non-discrimination," it does not articulate what those rights are, or create a cause of action for individual workers when rights are violated. NAALC does not require any party to amend its domestic laws to correspond to a standard that has been generally agreed to by the Parties. The agreement recognizes "the right of each Party to establish its own domestic labor standards." The definition of labor principles emphasizes that the principles, including equal pay, right to organize, and non-discrimination, "do not establish common minimum standards for their domestic law."

Critics have contended that NAALC lacks a vehicle for improving the labor laws of a country who remains recalcitrant in regards to generally recognized norms of behavior in the area of fundamental labor rights, as long as that country applies its own laws. Some argue that it is the failure to "harmonize" the labor laws of the three countries that limits NAALC's effectiveness. However, harmonization of the three nations' laws cannot necessarily be equated with improvement on wages in Canada and the United States as it allows migrant workers to be exploited to a degree that legal workers could not. See Moody, supra note 14, at 127.

126. See Sony Case, U.S. NAO 940003; see also Richard Stevenson, Union Misgivings on NAFTRA are Clinton's Latest Worry, N.Y. TIMES, Nov. 5, 1997, at A1; see generally Rockenbach, supra note 125, at 75-79.


129. NAALC, supra note 10, at art. 2. The core obligation assumed by Mexico, Canada, and the United States under the agreement is to effectively enforce their own domestic labor law. See id. at art. 3(1).

130. Id. at annex 1.

131. See Manuel Fuentes Muniz, The NAFTA Labor Side Accord in Mexico and its Repercussions for Workers, 10 CONN. J. INT'L L. 379, 393 (1995) ("Weak national laws are insulated from reform as long as they are applied.").

132. See, e.g., Barbieri, supra note 28; Briones, supra note 28.
of such laws. That is, it is just as possible that harmonization would have resulted in a weakening of labor protections in Canada, and as a strengthening in Mexico. The problem is not the failure to harmonize labor law, but the failure to create strong and enforceable labor rights.

In addition, the absence of a supranational tribunal to hear evidence and decide the guilt or innocence of alleged labor rights violators has further undermined NAALC’s ability to make its labor principles a reality. NAALC does not set up an international labor appeals court that can overrule domestic authorities. Contrast this to the European Court of Justice in the European Union, which has the power to review specific labor law violations and decisions by a member state’s highest court. In the case of NAALC, an individual must appeal to another country’s NAO to investigate. Not only is this unusual in international law, it also raises concerns about expertise and independence. Essentially, an administrative agency is asked to interpret the domestic laws of another country, laws with which it has little experience.

Take, for example, the Mexican Pregnancy Testing Case. In order to rule on whether Mexico had failed to enforce its own non-discrimination laws, the United States needed to make a determination about Mexican domestic law; in so doing, it was faced with arguments from the Mexican government that pre-employment testing did not violate its labor law. The NAO contracted the services of an expert in

133. See Johnson, supra note 28, at 856 (“The ECJ is the final arbiter of whether a Member-State has met its obligations under EU law. The ECJ is empowered to hear cases referred to it from the highest domestic courts of the EU Member-States on matters that implicate EU law.”).

134. I do not mean to suggest that lack of expertise in itself is always a problem. Though this structure is anomalous in international law, it is not uncommon for American courts to apply the law of another jurisdiction. See supra note 115.

135. See supra note 124 and accompanying text. According to Human Rights Watch,:

The petitioners submitted detailed documentation demonstrating that women were routinely required to undergo pregnancy tests as a condition of employment, so that employers could screen out women who would require maternity benefits if hired. Some women who became pregnant after being hired were also pressured to quit their jobs. Petitioners also accused the government of failing to meet the NAALC’s article 4 requirement that victims of labor rights violations have access to tribunals; under the Mexican government’s interpretation of the law, only people with an established work relationship can seek redress from labor tribunals, so a woman who is not hired because she is pregnant has no such opportunity for redress.

Mexican labor law and gender issues, held a public hearing, received testimony from human rights legal experts, Mexican women, and the Mexican government. Ultimately, the United States was unwilling to conclusively interpret Mexican law. Instead, the NAO pointed to "differing opinions within the Government of Mexico on the constitutionality and legality of the practice" and recommended ministerial consultations.\textsuperscript{136}

Under the NAALC system, not only is a judgment made by an administrative agency of another country's executive branch without expertise in the law it is reviewing, but there is also no independent judicial officer bound by precedent. Rather, cases are heard by political appointees who are part of the executive branch. As a result, political considerations greatly shape the decisions of the NAOs.\textsuperscript{137} Lack of independence may explain why the Commission has generally not challenged governments and why NAOs have not aggressively investigated complaints or pursued remedies. For example, in February 2002, shortly after the Bush administration took over and promised a new closeness with Mexico, the United States NAO declined even to review a complaint that alleged the Mexican government had failed to fulfill its commitment expressed in an earlier ministerial agreement to promote free and fair union elections. Despite its earlier ruling, the United States NAO stated that a review would not further the objectives of the NAALC and that there is no provision in Mexican labor law governing the use of secret ballots in trade union representation elections.\textsuperscript{138}

Finally, and most critically, NAALC lacks effective enforcement mechanisms. NAALC’s procedures are slow and in most cases cannot result in sanctions. The primary mechanism for resolving complaints is negotiations between the governments. NAALC does not provide remedies such as union certification, reinstatement, back wages or punitive damages. Rather, NAALC divides labor violations into three categories, each entitled to different remedies. For alleged violations of all eleven of the labor principles, advocates can obtain a critical review and report from a National Administrative Office in a country’s labor ministry, followed by direct consultations between ministers of labor.


\textsuperscript{137} See Telephone Interview with Kevin Banks, Director of Office, Inter American Labor Cooperation (Apr. 16, 2002).

But, only for violations of three of the eleven principles—violations of a country's health and safety, child labor, and minimum wage laws—can advocates obtain binding remedies. For these, remedies are available at the end of a long dispute resolution process, and only when an arbitral panel rules. To get to this final step in the NAALC process can take nearly four years; no such penalty has yet been issued.\(^{139}\)

While health and safety, child labor, and minimum wage violations can theoretically result in sanctions, the only remedy available for violations regarding forced labor, employment discrimination, equal pay for men and women, migrant worker protection, and workers' compensation is a consultation and/or expert evaluation process.

Moreover, freedom of association, the right to bargain collectively, and the right to strike are exempt from all the mechanisms under the agreement except for the consultation process. Violations of these rights cannot lead to any tangible legal sanction under NAALC. For example, after an extensive investigation which produced substantial evidence that Mexican workers' right to freedom of association, right to bargain, and right to strike had been violated by Sony, the NAO made no definite findings and provided no remedy.\(^{140}\)

Moreover, even the decision to call for a consultation process is discretionary. In the *Honeywell* case, in which several unions alleged that twenty (female) workers had been fired by a Mexican maquiladora for attempting to organize, the United States NAO declined to require ministerial consultations and instead called for a series of cooperative activities coordinated by the NAOs to discuss the right to organize.\(^{141}\)

Contrast NAALC to NAFTA Chapter 11, which provides for resolution for corporate complaints, creates an independent cause of action, and includes significant remedies. Chapter 11 of NAFTA provides that private investors on behalf of themselves or on behalf of an enterprise, may directly sue a national government. Article 1116 of NAFTA allows an individual to submit a claim to arbitration if s/he believes a government has breached an obligation under the NAFTA

\(^{139}\) Business has been lobbying for an interpretation of NAALC that would require exhaustion of domestic remedies, making resolution even less timely. See Diamond, supra note 27, at 217.

\(^{140}\) See Sony Case, U.S. NAO 940003; see also Summers, supra note 27, at 175–78.

\(^{141}\) See Honeywell Case, U.S. NAO 940001; see also Compa, NAFTA's Labor Side Accord: A Three Year Accounting, supra note 27, at 13; Summers, supra note 27. However, note that neither Summers, Compa, nor the submission itself mentions that the workers fired were women. New accounts take note of the gender makeup of the workers. See e.g., Rob Ortega & Dianne Solis, *Honeywell's Firing of Over 20 Women In Mexico May Test NAFTA, Unions Say*, WALL ST. J., Dec. 9, 1993, at A4.
and that the breach caused the investor to incur a loss or damage as a result.142 While workers are unable to win compensation for labor violations through NAALC, corporations are able to win considerable judgments when nations breach Chapter 11.143 The comparison reveals that NAFTA privileges the financial rights of corporations over the economic and social needs of workers and their families. Women, and especially women of color, concentrated in the lowest paid and most vulnerable workplaces, are particularly impacted by the failure of NAFTA to accord labor rights the same importance as corporate rights.

D. NAALC’s Expressive Function

Despite NAALC’s failure to provide an effective forum for the enforcement of labor rights, the past years have shown that the agreement nonetheless wields expressive power and can serve an important function when used as part of a broader organizing and political campaign. NAALC’s articulation of “labor principles” gives labor standards a salience with a moral claim,144 while its gender specific principles give moral force to demands for women’s equality. The NAO hearing process can be used as a forum to give voice to such claims, and potentially makes each governmental party confront its own failures. In this way, NAALC has been a useful tool for unions and human rights groups, in building cross-border connections, in increasing publicity about labor rights violations, and as a means to exercise political pressure.145 While the Sony workers, for example, did not win their independent union, they were able to use the NAALC procedures to focus international attention on corporate and governmental labor abuses. Using this public attention, and with the support of American counterparts, independent unions, with significant participation by women workers, have more strength in Mexico than ever before.


143. In 1999, Metalclad, a United States corporation, won a $16.7 million judgment from an arbitral panel that found Mexico to be in violation of Chapter 11 of NAFTA. Mexico appealed and the suit was later settled for $16 million. See David Hechler, U.S. Firm Gets $16M Settlement, NAT’L L.J., Nov. 12, 2002, at A17.

144. See Summers, supra note 27, at 187.

The expressive value of NAALC applies to gender specific norms as well. The Mexican Pregnancy Testing Case, which reveals both the potential and the limits of NAALC, demonstrates that little concrete remedy came from the United States NAO:

After holding a public hearing in November 1997, the U.S. NAO published a report on the topic in January 1998. The report criticized the practice of pressuring pregnant women to quit their jobs, but stopped short of condemning the practice of pre-hire pregnancy testing. The NAO recommended ministerial consultations “for the purpose of ascertaining the extent of the protections against pregnancy-based gender discrimination afforded by Mexico’s laws and their effective enforcement by the appropriate institutions.” As a result of the consultations, several conferences were held—in Mexico and the United States—to address issues related to women’s rights at work.146

Yet, groups were able to use the process to generate pressure on the Mexican government, eventually leading the Mexican government to change its interpretation of its own domestic law. The Mexican government argued throughout the NAALC process that pregnancy testing did not violate Mexican law, but ultimately Mexican authorities publicly stated that such testing did in fact breach domestic standards.147 According to Human Rights Watch, the organization that documented the discrimination and brought the complaint, “The NAALC complaint process validated activists and women workers in their own fight to bring attention to this problem and to seek to stop it.”148

Thus, the Pregnancy Testing Case suggests that, despite its remedial limits, NAALC’s expressive principles and its public forum can be used as a tool for transnational norm development and cross-border organizing on the part of women’s rights groups and labor groups. NAALC can provide a new space to articulate a broader vision of women’s labor rights before an international audience and can help de-
velop cross-border networks among women’s rights groups. However, although NAALC has now been in existence for eight years, women’s voices and concerns are largely absent from the NAALC submissions and reports. There have been twenty-five total submissions since the NAALC was created in 1994.149 Only one—the Mexican Pregnancy Testing Case—specifically mentions women.150 This is particularly striking given the fact that women make up the majority of workers in export processing zones—the subject of most NAALC complaints. News accounts of the Honeywell case, for example, reveal that the twenty workers fired for organizing were all women.151 Similarly, while a large percentage of migrant workers in the United States are women, the submissions dealing with migrant workers make no reference to gender.152 Most of these submissions have been filed by unions and human rights NGOs.158

Meanwhile, American women’s rights groups have virtually ignored NAALC as a locus for addressing the struggles of women workers, and have not been actively involved in helping to organize women workers. No cases have been filed regarding the rights of women workers in America. Although NAALC’s labor principles open up a possibility for women’s groups to challenge unequal pay and sex discrimination, with the exception of the Pregnancy Testing Case, these principles have never been raised in the submissions. No cases have been filed under NAALC alleging violations of the equal pay principle. Moreover, women’s groups have not joined any of the petitions focusing on core labor rights.

149. See List of Public Communications, at http://labour.hrdc-drhc.gc.ca/psait_spila/aicdt_ialc/pc_naalc/summary/index.cfm/doc/English (last visited Apr. 3, 2003). Sixteen have been filed with the United States NAO, six with the Mexican NAO, and three with the Canadians.
150. See U.S. NAO 9701.
153. Submitters include the International Brotherhood of Teamsters, the United Electrical Workers of America, the International Labor Rights Fund, The American Friends Service Committee, the Association of Democratic Lawyers, the Communication Workers of America, Human Rights Watch, Coalition for Justice in the Maquiladoras, the United Steelworkers, Yale University School of Law Workers’ Rights Project, and the ACLU. See Summary of Public Communications, at http://www.naalc.org/english/publications/pccharten.htm (last visited Apr. 3, 2003).
V. Looking Forward

The time since NAFTA's signing has made clear that globalization is not a passing phase in our economic system, and that this global restructuring has particular impact for women workers. It is critical that those concerned about gender equality begin to engage in and support cross-border labor organizing campaigns, and, when possible, exploit NAALC's expressive capabilities. Moreover, such groups must begin to advocate for the creation of stronger, more effective transnational labor agreements. Such organizing efforts and transnational legal provisions are essential to the existence of democracy, workers' rights, and gender equity in an increasingly transnational economy. As international law experts have argued, NAALC confronts one of the central tensions now facing the world: that which exists between nationally organized democratic regulatory frameworks and the emerging transnational nature of economic life.154 Moreover, as often ignored by international law and NAFTA experts, this tension has gendered roots and effects.155

Eight years after the passage of NAFTA, there are hopeful signs, at least in terms of citizen efforts to shape trade debates while connecting gender to economic rights. Faced by a sharp decline in union membership caused by the flight of the manufacturing industry, unions have increased their focus on organizing women and immigrants in the growing service sector. Shortly after the passage of NAFTA, a political struggle within the labor movement broke out. A dissident group of union leaders, expressing frustration with years of membership decline, was elected to the leadership of the federation in the first contested election in the AFL-CIO's history.156 The new slate was headed by John Sweeney of the largely female and immigrant Service Employees International Union, Richard Trumka, former president of the United Mine Workers of America, and Linda Chavez Thompson, a Mexican-American immigrant and the child of farmworkers.

154. See Diamond, supra note 27, at 200.
155. As I have argued throughout this paper, an accurate evaluation of the efficacy of the current system, and effective development of new models, depend on the recognition that the majority of workers being affected by the global economy are women and that they are being affected differently because they are women.
The new leadership promised increased militancy and more progressive politics.\textsuperscript{157}

Subsequently, the AFL-CIO has built an active new department focusing on women's rights, nationally and internationally.\textsuperscript{158} Unions such as the Service Employees International Union have focused intensely on organizing in female-dominated industries such as health care and homecare. Indeed, two out of three new union members are women.\textsuperscript{159} With increasing numbers of women in unions, the number of women in leadership positions is also increasing. The national federation has begun taking public stands in support of women's rights legislation, publicly endorsing national legislation for contraceptive equity and to protect survivors of domestic violence from unemployment and insurance discrimination, for example.\textsuperscript{160}

In addition, acutely aware of the diminished power of workers with respect to multinational corporations, parts of the American labor movement, particularly the United Electricalworkers and the Steelworkers, are beginning to engage in more international cross-border organizing, working directly with women in the maquiladoras.\textsuperscript{161} NAALC has facilitated these cross-border efforts.\textsuperscript{162} Further, the AFL-CIO has dramatically revised its position on immigration, putting new emphasis on the rights of immigrant workers rather than on narrow protectionism.\textsuperscript{163} Although there is much more progress to be made within the labor movement, and although unions face significant obstacles to organizing, changes enacted since the passage of NAFTA are promising.\textsuperscript{164}

\begin{footnotes}
\item[157] See Peter T. Kilborn, \textit{Why Labor Wants the Tired and the Poor}, \textit{N.Y. TIMES}, Oct. 29, 1995, (Week in Review), at 3 (describing labor’s new commitment to organizing the poor and engaging in social activism).
\item[158] See AFL-CIO, Women’s Dept., \textit{http://www.aflcio.org/women/workers_rights.htm} (last visited June 17, 2002).
\item[159] See AFL-CIO, Workers’ Rights are Women’s Rights, at \textit{http://www.aflcio.org/women/workers_rights.htm} (last visited June 17, 2002).
\item[160] See AFL-CIO, \textit{2001b Stopping Domestic Violence at Work} (Aug. 1, 2001), \textit{available at \textit{http://www.aflcio.org/publ/estatements/jul2001/violence.htm}} (last visited June 17, 2002). However, it is not clear whether the issue comes up in practice with union leaders at workplaces implementing the recommendations of the position paper.
\item[161] See Ansley, \textit{supra} note 23, at 220 n.4.
\item[162] See Compa, \textit{A Three Year Accounting}, \textit{supra} note 27, at 21–23.
\item[164] I do not mean to suggest that unions have solved problems of sexism or racism in their ranks, nor that they have effectively implemented a vision of social unionism, only that many are moving in this direction.
\end{footnotes}
While unions have moved in the right direction, so too have women’s groups. Although few women’s groups have been involved in active organizing campaigns, such as the campaigns that brought complaints under NAALC, women’s NGOs have become much more active in the trade debate. Since NAFTA’s passage, new NGOs have formed that are focused on trade and women workers’ rights. There are now more than thirty organizations doing advocacy and policy work around women’s issues in the global economy. \(^{165}\) Even traditional, well-established women’s organizations are beginning to get involved in the issue. In May of 2002, the League of Women Voters reassessed its stance on trade, for the first time since 1973, calling specific attention to the need to improve labor conditions and guarantee core labor rights. \(^{166}\) The National Council of Jewish Women formed the No Sweatshop Coalition (“NOSCO”) after their conference on sweatshops in October 1996. \(^{167}\) Major national women’s groups, including NOW and Feminist Majority recently wrote a letter to Speaker Hastert arguing against the renewal of fast-track trade authority. \(^{168}\)

Such advocacy work, merging issues of trade and gender, focusing specifically on women workers in the global economy is critically important. However, much of the current NGO work posits the women as victims of exploitation and sexual harassment at work, rather than as actors engaged in their own organizational efforts; it decides priorities and advocates policies on behalf of working women, rather

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\(^{165}\) For a description of many such organizations see Center for Concern’s website at http://www.coc.org/focus/?ID=907&show=Related_Links#rights (last visited Apr. 3, 2003). Two groups that are focused particularly on Mexican women workers and NAFTA based trade are the Canadian based Maquiladora Solidarity Network at http://www.maquilasolidarity.org/ (last visited Apr. 3, 2003), and the American based Coalition for Justice in the Maquiladoras. See also International Gender and Trade Network at http://www.genderandtrade.net (last visited Apr. 3, 2003) (“[A]n international network of gender advocates working to promote equitable, social and sustainable trade,” believing that, “[i]n the current international trading system, women have been turned into producers and consumers of traded commodities and are even traded commodities themselves.”).


\(^{167}\) The New York section went on to organize two no-sweat shopping days. See http://www.wccny.org/nosco/nosco.html (last visited Apr. 3, 2003).

\(^{168}\) See Against NAFTA, Letter to Speaker Hastert, at http://www.cwa3204.org/leg_news/1005871289.html (last visited June 17, 2002). The letter was also signed by a wide array of union, church groups, civic organizations, and environmental groups.
than furthering the rights of those women, as workers, to organize and to determine their own priorities.\textsuperscript{169}

The focus on working women as victims in need of someone to speak for them is not only normatively troubling, it is also practically limited. It occludes the importance of worker organizations. Unionization strongly correlates with economic gains for workers, and to some extent with social rights such as child-care, health care, and paid family leave.\textsuperscript{170} Union membership raises median weekly earnings of American workers and reduces gender based income gaps. Overall, women who are members of a labor union earn over 30\% more than their non-union counterparts; African American women earn 38\% more and Latina women 41\% more than non-union women of the same ethnic or racial background.\textsuperscript{171} In addition, union membership decreases the wage gap between men and women by more than 10\%.\textsuperscript{172} Union workers are also much more likely to have health care and pension benefits than non-union workers.\textsuperscript{173} Thus, a vital labor movement in transnational female workplaces such as Mexican maquiladoras and the American service sector, is critical for advancing women's economic and social rights.

Moreover, facilitating organization is essential to furthering democracy and workers’ ability to participate in and affect democratic political culture. Workplace organizations, like other voluntary associations, enable civic participation and strengthen democracy. As Theda Skocpol, Marshall Ganz, and Ziad Munson write:

Public life in the United States has long been rooted in voluntary membership groups as well as competitive elections. From churches and unions to social groups and reform crusades, membership associations have provided paths into active citizenship, al-


\textsuperscript{172} See id.

\textsuperscript{173} See id.
allowing Americans to build community, pursue shared goals, and influence social and political affairs.\textsuperscript{174}

The right to organize, the right to bargain collectively, and the right to strike run parallel to basic American political rights—the right to assemble, the right to freedom of speech, and the right to petition the government for redress of grievances. Unions are some of the most formally democratic institutions in American society, aside from actual elected bodies. They can be a space where workers learn about democracy first-hand, and, as a result, they tend to foster greater political participation.\textsuperscript{175} Moreover, unions have historically constituted a fundamental basis for a progressive coalitions in American politics.\textsuperscript{176} Thus, unionization in female-dominated industries has the potential not only to improve women’s economic conditions, but also to give them a collective voice through which to exercise power in the democratic process.

Skocpol, Ganz, and Munson warn us that the precipitous decline of organizational life in American society has dangerous implications for democracy. They urge Americans to “reimagine their democratic future and look to revitalize their shared and representative institutions not just in national politics but in associational life as well.”\textsuperscript{177}

\textsuperscript{174} Theda Skocpol, Marshall Ganz & Ziad Munson, A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States, 94 AM. POL. SCI. REV. 527 (2000); see also Theda Skocpol, Storrs Lectures, Yale Law School (2002).

\textsuperscript{175} See generally Carole Pateman, Participation and Democratic Theory (1970) (concluding that workers who have a meaningful role in decision-making at work develop a sense of political efficacy that may make them more active citizens in the project of self-governance). See also Thomas Kohler, The Overlooked Middle, 69 CHI-KENT L. REV. 229, 230 (arguing that membership organizations such as unions teach us “the habits necessary to sustain democratic political life”). For further discussions see Kate E. Andrias, Note, A Robust Political Debate: Realizing Free Speech in Workplace Representation Elections, 112 YALE L.J. (forthcoming, 2003).

\textsuperscript{176} See David Brody, Workers in Industrial America 199-239 (1993) (discussing the role of unions in politics beginning with the New Deal); Joshua Freeman, Working Class New York 55–71 (2000) (describing how during the years after World War II the labor movement led New York city toward a social democratic political regime). At times, particularly during the Cold War and the Vietnam era, the labor movement as a whole was less allied with progressive politics and followed a more narrow, business unionism model. However, even then, certain local unions played an important part in progressive political coalitions. See, e.g., Leon Fink & Brian Greenberg, Upheaval in the Quiet Zone: A History of Hospital Workers’ Union, Local 1199 184-189 (1989) (analyzing the role of the hospital workers’ union in the civil rights movement and in progressive politics during the 1960s when most other unions were viewed as conservative and complacent by the American Left); Robert Korstad & Nelson Lichtenstein, Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement, 75 J. AM. HIST. 768 (arguing that organized black workers were in the vanguard of efforts to transform race relations in the South in the 1960s).

\textsuperscript{177} Skocpol, Ganz & Munson, supra note 174, at 547.
Reconsidering their words in light of NAFTA, NAALC, and the current global economy, suggests that we must "re-imagine" organizational life not only nationally, but internationally. Foremost in the agenda of rights activists—human rights, women's rights, and labor rights alike—as well as that of sympathetic legal scholars must be to create transnational legal norms that strengthen civic participation and democratic structures. In short, efforts should focus on shaping trade agreements so that they protect the rights of workers to build effective labor organizations across borders. Only if NAALC and similar agreements include stronger organizational rights will they play a critical role in reestablishing democratic life on a transnational basis, allowing women to finally decide for themselves what rights they deserve.