

## Gender-Identity Protection, Trade, and the Trump Administration: A Tale of Reluctant Progressivism

*Jean Galbraith & Beatrix Lu*

**ABSTRACT.** The Trump Administration has been hostile to transgender people, stripping away many protections from discrimination established by the prior administration. It is therefore striking that President Trump’s signature international agreement to date – the “new NAFTA” recently negotiated with Canada and Mexico – includes a provision requiring all three countries to implement appropriate policies to protect workers against discrimination based on gender identity. This provision has a similar requirement with respect to discrimination on the basis of sexual orientation, notwithstanding the fact that the Trump Administration’s domestic policies have also shown hostility to such protections. How did this provision come to be included in the trade agreement? How powerful is it in practice? And what lessons does its inclusion have for international trade law more generally?

Drawing on subtle changes in the wording of the initial and revised texts of the trade agreement, this Essay hypothesizes that the initial inclusion of gender-identity and sexual-orientation protections took place with little to no interagency consultation with the Department of Justice, which has taken a strong position against such workplace protections. Once these protections made it into the initial public draft, the Trump Administration could – and did – water down the protections in subsequent negotiations, but the Administration could not remove the protections entirely. The net effect is an international commitment to the protection of gender identity and sexual orientation that is substantively weak but still meaningful – and that carries considerable expressive force. The inclusion of the protections shows that trade agreements can lead even powerful governments to make value-laden commitments at odds with their own domestic agendas.

### INTRODUCTION

When the initial text of the United States-Mexico-Canada Agreement (USMCA) was released in the fall of 2018, it included a provision that surprised and intrigued many observers. In Article 23.9, the three countries committed to “implement[ing] policies that protect workers against employment discrimination

on the basis of sex, including . . . sexual orientation [and] gender identity.”<sup>1</sup> How did this language—far more progressive than that found in any previous U.S. trade agreement<sup>2</sup>—end up in a trade agreement negotiated by the Trump Administration?

Some Trump Administration officials must have wondered this too, for the language changed. As the USMCA was finalized for signature, Article 23.9 dwindled to committing each country to “implement policies *that it considers appropriate* to protect workers against employment discrimination on the basis of sex, . . . sexual orientation [and] gender identity.”<sup>3</sup> A footnote further downplayed the effect of this provision for the United States.<sup>4</sup> Yet although these changes stripped Article 23.9 of most of its substantive impact, the Agreement retained language assuring freedom from discrimination on the basis of sexual

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1. United States-Mexico-Canada Agreement Text, OFF. U.S. TRADE REPRESENTATIVE (Oct. 2, 2018), <http://web.archive.org/web/20181001081423/https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico> [<https://perma.cc/8H65-DHNU>] [hereinafter Initial USMCA]. Throughout this Essay, we discuss both the gender-identity and the sexual-orientation portions of this provision. We emphasize the gender-identity portion in particular, however, because the Trump Administration’s hostile domestic policies on gender identity have been even more pronounced and salient than have its policies on sexual orientation. See *infra* notes 21-22, 30-32, and accompanying text (noting some policy actions relevant to both gender identity and sexual orientation and some policy actions focused exclusively on gender identity).
  2. Most of the United States’ prior trade agreements merely reaffirm commitments and permit cooperative activities related to the International Labour Organization (ILO) standards which require countries “to respect, to promote and to realize . . . the elimination of discrimination in respect of employment and occupation.” INT’L LABOUR ORG., ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW UP (June 18, 1998); see, e.g., United States-Korea Free Trade Agreement art. 19.2(1)(e), U.S.-S. Kor., June 30, 2007, 125 Stat. 428; Australia-United States Free Trade Agreement art. 18.1(1), U.S.-Aus., May 18, 2004, 118 Stat. 919; Chile-United States Free Trade Agreement annex 18.5(4)(a), U.S.-Chile, June 6, 2003, 117 Stat. 909. Agreements that explicitly mention gender or sex discrimination do so in the context of cooperative activities, rather than parties’ domestic obligations. See, e.g., Panama-United States Trade Promotion Agreement annex 16.6(3)(l), June 28, 2007, 125 Stat. 498; United States-Colombia Trade Promotion Agreement annex 17.6(2)(n), U.S.-Colom., Nov. 22, 2006, 125 Stat. 462; Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) annex 16.5(3)(l), Aug. 5, 2004, 119 Stat. 462.
  3. Agreement Between the United States of America, the United Mexican States, and Canada 05/30/19 Text, OFF. U.S. TRADE REPRESENTATIVE (Nov. 30, 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/EYE6-Y4BC>] [hereinafter Finalized USMCA] (emphasis added).
  4. *Id.* at n.13 (“The Article . . . requires no additional action on the part of the United States . . . in order for the United States to be in compliance with the obligations set forth in this Article.”). The implications of this footnote are discussed in more detail below. See *infra* notes 24-26 and accompanying text.

orientation and gender identity that contrasts sharply with other Trump Administration policies.<sup>5</sup>

This Essay uses Article 23.9 as a window into understanding how international negotiations can lead even powerful governments to make value-laden commitments at odds with their own domestic agendas. One burgeoning account of international trade law is that trade agreements have become vehicles by which more powerful Western economies push changes upon less-developed countries with respect to labor, the environment, human rights, and governance practices.<sup>6</sup> Article 23.9 reminds us that this account is not exhaustive, and that influence in other directions is possible as well. Here, Canada succeeded in writing an endorsement of progressive values into the USMCA—language at odds with the broader agenda set by the executive branch of the more powerful and equally developed United States.

We hypothesize that Canada’s success may be tied to internal dynamics within the U.S. executive branch. The Office of the U.S. Trade Representative (USTR), which led the U.S. negotiations of this time-sensitive agreement, may have placed a lower priority on avoiding protections for sexual orientation and gender identity than did other actors within the Trump Administration.<sup>7</sup> As we will show, subtle changes in the wording of the initial and revised versions of Article 23.9 suggest that, prior to the release of the initial version, USTR likely

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5. See *infra* note 21 and accompanying text.

6. See, e.g., EMILIE M. HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS 115 (2009); Meredith Kolsky Lewis, *Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means?*, 12 *LOY. U. CHI. INT’L L. REV.* 1, 1-2 (2014); Paul Mertenskotter & Richard B. Stewart, *Remote Control: Treaty Requirements for Regulatory Procedures*, 104 *CORNELL L. REV.* 165, 166-72 (2018); Zolomphi Nkowan, *International Trade and Labour: A Quest for Moral Legitimacy*, 8 *J. INT’L TRADE L. & POL’Y* 4, 10 (2009); Anne-Carlijn Prickartz & Isabel Staudinger, *Policy vs Practice: The Use, Implementation and Enforcement of Human Rights Clauses in the European Union’s International Trade Agreements*, 3 *EUR. & WORLD: L. REV.* 1, 18-20 (2019); see also Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?*, *WORLD TRADE ORG.*, [https://www.wto.org/english/res\\_e/publications\\_e/wtr11\\_forum\\_e/wtr11\\_15feb11\\_e.htm](https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm) [<https://perma.cc/E2JM-5YP7>] (discussing how middle-income and developing countries are reluctant to accept—let alone demand—human-rights provisions in trade agreements, but may become more receptive to these provisions upon becoming wealthier or more powerful).

7. In addition to updating the North American Free Trade Agreement (NAFTA), the core aim of USTR was to “rebalance[]” the international agreement with respect to U.S. “workers and businesses” on issues like outsourcing, rules of origins, and government procurements. See Press Release, Ambassador Lighthizer, Statement of USTR Robert Lighthizer at the Closing of the Seventh Round of NAFTA Renegotiations (Mar. 5, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/february/statement-ustr-robert-lighthizer> [<https://perma.cc/G6JT-UAUA>].

did not discuss the Article’s content with the Department of Justice, which has taken a strong position against workplace protections tied to sexual orientation and gender identity. The tight timeline surrounding the initial version, the priority President Trump placed on reaching a deal, and the apparent lack of inter-agency consultation all seem to have contributed to USTR’s initial acceptance of Article 23.9’s protective language.

#### I. PROTECTIONS AGAINST SEX-RELATED DISCRIMINATION IN THE INITIAL AND “SCRUBBED” USMCA

In 2017, President Trump began the process of renegotiating the North American Free Trade Agreement (NAFTA), a trilateral trade agreement between the United States, Mexico, and Canada that originally came into force in 1994.<sup>8</sup> President Trump had campaigned, in part, on either renegotiating or withdrawing from NAFTA, to which he referred as “the single worst trade deal ever approved in this country,” and which he blamed for decreasing domestic manufacturing.<sup>9</sup> Thus, after lengthy and contentious negotiations, the United States reached a new agreement with Mexico and Canada on October 1, 2018. Securing this agreement came down to the wire, as U.S. law effectively requires a sixty-day delay before the President may sign the agreement,<sup>10</sup> and the negotiators wanted the agreement signed before Mexico’s government changed hands on December 1.<sup>11</sup> Following the publication of the initially agreed-upon text on October 1, the agreement then went through a “legal scrub” – a final vetting by lawyers that is technical in theory but can include some substantive renegotiation in

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8. See Jean Galbraith, *Contemporary Practice of the United States Relating to International Law*, 113 AM. J. INT’L L. 131, 150 (2019). For a discussion of the initiation of these negotiations and, more generally, of the challenges of revising labor chapters in trade agreements, see Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT’L L. 315, 320-37 (2018).

9. Jackie Calmes, *Trump Scores Points on Trade in Debate, But Not So Much on Accuracy*, N.Y. TIMES (Sept. 27, 2016), <https://www.nytimes.com/2016/09/28/us/politics/hillary-clinton-donald-trump-trade-tpp-nafta.html> [<https://perma.cc/K8YP-2KEZ>].

10. 19 U.S.C. § 4205(a)(1)(B) (2018); see also Galbraith, *supra* note 8, at 153.

11. See Elisabeth Malkin, *Mexico’s New Leader, Once a NAFTA Foe, Welcomes New Deal*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/world/americas/nafta-mexico.html> [<https://perma.cc/U2E4-JBK5>] (noting that while both the outgoing and incoming Mexican presidents supported the agreement, the outgoing president saw it as “a win he can claim was part of his legacy” while the incoming president was thereby “free[d] from messy negotiations at the start of his administration”).

practice.<sup>12</sup> On November 30, the parties released a final version of the text and all three countries' leaders signed the USMCA.<sup>13</sup>

Canada had come to the negotiating table with a progressive trade agenda that included protections for gender rights and, specifically, for gender identity.<sup>14</sup> A side agreement to the original NAFTA had included some language about sex discrimination,<sup>15</sup> but left considerable room for improvement. While USMCA negotiations were underway, Canada was simultaneously modernizing its free-trade agreements with Chile and Israel such that, among other things, those agreements would include provisions related to gender and trade.<sup>16</sup> Yet those agreements did not include language on sexual orientation and gender identity. Elsewhere in the world, however, an example of such protections had emerged.

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12. See Wolfgang Alschner, *Legal Scrubbing or Renegotiation? A Text-as-Data Analysis of How the EU Smuggled an Investment Court into Its Trade Agreement with Canada*, MAPPING BITS BLOG (Mar. 24, 2016), <http://mappinginvestmenttreaties.com/blog/2016/03/legal%20scrubbing-ceta> [<https://perma.cc/93J5-B4NJ>] (discussing how renegotiation can occur during a scrub).
  13. See Galbraith, *supra* note 8, at 153. The agreement has no official name, but USMCA is the name the United States uses, see *id.* at 150 n.1, and we use it here.
  14. See Doug Palmer & Alexander Panetta, *New U.S.-Canada-Mexico Trade Pact Promises to Strengthen LGBTQ Rights*, POLITICO (Oct. 23, 2018, 4:21 PM EDT), <https://www.politico.com/story/2018/10/23/new-nafta-lgbtq-rights-874004> (quoting an unnamed Canadian official, who stated, “We viewed it as important to get gender identity included in the agreement . . . It’s a win for us”); Chrystia Freeland, Minister of Foreign Affairs of Can., Address by Foreign Affairs Minister on the Modernization of the North American Free Trade Agreement (NAFTA) (Aug. 14, 2017), [https://www.canada.ca/en/global-affairs/news/2017/08/address\\_by\\_foreignaffairsministeronthemodernizationofthenorthame.html](https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html) [<https://perma.cc/4WPY-YQJT>] (stating that Canada wanted to “add[] a new chapter on gender rights, in keeping with our commitment to gender equality”).
  15. North American Agreement on Labour Cooperation art. 11(1)(m), annex 1 arts. 7-8, Sept. 13, 1993, 32 I.L.M. 1499 (1993) (promoting cooperative activities regarding the “equality of men and women” and setting out as labor principles the elimination of employment discrimination, equal pay or men and women).
  16. Canada-Israel Free Trade Agreement, Can.-Isr., art. 13, 2018 Can. T.S.; Canada-Chile Free Trade Agreement, Can.-Chile, app. II, ch. N *bis*, 2017 Can. T.S. 2019/4. For a broader overview of gender-related provisions in trade agreements, see THE NEW WAY OF ADDRESSING GENDER EQUALITY ISSUES IN TRADE AGREEMENTS, POLICY BRIEF NO. 53, UNITED NATIONS CONFERENCE ON TRADE & DEV. 2-3 (Oct. 2017), [https://unctad.org/en/PublicationsLibrary/presspb2017d2\\_en.pdf](https://unctad.org/en/PublicationsLibrary/presspb2017d2_en.pdf) [<https://perma.cc/BJ7H-VNEY>]; Raj Bhala & Cody Wood, *Two Dimensional Hard-Soft Law Theory and the Advancement of Women’s and LGBTQ+ Rights Through Free Trade Agreements*, 47 GA. J. INT’L & COMP. L. 299 (2019); Foreign Trade Info. Sys., *Trade and Gender: Summary Table of Language Referring to Gender Equality in Trade Agreements*, ORG. AM. STATES (2019), [http://www.sice.oas.org/Genderandtrade/GT\\_mandates\\_table\\_e.asp](http://www.sice.oas.org/Genderandtrade/GT_mandates_table_e.asp) [<https://perma.cc/67TS-TR4P>]; and José-Antonio Monteiro, *Gender-Related Provisions in Regional Trade Agreements*, (World Trade Org., Staff Working Paper ERSD-2018-15, 2018), [https://www.wto.org/english/res\\_e/reser\\_e/ersd201815\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf) [<https://perma.cc/Q68V-TJKU>].

In 2016, a Chile-Uruguay free-trade agreement stated that the countries “recognize[d] the importance of promoting policies and practices of gender equality . . . [and] the elimination of every form of discrimination against women based on sex, . . . sexual orientation, [and] gender identity.”<sup>17</sup>

In the NAFTA renegotiations, Canada successfully bargained for gender-related protections in the chapter on labor.<sup>18</sup> The USMCA became the first trade agreement involving any of the three countries to explicitly include protections for sexual orientation and gender identity.<sup>19</sup> In the initial text released on October 1, 2018, Article 23.9 was titled “Sex-Based Discrimination in the Workplace” and stated:

The Parties recognize the goal of eliminating sex-based discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace. Accordingly, each Party shall implement policies that protect workers against employment discrimination on the basis of sex, including with regard to pregnancy, sexual harassment, sexual orientation, gender identity, and caregiving responsibilities, provide job-protected leave for birth or adoption of a child and care of family members, and protect against wage discrimination.<sup>20</sup>

This provision triggered considerable interest. Its progressive approach was contrasted starkly with other policy choices made by the Trump Administration, including its domestic decisions<sup>21</sup> to remove Obama-era protections for

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17. Tratado de Libre Comercio Uruguay-Chile, Uru.-Chile, art. 14.1(2), Apr. 10, 2016 (author’s translation).
  18. There is little public evidence regarding Mexico’s role in the negotiations on this issue. As noted *infra* note 54, Mexico passed a domestic law providing protection against workplace discrimination on the bases of sexual orientation and gender identity in April 2018, some months before the conclusion of the USMCA negotiations.
  19. See *Trade and Gender*, *supra* note 16; CONFERENCE BD. OF CAN., MAKING GENDER-RESPONSIVE FREE TRADE AGREEMENTS 7-8 tbl.1 (2019).
  20. Initial USMCA, *supra* note 1, art. 23.9.
  21. See, e.g., Katie Benner, *Federal Prisons Roll Back Rules Protecting Transgender People*, N.Y. TIMES (May 11, 2018), <https://www.nytimes.com/2018/05/11/us/politics/justice-department-transgender-inmates-crime-victims.html> [<https://perma.cc/N6FA-LTRZ>]; Erica L. Green, Katie Benner & Robert Pear, *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> [<https://perma.cc/VC59-EGT5>]; Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html> [<https://perma.cc/PV9N-RELQ>]. Most recently, the Department of Health and Human

transgender persons in prisons, schools, and the military, as well as its attempts to remove the word “gender” from international documents.<sup>22</sup>

When the final text was released sixty days later, on November 30, the provision had been renegotiated and its protections watered down. The finalized text of Article 23.9, which was renamed “Discrimination in the Workplace,” now read:

The Parties recognize the goal of eliminating discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace. Accordingly, each Party shall implement policies<sup>23</sup> that it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job-protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.<sup>23</sup>

Further, the United States added footnote 13:

The United States’ existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights

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Services (HHS) under Trump has proposed a rule that would reverse the Obama-era interpretation of the Affordable Care Act’s prohibition on sex discrimination to cover discrimination on the basis of gender identity and sexual orientation. *See* Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (June 14, 2019); *see also* Defendant’s Memorandum in Response to Plaintiff’s Motions for Summary Judgment at 1, *Franciscan Alliance, Inc. v. Azar*, No. 7:16-cv-00108 (N.D. Tex. Apr. 5, 2019) (arguing that the United States “has returned to its longstanding position that the term ‘sex’ in Title VII does not refer to gender identity,” so the Affordable Care Act should not be read to cover discrimination based on gender identity either). Until the final rule is promulgated, HHS has, as a matter of enforcement, suspended all subregulatory guidance that interprets or implements the Affordable Care Act to prohibit discrimination on these grounds. *See* Nondiscrimination in Health and Health Education Programs or Activities, *supra*, 84 Fed. Reg. at 27,872.

22. Around the same time the USMCA was being negotiated and signed, the Trump Administration tried to remove references to “gender” in other international documents, for example by replacing the phrase “gender-based violence” with “violence against women” in UN human-rights documents. *See* Julian Borger, *Trump Administration Wants to Remove ‘Gender’ from UN Human Rights Documents*, *GUARDIAN* (Oct. 25 2018, 1:00 PM ET), <https://www.theguardian.com/world/2018/oct/24/trump-administration-gender-transgender-united-nations> [<https://perma.cc/9WDG-CBRJ>].
23. Finalized USMCA, *supra* note 3, art. 23.9 (emphasis added).

Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article.<sup>24</sup>

This final version reduced U.S. obligations in three important ways. First, it reduced the substantive commitment from “shall implement policies” to “shall implement policies that [each country] considers appropriate.”<sup>25</sup> Second, footnote 13 attempted to limit any expansion of U.S. antidiscrimination obligations by asserting that current policies suffice to ensure U.S. compliance with the agreement, and by appearing to read the main text as relevant only to the protection of federal employees.<sup>26</sup> Third, the changes redefined “sex.” The structure of the initial provision suggested that discrimination on the basis of pregnancy, sexual harassment, sexual orientation, gender identity, and caregiving responsibilities were all “include[ed]” as *subcategories* of sex discrimination. But the final USMCA provision included sexual harassment only as an example of sex discrimination, while listing the remaining characteristics as *separate* grounds of discrimination. This change was also reflected in the title and first sentence of the provision, which referred to “discrimination” in the workplace broadly rather than “sex-based discrimination” specifically.<sup>27</sup>

In this Essay, we will focus on the USMCA’s redefinition of “sex” and what this suggests about the negotiating process. Despite the legal significance of the modification, the redefinition has received less attention than the first two changes. The change not only highlights the growing domestic divide over the meaning of “sex” but also hints at how Article 23.9 came to be part of the USMCA, in spite of the disjunct between its content and the Trump Administration’s general approach to gender issues.

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24. *Id.* at n.13. Despite these changes, another provision in the labor chapter allowing parties to develop cooperative activities in areas including the “elimination of employment discrimination in the areas of . . . sexual orientation, gender identity, and other characteristics not related to merit or the requirements of employment” remained unchanged. *Id.* art. 23.12(5)(1)(i).

25. See *An Analysis of the United States–Mexico–Canada Agreement*, HERITAGE FOUND. 47 (Tori K. Whiting & Gabriella Beaumont-Smith eds., 2019), [https://www.heritage.org/sites/default/files/2019-01/BG3379\\_0.pdf](https://www.heritage.org/sites/default/files/2019-01/BG3379_0.pdf) [<https://perma.cc/XJU9-NZRX>] (describing how the changed language “nullified” the provisions); Simon Lester, *The Progressive Parts of the New NAFTA: Footnotes at War with Obligations*, INT’L ECON. L. & POL’Y BLOG (Nov. 30, 2018, 1:46 PM), <https://worldtradelaw.typepad.com/ielpblog/2018/11/the-progressive-parts-of-nafta-footnotes-at-war-with-obligations.html> [<https://perma.cc/33DL-V3MN>] (stating that the change in language adds considerable discretion to the provision).

26. See Lester, *supra* note 25 (“In a sense, the footnote tries to say that even if the U.S. is not technically in compliance with Article 23.9, it is nonetheless in compliance with Article 23.9.”).

27. See Finalized USMCA, *supra* note 3, art. 23.9.



## II. THE USMCA AND THE STRUCTURE OF EXISTING FEDERAL LAW ON SEX-RELATED DISCRIMINATION

What explains the change in how discrimination on the basis of sex was defined between the USMCA's initial and finalized versions? We hypothesize that U.S. trade negotiators did not initially realize the tensions between the definition of discrimination based on "sex" in the USMCA as originally negotiated and the far less progressive definition of "sex" used by the current Department of Justice for Title VII purposes.

Title VII prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin."<sup>28</sup> In addition to covering sexual harassment, discrimination on the basis of sex is already understood in U.S. law to prohibit pregnancy-based discrimination and disparate treatment based on caregiver responsibilities.<sup>29</sup>

The issue is more complex, however, regarding discrimination on the basis of sexual orientation and gender identity. On the one hand, the Equal Employment Opportunity Commission (EEOC), the independent agency responsible for enforcing Title VII, maintains that discrimination based on both sexual orientation and gender identity are forms of sex-based discrimination prohibited by Title VII.<sup>30</sup> On the other hand, in 2017, then-Attorney General Jeff Sessions

28. 42 U.S.C. § 2000e-2(a) (2018).

29. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)) (amending Title VII to explicitly include "pregnancy, childbirth, or related medical conditions" in the definition of "sex"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986) (holding that sexual harassment claims are actionable under Title VII's prohibition on sex discrimination); U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (May 23, 2007) (clarifying that disparate treatment of persons with caregiving responsibilities may give rise to a Title VII violation).

30. Sam Schwartz-Fenwick & Lucas DeLoach, *Despite New Administration, EEOC Maintains Position That Title VII Prohibits Gender Identity Discrimination*, MONDAQ (Mar. 20, 2017), <http://www.mondaq.com/unitedstates/x/578160/employment+litigation+tribunals/Despite+New+Administration+EEOC+Maintains+Position+That+Title+VII+Prohibits+Gender+Identity+Discrimination> [https://perma.cc/8U9S-2X8W]; see also, e.g., Brief of the EEOC as Amicus Curiae in Support of Neither Party at 13-22, *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019) (No. 18-20251) (arguing that gender identity/transgender discrimination is sex discrimination under Title VII); En Banc Brief of Amicus Curiae EEOC in Support of Plaintiffs/Appellants and in Favor of Reversal at 5-10, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775), cert. granted, 139 S. Ct. 1599 (2019) (No. 17-1623) (arguing that sexual orientation discrimination is discrimination because of sex).

The EEOC has been able to maintain its stance despite pushback from the Trump Administration due to its structure as a bipartisan independent agency. Its five members are appointed by the President, with the advice and consent of the Senate, for five-year terms.

issued a memorandum stating that Title VII does not bar discrimination on the basis of gender identity, reversing the Obama-era interpretation.<sup>31</sup> In defending this conclusion, Sessions asserted that Congress had “confirmed this ordinary meaning” by listing the term “gender identity” in certain other statutes “in addition to, rather than within, prohibitions on discrimination based on ‘sex’ or ‘gender.’”<sup>32</sup>

Disagreements about the meaning of “sex” have made their way to the courts. In the last two years, three federal appeals courts have held that Title VII applies to sexual orientation, distinguishing or overruling the circuits’ previous precedents.<sup>33</sup> Other than the D.C. Circuit, which has not addressed the issue, the

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Civil Rights Act of 1964, Pub. L. No. 88-352, tit. 7, 78 Stat. 241, 258-59 (codified at 42 U.S.C. § 2000e et seq. (2018)). Until 2019, the EEOC operated with three Obama-era appointees — one of whose terms expired in 2019 — and two vacancies, which remained unfilled due to objections from Republican senators. See Tom Spiggle, *The Agency that Monitors Employment Discrimination Just Lost Its Only Openly Gay Commissioner*, FORBES (Feb. 19, 2019), <https://www.forbes.com/sites/tomspiggle/2019/02/19/the-agency-that-monitors-employment-discrimination-just-lost-its-only-openly-gay-commissioner> [<https://perma.cc/8RPQ-84SN>]; *The Commission and the General Counsel*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://web.archive.org/web/20181230073257/https://www.eeoc.gov/eeoc/commission.cfm> [<https://perma.cc/ZK8X-YJNX>]. On May 15, 2019, Trump nominee Janet Dhillon was sworn in as Chair of the EEOC, but two seats remain vacant. Press Release, U.S. Equal Emp’t Opportunity Comm’n, Janet Dhillon Becomes Chair of the Equal Employment Opportunity Commission (May 15, 2019), <https://www.eeoc.gov/eeoc/newsroom/release/5-15-19.cfm> [<https://perma.cc/H9JH-5LA>].

31. Memorandum from Jefferson Beauregard Sessions III, Attorney Gen., to U.S. Attorneys and Heads of Dep’t Components (Oct. 4, 2017), <https://www.justice.gov/ag/page/file/1006981/download> [<https://perma.cc/7WWA-J342>] [hereinafter Oct. 4 Sessions Memo]. Sessions has also interpreted protections for religious liberty in ways that undermine protections against discrimination for LGBTQ persons. Memorandum from Jefferson Beauregard Sessions III, Attorney Gen., to All Exec. Dep’ts. & Agencies 6, 9a-16a (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001891/download> [<https://perma.cc/Q6KT-WM3M>] (asserting that, for Title VII purposes, “religious employers are entitled to employ only persons whose beliefs and conduct are consistent with the employers’ religious precepts”); see also DEP’T OF LABOR, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, DIRECTIVE (DIR) 2018-03, at 2 n.1 (Aug. 10, 2018) (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) and superseding, in the name of religious liberty, prior guidance documents which had stated that religious exemptions did not excuse federal contractors from an obligation to not discriminate on the basis of sexual orientation or gender identity).
32. Oct. 4 Sessions Memo, *supra* note 31, at 1-2.
33. *Franchina v. City of Providence*, 881 F.3d 32, 55-56 (1st Cir. 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1623); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345-51 (7th Cir. 2017) (en banc). See generally William N. Eskridge Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 347 (2017) (surveying recent cases

remaining circuits have older precedents holding that Title VII does not bar discrimination based on sexual orientation,<sup>34</sup> and—in the case of three circuits<sup>35</sup>—have recently affirmed such precedents. As for gender identity, one circuit has held that Title VII prohibits discrimination on that basis.<sup>36</sup> Three others have signaled their agreement with this approach in non-Title VII cases, despite older precedents holding that Title VII does not prevent discrimination on gender-identity grounds.<sup>37</sup> In contrast, two circuits have left their old precedents largely untouched, neither relying on nor reaffirming them in precedential decisions within the last decade.<sup>38</sup> The remaining circuits have yet to address the issue.

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and arguing that Title VII, read in light of its ordinary meaning and purpose, covers discrimination based on sexual orientation and gender identity).

34. See, e.g., *Kay v. Indep. Blue Cross*, 142 Fed. App'x 48, 49 (3d Cir. 2005) (relying on *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001)); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1075 (9th Cir. 2002) (en banc), *aff'g DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam).
35. See *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 Fed. App'x 964, 965-66 (11th Cir. 2019) (per curiam) (affirming the dismissal of a Title VII sexual-orientation claim and reiterating that the court could not hold otherwise in the absence of an intervening Supreme Court or en banc Eleventh Circuit decision to the contrary); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 330 (5th Cir. 2019) (noting that *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (per curiam) remains binding precedent); *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (affirming *Blum*, 597 F.2d 936); *Gilbert v. Country Music Ass'n*, 432 Fed. App'x 516, 519 (6th Cir. 2011) (relying on *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006)); see also *Tumminello v. Father Ryan High Sch., Inc.*, 678 Fed. App'x 281, 285 (6th Cir. 2017) (relying on *Vickers* to reject a Title IX sexual-orientation claim).
36. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572, 576 (6th Cir. 2018).
37. See *Glenn v. Brumby*, 663 F.3d 1312, 1317-21 (11th Cir. 2011) (holding that discrimination based on gender identity violates the Equal Protection Clause's prohibition on sex discrimination). Compare *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047-49 (7th Cir. 2017) (looking to the Title VII context to decide that a Title IX gender-identity claim was likely to succeed), and *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (stating, in deciding a Gender Motivated Violence Act claim, that the *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) approach to Title VII was "overruled by the logic and language" of Supreme Court decisions holding that Title VII prohibited discrimination based on stereotypes about how people of a certain sex should behave), with *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (holding that Title VII does not protect against transgender discrimination), and *Holloway*, 566 F.2d at 661-63 (same).
38. See *Larson v. United Air Lines*, 482 F. App'x. 344, 348 n.1 (10th Cir. 2012) (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007)); *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam) (citing *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982)); see also *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019) (implying in dicta on a Title IX claim that Title VII's definition of sex does not include gender identity).

In light of the circuit splits, the Supreme Court has – after consideration during numerous conferences – granted certiorari in three cases dealing with the scope of Title VII’s sex-discrimination provision.<sup>39</sup> *R.G. & G.R. Harris Funeral Homes, Inc.* places before the Court the Sixth Circuit’s recognition of a Title VII gender-identity claim.<sup>40</sup> As to sexual orientation, the Court consolidated *Zarda* from the Second Circuit, recognizing a Title VII claim, and *Bostock* from the Eleventh Circuit, rejecting the claim.<sup>41</sup>

The Department of Justice submitted briefs in *Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc.* arguing that sex in Title VII “mean[s] biological sex” and the “physiological distinction” between men and women – not sexual orientation or gender identity.<sup>42</sup> This was unsurprising given the Justice Department’s push for a purely biological definition of sex under the Trump Administration.

By defining “discrimination on the basis of sex” broadly to include sexual orientation and gender identity, the initial USMCA text was in conformity with the EEOC interpretation but in tension with the Justice Department’s narrow approach to “sex” as used in Title VII. Had the text remained in this form, it would have been a rhetorical rebuke to the Justice Department’s approach and might have even served as legal ammunition in the pending Title VII cases. At the very least, it would have undercut Sessions’s argument that a narrow “ordinary meaning” of sex in Title VII could be inferred from the fact that other federal statutes treat sexual orientation and gender identity as distinct categories from sex.<sup>43</sup>

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39. *Bostock v. Clayton Cty.*, 723 Fed. App’x 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (No. 17-1618); *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (No. 17-1623); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (No. 17-1623).

40. *R.G. & G.R. Harris Funeral Homes* fired Stephens after she told them that she was in the process of transitioning and would not comply with the company’s dress code for male employees. Petition for Writ of Certiorari at 3-5, *R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (No. 18-107).

41. In both *Zarda* and *Bostock*, an employer fired a gay man for alleged misconduct; both men claim this was pretext to discriminate against them based on their sexual orientation. Petition for Writ of Certiorari at 2-3, *Zarda*, 883 F.3d 100 (No. 15-3775); Petition for Writ of Certiorari at 4-5, *Bostock*, 723 Fed. App’x 964 (No. 17-13801).

42. Brief for the Federal Respondent Supporting Reversal at 16-30, *R.G. & G.R. Harris Funeral Homes* (No. 18-107) (arguing that Title VII does not bar discrimination based on gender identity). *See generally* Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, *Zarda* (No. 15-3775) (arguing that Title VII does not bar discrimination based on sexual orientation).

43. *See* Oct. 4 Sessions Memo, *supra* note 31, at 1-2.

The move in the finalized text to separate the categories likely reflects concerns of the current Department of Justice. Indeed, the changes make clear that the use of the term “sex” in the USMCA cannot be interpreted as coextensive with the same term in Title VII. Unlike Title VII, the USMCA now explicitly separates out discrimination based on pregnancy and on caregiving responsibilities from discrimination based on “sex.”

In addition to its substantive implications, the change in language from the initial to the final drafts of the USMCA suggests something about the negotiating *process*. In light of the tension between the broad definition of “sex” in the initial USMCA and the positions being taken by the Justice Department, it seems exceedingly plausible that the Justice Department was not consulted about the content of Article 23.9 prior to the publication of the initial text. This is all the more likely given that the Trump Administration is not known for its punctilious processes,<sup>44</sup> that the negotiators were working under a tight deadline,<sup>45</sup> and that all parties were aware that the text would undergo a legal scrub after the USMCA’s initial publication.<sup>46</sup>

A lack of consultation among Trump Administration officials about U.S. employment discrimination law may help explain how the words “sexual orientation” and “gender identity” made it into the USMCA at all. “[W]hile the President is ultimately in charge, the White House itself is a ‘they,’ not an ‘it’” – and this is all the more true of the executive branch writ large.<sup>47</sup> USTR may have been not only less attuned to the definitional implications of “sex” than other agencies but also less resistant to the inclusion of language explicitly protecting against discrimination based on sexual orientation and gender identity. USTR negotiators may well have placed a higher premium on other provisions and a

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44. See generally, e.g., W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825 (2018).

45. See *supra* notes 10-11 and accompanying text.

46. For a discussion of some other changes made to the USMCA during the legal scrub, see Kathleen Claussen, *RIP NAALC: North American Agreement on Labor Cooperation*, INT’L ECON. L. & POL’Y BLOG (Dec. 4, 2018, 10:58 AM), <https://worldtradelaw.typepad.com/ielpblog/2018/12/guest-post-rip-naalc-north-american-agreement-on-labor-cooperation.html> [<https://perma.cc/7FHS-QRV8>].

47. Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013); see also Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT’L L. 359, 364 (2013) (describing the executive branch as “a massive multifaceted organization whose decisionmaking gears shift into entirely different places and whose individual players reshuffle depending on the framing of the initial triggering event”).

correspondingly lower premium on the content of Article 23.9.<sup>48</sup> And, once the terms “sexual orientation” and “gender identity” made it into the initial published text, this language had staying power. While Canada made some concessions regarding Article 23.9 during the legal scrub, Canadian negotiators had a strong argument that the total removal of these terms would result in an unacceptable loss of moral face for the country.<sup>49</sup> The negotiated result was a provision that was thin but still meaningful.

### III. THE SUBSTANTIVE AND EXPRESSIVE REACH OF THE USMCA’S SEX-RELATED PROTECTIONS

The final text of the USMCA dashed most of the hopes raised by the initial version. One LGBTQ advocate remarked grimly that footnote 13 “effectively nullified” the original protections and that Trump had “[o]nce again . . . squander[ed] the United States’ status as a leader in LGBTQ equality.”<sup>50</sup> For all the thinness of the final version, however, it does have some substantive content and sends a powerful expressive signal.

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48. For a list of the United States’ negotiating objectives, see *Summary of Objectives for NAFTA Renegotiation*, OFF. U.S. TRADE REPRESENTATIVE (2017), [http://www.sice.oas.org/TPD/USMCA/Modernization/USTR\\_NAFTA\\_Objectives\\_e.pdf](http://www.sice.oas.org/TPD/USMCA/Modernization/USTR_NAFTA_Objectives_e.pdf) [https://perma.cc/U3CK-KBY9]. As the negotiations proceeded, for example, the United States placed heavy emphasis on rules of origin for the automobile industry and opening Canada’s dairy market to U.S. farmers. See Jim Tankersley, *Trump Just Ripped Up NAFTA. Here’s What’s in the New Deal*, N.Y. TIMES (Oct. 1, 2018), <http://nytimes.com/2018/10/01/business/trump-nafta-usmca-differences.html> [https://perma.cc/NV3G-JFL3]. It is possible that there could have been an explicit or implicit “bargain” struck, whereby the inclusion of protections for sexual orientation and gender identity in Article 23.9 were agreed to in exchange for some other specific concession from Canada.
49. See Alexander Panetta & Lauren Gardner, *House Conservatives Protest LGBT Protection in Mexico-Canada Trade Deal*, POLITICO (Nov. 16, 2018, 12:49 PM EST), <https://www.politico.com/story/2018/11/16/house-conservatives-lgbt-protection-trade-pact-977288> [https://perma.cc/VC9E-FMAT] (describing the Canadian government’s remarks that the provision as a “big win”); see also Jordan Press, *Trudeau Says He Won’t Negotiate in Public on Future of LGBTQ Rights in USMCA*, STAR (Nov. 18, 2018), <https://www.thestar.com/amp/news/canada/2018/11/18/trudeau-says-he-wont-negotiate-in-public-on-future-of-lgbtq-rights-in-usmca.html> [https://perma.cc/H6NG-YZ72] (describing how Trudeau refused to discuss how far he was willing to go to keep the sex-discrimination provision in the agreement).
50. Tim Fitzsimons, *Footnote in New Trade Agreement Causes Confusion over LGBTQ Protections*, NBC NEWS (Dec. 4, 2018, 12:53 PM EST), <https://www.nbcnews.com/feature/nbc-out/footnote-new-trade-deal-causes-confusion-over-lgbtq-protections-n943591> [https://perma.cc/3265-WYJQ] (quoting Gay and Lesbian Alliance Against Defamation (GLAAD) president, Sarah Kate Ellis).

The initial version of Article 23.9 would have squarely committed the United States to addressing employment discrimination based on sexual orientation and gender identity as a matter of international law. As noted earlier, the reach of Title VII on these matters currently varies by federal circuit, and Congress's attempts to explicitly incorporate these grounds into Title VII have failed.<sup>51</sup> Protection against discrimination on the basis of sexual orientation and gender identity is similarly intermittent at the state and local level.<sup>52</sup> In contrast to the United States, Canada's federal, provincial, and territorial governments have each outlawed employment discrimination on these grounds.<sup>53</sup> Mexico has also prohibited employment discrimination based on sex, sexual orientation, and gender, which includes gender identity and expression.<sup>54</sup> The initial version of Article 23.9 would thus have been a particularly significant commitment for the United

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51. The Equality Act, which died in the last Congress but has since passed the House, would amend the Civil Rights Act of 1964 to prohibit employment discrimination on the basis of sexual orientation and gender identity. H.R. 5, 116th Cong. § 7 (2019); H.R. 2282, 115th Cong. § 7 (2017). The bill's predecessor, the Employment Non-Discrimination Act (ENDA), would have prohibited employment discrimination on the basis of sexual orientation or gender identity without amending the Civil Rights Act. See S. 815, 113th Cong. (2013). Every attempt to pass ENDA since 1994 has failed. S. 811, 112th Cong. (2011); H.R. 3017, 111th Cong. (2009); H.R. 3685, 110th Cong. (2007); H.R. 3285, 108th Cong. (2003); S. 1284, 107th Cong. (2002); H.R. 2692, 107th Cong. (2001); H.R. 2355, 106th Cong. (1999); H.R. 1858, 105th Cong. (1997); H.R. 1863, 104th Cong. (1995); H.R. 4636, 103d Cong. (1994).
52. See *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN (Jan. 28, 2018), <http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> [https://perma.cc/CE6Y-JE8E]; *Local Nondiscrimination Ordinances: Employment*, MOVEMENT ADVANCEMENT PROJECT (Aug. 22, 2019), [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances](http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances) [https://perma.cc/AEM2-NHTE]; *State Maps of Laws & Policies: Employment*, HUM. RTS. CAMPAIGN (June 7, 2019), <https://www.hrc.org/state-maps/employment> [https://perma.cc/KNH4-GNG5].
53. Canadian Human Rights Act, R.S.C. 1985, c. H-6, Part 1, Sec. 3(1) (last amended June 19, 2017); *Overview of Human Rights Codes by Province and Territory in Canada*, CANADIAN CTR. FOR DIVERSITY & INCLUSION 36 (2018), <https://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf> [https://perma.cc/G4US-9TEF].
54. Decreto por el que Se Reforman y Adicionan Diversas Disposiciones de la Ley Federal para Prevenir y Eliminar la Discriminación, arts. 1(II), 9(III), Diario Oficial de la Federación [DOF] 21-06-2018 (Mex.); *Senado fortalece legislación en contra de la discriminación y reforma la Ley de la CNDH* [Senate Strengthens Legislation Against Discrimination and Reforms Human Rights Commission Law], SENADO DE LA REPÚBLICA (Apr. 27, 2018, 12:18 AM), <http://comunicacion.senado.gob.mx/index.php/informacion/boletines/40862-senado-fortalece-legislacion-en-contra-de-la-discriminacion-y-reforma-la-ley-de-la-cndh.html> [https://perma.cc/L74F-NPAE] (“The Assembly also adopted a decision to reform . . . the Federal Law to Prevent and Eliminate Discrimination to include in the definition of discrimination sexual orientation, gender identity, gender expression, and sexual characteristics.”) (author’s translation).

States, and it would have become even more so if the Supreme Court were to rule against a broad interpretation of “sex” for purposes of Title VII. In this counterfactual (and further assuming U.S. ratification of the USMCA), the United States would have been in violation of its international obligations, which could have spurred domestic action.

The final version of the USMCA, by comparison, has a much narrower reach. In contrast to the main text of Article 23.9, footnote 13 appears to limit U.S. obligations to “federal agency policies regarding the hiring of federal workers” (as well as explicitly disclaiming any obligation to amend Title VII).<sup>55</sup>

Yet, although footnote 13 narrows the scope of the main text, it arguably bolsters the article’s depth. At first glance, the change in the main text from “shall implement policies to protect workers” to “shall implement policies that *each country* considers appropriate to protect workers” seems to make Article 23.9 so subjective as to be meaningless. But the assertion in the footnote that the “United States’ existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article” can be read to rest on the implicit premise that Article 23.9 does create genuine “obligations” rather than stating aspirational goals. The federal agency policies referred to in the footnote derive solely from President Obama’s Executive Order 13,672, which prohibits the federal government from discriminating against employees on the basis of sexual orientation or gender identity.<sup>56</sup> The footnote can thus be read to commit the United States to the continuance of these protections—notwithstanding the Trump Administration’s eagerness to roll back Obama-era protections tied to sexual orientation and gender identity.

In addition to this limited but meaningful substance, Article 23.9 has expressive significance, both internationally and domestically. The expressive function of international agreements is well-recognized, particularly with respect to human rights.<sup>57</sup> Human-rights provisions in trade agreements can be included in agreements between like-minded countries, as was the case with the gender

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55. In line with this interpretation, USTR made no mention of Article 23.9 in its notice to Congress about changes in domestic law necessary for USMCA compliance. Letter from Robert Lighthizer, U.S. Trade Representative, to Congress (Jan. 29, 2019), <https://www.finance.senate.gov/imo/media/doc/USMCA%20Changes%20To%20Existing%20US%20Law%20Document.pdf> [<https://perma.cc/U6R8-QL9A>].

56. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014) (also applying this prohibition to government contractors).

57. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2002-06 (2002) (discussing instrumental and expressive functions of human rights treaties).



chapter in the Chile-Uruguay Free Trade Agreement.<sup>58</sup> Often, however, “developing countries have acceded to the demands of developed countries by agreeing to some form of human rights obligations” in trade agreements.<sup>59</sup> Most of the time, this language is purely aspirational and, even when it creates binding commitments, such commitments are usually not enforced.<sup>60</sup> As such, the purpose of these provisions is often symbolic, with the hope that symbols can shape norms.<sup>61</sup> Along these lines, the USMCA communicates to the world the parties’ commitment to protecting their citizens against discrimination on the basis of sexual orientation and gender identity. Unlike many such expressive provisions, however, the protections of the USMCA were added at the insistence of a smaller economy, Canada, despite the reluctance of the equally developed and economically more powerful United States.

Domestically, although the USMCA provision has limited practical effect, it still creates expressive value by recognizing and protecting the existence of LGBTQ identities. Federal statutory language on sexual orientation and gender identity remains sparse – and where it appears, it is not always progressive. Some older statutes speak of gender identity “disorders.”<sup>62</sup> A few more recent statutes

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58. See Pía Mesa, *TLC con Chile Es un Modelo para Replicarlo con China*, EL PAÍS (July 26, 2018), <https://negocios.elpais.com.uy/noticias/tlc-chile-modelo-replicarlo-china.html> [https://perma.cc/D9QS-VFFF] (describing the Uruguay-Chile Agreement, including the gender chapter, as a good model that Uruguay could eventually replicate with other partners). Chile has already concluded a free-trade agreement with Argentina that includes a gender chapter. CONFERENCE BD. OF CAN, *supra* note 19, at 7-9.
59. Lewis, *supra* note 6, at 4. It is of course harder for less powerful countries to succeed in extracting concessions from more powerful ones. An example of one such attempt can be seen in Ecuador’s push for a treaty on business and human rights, which has received significant pushback from Western nations. See Human Rights Council Res. 26/9 (July 14, 2014) (listing the Human Rights Council members, including European Union member states and the United States, who voted against the creation of a working group on a business and human rights treaty).
60. Lewis, *supra* note 6, at 1. *But see* Ionel Zamfir, *Human Rights in EU Trade Policy*, EUR. PARLIAMENTARY RES. SERVS. PE 621.905 4-6 (2018) (describing the European Union’s suspension of preferential trade agreements in three cases where developing countries violated the human rights provisions in the agreements).
61. See Hathaway, *supra* note 57, at 2002-06 (discussing the expressive value of human rights provisions); cf. D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 261-62 (2008) (discussing the expressive value of non-binding competition policies in free-trade agreements).
62. See, e.g., 29 U.S.C. § 705(20)(E)-(F) (2018) (excluding “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders” from the definition of disability for the purposes of rehabilitation services).

recognize sexual orientation and gender identity more positively, including a provision defining hate crimes to include crimes motivated by sexual orientation and gender identity,<sup>63</sup> and the Violence Against Women Reauthorization Act of 2013, which prohibits discrimination on these grounds in programs that received funding under the Act.<sup>64</sup> The limited scope of these protections signals disfavored status for people who are not heterosexual or cisgender. As Elizabeth Anderson and Richard Pildes have observed, “legal communications of state attitudes . . . often impose different legal statuses on the citizens and residents of a State—as first- or second-class citizens, insiders and outsiders . . . and so forth.”<sup>65</sup> The more legal commitments, particularly legislative ones, the United States makes to protect persons from being targeted due to sexual orientation or gender identity, the more these expressions may help shape societal attitudes and behaviors.<sup>66</sup>

Congress will have to approve the USMCA in order for the agreement to take effect. Since the USMCA is an international agreement, however, Congress cannot unilaterally change the document’s language—and any attempt to reopen negotiations with Canada and Mexico at this point would likely be a high-stakes affair.<sup>67</sup> Perhaps recognizing how limited their clout would be after the USMCA was signed, forty-six Republican representatives registered their objections to Article 23.9 while the legal scrub was ongoing.<sup>68</sup> Referring to the Trump Administration’s “cohesive agenda regarding policies surrounding sexual orientation

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63. 18 U.S.C. § 249(a)(2) (2018).

64. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 13, 127 Stat. 54, 61.

65. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1574 (2000).

66. See Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60, 70-71 (2017) (“Law can work expressively not so much by shaping independent individual attitudes as by shaping group values and norms, which in turn influence individual attitudes.”).

67. See David Ljunggren, *Canada Says Reopening USMCA Trade Pact Could Be a “Pandora’s Box,”* REUTERS (Apr. 4, 2019) <https://www.reuters.com/article/us-usa-trade-canada/canada-says-reopening-usmca-trade-pact-could-be-a-pandoras-box-idUSKCN1RG2BU> [<https://perma.cc/TX8M-DCS3>] (describing Canada’s reluctance to reopen negotiations). *But see* Jonas Ekblom, *Canada and Mexico May Be Open to Tweaking USMCA: U.S. Democrat*, REUTERS (June 26, 2019), <https://www.reuters.com/article/us-usa-trade-mexico-canada/canada-and-mexico-may-be-open-to-tweaking-usmca-us-democrat-idUSKCN1TR2OO> [<https://perma.cc/F6ZY-9RWA>] (stating that Canada and Mexico may be willing to renegotiate specific aspects of the agreement).

68. Letter from Forty-Six Congressmembers to Donald Trump, President (Nov. 16, 2018), [https://lamborn.house.gov/uploadedfiles/final\\_letter.pdf](https://lamborn.house.gov/uploadedfiles/final_letter.pdf) [<https://perma.cc/4TC2-MMC6>] (also expressing concern “at the contradictory policy coming through USTR when other Departments under your Administration are working to come into alignment on SOGI policy”).

and gender identity,” they rejected the “elevation of SOGI [sexual orientation and gender identity] to the level of sex.”<sup>69</sup> They further protested that adopting “social policy” through a trade agreement would be “inappropriate and insulting to our sovereignty” and called for the complete removal of protections for sexual orientation and gender identity from the agreement.<sup>70</sup> The watered-down version of Article 23.9 addresses some, but not all, of these concerns. When the USMCA comes to a vote, as it presumably will sometime this year,<sup>71</sup> these members will have to decide how to respond. As President Trump’s signature international agreement, we anticipate that the USMCA will end up garnering many Republican votes.<sup>72</sup>

## CONCLUSION

In the era of international regulatory cooperation, free-trade agreements often touch not only on what is traditionally thought of as trade, but also on other areas of historically national or even subnational control. Increasingly, these expansive agreements include expressive norm-creating provisions in addition to substantive law-creating ones. The USMCA’s provisions on sexual orientation and gender identity show that even the most powerful countries are not immune from being on the receiving end of such expressive norms. In this instance, Canada was able to pressure the United States into accepting human-rights

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69. *Id.*

70. *Id.*

71. See Megan Cassella & Sabrina Rodriguez, *Democrats Vow Trade Deal Talks Will Continue Despite Impeachment Push*, POLITICO (Sept. 25, 2019, 05:02 PM), <http://politico.com/story/2019/09/25/democrats-usmca-impeachment-1511003> [<https://perma.cc/8YJS-B8Y8>] (reporting that “Democrats working with the Trump administration to try to pass a new North American trade agreement say they are unbowed in their efforts to try to get a deal done this year” and will “proceed with optimism”); Niv Elis, *Pelosi, Trump May Reach Trade Deal Despite Impeachment*, HILL (Oct. 3, 2019), <https://thehill.com/policy/finance/464121-pelosi-trump-may-reach-trade-deal-despite-impeachment> [<https://perma.cc/8UC7-NN74>] (describing continued progress on USMCA legislation despite the impeachment inquiry). *But see* Jeff Mason & Anthony Esposito, *Trump Says Impeachment Inquiry Could Derail Trade Deal, Mexico Markets Slump*, REUTERS (Sept. 25, 2019, 1:36 PM), <https://www.reuters.com/article/us-usa-trade-nafta/trump-says-impeachment-inquiry-could-derail-trade-deal-mexico-markets-slump-idUSKBN1WA2C7> [<https://perma.cc/Z6FG-AQHE>] (describing Trump’s concerns that the impeachment inquiry will “derail” the USMCA but explaining that USTR Lighthizer remained optimistic that Congress would approve the agreement).

72. See Kevin Freking, *GOP Lawmakers Set Goal of Summer Vote for Trade Deal*, ASSOCIATED PRESS (Mar. 26, 2019), <https://www.apnews.com/69bdo7dd034b4308a65d7ff722409ab2> [<https://perma.cc/95F3-XDYJ>] (“Rep. Vern Buchanan of Florida, the ranking Republican on the trade subcommittee, said he believes the vast majority of Republicans will end up voting for the agreement.”).

provisions that stand in sharp tension with the Trump Administration's own domestic agenda. Although watered down prior to the USMCA's finalization, these provisions demonstrate that trade negotiations can be multidirectional, not only as to economics, but also as to values.

*Jean Galbraith is a Professor of Law at the University of Pennsylvania Law School. Beatrix Lu is a J.D. candidate (expected 2020) at the University of Pennsylvania Law School. The authors thank Kathleen Claussen and Serena Mayeri for comments, and the editors of the Yale Law Journal, especially Sasha Dudding, Peter Kallis, Ela Leshem, and Abigail Pershing, for their contributions throughout the editing process.*