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The Consumer Imaginary: Labor Rights, Human Rights, and Citizen-Consumers in the Global Supply Chain

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The Consumer Imaginary: Labor Rights, Human Rights, and Citizen-Consumers in the Global Supply Chain

*Kevin Kolben**

ABSTRACT

Consumers are increasingly demanding that the goods and services they consume be produced in a way that meets their social expectations. By extension, they are exhibiting greater willingness to pay more at the cash register for products made in good working conditions, and they are willing to punish companies that do not satisfy these expectations. Driving these “citizen-consumers” is what this Article terms the “consumer imaginary,” which is defined as the narratives that consumers tell themselves about the people that make their things—people whom consumers will likely never meet, and whose lived experiences are distant from their own. Policymakers have attempted to extraterritorially improve working conditions in the global supply chain through public law in at least two ways: (1) incorporating labor standards into trade law and free trade agreements, and (2) corporate transparency laws. Using these two examples as case studies, this Article argues that both of these tools could be better tailored to beneficially exploit the consumer imaginary and mobilize citizen-consumers to compel lead firms to improve labor and human rights in their supply chains.

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I. INTRODUCTION

Imagine, if you will, the person who sewed the zipper onto your favorite jacket. Have you ever met this person, or anyone who has worked in a garment factory? If not, how do you imagine him or, most likely, *her*? What is her name? Is she married? Is she a mother? What kind of home does she sleep in at night? What does her workplace look like? Smell like?

Now think a moment about the cup of coffee that you drank this morning. Picture the landscape of the plantation on which the coffee bushes grew. In your mind, form an image of the faces and the hands of the people who picked the raw coffee beans that eventually made it into your mug. What do you think were the working conditions of those people whom you now have a mental image of?

If you “played along” in the exercise above, you have just engaged in what this Article terms the “consumer imaginary.” That is, you created for yourself a narrative and mental image of the producers and

origins of two distinct products that are staples for hundreds of millions of people. Yet it is highly likely that you have neither worked on a coffee farm nor in a garment factory; and it is also likely that you have not had significant social contact with anyone who has. Nevertheless, it is quite possible that your consumption choices are, or could be, affected by the ways in which you imagine, or are made to imagine, (1) the context in which the goods you consume were produced, and (2) the degree to which you feel a bond with the producers of those goods.

This Article argues that the law should motivate citizen-consumers to improve labor conditions and human rights compliance in the global supply chain by triggering the consumer imaginary. Two brief examples illustrate this idea. In 1996, reports emerged that workers making Nike sneakers in Indonesia were being paid below subsistence wages in violation of Indonesian law and working in highly abusive conditions.¹ As a result, labor activists pressured Nike to make a change, and Nike saw drops in its share price and revenue that likely had at least some connection with the negative coverage.² The reputational pressure, along with other fiscal pressures that Nike was concurrently facing, led Nike CEO Phil Knight to rue the fact that the Nike swoosh, which many consumers closely identified with, had come to symbolize slave-like labor conditions and abuse, and he acknowledged that “the American consumer does not want to buy products made in abusive conditions.”³ Nike has, by many observers’ accounts, significantly improved its supply chain compliance program by introducing several experimental initiatives,⁴ and by opening its programs to the study and scrutiny of scholars.⁵

A growing body of research suggests that Phil Knight’s intuition was correct: an important segment of consumers is increasingly acting as citizen-consumers.⁶ That is, they take into account the social and environmental context of the goods they consume and make

1. RANDY SHAW, RECLAIMING AMERICA: NIKE, CLEAN AIR, AND THE NEW NATIONAL ACTIVISM 13–16 (Univ. of Cal. Press 1999).

2. DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 79 (2d ed., Brookings Inst. Press 2006).

3. *Id.* at 79–80.

4. See Angharad Porteous & Sonali Rammohan, *Integration, Incentives and Innovation Nike’s Strategy to Improve Social and Environmental Conditions in its Global Supply Chain*, STAN. INST. FOR THE STUDY OF SUPPLY CHAIN RESPONSIBILITY (Nov. 19, 2013), <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/non-teaching-case-study-nike-strategy-improve-global-supply-chain.pdf> [<https://perma.cc/STM5-XJP9>] (archived Aug. 12, 2019).

5. See, e.g., RICHARD M. LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY 46–77 (Cambridge Univ. Press 2013) (drawing on data provided by Nike to study supply chain compliance effectiveness); Greg Distelhorst, Jens Hainmueller & Richard M. Locke, *Does Lean Improve Labor Standards? Management and Social Performance in the Nike Supply Chain*, 63 MGMT. SCI. 587, 707 (2016).

6. See *infra* Part III.C.

purchasing choices based on these considerations.⁷ Consumer citizenship and political consumerism are widely discussed phenomena in scholarly literature, including in sociology,⁸ political science,⁹ history,¹⁰ and marketing.¹¹ Legal scholars have also now begun to turn their attention to the role of consumer citizenship and socially driven consumption, including in tort law,¹² corporate law,¹³ intellectual property law,¹⁴ and trade law.¹⁵ But the potential of consumers serving as regulatory agents remains underexamined by legal scholars. This Article aims to contribute to this nascent stream of legal scholarship by examining the role of the consumer in supply chain regulation through the conceptual lens of consumer citizenship, and by proposing ways that (1) trade and labor provisions and (2) corporate disclosure laws can exploit the consumer imaginary to beneficial ends. These two

7. *Id.*

8. *See, e.g.,* Craig J. Thompson, *Understanding Consumption As Political and Moral Practice: Introduction to the Special Issue*, 11 J. CONSUMER CULTURE 139, 139 (2011) (introducing a special issue on the intersections between consumption and citizenship ideals).

9. *See, e.g.,* Lauren Copeland, *Conceptualizing Political Consumerism: How Citizenship Norms Differentiate Boycotting From Buycotting*, 62 POL. STUD. 257, 258 (2013) (noting that political practices are moving toward non-electoral politics such as political consumerism); VOGEL, *supra* note 2, at 46–56 (describing the rising role of consumers in driving corporate social responsibility initiatives); Margaret M. Willis & Juliet B. Schor, *Does Changing a Light Bulb Lead to Changing the World? Political Action and the Conscious Consumer*, 644 ANNALS AM. ACAD. POL. & SOC. SCI. 160 (2012); Michael Schudson, *The Troubling Equivalence of Citizen and Consumer*, 608 ANNALS AM. ACAD. POL. & SOC. SCI. 193 (2006) (arguing that consumer choices are also often political choices).

10. *See, e.g.,* Terry Newholm, Sandra Newholm & Deirdre Shaw, *A History for Consumption Ethics*, 57 BUS. HIST. 290 (2015) (discussing the history of ethical consumption and challenging the economic view of consumers as simply economic maximizers).

11. In the business literature, the issue is often addressed from the perspective of consumers reaction to Corporate Social Responsibility efforts and its effect on competitive advantage. *See, e.g.,* C.B. Bhattacharya, Shuili Du, & Sankar Sen, *Corporate Social Responsibility and Competitive Advantage: Overcoming the Trust Barrier*, 57 MGMT. SCI. 1528, 1528 (2011) (discussing the role of CSR initiatives in strengthening competitive advantage).

12. *See, e.g.,* Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 868 (2018) (arguing that there should be a remedy in tort for harms to a consumer's emotional and psychic harm when a brand betrays their social or environmental commitments).

13. *See, e.g.,* Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 420 (2015) (arguing that current corporate transparency mandates are limited in their ability to improve human rights and labor practices).

14. *See* Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 U.C. DAVIS L. REV. 935, 964–65 (2014) (arguing for greater information flows between producers, consumers, and other stakeholders as a means of improving a brand's social and environmental performance in the value chain).

15. *See, e.g.,* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 624 (2004) (arguing that political consumerism requires greater allowance for information about processes in the supply chain); Kevin Kolben, *A New Model For Trade And Labor? The Trans-Pacific Partnership's Labor Chapter and Beyond*, 49 N.Y.U. J. INT'L L. & POL. 1063, 1064–71 (2017) (arguing that trade and labor provisions in trade agreements ought to be partially grounded in a consumer citizenship framework).

areas of law were chosen because they are the two domains that most directly seek to impact labor and human rights abuses in the global supply chain. In the case of disclosure laws, the consumer is already implicitly part of the laws' design, albeit, it is argued, in an ineffective way. In trade law, it is argued that the consumer could be explicitly utilized as a tool to effectuate the goals of improving labor conditions in trading partner countries.

To make this case, Part II describes the economic and political drivers that have given rise to consumer citizenship. A significant driver has been the evolution of "the supply chain economy."¹⁶ In recent decades, the organization of the global economy has led to increasingly disaggregated production processes that have taken the form of complex supply chains whereby production has been contracted out to far flung suppliers around the globe.¹⁷ One of the implications of this has been a transformation of the employer–employee relationship, whereby lead firms do not have direct control or liability for the working conditions in their supply chain.¹⁸

The conflict that arises in this arrangement, as examined in Part III, is that the working conditions in suppliers' factories are often poor and do not meet the expectations of global consumers.¹⁹ This is because the labor law regimes of the countries in which suppliers' factories are located often lack adequate enforcement capacity and/or will to improve labor standards.²⁰ Informed and mobilized by transnational labor activist networks (TLANS) and an increasingly attuned media, consumers have been increasingly taking into account the social conditions under which the goods that they buy are made.²¹

Indeed, as Part IV argues, consumers' identities are increasingly linked to the products that they choose to buy. This tight linkage has compelled a number of them to try and use their purchasing decisions as a means of social and political action.²² This Article refers to this phenomenon as "cosmopolitan consumer citizenship." This term describes the actions of citizen-consumers who believe that they have a duty to the producers with whom their consumptive and economic lives are bound. They wield their consumptive activity in the market as a means of engaging in political and social action across borders. Confronted with the weak extraterritorial regulation of supply chains, cosmopolitan consumer citizenship is a reaction to the inability of consumers to address labor and human rights abuses in the global

16. See *infra* Part II.

17. See RICHARD BALDWIN, *THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION* 5–10 (Belknap Press 2016).

18. See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 179 (Harv. Univ. Press 2014).

19. See *infra* Part III.

20. *Id.*

21. See *infra* Part IV.

22. *Id.*

supply chain through traditional forms of domestic political engagement.

An important driver of this new form of citizenship, Part V argues, is an increase in the physical and “social distance” between producers and consumers that is a result of the disaggregated supply chain economy. This expanding distance bothers many consumers, and they are increasingly seeking to recapture one of the most basic forms of localized social interaction—purchasing, trading, and consuming goods and services from people they personally know.²³ But there is a tension here: in a globalized economy, there are few direct personal relationships between consumers and producers, and the bonds between them are largely imagined.²⁴ The imagined nature of those relationships, which is termed here as the “consumer imaginary” and which provides the title of this Article, both poses risks and holds out promise for regulatory efforts to improve labor and human rights in the global supply chain.²⁵

While the primary approach of this Article is conceptual, Part VI turns to the concrete and suggests how the theoretical discussion can be applied to law and legislation. There are two central ways that public law has heretofore attempted to regulate labor conditions in the global supply chain. The first is through trade law and trade agreements.²⁶ US trade law has long included labor criteria in its trade legislation and its free trade agreements (FTAs).²⁷ Increasingly, the FTAs of a number of countries have included labor provisions requiring that trading partners comply with various labor standards and engage in certain processes at the risk, in some instances, of being subject to trade dispute procedures and remedies.²⁸

23. See Joyce E. Williams, *Social Distance*, in BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer ed., 2007) (tracing the development of the term social distance).

24. They are imagined in a similar way that the scholar Benedict Anderson observed the bonds between citizens of the nation-state to be. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 1, 62 (2d rev. ed. 2006).

25. See Kevin Kolben, *Transnational Private Labor Regulation, Consumer-Citizenship, and the Consumer Imaginary*, in HANDBOOK ON TRANSNATIONAL LABOR REGULATION 361, 370–71 (Adelle Blacket & Anne Trebilcock eds., 2015); see also *infra* Part V.

26. See *infra* Part VI.A.

27. See, e.g., Jeffrey S. Vogt, *The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership*, 18 J. INT'L ECON. L. 827, 835 (2015) (describing the evolution of labor provisions in US FTAs); Lance A. Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL'Y J. 199, 205 (2001) (analyzing the history and success of labor rights conditionality in the generalized system of preferences regime in the United States).

28. Between 2013 and 2016, 80 percent of all FTAs entered into globally had labor provisions. See INTERNATIONAL LABOUR ORGANIZATION, *THE HANDBOOK ON ASSESSMENT OF LABOUR PROVISIONS IN TRADE AND INVESTMENT ARRANGEMENTS 1* (Geneva, 2017) [hereinafter ILO HANDBOOK ON LABOUR PROVISIONS].

The second way is through disclosure and transparency laws aimed directly at lead firms.²⁹ While the regulation of global supply chains has been largely left to the market, in recent years legislation in Europe and, now increasingly, the United States has been enacted or proposed that compels firms to generate and reveal information about their supply chain practices.³⁰ These laws have not prescribed the actual conduct of lead firms *vis-à-vis* their supply chains, but rather require that they disclose the processes by which they have conducted due diligence to ensure that their supply chains are free of certain kinds of human and labor rights violations.³¹ In this sense, the laws rely on consumers taking this information into account, or, alternatively, on companies fearing that consumers will do so.³² This is supposed to motivate companies to root out labor and human rights violations from their supply chains.³³ Both mechanisms have been subject to critique for inadequately achieving their aims of improving working conditions in the supply chain.³⁴ This Article argues that trade and disclosure laws would be more effective if they could better reduce social distance and trigger the consumer imaginary, which in turn would better mobilize and catalyze consumer citizenship.

II. THE SUPPLY CHAIN ECONOMY

In order to understand cosmopolitan consumer citizenship and its role in generating supply chain governance and regulation regimes, this Article will briefly review the economic context that has fueled its rise. This Article refers to this economic phenomenon as the “supply chain economy.” The supply chain economy is facilitated and characterized by three interrelated dynamics: (1) economic unbundling, (2) firm transaction costs, and (3) fissured work.

A. *Economic Unbundling*

The last century has experienced dramatic growth in world trade and economic integration, which has rapidly accelerated in the last three decades.³⁵ Since 1990 alone, total world exports of goods and

29. See *infra* Part VI.B.

30. Susan A. Aaronson & Ethan Wham, *Can Transparency in Supply Chain Advance Labor Rights? Mapping of Existing Efforts* 1, 5 (Geo. Wash. Univ., Inst. for Int'l Econ. Policy Working Paper Series, Working Paper No. IIEP-WP-2016-6, 2016) (noting that by 2011 there were 23 countries in Europe requiring companies to divulge social and environmental information).

31. *Id.* at 9, 16.

32. See *id.* at 13.

33. See *id.* at 16.

34. See *infra* Part VI.

35. *Export of Goods and Services*, WORLD BANK, <https://data.worldbank.org/indicator/NE.EXP.GNFS.CD> (last visited Sept. 14, 2019) [<https://perma.cc/RYG6-FM5G>] (archived Aug. 12, 2019).

services has grown from about \$2.3 trillion in 1980, to a high of about \$24 trillion 2014, and in 2017 stood at \$23.064 trillion.³⁶ As Richard Baldwin and others document, the first stage of globalization began in earnest in 1820 with the advent of the steamship and railroads, which dramatically lowered the costs of moving goods over long distances.³⁷ This stage marked the beginning of the separation of consumption from production, or what Baldwin describes as the unbundling of the tight geographic relationship between production and consumption.³⁸ That is, while production used to take place very close to the point of consumption in more artisanal forms of manufacturing, now production has become increasingly geographically concentrated in specialized manufacturing areas that could be some distance from the end consumers.³⁹ This early stage of globalization was what Baldwin calls the “first unbundling.”⁴⁰ But while transportation costs were decreasing, the world trading system had been raising tariffs, particularly during the interwar periods.⁴¹ Increased tariffs slowed the process of separation of consumption from production, but hastened the onset of World War II.⁴² After World War II, nations started to reduce tariffs in earnest through the Bretton Woods institutions and agreements, such as the General Agreement on Tariffs and Trade (GATT).⁴³ Tariff reductions combined with the advent of containerization and other improvements in transportation technology led to a dramatic reduction in overall trading costs, and only accelerated the process of separating consumption and production.⁴⁴ The lowering of global tariffs was further accelerated by the creation of the World Trade Organization (WTO) in 1995, and while individual tariff rates have fluctuated, since 1996 weighted average tariffs have decreased from about 34 percent in 1996 to 2.59 percent in 2017.⁴⁵ Developing countries have particularly benefited from this. Eighty percent of all developing country exports to developed countries are now duty free, thanks to decreased bound tariff levels negotiated in the

36. *Id.*

37. RICHARD BALDWIN, *THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION* 49–53 (Belknap Press 2016).

38. *Id.* at 4.

39. *Id.* at 8.

40. *Id.* at 5.

41. *Id.* at 64–67.

42. *Id.* at 66.

43. *Id.* at 67–75.

44. *Id.* at 67–78.

45. *Data*, WORLD BANK, <https://data.worldbank.org/indicator/TM.TAX.MRCH.WM.AR.ZS?end=2017&start=1996&view=chart> (last visited Sept. 14, 2019) [<https://perma.cc/8WAC-6VT9>] (archived Aug. 12, 2019).

WTO, preferential trade arrangements, and regional and bilateral free trade agreements.⁴⁶

The second significant unbundling began roughly in the 1980s with the rapid development of new information and communication technologies (ICT).⁴⁷ The ICT revolution was a combination of rapidly increasing computer power combined with advances in telecommunications.⁴⁸ The ICT revolution, combined with the first unbundling's lower transportation costs and reduced tariffs, supercharged the processes of globalization and radically altered the structure of global production.⁴⁹ The second unbundling made it possible, according to Baldwin, to efficiently separate many stages of production, leading to what has been termed a "global value chain revolution."⁵⁰ In other words, production within specific manufacturing sectors became increasingly disaggregated, leading to a rapid expansion of global supply chains.⁵¹

The global value chain revolution has been an economic boon for many developing countries. As trade theory would predict, liberalizing trade regimes and reduced trading costs have led to countries specializing in economic activities in which they have a comparative advantage.⁵² A comparative advantage held by many developed economies has often been research and design, while the comparative advantage of developing economies has focused on lower labor costs.⁵³ From the perspective of developing countries, the supply chain revolution has meant that accessing and participating in those global supply chains has become much more feasible.⁵⁴ Importantly, from a development perspective, gaining access to global supply chains has been an important means for countries to industrialize through, in part, the access to technical knowledge from lead firms.⁵⁵ This has led to a dramatic shift in manufacturing from developed countries to developing ones, particularly concentrated in the so-called Industrializing Six.⁵⁶

46. *WTO Tariff Profiles 2015*, WORLD TRADE ORGANIZATION (2015), https://www.wto.org/english/res_e/booksp_e/tariff_profiles15_e.pdf [<https://perma.cc/5RLG-88ZC>] (archived Aug. 13, 2019). Notably, while tariffs have dramatically decreased, and do not have a great deal farther to fall, non-tariff barriers have arguably been on the rise, even those with non-protectionist intent. See U.N. Conference on Trade & Dev., *Key Statistics and Trends in International Trade*, 12, U.N. Doc UNCTAD/DITC/TAB/2015/1 (2015), http://unctad.org/en/PublicationsLibrary/ditctab2015d1_en.pdf [<https://perma.cc/YU5Q-THPR>] (archived Aug. 12, 2019).

47. BALDWIN, *supra* note 37, at 79–112.

48. See *id.* at 81–85.

49. *Id.*

50. *Id.* at 217.

51. *Id.* at 217–18.

52. See PAUL KRUGMAN & ROBIN WELLS, *ECONOMICS* 217 (5th ed. 2017).

53. See DOUGLAS A. IRWIN, *TRADE UNDER FIRE* 34–44 (4th ed. 2015).

54. BALDWIN, *supra* note 37, at 151.

55. *Id.* at 214–16.

56. These are China, Korea, India, Indonesia, Thailand, and Poland. *Id.* at 86.

The contemporary significance of global supply chains to world trade cannot be overstated. According to the United Nations Conference on Trade and Development (UNCTAD), 80 percent of global trade is linked to the international supply chains of multinational enterprises (MNEs).⁵⁷ But it is important to not view global supply chains as primarily providing manufactured goods to their end users. In fact, an estimated 60 percent of global trade is constituted by intermediate goods—that is, goods that are subsequently used in the manufacture of other goods that are consumed by the end user.⁵⁸ This is key to understanding the potential and limitations of consumer-grounded regulatory regimes because most consumer items are actually complex bundles of components, the production chains and processes of which are mostly invisible.⁵⁹ Indeed, it is generally only the final stage of assembly that attracts the attention of political and ethical consumers.⁶⁰

Another important aspect of disaggregated production is that, while the modern ethical consumer imagination is often focused on production in developing countries, in fact about half of the value of trade in goods and two-thirds of trade in services originate from developed countries.⁶¹ BRICs and developing countries roughly split the bulk of the rest, while the least developed countries have negligible participation in world trade.⁶² The largest trade flows exist between developed regions and East Asia, while regions such as Latin America have much smaller participation rates in global supply chains.⁶³ Importantly, developing countries have demonstrated the most rapid increase in integration into trade streams, which means integration into global supply chains.⁶⁴

B. Firms

The discussion above helps show the context of globalization and the growth of supply chains from the perspective of macroeconomics and technological change. From the microeconomic perspective of business decision-making, the supply chain economy has profoundly affected the make–buy calculus that is described in the transaction cost

57. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2013: GLOBAL VALUE SUPPLY CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT, at 135, U.N. Sales No. E.13.II.D.5 (2013).

58. *Id.* at 122.

59. *Id.*

60. *Id.*

61. *Key Statistics and Trends in International Trade*, *supra* note 46, at 12.

62. *Id.* The term ‘BRICs’ refers to Brazil, Russia, India, and China, which are the most economically advanced emerging economies.

63. *Id.* at 13.

64. *Id.* at 14.

economics literature.⁶⁵ As Ronald Coase first theorized, and Oliver Williamson and others later developed, comparative transaction costs determine whether firms make a product in-house, or use the market to outsource that manufacturing activity.⁶⁶ As the transaction costs of outsourcing business processes and production decrease, it becomes potentially more profitable for firms to rely on global supply chains, particularly in a global economic context of decreased trading and transmission costs.⁶⁷

Indeed, global supply chains have become an important source of competitive advantage for the modern corporation.⁶⁸ Logistics and procurement, once considered to be secondary functions, have become core business activities upon which businesses succeed or fail.⁶⁹ Prominent retailers such as Walmart have come to dominate the market in no small part due to their incredible supply chain efficiency and buying power, becoming price makers that can make or break some of their suppliers.⁷⁰ Brands such as Nike and Apple manufacture nothing themselves—they are primarily design, retail, and marketing companies that rely on a far-flung and complex network of suppliers to manufacture and deliver their products.⁷¹ In fact, this phenomenon of outsourcing production while insourcing design and services is so common that government agencies have officially termed such companies as “factoryless goods producers,”⁷² and scholars have begun

65. See, e.g., Jill E. Hobbs, *A Transaction Cost Approach to Supply Chain Management*, 1 SUPPLY CHAIN MGMT. 15, 18–20 (1996) (discussing how transaction cost analysis can explain levels of vertical integration of the firm).

66. Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 394–95 (1937); Oliver E. Williamson, *Transaction Cost Economics*, HANDBOOK OF INDUSTRIAL ORGANIZATION 135–82 (1989) (providing an overview of transaction cost economics); Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548, 548 (1981); see also Kish Vinayagamoorthy, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 756–59 (2014) (discussing transaction cost economics as applied to global value chains and outsourcing).

67. See Vinayagamoorthy, *supra* note 66, at 756–69.

68. See Suhong Li et al., *The Impact of Supply Chain Management Practices on Competitive Advantage and Organizational Performance*, 34 OMEGA 107, 107 (2006).

69. See WEIL, *supra* note 18, at 160.

70. See Paul N. Bloom & Vanessa G. Perry, *Retailer Power and Supplier Welfare: The Case of Wal-Mart*, 77 J. RETAILING 379 (2001); Paul Ziobro & Serena Ng, *Wal-Mart Ratchets Up Pressure on Suppliers to Cut Prices*, WALL ST. J., Mar. 31, 2015, <https://www.wsj.com/articles/wal-mart-ratchets-up-pressure-on-suppliers-to-cut-prices-1427845404> [<https://perma.cc/SA26-6WD6>] (archived Sept. 15, 2019).

71. See ANDREW B. BERNARD & TERESA C. FORT, *Factoryless Goods Producers in the US, in THE FACTORY-FREE ECONOMY: OUTSOURCING, SERVICITIZATION, AND THE FUTURE OF INDUSTRY 1* (Oxford Univ. Press 2017); Robert E. Scott, *What Is Manufacturing and Where Does It Happen?*, ECON. POL’Y INST. (July 21, 2014), <https://www.epi.org/publication/what-is-manufacturing-and-where-does-it-happen/> [<https://perma.cc/SEJ8-FT8R>] (archived Oct. 7, 2019).

72. See Bureau of Labor Statistics, *Keeping NAICS Relevant: Identifying and Classifying Factoryless Goods Producers (FGPs)*, U.S. DEPT LAB. (Jan. 9, 2017), https://www.bls.gov/bls/factoryless_goods_producers.htm [<https://perma.cc/P5X6-EGDT>] (archived Oct. 7, 2019).

to describe the “factory-free economy.”⁷³ Boeing, for example, outsourced about 70 percent of the manufacturing and design for its latest 787 Dreamliner.⁷⁴ This constituted a significant increase from its previous planes, effectively turning the manufacture and design of its blockbuster new airplane into a highly complex, and in the end unsuccessful, supply chain management project.⁷⁵ The list of companies that live and die by their supply chains could continue *ad infinitum*.⁷⁶ But what is key is that many corporations increasingly operate as lead firms that contract out significant proportions of manufacturing and other specific business tasks to contractors around the globe.⁷⁷ These suppliers are “upstream” in the supply chain, and send the goods and services “downstream” to the lead firms and, finally, the end consumers.⁷⁸

The degree to which this restructuring of large enterprises has taken place is so significant that one prominent management scholar has given it a name: “Nikefication.”⁷⁹ Gerald Davis agrees with the notion that corporations have largely become simply a “nexus of contracts,”⁸⁰ and that this is a harbinger of the end of the public corporation as it is currently known.⁸¹ Corporations, rather than being built up from scratch centered around a core of productive activities, are now similar to Lego sets that pick and choose various business

73. See generally LIONEL FONTAGNÉ & ANN HARRISON, INTRODUCTION TO THE FACTORY-FREE ECONOMY: OUTSOURCING, SERVITIZATION, AND THE FUTURE OF INDUSTRY 1 (Oxford Univ. Press 2017) (describing the transformation of industrial economy firms to becoming focused on design and innovation).

74. Steve Denning, *What Went Wrong at Boeing*, FORBES (Jan. 21, 2013, 2:28 AM), <http://www.forbes.com/sites/stevedenning/2013/01/21/what-went-wrong-at-boeing> [<https://perma.cc/X7T4-3PCX>] (archived on Aug. 12, 2019).

75. *Id.*

76. One of the most studied of these regimes is Toyota’s lean management system, which is essentially a method of managing suppliers, and has been of some interest to regulatory scholars, as well. See, e.g., William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, LAW & NEW GOVERNANCE IN THE EU & THE US (Gráinne de Búrca & Joanne Scott eds., Hart Publishing 2006).

77. See WEIL, *supra* note 18, at 270 (citing surveys that find significant prevalence of subcontracting).

78. In supply chain management parlance, upstream refers to the manufacturer of a good who sends the good *downstream* along the supply chain to the buyers or distributors of the output. See KENNETH BOYER & ROHIT VERMA, OPERATIONS & SUPPLY CHAIN MANAGEMENT FOR THE 21ST CENTURY 19 (2010).

79. Gerald F. Davis, *After the Corporation*, 41 POL. & SOC. 283, 294 (2013) [hereinafter Davis I].

80. See Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976). But see Katherine Van Wezel Stone, *Policing Employment Contracts within the Nexus-of-Contracts*, 43 U. TORONTO L.J. 353, 356 (1993) (critiquing the normative underpinning of the nexus of contracts perspective from an employment law perspective); William W. Bratton, *Nexus of Contracts Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 411 (1989).

81. See Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121, 1127–28 (2010) [hereinafter Davis II].

processes and piece them together according to need.⁸² Fewer direct employees are hired, and fewer directly owned assets are required.⁸³ This new form of corporate organization—Nikefication—is a form of intense disintegration and decentralization that has become pervasive across a number of industries.⁸⁴ A significant reason why companies such as Apple, Nike, Boeing, and others have been able to adopt this particular mode of operation is closely related to the rapid integration of the global economy through liberalized trade and investment regimes, and the ICT revolution.⁸⁵ Reliance on global supply chains has thus become essential to the modern firm.

C. *The Fissured Workplace*

While there are a number of important ramifications of the supply chain economy, one of the key impacts has been the implications for labor markets, labor rights, and labor regulation. Previously, when manufacturing was more vertically integrated, corporations directly employed many workers across a range of functions.⁸⁶ Now, firms directly employ fewer employees than they otherwise might have had when all production and services remained in-house.⁸⁷ This has resulted in what David Weil has famously described as the “fissured workplace,”⁸⁸ whereby “employment is no longer the clear relationship between a well-defined employer and a worker.”⁸⁹ Instead, “[e]mployment has been actively shed by these . . . [firms] and transferred to a complicated network of smaller business units.”⁹⁰

Apple is one example that demonstrates how significant the supply chain model of employment has become. Apple directly employs about 110 thousand employees.⁹¹ These employees primarily work in research, design, marketing, retail sales, and supply chain management.⁹² Yet the actual number of workers that produce Apple products and that are engaged in the vast Apple supply chain is far greater.⁹³ According to Apple’s Supplier Responsibility Report, over 1.6

82. See Davis I, *supra* note 79, at 287.

83. See *id.*

84. See *id.* at 286–88.

85. See *supra* Part II.A–B; Davis I, *supra* note 79, at 285.

86. Davis I, *supra* note 79, at 294–95.

87. *Id.*

88. WEIL, *supra* note 18, at 7–20.

89. *Id.* at 7.

90. *Id.* at 8.

91. See Apple Inc., Annual Report (Form 10-K), at 7 (Oct. 28, 2015).

92. The prominence of supply chain management as a field has been highlighted by the ascent of Tim Cook to the CEO position. Cook rose up in Apple’s supply chain and operations wing. See Matt Richtel & Brian X. Chen, *Tim Cook Making Apple His Own*, N.Y. TIMES, June 15, 2014, <https://www.nytimes.com/2014/06/15/technology/tim-cook-making-apple-his-own.html> [<https://perma.cc/ZHN2-8XBJ>] (archived Aug. 12, 2019).

93. *Id.*

million people are employed by Apple's global suppliers,⁹⁴ and many of Apple's suppliers are highly exposed to, and reliant upon, Apple's business, dedicating much of their employees' time to Apple production.⁹⁵ Foxconn, for example, which is the largest electronics manufacturer in the world, is said to derive between 40 to 50 percent of its revenue from its business contracts with Apple.⁹⁶ What all of this is to say, is that the control, risk, liability, and legal responsibility for human resource management have been outsourced, along with production, to a highly significant degree.

There are clearly advantages, from the lead firm's perspective, to outsourcing labor management and employment. One advantage is the reduction of employee-related costs, particularly if one can outsource noncore competency activities to lower-cost firms and to lower-cost countries.⁹⁷ Another advantage is the insulation from legal responsibility or liability for the employees in the supply chain. This is because human resource management, wages, and labor law compliance become the legal and economic responsibility of the supplier, rather than the lead firm.⁹⁸

But while the globalization of the supply chain might seem to be in this way advantageous for the lead firm, there are also significant risks involved with this strategy. One of those risks is that consumers and civil society have in recent decades increasingly focused their attention on corporations that utilize upstream contractors that are found to have abusive labor conditions in their supply chains. This focus has pressured corporations to take financial and regulatory (if not legal) responsibility for the labor and environmental conditions in which their products are manufactured. Lead firms have been forced to respond, taking steps to regulate their far-flung supply chains, and even stepping into the shoes of the state, or usurping its role depending on how one views it. This subject is addressed next.

III. THE CONSUMER STRIKES BACK

This Article has reviewed thus far how economic change and decreasing transaction costs have led to changes in the structure of production and of the firm itself. As a result, firms have increasingly relied on a model of production that relies heavily on global supply chains. One of the implications of this transformation has been a fundamental restructuring of work, which has taken the form of

94. Apple Inc., Supplier Responsibility Progress Report, at 2 (2016).

95. *Id.*

96. Michael Kan, *Foxconn builds products for many vendors, but its mud sticks to Apple*, MACWORLD (Oct 24, 2012, 10:45 AM), <https://www.macworld.com/article/2012972/smartphones/foxconn-builds-products-for-many-vendors-but-its-mud-sticks-to-apple.html> [<https://perma.cc/5WET-PR5W>] (archived Aug. 12, 2019).

97. See WEIL, *supra* note 18, at 49–52.

98. *Id.* at 17.

fissured workplaces.⁹⁹ This Part looks at another consequence of the new supply chain economy, specifically how it has led to increased demands by consumers and other stakeholders that labor conditions in those supply chains meet their expectations.

A. *The Demand for Social Governance*

The restructuring of the economy and work in the supply chain economy have been beneficial for many firms, but they have also led to what Karl Polanyi might describe as a double movement, referring to the social counterreactions that arise in market economies in response to the spread of markets and the marketization of society.¹⁰⁰ The more that markets become the dominant organizing force of society, Polanyi argued, the more policies and institutions emerged to check the market's pernicious effects.¹⁰¹ As the world's economies have become increasingly interconnected, and work and production have become more geographically dispersed, a different kind of double movement, which seeks to re-embed markets in society through private means and institutions, can be observed. A growing number of politically and ethically motivated consumers, mobilized in part by labor activists and organizations, have demanded that multinational corporations assure them that those corporations' products are made in ways that conform to consumers' ethical and political expectations.¹⁰²

In brief, the new organization of the global economy has led to demands for new forms of labor governance from citizens and their proxies in their capacity and identities as global consumers. A few illustrations will help clarify what is meant by this. One of the first well-publicized instances of consumer citizenship in global supply chains occurred in 1996, when television celebrity Kathie Lee Gifford was accused by a labor rights groups of licensing her name to a line of clothing marketed by Walmart and manufactured by a complicated network of suppliers, some of which were located in Honduras and employed thirteen- and fourteen-year-old children.¹⁰³ In another

99. *Id.* at 11–12.

100. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 79 (Beacon Press 1946).

101. *Id.* Polanyi specifically noted that “human society had become an accessory to the economic system.”*Id.*

102. See generally MICHELE MICHELETTI & DIETLIND STOLLE, *POLITICAL CONSUMERISM: GLOBAL RESPONSIBILITY IN ACTION* (2013) (analyzing the rise and causes of political consumerism); Jonah Peretti, *The Nike Sweatshop Email: Political Consumerism, Internet, and Culture Jamming*, in *POLITICS, PRODUCTS, AND MARKETS: EXPLORING POLITICAL CONSUMERISM* 311 (Michele Micheletti & Dietlind Stolle eds., 2011) (describing contemporary techniques used by consumers and transnational labor activists against the garment industry).

103. Stephanie Strom, *A Sweetheart Becomes Suspect; Looking Behind Those Kathie Lee Labels*, N.Y. TIMES, Jun 27, 1996, <http://www.nytimes.com/1996/06/27/business/a-sweetheart-becomes-suspect-looking-behind-those-kathie-lee-labels.html> [<https://perma.cc/SZ3N-U6WT>] (archived Aug. 12, 2019).

example, in 2006 the same labor rights group accused Disney, among others, of using suppliers in Jordan to manufacture apparel that engaged in highly abusive labor practices, such as confiscating passports of the mostly foreign workers, forcing the workers to work unconscionably long hours, and subjecting them to sexual abuse.¹⁰⁴

Then in the most egregious example of abusive labor conditions in modern history, on April 24, 2013, over 1,100 Bangladeshi garment workers were killed and scores more injured when the building in which they were working, Rana Plaza, collapsed outside of Dhaka, Bangladesh.¹⁰⁵ Their direct employers were Bangladeshi-owned factories that were contracted by multinational retailing companies ranging from the well-known—such as Benetton, Children's Place, and Primark—to the more anonymous.¹⁰⁶ These retailers, in turn, sold to individual consumers who resided several thousand miles away, mostly in Europe and the United States. They, along with other shoppers, purchased the vast bulk of the over \$20 billion in yearly garment exports that constitute 83.5 percent of Bangladesh's total exports.¹⁰⁷

The news media covered these stories intensively, and the Rana Plaza collapse in particular.¹⁰⁸ Viewers and readers were confronted with countless images of rubble and dead workers, arguably blurring the line between newsworthiness and exploitation.¹⁰⁹ The media clearly believed that news consumers, who are by and large also clothing consumers, would be deeply moved by this tragedy and be interested in following the news.¹¹⁰ And after a series of online petitions intended to compel companies doing business in Bangladesh

104. See Charles Kernaghan, *U.S.—Jordan Free Trade Agreement Descends into Human Trafficking & Involuntary Servitude*, NAT'L LAB. COMMITTEE (2006).

105. Amy Kazmin, *How Benetton Faced Up to the Aftermath of Rana Plaza*, FIN. TIMES, Apr. 20, 2015, <https://www.ft.com/content/f9d84f0e-e509-11e4-8b61-00144feab7de> [<https://perma.cc/CYT8-AHBR>] (archived Aug. 12, 2019).

106. *Id.*

107. See *Bangladesh Development Update: Towards Regulatory Predictability*, WORLD BANK 2–3 (Apr. 2019), <http://documents.worldbank.org/curated/en/269241554408636618/pdf/Bangladesh-Development-Update-Towards-Regulatory-Predictability.pdf> [<https://perma.cc/C4XW-XK6D>] (archived Aug. 12, 2019).

108. See Dana Thomas, *Why Won't We Learn from the Survivors of the Rana Plaza Disaster?*, N.Y. TIMES, Apr. 24, 2018, <https://www.nytimes.com/2018/04/24/style/survivors-of-rana-plaza-disaster.html> [<https://perma.cc/5W3X-36YT>] (archived Aug. 12, 2019) (describing embarrassing media coverage that compelled brands to take action).

109. For a discussion from a photographer at Rana Plaza and the tensions of photographing disaster sites, see Ismail Ferdous, *Photography as Activism: The Role of Visual Media in Humanitarian Crises*, 36 HARV. INT'L REV. 22 (2014). For a photo montage, see Jason Motlagh, *The Ghosts of Rana Plaza: In Bangladesh, one year after the worst accident in the history of the garment industry, recovery remains a fragile process, justice seems elusive, and reform has a long way to go*, 90 VA. Q. REV. 44 (2014).

110. A search on Dow Jones Factiva on July 22, 2019 using the search term "Rana Plaza" returned 23,181 articles from newspapers and magazines around the world. Agence France Presse printed the most of these articles, and the 9,667 of these were published in 2013 following the accident. This number does not include television or other non-print media.

to take action generated well over a million signatures, many companies also apparently believed this. Indeed, following the tragedy, a small group of mostly United States-based companies formed an initiative to address fire and safety issues in Bangladesh's garment factories,¹¹¹ while a larger number of mostly European companies joined to form a different organization that also had union support.¹¹² This tragic incident, and the others discussed above, exemplify the important and growing role of the consumer in the regulation and governance of labor, the environment, and other issues in global supply chains.

B. Labor Governance Deficits

The central problem that consumers and labor activists have sought to redress is the gap that exists between what governments in exporting countries are willing and/or are able to accomplish, and what labor activists, workers, and consumers expect to be done. This phenomenon is related to what Gary Gereffi and Frederick Mayer have notably termed a "governance deficit."¹¹³ A governance deficit refers to the situation where public governance institutions, international and domestic, do not have the ability or power to regulate the new economic forms that have arisen as a result of liberalized trade and investment, including global supply chains.¹¹⁴ In the context of labor, such deficits can be termed as "labor governance deficits."¹¹⁵

Labor governance deficits take several forms. One exists at the domestic regulatory jurisdiction in which suppliers are located.¹¹⁶ Often, suppliers are located in countries and jurisdictions whose labor laws are either *de jure* or *de facto* weaker than in the jurisdiction of the lead firm.¹¹⁷ If this is the case, then a supplier's factory and production processes will not be adequately regulated to meet the needs of the importing firm's own specifications, as well as the importing country's health, safety, or other requirements.¹¹⁸ Thus, if a lead firm relies on a particular environmental standard or wishes to source a product that

111. See generally ALL FOR BANGLADESH WORKER SAFETY, <https://www.bangladeshworkersafety.org> (last visited Sept. 15, 2019) [<https://perma.cc/LU7E-KWQL>] (archived Aug. 12, 2019). The organization ceased operating in 2018 after five years of activity.

112. See generally ACCORD ON FIRE & BUILDING SAFETY IN BANGLADESH, <https://bangladeshaccord.org> (last visited Sept. 15, 2019) [<https://perma.cc/LNG6-4NWC>] (archived Aug. 12, 2019).

113. Gary Gereffi & Frederick Mayer, *Regulation and Economic Globalization: Prospects and Limits of Private Governance*, 12 BUS. & POL. 1, 1–2 (2010).

114. See *id.* at 1–5.

115. See Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 THEORETICAL INQUIRIES L. 403, 405–07 (discussing various kinds of labor governance deficits).

116. *Id.*

117. See David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 BUS. & SOC'Y 68, 71–72 (2009).

118. *Id.*

is free of certain hazardous materials, for example, then it cannot rely on the regulatory rules or enforcement of the exporting country. This is not to say that these states are simply black holes devoid of any labor law enforcement.¹¹⁹ Rather, the supply of regulation is insufficient to satisfy transnational demand.¹²⁰

There are several reasons why this might be the case. One reason is technical: states often do not have the capacity to enforce their own labor laws due to a mix of a lack of technical know-how and a lack of resources.¹²¹ But as political scientist Kate MacDonald has noted, other reasons reflect deliberate political choices made by governments.¹²² A perceived trade-off between high labor standards and investment means that policymakers might believe that if worker protections are too strong, then the costs of doing business in the country will be too high and will drive away investors.¹²³ In some countries, a political factor is that capital is usually substantially more powerful than workers and unions. Indeed, in many countries, members of the political class are also often the owners of capital. In Bangladesh, for example, 60 percent of parliament members are involved in industry or business and 10 percent directly own garment factories, by far the largest export industry, with others holding less direct financial stakes.¹²⁴ This serves as a counterweight to increasing labor standards, which might have redistributive effects on firm owners.

A second labor governance deficit exists at the international level. As economic production and activity have become disaggregated and transnational, there has not arisen a complementary set of transnational regulatory instruments that can adequately regulate those processes.¹²⁵ While international regulatory networks might have grown and strengthened,¹²⁶ these networks are engaged in consultations between state actors rather than engaging in actual

119. See Tim Bartley, *Transnational Governance and The Re-Centered State: Sustainability or Legality?*, 8 REG. & GOVERNANCE 93, 95 (2014).

120. *Id.*

121. KATE MACDONALD, *THE POLITICS OF GLOBAL SUPPLY CHAINS* 1, 37 (2014).

122. *Id.* at 39.

123. *Id.* at 38–39; see also Richard M. Locke, *Can Global Brands Create Just Supply Chains?*, BOS. REV. (May 21, 2013), <http://bostonreview.net/forum/can-global-brands-create-just-supply-chains-richard-locke> [<https://perma.cc/NEV9-5NT7>] (archived Aug. 12, 2019).

124. Jim Yardley, *Garment Trade Wields Power in Bangladesh*, N.Y. TIMES, July 24, 2013, <http://www.nytimes.com/2013/07/25/world/asia/garment-trade-wields-power-in-bangladesh.html> [<https://perma.cc/NN6C-3882>] (archived Aug. 12, 2019).

125. Kolben, *Transnational Labor Regulation and the Limits of Governance*, *supra* note 115, at 406; Gary Gereffi & Frederick Mayer, *Globalization and the Demand for Governance*, in *THE NEW OFFSHORING OF JOBS AND GLOBAL DEVELOPMENT* 39, 48–49 (Int'l Labor Office 2008).

126. For a seminal work on transnational regulatory networks that addresses democracy and accountability issues, see Ann Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2002).

enforcement activities, and they are thus limited in their ability to address the highly political nature of labor enforcement.¹²⁷ The United Nations (UN) organization charged with addressing global labor standards is the International Labor Organization (ILO). Yet many have argued that it is relatively toothless when it comes to compelling its member states to enforce their laws, and it has little to no enforcement power itself, particularly at the individual factory level.¹²⁸

A final labor governance deficit concerns the ability of home country jurisdictions of lead firms to legally compel those firms to take action against their suppliers in instances where suppliers' actions violate a given set of norms.¹²⁹ Generally speaking, states have little ability or will to regulate the extraterritorial activities of their firms.¹³⁰ This is particularly the case when the activity in question is one that is not directly controlled by the lead firm. This has led some scholars to argue for new legal tools to hold lead firms liable for the conduct of their suppliers.¹³¹ But these proposals as of now are more theoretical than practical. Another way to create incentives for lead firms to improve conditions in their supply chains is through transparency and disclosure laws, and these laws have been increasingly enacted in the United States and Europe. Transparency laws require lead firms to divulge certain kinds of information about the supply chain, or to divulge their good faith efforts in uncovering what occurs in those supply chains. More discussion of these laws, and some suggestions on

127. See Vinayagamoorthy, *supra* note 66, at 793–98. Vinayagamoorthy points out that Networks are voluntary, better at technical issues than policing, and do not include MNCs in their deliberations.

128. This argument has been widely made. For a critique of the ILO's supervisory mechanism, see BOB HEPPLER, *LABOUR LAWS AND GLOBAL TRADE* 25–68 (2005). For a critique of the statist focus of the ILO, see Yossi Dahan, Hanna Lerner, & Faina Milman-Sivan, *Shared Responsibility and the International Labour Organization*, 34 *MICH. J. INT'L L.* 102, 116–36 (2014).

129. See Kolben, *Transnational Labor Regulation and the Limits of Governance*, *supra* note 115, at 406 (discussing home country labor governance deficits); Katherine Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 *MICH. J. INT'L L.* 987, 1011–19 (1996) (discussing extraterritorial application of U.S. labor law).

130. One notable exception is the U.S. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd–1 (2018), which forbids US companies from making payments to foreign officials in order to obtain business contracts.

131. See Alan Hyde, *To What Duties to Global Labour Rights Correlate?*, in *GLOBAL JUSTICE AND INTERNATIONAL RIGHTS* 209, 230–32 (Yossi Dahan et al. eds., 2016) (articulating a very specific set of principles that could be incorporated into hard and soft law to impose vicarious liability on firms that benefit from non-directly employed labor); Mark Anner, Jennifer Bair & Jeremy Blasi, *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 *COMP. LAB. L. & POL'Y J.* 1, 37–38 (2013) (arguing for a new “hot goods” provision as applied to global supply chains). Mark Anner et al. have also proposed theories of joint liability, looking to reinstate so called “jobbers agreements” between lead firms and various stakeholders that would place liability on lead firms for the conduct of their suppliers; and also have proposed legislative or common law versions of “hot goods” provisions of the Fair Labor Standards Act.

how to make them more effective, are put forward in Part V of this Article.

C. Consumer Mobilization: TLANs

Consumers and activists have responded to these governance deficits in part by seeking nonstate mechanisms to improve supply chain working conditions. One such mechanism is the mobilization of consumers and activists to pressure lead firms through transnational labor activist networks (TLANs).

Building upon Margaret E. Keck and Kathryn Sikkink's seminal work on transnational human rights advocacy networks,¹³² the sociologist Gay Seidman has described how TLANs function.¹³³ When poor labor conditions and labor abuses occur in workplaces that manufacture or provide services for export to a given multinational consumer or contractor, local activists will provide that information to transnational activists.¹³⁴ Those transnational activists then mobilize consumers to pressure lead firms to take action and improve working conditions in their supply chains.¹³⁵ In a well-functioning democratic regime, the state would be responsive to the demands of domestic constituents and would theoretically respond to such pressure. But in many countries that have jurisdictional authority over suppliers in global supply chains, the state is often not responsive.¹³⁶ Accordingly, TLANs reach out to actors, particularly those that have influence on lead firms to compel those lead firms to ensure that their supply chains meet the expectations of their stakeholders.¹³⁷ One of the most potentially powerful stakeholders is consumers, and TLANs make special efforts to mobilize them, or at least generate a credible threat of doing so.¹³⁸

TLANs deploy a variety of means to compel lead firms to pressure the rights-violating supplier to alter its behavior, and even in some rare situations have managed to compel lead firms to directly compensate the workers involved if the supplier is unable or unwilling to do so.¹³⁹ Using these various tools, TLANs have been remarkably effective in affecting corporate culture and action. They have also been

132. See generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (Cornell Univ. Press 1998).

133. See GAY W. SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM* 1, 16–18 (2009).

134. *Id.*

135. *Id.*

136. *Id.*

137. *See id.*

138. *See id.*

139. For an example of this phenomenon, see Steven Greenhouse, *\$40 Million in Aid Set for Bangladesh Garment Workers*, N.Y. TIMES, Dec. 23, 2013, <http://www.nytimes.com/2013/12/24/business/international/40-million-in-aid-set-for-bangladesh-garment-workers.html> [<https://perma.cc/34QQ-ABLT>] (archived Aug. 12, 2019).

increasingly effective in impacting public policy and other forms of domestic and transnational labor governance, or what Sabrina Zajak calls a “global architecture of labor governance.”¹⁴⁰ The significance and effectiveness of these efforts is reflected not only in the actual practice of companies but also tellingly in the content of business school education and research.¹⁴¹ Just about every supply chain management textbook in business schools now includes sections on sustainability and the social impact of the supply chain on the firm’s stakeholders, for they are considered integral aspects of supply chain management—not simply a question of business ethics.¹⁴² In other business fields, academic accountants have focused on social compliance as a form of auditing known as social accounting,¹⁴³ and a number of trade books oriented toward business people have appeared in recent years focusing uniquely on this issue.¹⁴⁴

D. Corporate Supply Chain Compliance

But the most important indicator of the mainstreaming of supply chain governance initiatives in corporate practice is the widespread adoption and implementation of supply chain governance programs by multinationals with far-flung supply chains. Indeed, private mechanisms of supply chain labor governance are now ubiquitous among companies with extensive supply chain networks. Many companies have mainstreamed supply chain labor compliance programs into their management structures, and they have also in some instances used supply chain compliance and conditions as part of their marketing and business strategies.¹⁴⁵ Because of the success of these campaigns over time, the large majority of companies that source globally have instituted compliance programs in their supply chains in order to reduce the number and intensity of campaigns directed at them by activists.¹⁴⁶

The rise of supply chain regulatory efforts in recent decades is notable. Indeed, one might argue that the expectation that companies

140. See SABRINA ZAJAK, *TRANSNATIONAL ACTIVISM, GLOBAL LABOR GOVERNANCE, AND CHINA* 3, 104 (Palgrave Macmillan 2017) (examining the effects of transnational labor-rights activism on labor rights in China).

141. See *id.*

142. See, e.g., F. ROBERT JACOBS & RICHARD B. CHASE, *OPERATIONS AND SUPPLY CHAIN MANAGEMENT: THE CORE* 26-27 (4th ed. 2016); UNITED NATIONS GLOB. COMPACT & BUS. FOR SOC. RESPONSIBILITY, *SUPPLY CHAIN SUSTAINABILITY: A PRACTICAL GUIDE FOR CONTINUOUS IMPROVEMENT* 1, 13-19 (2010).

143. See MUHAMMED AZIZUL ISLAM, *SOCIAL COMPLIANCE ACCOUNTING: MANAGING LEGITIMACY IN GLOBAL SUPPLY CHAINS* 1 (Springer 2015) (noting the centrality of that social compliance is a major performance issue for MNCs sourcing from developing countries).

144. See, e.g., DALE NEEF, *THE SUPPLY CHAIN IMPERATIVE: HOW TO ENSURE ETHICAL BEHAVIOR IN YOUR GLOBAL SUPPLIERS* (2004).

145. *Id.* at 5.

146. *Id.*

at least proclaim to require, their suppliers' compliance with a basic minimum of human rights, environmental, and labor rights standards, has become hegemonic. Increasingly, as a response to TLANs, MNCs have implemented various supply chain compliance mechanisms, both individually and through industry-wide efforts.¹⁴⁷ That is, in response to pressure from consumers and other relevant stakeholders that exert power over corporate reputation, including in some cases governments, lead firms have taken extensive measures in many cases to generate codes of conduct and to enforce those codes with their suppliers through contractual provisions,¹⁴⁸ albeit with a limited degree of success.¹⁴⁹ Rather than attempting direct communication with consumers through social labels, these codes of conduct generated by lead firms constitute an effort to directly regulate supply chains through private means.

Often, rather than go it alone, firms combine efforts through industry groups, establishing common codes of conduct for suppliers, and either coordinate or share compliance and enforcement systems.¹⁵⁰ Especially for the most vulnerable companies that function in the highly targeted area of garments and apparel, they will join and create multistakeholder initiatives that bring together several different stakeholder groups, such as universities, NGOs, and governments to collaborate on compliance in the global supply chain.¹⁵¹

147. See S. Prakash Sethi, *Self-Regulation through Voluntary Codes of Conduct*, in GLOBALIZATION AND SELF-REGULATION: THE CRUCIAL ROLE THAT CORPORATE CODES OF CONDUCT PLAY IN GLOBAL BUSINESS 7–10 (2011).

148. Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains As An Example*, 57 AM. J. COMP. L. 711, 741 (2009) (arguing that contractual codes of conduct constitutes a form of legal transplantation).

149. The literature discussing this phenomenon and their effectiveness is quite extensive. See *id.*; Niklas Egels-Zandén & Henrik Lindholm, *Do Codes of Conduct Improve Worker Rights in Supply Chains? A Study of Fair Wear Foundation*, 107 J. CLEANER PRODUCTION 31 (2015) (finding marginal improvements in factories subject to codes of conduct but only for certain workers' rights); Vogel, *supra* note 117, at 68 (arguing that private codes of conduct are insufficient to constitute a substitute for state authority. Perhaps the most influential research in recent years on this topic has been produced by Richard M. Locke and his collaborators, who have argued that what they describe as compliance approaches to supply chain governance have been largely ineffective. LOCKE, *supra* note 5, at 24–45 (describing the limits of a compliance approach to enforcing codes of conduct and supply chain governance in favor of a cooperation approach). These scholars argue that cooperative approaches between lead firms and suppliers will result in better outcomes. Others are skeptical of this view, however, arguing that a cooperative approach is insufficient to significantly change power relations between lead firms, suppliers, and workers; nor will it change the structural problems underlying abusive working conditions in supply chains, such as pressures to drive down wages and increase productivity. See Peter Lund-Thomsen & Adam Lindgreen, *Corporate Social Responsibility in Global Value Chains: Where Are We Now and Where Are We Going?*, 123 J. BUS. ETHICS 11, 12 (2014).

150. Sethi, *supra* note 147, at 7–8.

151. See generally Luc Fransen, *Multi-stakeholder Governance and Voluntary Programme Interactions: Legitimation Politics in the Institutional Design of Corporate Social Responsibility*, 10 SOCIO-ECON. REV. 163 (2012) (comparing the legitimacy of multi-stakeholder and business driven initiatives).

IV. COSMOPOLITAN CONSUMER CITIZENSHIP

The previous Part reviewed the consumer countermovement against labor violations in the supply chain, and the lead firms' responses to it. This Part focuses more closely on ethically minded consumers, analyzing them in the theoretical framework of citizenship. This particular subsection of consumers is referred to as "cosmopolitan citizen-consumers," or those who practice a form of cosmopolitan consumer citizenship. Other scholars have alternatively described this form of market-based engagement as conscientious consumerism,¹⁵² ethical consumerism, or political consumerism.¹⁵³ The nomenclature often reflects the geography of its users, with Europeans preferring political consumerism, for example. But it also reflects the conceptual framework used by its adopters.¹⁵⁴ For this Article, the term "consumer citizenship" is chosen because consumers who make purchasing choices informed by a political ideal and desire to connect with producers are engaging in a form of activity that is consonant with cosmopolitan ideas of citizenship.

A. *From Traditional Citizenship . . .*

In order to understand how cosmopolitan consumer citizenship is constituted, and how it functions as a regulatory force, it is important to first discuss what is meant by citizenship. Citizenship is the political notion that one has both rights and duties as a member of a defined political body—generally a nation-state.¹⁵⁵ A classic delineation is that between liberal and republican conceptions.¹⁵⁶ In liberal conceptions of citizenship, the emphasis is placed on the legal rights that the citizen possesses *vis-à-vis* the state or political regime.¹⁵⁷ The emphasis, as is reflected in liberal constitutionalism, for example, is on ensuring that private citizens are extended legal rights and protection from infringement into the private sphere by government.¹⁵⁸ In republican conceptions, on the other hand, the emphasis is generally placed on the duties one has to participate in the decision-making of the political body.¹⁵⁹ Alternatively, as the political philosopher Jurgen Habermas conceptualizes it, republican citizenship is a "model of received

152. See TIM BARTLEY ET AL., *LOOKING BEHIND THE LABEL: GLOBAL INDUSTRIES AND THE CONSCIENTIOUS CONSUMER 1* (Ind. Univ. Press 2015). Bartley et al., for example, prefer the term "conscientious consumerism" because they are skeptical of the degree to which consumer choice in the market rises to the level of a political act.

153. MICHELETTI & STOLLE, *supra* note 102, at 39 (describing political consumerism as individualized responsibility-taking).

154. See BARTLEY ET AL., *supra* note 152, at 7.

155. Michael Walzer, *Citizenship*, in *POLITICAL INNOVATION AND CONCEPTUAL CHANGE 211* (Terence Ball et al. eds., Cambridge Univ. Press 1989).

156. *Id.* at 216.

157. *Id.* at 214–16.

158. *Id.* at 215.

159. *Id.*

membership in a self-determined ethical community.”¹⁶⁰ But some scholars, such as Michael Walzer, have noted that the dichotomy between republican and liberal notions is somewhat false: a citizen cannot secure rights without participating in the political processes that define and institutionally protect that citizen.¹⁶¹

Another way of thinking about citizenship—one that centers on notions of social citizenship in relationship to the capitalist state—was articulated by T.H. Marshall in his seminal essay *On Citizenship and Social Class*. Marshall argued that there has been a progression in modern democratic capitalist states of the meaning and types of citizenship.¹⁶² In the first stage, “civil” citizenship was extended to those members of society that were deemed citizens—generally landowning men—as a means of protecting their “individual freedom.”¹⁶³ These rights included property rights, freedom of thought and speech, and the due process of law.¹⁶⁴ In the second stage, “political” citizenship was extended to groups of people to enable participation in political decision-making and to build political power through voting rights.¹⁶⁵ Marshall then identified a third stage of citizenship that emerged in the twentieth century—“social” citizenship.¹⁶⁶ Social citizenship entails the range of rights that a citizen accrues for a “modicum of economic welfare and security to the right to . . . live the life of a civilized being according to the standards prevailing in the society.”¹⁶⁷ Such rights, as Polanyi argued, become necessary to maintain the stability and legitimacy of capitalism.¹⁶⁸ Marshall’s conception of citizenship is consistent with what some have termed the “unitary” or traditionally liberal conception, in which all members of a polity are accorded the same civil, political, and social rights regardless of their position or status, assuming of course that they meet the political criteria of “citizen” in a given nation.¹⁶⁹

160. Jürgen Habermas, *Citizenship and National Identity: Some Reflection on the Future of Europe*, in *THE CONDITION OF CITIZENSHIP* 25–26 (Bart Van Steenberghe ed., 1992). Specifically, Habermas understands the republican strain of citizenship to be such that “citizens are integrated into the political community like parts into a whole; that is, in such a manner that they can only form their personal and social identity in the horizon of shared traditions and intersubjectively recognized institutions.”

161. Walzer, *supra* note 155, at 217 (“the security provided by the authorities cannot just be enjoyed; it must be secured, and sometimes against the authorities themselves.”).

162. See T.H. Marshall, *Citizenship and Social Class*, in *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* 1, 10 (Cambridge Univ. Press 1950).

163. *Id.*

164. *See id.* at 10–11.

165. *See id.* at 11.

166. *See id.*

167. *Id.*

168. See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 79–80 (2d ed. 2001) (discussing the double movement).

169. Dominique Leydet, *Citizenship*, *STAN. ENCYCLOPEDIA OF PHIL.* (Oct. 13, 2006), <http://plato.stanford.edu/entries/citizenship/> [https://perma.cc/93H7-H8ZS] (archived Sept. 15, 2019).

The unitary, nation-state centric, and liberal conception of citizenship has come under increasing scrutiny, however, in recent years. Recognizing the limitation of a unitary perspective, scholars have identified and argued for alternative forms of citizenship, using the concept to serve as a means of identifying rights and privileges of individuals and groups, particularly women, minority groups, and migrants, that have been excluded from the traditional institutions and conceptions of citizenship.¹⁷⁰ For example, feminist critiques of citizenship have focused on what feminist scholars consider to be a false divide between private and public spheres that undergird liberal conceptions of citizenship.¹⁷¹ Radical feminist critiques have accordingly argued for far-reaching extensions of public power into traditionally private spheres in order to remedy the forms of inequality that are reified in private gender relationships.¹⁷² Other critiques of liberal notions of citizenship argue that both liberal and republican conceptions fail to sufficiently take into account the increasing diversity of political communities.¹⁷³ In this view, diverse identities and the existence of multiple and overlapping minority groups require that such groups are given special consideration in order to have equal opportunities and status in political bodies that have traditionally excluded them.¹⁷⁴ Critics, however, argue that this kind of “special treatment” undermines the universalism and egalitarianism before the law underlying traditional liberal understandings of citizenship.¹⁷⁵

A third critique of the traditional liberal conception of citizenship—a critique that is particularly pertinent to this Article’s discussion—challenges the notion that citizenship is necessarily bounded and defined by the nation-state.¹⁷⁶ For proponents of a state-centric conception of citizenship, citizens act *qua* citizens not only for their own benefit, but also for the benefit of the political collective.¹⁷⁷ Citizenship traditionally defines the political collective as a bounded one, and usually by the borders of a nation-state.¹⁷⁸ Otherwise, advocates argue, the notion of citizenship would be overinclusive, bringing every social

170. *Id.*

171. The public private divide is the Aristotelian notion that the private sphere must be organized to ensure that citizens (male and property owning) can participate in politics. The home must be organized to facilitate this, which means ensuring that women will provide for the home and not have access to work or political power outside of it. See Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 29–30 (Jeff Weintraub & Krishan Kumar eds., 1997).

172. See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 1, 96–97 (Harv. Univ. Press 1988).

173. Leydet, *supra* note 169, § 2.1.

174. *Id.*

175. *See id.*

176. See DAVID I. MILLER, CITIZENSHIP AND NATIONAL IDENTITY 1, 82 (2000) (arguing that citizenship must be bounded within the “boundaries of national political communities”).

177. *Id.*

178. *See, e.g., id.* at 81.

relationship within its umbrella and rendering the concept somewhat meaningless.¹⁷⁹ Citizenship, moreover, also suggests other kinds of mutual identification with fellow citizens in that bounded community.¹⁸⁰ That is, for citizenship to function (i.e. if citizens are to respect their duties in conjunction with the extension of rights) there must be some shared values and social engagement with other citizens.¹⁸¹

For those who wish to expand the nation-state bounded conception of citizenship, the argument is that many contemporary regulatory and social problems are ones that are not limited by, or solvable within, traditional nation-state boundaries.¹⁸² These include, but are not limited to, environmental degradation, economic crisis, and the changing nature of security threats.¹⁸³ Indeed, if citizenship is to be understood as a mix of civil, political, and social rights and duties, then many of these rights and duties cannot be protected or exercised solely in the boundaries of the nation-state. In an increasingly transnational economy, human rights violations can be caused by a complex and interconnected set of actors. Thus, as David Held writes, “[in] our increasingly interconnected world, these global problems cannot be solved by any one nation-state acting alone. They call for collective and collaborative action.”¹⁸⁴ This is because the contemporary nation-state is insufficiently equipped to address these transnational economic and social regulatory challenges and problems.¹⁸⁵ The nation-state is limited in its ability to adequately address extraterritorial activity because the conduct or injuries in question often take place and have causal chains that span across jurisdictions.¹⁸⁶ This is a well-recognized problem among scholars of global regulation and governance.¹⁸⁷

B. . . . To Consumer Citizenship

Thus, while traditional theories of citizenship and democratic participation are limited in their capacity to address some transnational challenges, including labor rights and standards in global supply chains, contemporary scholarship on citizenship opens up theoretical space to exercise citizenship in nontraditional arenas.

179. *Id.* at 10.

180. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 514 (2007).

181. MILLER, *supra* note 176, at 10.

182. See DAVID HELD, *COSMOPOLITANISM: IDEALS AND REALITIES* 4 (2010).

183. *See id.*

184. *Id.*

185. *See id.*

186. *Id.*

187. See, e.g., Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE 1 (2014) (discussing the interaction of non-state actors and states in the regulation of market activities that cross borders).

These include in the market, and not just in domestic, public parliamentary or legislative institutions. Expanding the realm of citizenship will provide greater opportunities for political engagement in a greater number of deliberative spaces that might be more effective in addressing transnational regulatory problems. To do so, citizens must be engaged in multiple arenas that engage the multiple aspects of their lives as they are led in the day to day. Indeed, citizens inhabit many different spheres including at work, at home, with friends, or in their communities. They thus have multiple identities and operate in different domains of action.

One of the most important of such identities is citizens' identity as consumers. While few people in society actively engage in traditional forms of politics in a sustained way, either at the local or national levels, nearly everyone engages in acts of consumption almost every day. This means that consumption, which is generally practiced at the level of the market, is a potentially powerful means of expressing political and moral preferences. Consumption thus transforms from an activity solely aimed at satisfying one's immediate needs and desires, to one that provides opportunities to express social and political preferences, and to make an impact on the world. Consumption, in this perspective, should thus be understood to be expressive of political ideals, and to be a form of action. As Frank Trentmann argues, rather than occupying "opposing spheres of public and private," consumption and citizenship are "today increasingly recognized as porous, indeed overlapping domains."¹⁸⁸ And for some, everyday goods can be an object of consumers' humanitarianism, "shaping and deepening citizenship."¹⁸⁹

What results is the concept of consumer citizenship, which, in the context of the global economy, is necessarily grounded in a transnational context. As Joséé Johnston argues, one must broaden the "meaning of citizenship beyond the state-container of formal politics to encompass citizenship's political-economic and political-ecological dimensions."¹⁹⁰ Accordingly, she views "the citizen as part of collective struggles to reclaim and preserve the social and ecological commons."¹⁹¹ In consumer citizenship, political activity occurs at the site of consumption and through market transactions. In short, as defined by Michele Micheletti and Dietlind Stolle, consumer

188. Frank Trentmann, *Citizenship and Consumption*, 7 J. CONSUMER CULTURE 147, 147 (2007). But for an analysis about how these ideal types are inherently conflicting, see Joséé Johnston, *The Citizen-Consumer Hybrid: Ideological Tensions and the Case of Whole Foods Market*, 37 THEORY & SOC'Y 229, 241-48 (2008). But for a skeptical view of consumer citizenship campaigns, see generally ETHEL BROOKS, UNRAVELING THE GARMENT INDUSTRY: TRANSNATIONAL ORGANIZING AND WOMEN'S WORK (Bert Klandermans et al. eds., 2007).

189. Michele Micheletti, *The Moral Force of Consumption and Capitalism, in* CITIZENSHIP AND CONSUMPTION 121, 122 (Kate Soper & Frank Trentmann eds., 2008).

190. Johnston, *supra* note 188, at 243.

191. *Id.*

citizenship is the “consumers’ use of the market as an arena for politics in order to change institutional or market practices found to be ethically, environmentally, or politically objectionable.”¹⁹²

To illustrate the political nature of consumer activity, this Article turns to Iris Marion Young. Young has made one of the most widely cited arguments for how consumption is inherently a political act that carries with it political duties and obligations, particularly as applied to labor in global supply chains.¹⁹³ Specifically, she proposes a “social connection model of responsibility,” whereby individuals “bear responsibility for structural injustice because they contribute by their actions to the processes that produce unjust outcomes.”¹⁹⁴ If consumers’ lives are embedded in the web of structural relations that require the labor of workers in global supply chains, then, Young argues, nation-state-based conceptions of citizenship are no longer helpful in allocating or bounding political responsibility.¹⁹⁵ Her argument is that consumers’ actions are part of a causal chain that affects workers’ rights in supply chains, and that makes consumers “structurally” responsible for the conditions in which they work.¹⁹⁶

But while some view consumer citizenship as a politically legitimate and potentially effective means of effecting social change in the global economy, others argue that consumer citizenship is theoretically problematic.¹⁹⁷ One argument is that, by focusing on consumerism as the key to social change, the ecologically important goal of reducing consumption is de-emphasized.¹⁹⁸ The potential of consumer citizenship as a form of social change is thus inherently limited because it valorizes and legitimizes the market and capitalist forms of economic organization that might be the source of the problems in the first place. While this might be true in the case of environmental stewardship, this argument is perhaps less applicable to the question of labor and human rights, where the concern is less on reducing consumption and more on improving the conditions under which production for consumption occurs.

A second argument is that consumer citizenship might be contrary to notions of equal citizenship and constitute a threat to democracy.¹⁹⁹ This is because it relies on a form of political participation that is

192. MICHELETTI & STOLLE, *supra* note 102, at 39.

193. Iris M. Young, *Responsibility and Global Justice: A Social Connection Model*, 12 SOC. PHIL. & POL'Y. 102, 119 (2006).

194. *Id.*

195. *Id.* Others argue that cosmopolitan notions of justice are in fact too expansive to be meaningful and might result in less robust democratic functioning. Bellamy argues, for example, that this expansive notion of citizenship diminishes the opportunity for real democratic participation, in favor of a world *polis* that is constituted by individual interactions. See RICHARD BELLAMY, *CITIZENSHIP: A VERY SHORT INTRODUCTION* 91–92 (Oxford Univ. Press 2008).

196. Young, *supra* note 193, at 102–03.

197. See generally BARTLEY ET AL., *supra* note 152.

198. *Id.* at 18.

199. *Id.* at 71.

dependent on the number of dollars one has to spend.²⁰⁰ One dollar equals one vote, so to speak.²⁰¹ As a result, those with the most dollars to spend on consumption are able to have more political influence than those with fewer dollars. Others, such as the sociologist Zygmunt Bauman, claim that “market populists” ignore the contradictory nature of using markets to achieve equality, because markets themselves are “factories of social inequality.”²⁰² A response to these equality-centered critiques is that it is true that those with more money to spend will potentially have more power to exert their will, including over producers. But if that power is in fact wielded to redistribute more power and dollars to producers, then capitalism’s tendency to increase economic inequality can in fact be tempered while at the same time achieving the potential of capitalism to increase the wealth and well-being of global producers. As for the inequality of political power between consumers with various resource endowments (versus inequality between consumers and producers), again, that inequality is not intuitively disturbing if consumers with more to spend choose to spend it toward ends that are aimed to benefit producers.

A third critique is that consumer citizenship is a form of political action that is intrinsically individualistic, and as a political practice it might displace or crowd out collective political action, which is arguably a more effective means of effecting sustainable political change.²⁰³ But in a widely cited article from political science literature, Margaret M. Willis and Juliet B. Schor argue, based on empirical evidence, that individual acts of political consumption do not undermine, displace, or substitute for conventional collective and political activism and engagement.²⁰⁴

Consumer citizenship is not only of interest to scholars, however. Transnational labor activists who seek to mobilize global consumers to pressure lead firms to govern their supply chains also find the merged citizen-consumer appealing and see it as an idea that can help mobilize consumers. An example of this revealed itself in the wake of the Rana Plaza collapse in Bangladesh in 2013. Rana Plaza was an industrial building housing several different garment factories that manufactured apparel for a number of lead firms, a number of which were prominent western garment firms.²⁰⁵ The factories were located on several floors, a number of which were built without permits and

200. *Id.* at 71–72

201. *Id.*

202. Zygmunt Bauman, *Exit Homo Politicus, Enter Homo Consumens*, in *CITIZENSHIP AND CONSUMPTION* 139, 142 (Kate Soper & Frank Trentmann eds., Palgrave Macmillan 2007). *But see* MICHELETTI & STOLLE, *supra* note 102, at 126–29 (arguing the market logic of capitalism helped the anti-slavery movement).

203. Bauman, *supra* note 202, at 73–75.

204. Willis & Schor, *supra* note 9, at 161.

205. *Rana Plaza: A man-made disaster that shook the world*, CLEAN CLOTHES CAMPAIGN, <https://cleanclothes.org/ua/2013/rana-plaza> (last visited Sept. 15, 2019) (<https://perma.cc/2C22-HM28>) (archived on Aug. 22, 2019).

against code.²⁰⁶ Ignoring warnings from engineers and workers, the building's owner and factory managers forced workers to go into the building, and on April 24, 2013, it collapsed, killing 1,138 Bangladeshi garment workers inside and injuring some 2,600, according to the Clean Clothes Campaign.²⁰⁷

Soon after the collapse, global unions and workers' rights organizations mobilized to form an organization independent from the Bangladeshi government that could monitor and improve safety conditions in Bangladesh's factories. What formed was the Bangladesh Fire and Safety Accord (The Accord), which is a union-supported, multistakeholder effort to get lead firms to ameliorate health and safety conditions in the factories from which they source.²⁰⁸ To compel lead firms to join the Accord, an activist organization called AVAAZ.org, which uses online petitions and mobilization, hosted a petition to compel companies to join.²⁰⁹ The petition read in part:

As citizens and consumers, we urge you to immediately sign an enforceable Bangladesh fire and building safety agreement, or risk fatal damage to your brand image. The agreement must commit you to pay for routine, independent inspections and safety upgrades for your supplier factories. Your companies and other multinationals profit from cheap labor, and can do much more to reduce the dangers of the places where your products are made.²¹⁰

The text of this petition is a nice illustration of how the overlapping nature of consumption and citizenship noted by Trentmann is utilized by activists.²¹¹ It is important to note that there are multiple relationships and connections that are both implied and explicitly asserted in this petition.²¹² One set of relationships exists between consumers and lead firms, which are the relationships that most concern firms, and that drive their supply chain practices.²¹³ A second set exists between consumers across the globe who are joining a transnational campaign to effect change in the conduct of multinational corporations and to assert that lead firms have duties

206. *Id.* Rana Plaza unfortunately was not the first, or last, of such tragedies. Factory fires have long been an issue in Bangladesh, and according to the labor rights group, the Solidarity Center, there were at least 34 deaths and almost 985 injuries due to factory fires from November 2012 to December 2015. *Bangladesh Garment and Textile Factory Safety Incidents Since Tazreen Fashion Factory Fire*, SOLIDARITY CTR. (Dec. 7, 2015), <https://www.solidaritycenter.org/wp-content/uploads/2015/12/Bangladesh-Garment-Factory-injury-and-death-fact-sheet12.pdf> [<https://perma.cc/WQ2S-P7T8>] (archived on Aug. 22, 2019).

207. *Bangladesh Garment and Textile Factory Safety Incidents*, *supra* note 206.

208. See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 112.

209. See AVAAZ, <http://www.avaaz.org/en/> (last visited Sept. 15, 2019) [<https://perma.cc/UF5S-6ZRA>] (archived on Aug. 22, 2019).

210. *Id.*

211. See Trentmann, *supra* note 188, at 147.

212. Kolben, *Transnational Private Labor Regulation*, *supra* note 25, at 370–71.

213. See *supra* Part III.C.

and obligations toward their suppliers' employees.²¹⁴ A third set of relationships exists between consumers and the workers in the supply chain who are the subjects of this petition. It is these relationships that this Article is most concerned with. A final set of relationships exists between the lead firms and the workers—the claim being that corporations have an obligation toward the workers that produce their goods, despite the lack of a direct legal-employment relationship between them. Importantly, the petition does not address other significant relationships that exist in the global supply chain, but that are often neglected by scholars and activists. These include the various forms of relationships that exist between the supply chain workers themselves, the relationships between workers and their direct employers, or between workers and the state, for example.

Transnational movements succeed in compelling lead firms to take action in their supply chains when some or all of these relationships are made apparent and visceral for citizen-consumers, particularly the relationship between consumers and workers, and that between consumers and lead firms. Citizen-consumers must also be made to feel (1) that they bear ethical and political obligations toward workers, as Young claims there to be;²¹⁵ (2) that they possess power and influence over companies with whom they do business; and (3) that they share community and solidarity with other like-minded citizen-consumers.

There are a number of challenges to achieving these conditions, however. How, for example, can transnational consumer citizenship effectively function when the boundaries of cosmopolitan citizenship are so geographically large? How can any sense of responsibility, duty, or obligation be internalized when the relationships just described are seemingly so tenuous? And finally, the question to which we turn next, to what degree do citizen-consumers actually care and engage in political activity through the market? While these questions and potential critiques of consumer citizenship must at least be acknowledged and addressed, at the same time they cannot serve to negate the whole project just because the questions require continued examination.

C. *Empirics: To What Degree do Consumers Care?*

As the world economy has unbundled, and as labor governance deficits have been exposed, a remarkable parallel change in the way that corporations *qua* lead firms govern labor conditions in their supply chains can be observed.²¹⁶ These changes are driven in large part by the threat and fear that citizen-consumers, mobilized and informed by

214. See Deirdre Shaw, *Consumer Voters in Imagined Communities*, 27 INT'L J. SOC. & SOC. POL'Y 135 (2007) (describing an imagined community of like-minded consumers who are consuming based on ethical criteria).

215. See Young, *supra* note 193, at 119.

216. See *supra* Part III.D.

TLANs and by the media, will punish firms in the marketplace for poor labor rights in their supply chains.²¹⁷ This is especially true for those whose brands and reputations are vulnerable to the pressures and spotlights of TLANs and consumers.²¹⁸

But to what degree are consumers in fact observably motivated to purchase products based on labor and other social criteria? And what informs these decisions? In other words, are consumers acting as citizen-consumers, or just as plain, old consumers, maximizing value and minimizing cost? If consumer citizenship is in fact a potentially powerful tool in the supply chain governance tool kit, then scholars and policy makers need to understand how consumers behave in theory and in practice. They must (1) understand to what degree consumers are in fact motivated to purchase products based on labor and other social criteria; and (2) understand what the drivers are that might emotionally or intellectually move a consumer to take into consideration social criteria when they purchase a product.

1. Survey Research

The first way in which empirical researchers investigate these questions is through surveys that ask consumers about their intention and actual action. This line of research appears to support the proposition that there is a fair amount of consumer desire, at least in the abstract, to purchase goods based on ethical and political considerations, and not just based on minimizing cost. But, of course, that desire is nuanced and contingent on certain factors. According to research conducted and reviewed by Richard Freeman and Kimberly Elliott, for example, consumers report in surveys that they are willing to pay more for products that they are told are made in good conditions.²¹⁹ Of course, like most things, this is price contingent—those same consumers report a sharply decreasing willingness to purchase products that are made in good conditions as the price increases.²²⁰ On the other hand, when consumers are told that a t-shirt is made in bad conditions, they report being less willing to buy that t-shirt, even if given a discount on that item.²²¹ In other words, from the lead firm's perspective, making products in exceptional labor conditions provides limited value, but being publicly exposed for sourcing products made in bad conditions can have potentially damaging effects.

217. See *supra* Part III.C.

218. Drusilla Brown, Rajeev Dehejia & Raymond Robertson, *Is There a Business Case for Improving Labor Standards? Some Evidence From Better Factories Cambodia*, in *WORKERS' RIGHTS AND LABOR COMPLIANCE IN GLOBAL SUPPLY CHAINS: IS A SOCIAL LABEL THE ANSWER?* 69, 82 (Jennifer Bair et al. eds., Routledge 2013).

219. KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, *CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION?* 34–35 (Peterson Inst. for Int'l Econ. 2003).

220. *Id.*

221. *Id.*

Other survey research has also found extensive support among consumers in the United States and Europe for buying products that are made in ethical and sweatshop-free conditions. Shareen Hertel *et al* surveyed 508 respondents in the United States and asked how much they would be willing to pay for a sweater made in non-sweatshop conditions.²²² The researchers found that “[a] sizable majority (62 percent) report that they are willing to pay at least five dollars more, and more than one-third of Americans report that they would be willing to spend 10 dollars more.”²²³ A similar result was obtained for fair trade coffee consumption.²²⁴ That is, the authors reported that according to their surveys “more than 75 percent of coffee buyers would be willing to pay at least 50 cents more per pound for fair-trade, while more than half would pay a premium of one dollar or more.”²²⁵

Stolle and Micheletti, drawing on surveys in the European Social Survey (2003) and the Citizenship, Involvement, and Democracy Survey in the US (2006), surveyed self-reported political activity by consumers in the course of consumer activity.²²⁶ According to these surveys, about 31 percent of people surveyed reported engaging in either “buycotting,” boycotting, or both.²²⁷ In Sweden, approximately 60 percent of respondents reported doing so, and in the United States, 28 percent.²²⁸ While boycotting is the refusal to buy a good from a company because of its practices, “buycotting” is the use of labels or other forms of information about a good to affirmatively seek that product and company out and purchase the good as a means of rewarding that company’s good behavior.²²⁹

Some scholars have argued that the methods used in many of these surveys are poorly designed, and thus overly estimate consumers’ willingness to pay.²³⁰ They argue that there is a discrepancy between what consumers profess to wish to do in surveys, and what they do in practice.²³¹ Some attribute this in part to consumers creating justificatory stories that rationalize their decisions not to purchase

222. C. Patrick Heidkamp et al., *Human Rights and Public Opinion: From Attitudes to Action*, 124 POL. SCI. Q. 443, 448 (2009).

223. *Id.* at 455.

224. *Id.*

225. This is not insignificant given that between 2001 and 2005 the authors report that the average price of a pound of coffee was \$3 per pound. *Id.*

226. MICHELETTI & STOLLE *supra* note 102, at 95.

227. *Id.* at 68.

228. *Id.* at 97.

229. *See id.* at 40.

230. Pat Auger & Timothy M. Devinney, *Do What Consumers Say Matter? The Misalignment of Preferences with Unconstrained Ethical Intentions*, 76 J. BUS. ETHICS 361, 365 (2007).

231. *See* Michael J. Carrington, Benjamin A. Neville & Gregory J. Whitwell, *Why Ethical Consumers Don’t Walk Their Talk: Toward a Framework for Understanding the Gap Between the Ethical Purchase Intentions and Actual Buying Behaviour of Ethically Minded Consumers*, 97 J. BUS. ETHICS 139, 139 (2010) (citing to one study indicating that while 30% of consumers state they would purchase ethically, only 3% of consumers actually do so).

according to their beliefs.²³² Others go so far as to argue that “ethical consumerism” is in practice largely a “myth,” and that, in fact, consumers generally do not make purchasing decisions based on ethical criteria.²³³

Another question examined through survey research concerns what motivates and drives consumers to make politically and ethically driven consumption purchases. Lyle Scruggs *et al.*, argue that political consumerism is “surprisingly widespread,” and is more often engaged in by individuals who are “more disaffected with traditional political institutions of authority.”²³⁴ They find that the “likelihood of engaging in political consumption increases significantly alongside a person’s level of concern about a problem, the perceived importance of individual consumption in causing that problem, and information about how related goods are produced.”²³⁵ Psychological motivations can also play a role. For example, some research suggests that consumers are motivated by defining and distinguishing themselves through their identification with certain companies that are thought to be socially responsible.²³⁶

2. Experimental Research

A second stream of research attempts to go beyond surveys and gauge actual consumer behavior through field and lab experiments, and some of these field experiments do, in fact, suggest that consumers are willing to pay somewhat more for goods that they are told are made in better working conditions. In a study by Jens Hainmueller and Michael J. Hiscox, the authors compelled the United States-based retailer Gap Inc., which owns the retail brand Banana Republic, to allow an experiment in Banana Republic outlet stores.²³⁷ Researchers conducted a study in 111 Banana Republic outlet stores in thirty-eight states over a period of four weeks.²³⁸ Researchers placed two different signs over three different clothing items in Banana Republic stores: a \$130 women’s suit, an \$18 women’s yoga pant, and a \$12 men’s t-shirt.²³⁹ One sign emphasized the fashion aspects of the product, but

232. See Russell Belk, Timothy M. Devinney, & Giana M. Eckhardt, *Why Don't Consumers Consume Ethically?*, 9 J. CONSUMER BEHAV. 426, 428 (2010).

233. See PAT AUGER, TIMOTHY M. DEVINNEY, & GIANA M. ECKHARDT, *THE MYTH OF THE ETHICAL CONSUMER* 4 (Cambridge Univ. Press 2010).

234. Samuel J. Best et al., *Information, Choice and Political Consumption: Human Rights in the Checkout Lane*, 33 HUM. RTS. Q. 1092, 1095 (2011).

235. *Id.*

236. See Longinos Marin et al., *The Role of Identity Salience in the Effects of Corporate Social Responsibility on Consumer Behavior*, 84 J. BUS ETHICS 65, 65–66; (2009).

237. Jens Hainmueller & Michael J. Hiscox, *The Socially Conscious Consumer? Field Experimental Tests of Consumer Support for Fair Labor Standards* 8 (MIT Pol. Sci. Dep’t Working Paper No. 2012-15, 2012).

238. *Id.*

239. *Id.*

stated nothing about labor conditions.²⁴⁰ The other emphasized the company's commitment to promote fair and safe working conditions and stated that consumers can "feel good about what you wear."²⁴¹ The researchers found that the signs promoting good labor conditions in the production of women's suits significantly boosted sales of that item.²⁴² But shoppers in the market for the lower cost items showed no statistically significant inclination to spend more on items made in good conditions.²⁴³ The researchers concluded that their findings confirmed what many surveys suggest, that at least some segments of shoppers—here women looking for higher price items—are in fact willing to choose items, all things being equal, that are indicated to have high labor standards.²⁴⁴ Importantly, the authors made no claims as to what exactly motivates buyers.²⁴⁵ But regardless of motivations, it seems that such criteria are increasingly becoming part of the factors that lead to purchasing decisions.

It is important to emphasize that the study tested the effects of marketing clothing that are described as being made in good conditions. It did not test what would happen if consumers were told that clothing were made in bad conditions, or in conditions that might even shock the conscience, such as slavery or child labor. Would consumer behavior be consistent with the survey evidence of Freeman and Elliott?²⁴⁶ It is likely, given the degree to which many image sensitive corporations have implemented supply chain governance regimes, that many, although certainly not all, consumers would make alternative purchasing decisions, and this intuition that companies will be punished in the marketplace for abuses in its supply chain is likely shared by many managers.²⁴⁷ In an interview with *Der Spiegel*, for example, the CEO of the Germany-based Otto Group, which is one of the world's largest online retailers, confirms this intuition. Despite his personal commitment to sustainability issues and his own company's tradition of "social conscience," he chooses not to highlight his company's social and environmental efforts in his company's communications. This is because he believes "that you won't necessarily be rewarded by customers and markets just because you're making more of an effort than your competitors. . . but you will be punished if you make a mistake."²⁴⁸

240. *Id.* at 9.

241. *Id.* at 21–22.

242. *Id.* at 13.

243. *Id.*

244. *Id.*

245. *Id.*

246. See ELLIOTT & FREEMAN, *supra* note 219, at 34–35.

247. Markus Brauck et al., *Buying Better: The Impossible Challenge of Ethical Shopping*, SPIEGEL ONLINE (Apr. 18, 2015), <http://www.spiegel.de/international/how-we-can-become-ethical-consumers-a-1028298.html> [<https://perma.cc/R59U-7DT5>] (archived on Aug. 22, 2019).

248. *Id.*

Indeed, in a study conducted by Retail Week in May 2013 following the Rana Plaza disaster, 35 percent of consumers reported being either a little or a lot more likely to ask retailers about where their clothing was produced, while 44 percent claimed it made no difference.²⁴⁹ Thirty-five percent of consumers is not an insignificant number, and retailers would surely take note. And it is for this reason that the major brands are primarily focused on preventing bad publicity, rather than promoting exceptionally good conditions and respect of rights in their factories.²⁵⁰

Moreover, individuals can be subtly influenced by brand reputation and image in ways that they are not consciously aware.²⁵¹ If company X's reputation is being harmed, for example, because of negative coverage of its supply chain labor practices, this might have unconscious effects on consumer sentiments about that company. The expression of this sentiment, however, might not be consciously expressed in terms of labor rights preferences, but rather in terms of aesthetics or in terms of perception of quality. For brands that are particularly image conscious, or that are highly sensitive to popular cultural sentiments of being "cool," these perceptions can be very important. For companies that are less brand sensitive, however, such as multibrand retailers like Walmart and Target that source and sell items under different generic brand names, and that compete based on price, consumer perceptions might be less important.²⁵²

One of the most interesting experimental results, albeit in lab, not field, conditions, is reported by Mark Pigors and Bettina Rockenbach.²⁵³ Like other researchers, the authors find that under experimental conditions, consumers are indeed generally price sensitive, but that when the right balance is reached between price and social responsibility, which in their experiment the authors uniquely define to mean producer wage levels, consumers do take wage levels into consideration as a decision criterion.²⁵⁴ But what is particularly interesting are the authors' conclusions related to what they refer to as "social distance" and direct communication.²⁵⁵ The authors look at willingness to pay with two measures: one by managers and one by consumers.²⁵⁶ In the first finding, the authors find that in

249. John A. Quelch & Margaret L. Rodriguez, *Rana Plaza: Workplace Safety in Bangladesh*, 4 Harv. Bus. Sch. Case 514-034 (Sept. 2013).

250. ELLIOTT & FREEMAN, *supra* note 219, at 45.

251. See, e.g., Neale Martin & Kyle Morich, *Unconscious Mental Processes in Consumer Choice: Toward a New Model of Consumer Behavior*, 18 J. BRAND MGMT. 483, 483 (2011) (describing the unconscious roots of most consumer behavior).

252. The connection between price point and consumer commitment to ethical consumption is illustrated by the experiment by Hainmueller and Hiscox. See Hainmueller & Hiscox, *supra* note 237.

253. Mark Pigors & Bettina Rockenbach, *Consumer Social Responsibility*, 62 MGMT. SCI. 3123, 3124 (2016).

254. *Id.*

255. *Id.* at 3131.

256. *Id.* at 3125.

experimental conditions, managers choose to pay higher wages to workers in competitive environments when there is direct communication between workers and consumers about the satisfaction level workers have about those wages.²⁵⁷ According to the authors, the reasons that managers pay the higher wages is because “direct communication between workers and consumers reduces the social distance and triggers social concerns of the consumers for the workers, which results in higher wages for the workers.”²⁵⁸ The authors go on to report that, “[m]oreover, explicitly showing the satisfaction of workers may reduce the uncertainty of whether or not the wage is acceptable for the worker and thus reduces the consumers’ ‘moral wiggle room.’”²⁵⁹ That is, managers recognize or perhaps imagine direct communication between workers and consumers to be a powerful tool, and thus pay higher wages to the workers in order to make them happy for instrumental reasons—increasing sales.

The authors also investigated consumer willingness to pay for goods made by workers that are paid higher wages.²⁶⁰ The authors found that in conditions of producer competition (i.e. when there is price competition) consumers are willing to pay more for a good when there is some indication that workers are paid higher wages, whether through a label or when there is complete transparency.²⁶¹ Moreover, when there is direct communication between workers and consumers regarding workers’ satisfaction with their wages, then consumers are most willing to pay more for those goods.²⁶² While this still only constitutes about 28 percent of buyers, it is still a significant number, even if relatively small.²⁶³ And generally speaking, when there are not significant price differences between products that are differentiated by higher and lower wage workers, consumers will generally choose to buy the product made in higher wage conditions.²⁶⁴ The authors also gave support to the business case for socially responsible production, finding that producers will achieve higher sales and “significantly higher profits” in competitive environments where prices are not different, but where the product is differentiated by higher wage levels.²⁶⁵

257. *Id.*

258. *Id.* at 3131.

259. *Id.*

260. *Id.* at 3133.

261. *Id.*

262. As the authors put it, “[w]hen suppliers compete . . . we find that consumers take SR in production as a decision criterion and go for the SR-produced good whenever the price premium for SR is not too high.” *Id.* at 3124.

263. *Id.* at 3133. Specifically, the authors claim that consumers will purchase from the higher price firm 27.8% of the time when there is direct communication between workers and producers indicate that they are happy with their wages.

264. *Id.* (“Thus, it seems that consumers follow a lexicographic decision rule: the first priority is to buy cheap, but if prices do not differ too much, the worker’s wage guides the decision.”).

265. *Id.* at 3134.

The degree to which consumers will in fact engage in ethical consumption practices, and in what contexts, is thus still a matter of debate and requires more research.²⁶⁶ But the discussion above demonstrates that, despite the legitimate questions about the degree to which consumers care or will act on their beliefs, a substantial number are indeed motivated by specific commitments to improving the plight of workers. These commitments might range from seeking out products made in good conditions (“buycotting”), to taking direct action in a protest, or signing a petition. Others will consciously boycott or subconsciously avoid purchasing from companies that are actively shown to source from factories where certain kinds of poor labor conditions exist. Whatever the degree to which this is the case, certain image-sensitive companies try to avoid labor conditions in their supply chains that would, if exposed, reflect poorly on their brand image and potentially their bottom lines. Moreover, there is evidence that both consumers and managers are affected when social distance between workers and consumers is decreased. If the law is to be a tool to reduce social distance and thus help improve conditions in global supply chains, how both social distance and the consumer imaginary function needs to be fleshed out.

V. THE CONSUMER IMAGINARY

The discussion in the prior Part asked to what degree consumers care about how their goods are made. It concluded that a significant number do, or would in the right circumstances, take into account such considerations in their purchasing decisions. This Part turns to a more conceptual reflection on the nature of consumer citizenship, building on the notion of social distance introduced above, and proposing that the notion of the “consumer imaginary” is a helpful way of conceptualizing the nature of the consumer–producer relationship.

A. *Social Distance in the Supply Chain Economy*

For sociologists and social theorists, the concept of social distance describes the degree to which people are willing and able to accept and include those who belong to other social groups based on race, social class, and nationality, to name a few differentiators.²⁶⁷ While social distance has been used most commonly to describe social relations between people who might have some relative geographic proximity but that experience social distance from each other,²⁶⁸ scholars increasingly use the term to also describe social relations between

266. *Id.*

267. See Williams, *supra* note 23 (tracing the development of the term social distance to the sociologist Georg Simmel in 1923).

268. *Id.*

various actors in the global economy who experience both social as well as physical distance.²⁶⁹

Social distance has been highlighted by some scholars for the role it plays in various private supply chain labor initiatives, and in global economic relationships more generally. The experimental research described in the previous Part by Pigors and Rockenbach illustrates how reducing social distance can affect working conditions in supply chains by creating closer connections between producers (workers) and consumers.²⁷⁰ Other scholarship has argued that reducing social distance is a goal of Fair Trade Organizations, which certify particular goods, particularly food items, to comply with various social criteria, and label those goods as meeting the fair trade standards.²⁷¹ As Laura T. Reynolds articulates, Fair Trade serves as a means of shortening the “social distance between consumers and producers even where the products being exchanged traverse substantial geographic distances.”²⁷² For Reynolds, Fair Trade provides an opportunity to instill what she calls “civic values,” such as equality and trust, respect, and partnership, into traditional trade relationships by severing the relationship between social distance and geography.²⁷³ Further, “Fair Trade networks support and are supported by heightened concerns among Northern consumers over global ethics and the rise of ‘ethical consumption’ practices where the social relations embodied in particular commodities increasingly shape product choices.”²⁷⁴

Other scholars have also used the notion of social distance to describe the nature of relationships in the supply chain economy. Richard McIntyre, for example, describes social distance as “the social gap caused by the severing of a direct relationship between the producer and the eventual beneficiary of her effort,”²⁷⁵ whom McIntyre acknowledges to be both the lead firm and the consumer.²⁷⁶ He applies that concept to the fissured employment relationship, and, drawing on Adam Smith, suggests that social distance has grown between lead firms and the workers that actually produce the goods up the supply

269. *Id.*

270. See Pigors & Rockenbach, *supra* note 254, at 3123–34.

271. See, e.g., Laura T. Reynolds, *Consumer/Producer Links in Fair Trade Coffee Networks*, 42 *SOCIOLOGIA RURALIS* 404, 404 (2002) (investigating how social and spatial distances may be shortened between Northern consumers and Southern producers); Geoff Moore, *The Fair Trade Movement: Parameters, Issues and Future Research*, 53 *J. BUS. ETHICS* 73, 81–82 (2004) (discussing Reynolds’ notion of social distance and emphasizing the need, from a marketing perspective, for information dissemination to do so); Aimee Shreck, *Just Bananas? Fair Trade Banana Production in the Dominican Republic*, 3 *INT’L J. SOC. AGRIC. & FOOD* 13, 13 (2002) (noting the social distance reducing function of Fair Trade and investigating the degree to which Fair Trade bananas benefit Dominican banana producers).

272. Reynolds, *supra* note 271, at 420.

273. *Id.* at 410.

274. *Id.* at 415.

275. RICHARD P. MCINTYRE, *ARE WORKER RIGHTS HUMAN RIGHTS?* 43–44 (Univ. of Mich. Press 2008).

276. See *id.* at 34–44.

chain.²⁷⁷ Because of this greater social distance, which is exacerbated by geographic distance, lead firms are more likely to use a “sweating” model in which wages are driven down as far as possible to maximize profits.²⁷⁸

According to McIntyre, the sweating system is facilitated by the social distance between consumers and lead firm managers who have fewer sympathetic or empathetic feelings toward workers with whom they have little direct relationship and who are not direct employees.²⁷⁹ For McIntyre, then, lead firm managers would be less likely to utilize a “sweating” model if the social distance between them and the workers was reduced through direct employment. He is skeptical, however, that self-regulation can be an effective tool to reduce the “sweating model” that he argues has become intrinsic to the great unbundling’s organization of production.²⁸⁰

Like McIntyre, Ian Hudson and Mark Hudson also argue that the increase in social distance is a central factor in alienating consumers from the people that make their goods and the conditions they are made in. Building on Karl Marx’s theory of commodity fetishism, they suggest that “[b]ecause the worker has no direct relationship with the consumer[s] and is little concerned with their well-being or even their satisfaction with the product, it is scarcely surprising that the opposite is also true: that consumers give little thought to the manner in which the items they consume are produced.”²⁸¹ This is so because although consumers are bombarded by endless marketing to buy goods and services, little is known about the processes that went into making those goods.²⁸² The ignorance is only exacerbated as production has

277. *Id.* at 45.

278. *Id.*

279. *Id.* at 47–48.

280. *See id.* at 35.

281. Ian Hudson & Mark Hudson, *Removing the Veil?: Commodity Fetishism, Fair Trade, and the Environment*, 16 *ORG. & ENV'T* 413, 416 (2003). Indeed, Karl Marx remains an essential starting point for any discussion of the relationship between producers and consumers, for it was Marx who first conceptually unpacked the way in which the commodity, as he described goods produced for the market, obscures the labor and the social processes that produce it. *See* KARL MARX, *CAPITAL* 81–96 (Dover Publications 2011) (1867). Marx argued that market forms of production create commodities that are a kind of mystical object, and he describes “[t]he whole mystery of commodities, all the magic and necromancy that surrounds the products of labour as long as they take the form of commodities . . .” *Id.* at 87. Marx’s insight is that labor and the laborer become hidden behind the commodity form, and the exchange of commodities masks the social relationships that constitute them. That is, the commodities or goods mask the humanity that went into manufacturing those goods. From the consumer’s perspective, commodities are experienced as having an almost magical quality. They exist as things in themselves, severed from the labor, the social relations, and the social and environmental context that enabled them to be produced. The commodity form obfuscates the actual labor and labor processes that went into making them, as well as the economic and personal relationships that structure their production. *See* Hudson & Hudson, *supra* note 281, at 416–17 for a discussion.

282. Hudson & Hudson, *supra* note 281, at 417.

become more globally dispersed.²⁸³ Consumers are more geographically separated from the environmental consequences of production, as well as the workers who were involved in creating the good.²⁸⁴ Processes, consequences, and the humanity of production become out of sight and out of mind. If production were local, and if consumers knew the people who manufactured the goods they consumed and the factories were located in their communities, then the consumers would have a more visceral and immediate interest in ensuring that they and their neighbors were treated fairly and that pollution was mitigated.²⁸⁵ As Hudson and Hudson write,

When commodities are produced close to where they are sold, as was much more the case only a few decades ago, the social relations of production are more likely to be visible. Those that live next to the local garment factory are much more likely to have some idea about the labor relations that created their T-shirt than those purchasing commodities involved in the current long-distance production connections in which corporations subcontract the manufacturing process to unknown firms halfway across the world.²⁸⁶

To make the point more concretely, the beautiful, shiny Apple computer seems as if it simply assembled itself out of the magical ether, rather than assembled by workers at a Foxconn factory in China. Likewise, it is hard to understand that our crisp new blue jeans that we picked off the shelves of a retail store were made in a hot factory in the middle of Jordan by migrant workers in work camp-like conditions.²⁸⁷

B. *Introducing the Consumer Imaginary*

So the problem is clear—there exists social distance between producers and consumers that is greatly exacerbated by geographic distance. But short of reorganizing economic production to decrease geographically exacerbated social distance, is there another way that scholars and policymakers can conceptualize and address this problem? The concept of the consumer imaginary can provide some help. The consumer imaginary is a way of thinking about how consumers conceptualize and imagine the human beings, the processes, and the labor that constitute the goods that they consume. It is imaginary because by and large consumers will never meet or come into contact with the workers that make the things that they buy. A particular paradox and challenge of consumer citizenship is that the nature of many of the multivalent connections that this Article

283. *Id.* at 418.

284. *Id.*

285. *Id.*

286. *Id.*

287. See generally Kevin Kolben, *Trade, Development, and Migrant Garment Workers in Jordan*, 5 MIDDLE E.L. & GOVERNANCE 195, 204–17 (2013) (describing the use and exploitation of migrant workers in Jordan).

described previously,²⁸⁸ the bonds forged through consumptive practices in a globalized economy, are largely imagined.

The concept of the consumer imaginary is influenced by Benedict Anderson's well-known conception of an imagined community²⁸⁹ and is also related to Charles Taylor's notion, building off Anderson, of the social imaginary.²⁹⁰ Anderson used the concept in the context of political community in the modern nation-state.²⁹¹ He argued that a nation is imagined as a community because, "regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship."²⁹² Taylor, also building on Anderson, describes the social imaginary as "the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations."²⁹³ Taylor recognizes that narrative and that "images, stories, and legends" play important roles in the way that people "imagine their social surroundings."²⁹⁴

Anderson's conceptualization also resonates with the nature of the market-based relationships between consumers and producers, among consumers themselves,²⁹⁵ as well as even between consumers and lead firms.²⁹⁶ The function that imagination plays in marketing and consumerism is well recognized.²⁹⁷ Yet the imagined nature of the relationship between the consumer and the producer in global supply chains has not been sufficiently examined, but is nevertheless apparent. Indeed, most consumers of t-shirts from Bangladesh and computers assembled in China will never travel to those countries and will never meet the workers who assembled them. Nor will most of

288. See *supra* Part IV.B.

289. See ANDERSON, *supra* note 24, at 6–7.

290. See CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 1, 23 (Duke Univ. Press 2004).

291. See ANDERSON, *supra* note 24, at 6–7.

292. *Id.* at 7.

293. TAYLOR, *supra* note 291, at 23.

294. *Id.*

295. See Shaw, *supra* note 214, at 140–41 (describing the imagined nature of consumer communities that engage in political consumerism); Albert M. Muniz, Jr. & Thomas C. O'Guinn, *Brand Community*, 27 *J. CONSUMER RES.* 412, 419 (2001) (noting that brand communities are largely imagined communities).

296. What is meant by this is the way that consumers imagine their relationship to a brand conscious retailer like Nike or Apple is also imagined in the sense that a brand is a socially constructed concept without any material or fixed meaning. See Albert M. Muniz, Jr. & Thomas C. O'Guinn, *Collective Brand Relationships*, in *HANDBOOK OF BRAND RELATIONSHIPS* 173–74 (Deborah J. MacInnis et al. eds., 2014) (arguing that the notion of a brand is communally constructed).

297. See Rebecca Jenkins, Elizabeth Nixon & Mike Molesworth, 'Just Normal and Homely': *The Presence, Absence and Othering of Consumer Culture in Everyday Imagining*, 11 *J. CONSUMER CULTURE* 261, 263 (2011) (citing to Campbell's thesis that the imagination is largely accountable for driving contemporary consumption by generating a bridge between the actual dissatisfactory present, and the imagined happy ideal).

those workers themselves likely make the journey downstream to the final destination of the fruit of their travails. Likewise, consumers who take individual action, such as boycotting, making alternative purchasing choices, or signing an online petition are imagining their fellow global consumers as like-minded fellow travelers who share particular values and act on those values.²⁹⁸ Finally, managers of lead firms also imagine, and possibly fear, that their customers will be citizen-consumers who will potentially take action in certain circumstances.

Aware of the power of consumers to pressure lead firms and the new dynamics of consumer citizenship, workers have taken creative steps to communicate with them about their working conditions. In one well-publicized case, an inmate at a Chinese labor camp that made Halloween toys sold at Kmart in the United States enclosed a written plea to the consumer of the product in hope of communicating with her about his plight.²⁹⁹ In another example, a woman who purchased a jacket at Walmart found a note in Chinese sewn into a jacket that described terrible working conditions in what might have been a prison labor camp, or just an abusive factory that was prison-like, including fourteen-hour days and beatings.³⁰⁰

Whereas labor conditions and the grim reality of the workplace were once hidden behind the veil of the commodity, new technologies have enabled workers and consumer movements to make more transparent the working conditions in factories in far-flung locales, and even closer to home.³⁰¹ Like in Anderson's account of the rise of political nationalism, new technologies of communication and changing "apprehensions of time" have facilitated these imagined bonds.³⁰² Newspapers, videos, the internet, and social media have made it easier for consumers to imagine relationships and develop empathy for workers. What transnational activists do, and what

298. See Shaw, *supra* note 214, at 137–38.

299. See Andrew Jacobs, *Behind Cry for Help From China Labor Camp*, N.Y. TIMES, June 11, 2013, http://www.nytimes.com/2013/06/12/world/asia/man-details-risks-in-exposing-chinas-forced-labor.html?pagewanted=all&_r=0 [<https://perma.cc/6KVU-LWNX>] (archived July 31, 2019).

300. See Russ Wiles, *Mystery Note in Jacket May Point to China Worker Abuse*, USA TODAY (May 2, 2017, 7:10 PM), <https://www.usatoday.com/story/money/business/2017/05/02/mystery-note-jacket-may-point-china-worker-abuse/101219820/> [<https://perma.cc/86HH-WPMH>] (archived July 31, 2019).

301. See Natalie Kitroeff & Victoria Kim, *Behind a \$13 shirt, a \$6-an-hour Worker*, L.A. TIMES, Aug. 31, 2017, <http://www.latimes.com/projects/la-fi-forever-21-factory-workers/> [<https://perma.cc/HQ95-CT6V>] (archived July 31, 2019) (reporting that in 2016 the U.S. Department of Labor found that 85% of 77 L.A. garment factories inspected were found to have labor violations, and were ordered to pay \$1.3 million in back wages lost overtime, and damages). For a discussion of how imagined kinship relationships between Asian designers and their employees and contractors in New York inject social connection into a hierarchical relationship, see Thuy Linh Nguyen Tu, *All in the Family? Asian American Designers and the Boundaries of Creative Labor*, 2 AM. Q. 279, 281 (2010).

302. See ANDERSON, *supra* note 24, at 32–35.

companies that utilize social marketing to promote their products do as well, is to try to promote and forge these imagined relationships in order to realize their respective objectives. They do so by utilizing compelling images of workers who, consumers are told, are either suffering or happy, depending on the objectives of the campaign. Indeed, the creation and wide diffusion of narratives and images are important tools that TLANs use to reify for consumers the abstract concepts of supply chains and the people who work in them. While garment and apparel production is a trenchant example of this phenomenon, it is not the only industry in which imagined communities are exploited—and not in a pejorative sense—to promote transnational campaigns or corporate marketing.

C. *The Consumer Imaginary in Action: Social Labels*

One of the most commonly used means of harnessing the consumer imaginary by transnational activists is through social labels. Of all the forms of private, market-based regulations, social labels are the most explicit in using the consumer imaginary. The main goal of a social label is to “provide an emerging group of ethically conscious consumers with credible assurances that labeled goods are produced in a manner consistent with certain social and/or ecological standards.”³⁰³ Social labels that are aimed primarily toward communicating with the end consumers can be termed “primary labels.”³⁰⁴ Social labels are not only directed toward retail consumers, however. “Secondary Labels” are business-to-business labels intended to assure firms that the goods and services they purchase, as intermediate goods or as goods intended for retail sale, meet the social and ecological standards of their stakeholders.³⁰⁵

Social labeling is not a new phenomenon. As scholars have noted, the first social labels appeared in the late nineteenth century when the National Consumers League (NCL) issued so-called white labels for women’s white cotton underwear that met certain social and labor standards.³⁰⁶ The NCL ended the label in 1918 so as not to compete with American unions, who denounced the label as being used by

303. JENNIFER BAIR, MARSHA ANN DICKSON, & DOUG MILLER, *To Label or Not to Label: Is that the Question?*, in *WORKERS’ RIGHTS AND LABOR COMPLIANCE IN GLOBAL SUPPLY CHAINS: IS A SOCIAL LABEL THE ANSWER?*, *supra* note 218, at 1, 4. Social labels are usually part of certification regimes, often administered by a nonprofit third party, which provide a verification that a product or a brand corresponds to a given set of standards. For more on certification and the role it plays in transnational governance, see Tim Bartley, *Certification as a Mode of Social Regulation*, in *HANDBOOK ON THE POLITICS OF REGULATION* 441 (David Levi-Faur ed., 2011).

304. BAIR, DICKSON, & MILLER, *supra* note 304, at 5.

305. *Id.* at 6.

306. Kathryn Kish Sklar, *The Consumers’ White Label Campaign of the National Consumers’ League, 1908-1918*, in *GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY 17-18*, 24 (Susan Strasser et al. eds., Cambridge Univ. Press 1998).

antilabor employers.³⁰⁷ American unions developed their own version of the social label, which focused primarily on union representation and was targeted to the working class and union members, in contrast to the NCL's label, which was primarily targeted at middle-class female consumers.³⁰⁸ By 1908, some sixty-eight unions across the United States had adopted a union label.³⁰⁹

Examples of social labels include "fair trade" initiatives, such as the European based Fair Trade International (FI), which certifies many food items as well some other products such as gold,³¹⁰ and Fair Trade USA, a United States based organization, which, in addition to food, also certifies apparel products and home goods under its Fair Trade Certified seal.³¹¹ Fair trade labels are a direct means of communicating to consumers that the products they purchase are made by workers who are paid adequate wages,³¹² whose core labor rights are respected,³¹³ and, especially in the case of agricultural products, that they are produced by small cooperatives that meet certain standards for democratic governance.³¹⁴ In an effort to expand the range of goods covered, FI also later issued a textile standard to cover the textile supply chain.³¹⁵

What makes some kinds of primary social labels particularly interesting for the purpose of this Article is their aim to forge a bond—albeit a largely imagined one—between consumers and producers. Indeed, one of the hallmarks of fair trade organizations, for example, is their efforts to personalize the consumer–producer relationship.³¹⁶ If one looks at the websites of these organizations, invariably there will be links to photos and long descriptions of the producers, often farmers since food and agriculture are the primary industries in which social labels are used.³¹⁷ FI, for example, even allows one to get an RSS feed

307. *Id.* at 366.

308. *See id.* at 368–70.

309. *Id.*

310. *See generally* *Products*, FAIRTRADE INT'L, <https://www.fairtrade.net/products.html> (last visited Sept. 15, 2019) [<https://perma.cc/XD4H-RMS5>] (archived July 31, 2019).

311. *See generally* *Who We Are*, FAIRTRADE USA, <https://www.fairtradecertified.org/who-we-are> (last visited Sept. 15, 2019) [<https://perma.cc/6B3X-WQNQ>] (archived July 31, 2019).

312. *See Fairtrade Standard for Hired Labour*, FAIRTRADE INT'L 26–28 (Jan. 15, 2014), https://files.fairtrade.net/standards/HL_EN_previous_version.pdf [<https://perma.cc/NV62-5CGC>] (archived Sept. 15, 2019).

313. *See id.* at 23.

314. *See id.* at 35–37.

315. *See Fairtrade Textile Production*, FAIRTRADE INT'L 1–4 (2016), https://www.fairtrade-deutschland.de/fileadmin/DE/01_was_ist_fairtrade/03_standards/new_2016_quick_guide_textile_labeling.pdf [<https://perma.cc/T2RU-2DZF>] (archived Sept. 15, 2019).

316. *See* Reynolds, *supra* note 271, at 410.

317. *See Meet the Producers*, FAIRTRADE INT'L, <http://www.fairtrade.net/producers/meet-the-producers.html> (last visited Sept. 15, 2019) [<https://perma.cc/4EA3-4NEN>] (archived July 31, 2019).

of new stories about Fair Trade producers.³¹⁸ This is an explicit example of an effort to reduce the social distance between consumers and producers.

One arena in which the social imaginary is particularly mobilized is in the growing niche market for high-end coffee that is made in conditions that meet certain social and environmental standards. Here, the dominant approach has been FI certification, whereby consumers are assured that the coffee and teas they consume are sourced from farms and plantations that meet a minimal set of criteria that corresponds to consumer intuitions about what constitutes a just set of economic, environmental, and social arrangements.³¹⁹ Another approach by some boutique coffee companies that are not fair trade certified has been to describe their sourcing process as “direct trade,”³²⁰ although many firms are now moving away from that designation.³²¹ Direct trade coffee companies are even more explicit in forging a close, imagined relationship between consumers and producers. In direct trade marketing, consumers are provided with narratives about the coffee growers, albeit usually about the farm owners and not the workers, and can view pictures and stories about the site from which their coffee and teas are grown and harvested.³²² Here, the economic relationship is portrayed as existing directly between the coffee roasters downstream in the supply chain, and the producers, farthest upstream. To concretize the “direct relationship” in this niche market, employees of the roaster visit the coffee producers and often claim to be involved in the growing and processing, serving, in a sense, as agents of the consumers.³²³ As one prominent coffee roaster, Intelligentsia, describes it on its website, “[o]ur buying team travels the globe and is collectively in the field virtually every day of the year, sourcing new grower relationships and working with our existing farmers.”³²⁴

318. *Id.*

319. See *Products: Coffee*, FAIRTRADE INT’L, <https://info.fairtrade.net/product/coffee> (last visited Sept. 15, 2019) [<https://perma.cc/W25N-534A>] (archived Aug. 2, 2019).

320. See Finlay MacGregor et al., *Problems with Firm-Led Voluntary Sustainability Schemes: The Case of Direct Trade Coffee*, 9 SUSTAINABILITY 651, 652 (2017) (“Direct trade as a concept for coffee sourcing refers to having direct and regular contact between roasting firms and coffee producers, which is typically represented by practices such as coffee buyers from roasting firms visiting coffee producers, with quality-based prices paid directly to producers.”).

321. See *id.* at 653.

322. See Peter Meehan, *To Burundi and Beyond for Coffee’s Holy Grail*, N.Y. TIMES, Sept. 12, 2007, <http://www.nytimes.com/2007/09/12/dining/12coff.html> [<https://perma.cc/K72B-3L28>] (archived Aug. 2, 2019).

323. See Sarah Lyon, *Fair Trade Coffee and Human Rights in Guatemala*, 30 J. CONSUMER POL’Y 241, 242 (2007) (arguing that coffee roasters act as ‘conduits for consumer actions and intentions’).

324. *About Us*, INTELLIGENTSIA COFFEE, <https://www.intelligentsiacoffee.com/about-us> (last visited Sept. 15, 2019) [<https://perma.cc/A6ZT-WPLS>] (archived Aug. 2, 2019).

The fiction is that consumers, thought the proxies of these roasters, are made to believe that they are active participants in the sourcing and production of the coffee itself, directly influencing producers on the aesthetic quality of the product, as well as on the social quality of the production processes.

The efficacy and strategy of social labels and their implementers have been a subject of debate, however.³²⁵ Some scholars and activists have argued that social labels are often too universalizing in their standards and approaches, and that social label initiatives should be more grounded in local institutions and priorities.³²⁶ Others argue that they are ineffective in addressing certain kinds of labor rights violations, such as freedom of association and collective bargaining rights.³²⁷ Also problematic, critics point out, are the inherent cognitive limitations that consumers have in assessing the relevance and accuracy of the label's information, and in discerning "good" labels from "bad" ones.³²⁸ Other scholars, such as Gay Seidman, have argued that social labels, and market-centered regulation more generally, are a poor means of ensuring workers' rights compared to other development-oriented methods.³²⁹

Despite these critiques, there are signs of success. Arianna Rossi has argued that Morocco's attempt at creating a social label for its garment industry led to improvements in health and safety levels in the industry.³³⁰ And a number of studies have shown that fair trade producers who receive certification receive higher prices than do non-fair-trade farmers for their goods,³³¹ experience greater financial stability,³³² and generate improved environmental practices.³³³ Yet on the other hand, according to critics, the income benefits accrue largely

325. See Bama Athreya & Brian Campbell, *No Access to Justice: The Failure of Ethical Labeling and Certification Systems for Labor Rights*, in *WORKERS' RIGHTS AND LABOR COMPLIANCE IN GLOBAL SUPPLY CHAINS: IS A SOCIAL LABEL THE ANSWER?*, *supra* note 218, at 226, 233.

326. See Annelies Goger, *Ethical Branding in Sri Lanka: A Case Study of Garments without Guilt*, in *WORKERS' RIGHTS AND LABOR COMPLIANCE IN GLOBAL SUPPLY CHAINS: IS A SOCIAL LABEL THE ANSWER?*, *supra* note 218, at 47–48.

327. See Arianna Rossi, *The Impact of the Fibre Citoyenne Label on the Moroccan Garment Industry and its Workers*, in *WORKERS' RIGHTS AND LABOR COMPLIANCE IN GLOBAL SUPPLY CHAINS: IS A SOCIAL LABEL THE ANSWER?*, *supra* note 218, at 22.

328. See, e.g., Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 *STAN. J. INT'L L.* 1, 1 (2017).

329. Gay W. Seidman, *Labouring Under An Illusion? Lesotho's 'sweat-free' label*, 30 *THIRD WORLD Q.* 581, 594–95 (2009) (discussing Lesotho's ill-fated efforts at generating a sweat free label for Lesotho's garment industry).

330. See Rossi, *supra* note 328, at 88.

331. See Raluca Dragusanu, Daniele Giovannucci & Nathan Nunn, *The Economics of Fair Trade*, 28 *J. ECON. PERSP.* 217, 223–25 (2014); Raynolds, *supra* note 272, at 417.

332. Dragusanu, Giovannucci, & Nunn, *supra* note 332, at 228.

333. *Id.* at 229.

to farm owners and skilled workers and do not necessarily result in higher wages for hired laborers.³³⁴

These debates will continue. But social labels and other initiatives' efforts to generate empathetic relationships with producers by sharing and publicizing narratives of actual producers have shown potential in triggering consumer action, even if these relationships are largely imagined. Private initiatives of supply chain governance, social labeling schemes, and transnational labor activists have been the primary user of such tools. But the question this Article next turns to is: How might those empathetic bonds be drawn on, or the "sympathies" that were described by Adam Smith,³³⁵ in public law initiatives of supply chain governance?

VI. CONSUMER CITIZENSHIP IN PUBLIC LAW

This Article has argued that elements of the supply chain economy have given rise to a consumer movement for more humane supply chains born in part from a desire by citizen-consumers to bridge the gap between production and consumption. This movement has been partly fueled by activists and media technologies that have fueled the consumer imaginary. This Part takes a prescriptive turn, focusing on public law. It asks the questions: (1) How has the law heretofore made use of the consumer imaginary to achieve the goals of improving labor conditions in the supply chain? (2) How can these efforts be improved? These questions are relevant because of the increasing interest by policy makers at both the federal and state levels in designing laws and policies that can improve working conditions in global supply chains.

This Part looks at two ways in which US policy endeavors to regulate labor conditions in the supply chain. The first is through trade law, while the second is through domestic transparency laws, which are a far more recent a development, and one that explicitly attempts to catalyze citizen-consumers to pressure lead firms to regulate their supply chains. Both mechanisms have been critiqued for inadequately achieving their aims of improving working conditions in the supply

334. *Id.* at 232; Raluca Dragusanu & Nathan Nunn, *The Impacts of Fair Trade Certification: Evidence From Coffee Producers in Costa Rica* 27–28 (Feb. 28, 2014) (unpublished manuscript) (on file with author).

335. See MCINTYRE, *supra* note 276, at 46–48 (discussing Smith's notion of sympathies in relation to the social distance between lead firms and workers in the supply chain).

chain,³³⁶ both in different ways have been motivated by the demands of citizen-consumers, and both have the potential to improve their effectiveness by better engaging the consumer imaginary.

A. Trade Law

Social and labor concerns have long been incorporated into US as well as European trade policy. Perhaps the earliest example is bans by the United States and other countries on the importation of goods made by forced or slave labor and prison labor. The bans on slave labor were largely driven by changing moral norms on slavery and its general elimination by trading countries in the nineteenth century, culminating in 1890 when a number of countries signed the Brussels Conference Act of 1890, putting an end to the slave trade over land and sea.³³⁷ The bans on importation of goods made with prison labor were primarily grounded in economic competition arguments (i.e. that prison labor is an unfair form of competition because it uses unpaid labor to produce goods).³³⁸ Indeed, prison labor is the sole labor-related condition that members of the WTO are explicitly allowed to rely on as a basis for discriminating between products.³³⁹

In the United States there have been, as Steve Charnovitz has described, a number of attempts to pass legislation denying “entry to foreign goods produced under ‘oppressive’ or ‘substandard’ labor conditions.”³⁴⁰ Efforts by the Senate and House of Representatives to

336. Some scholars have argued, for example, that in the context of trade, the provisions simply do not provide for strong enough remedies, *see, e.g.*, Lorand Bartels, *Human Rights, Labour Standards and Environmental Standards in CETA*, in MEGA-REGIONAL AGREEMENTS: TTIP, CETA, TISA. NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS (Stefan Grillier et al. eds., 2017), or that the standards themselves are too weak. *See* Gerda Van Roozendaal, *The Diffusion of Labour Standards: The Case of the US and Guatemala*, 3 POL. & GOVERNANCE 18, 21 (2015). Another line of critique argues that trade and labor provisions are too focused on state action, and ought to harness the tools of non-state labor governance that have been used in private governance. *See* Kevin Kolben, *A Supply Chain Approach to Trade and Labor Provisions*, 5 POL. & GOVERNANCE 60, 61 (2017). Scholarly critiques of disclosure laws have argued, for example, that they do not adequately force disclosure of conditions in supplier factories, *see, e.g.*, Vinayagamorthy, *supra* note 66, while others have argued that mandated disclosures do not offer enough readily usable information for consumers, in part because consumers are unable to discern between high quality and low-quality disclosures. *See* Chilton & Sarfaty, *supra* note 328, at 41.

337. This treaty was updated in the United States of America. Convention revising the General Act of Berlin, February 26, 1885, and of the General Act and the Declaration of Brussels, July 2, 1890, signed at Saint-Germain-en-Laye, September 10, 1919 L.N.T.S. 19; Africa: Revision Of General Act of Berlin and General Act And Declaration of Brussels art. 11, Sept. 10, 1919, 8 L.N.T.S. 27, 49 Stat. 3027, which provided that the countries would “endeavor the complete suppression of slavery in all its forms and of the slave trade by land and sea.”

338. Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime – A Historical Overview*, 126 INT’L L. REV. 565, 569 (1987).

339. *See* General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

340. Charnovitz, *supra* note 338, at 568.

make such limitations part of the Fair Labor Standards Act have failed, however.³⁴¹ These efforts, as well as those by other countries in the early twentieth century to impose tariffs on imported goods manufactured by workers earning lower wages or working in lower conditions or employment, were grounded in fears of unfair competition.³⁴² In other words, they were protectionist measures designed to protect domestic industries.

But as the nature of the economy changed, and as American consumers obtained more of their goods from global supply chains that extended deep into developing countries with poor working conditions, the emphasis changed. While unfair competition arguments were still present, ethical and moral justifications also clearly motivated new trade legislation, both implemented and proposed legislation. Laws governing imports made with child labor laws are one example. One of the most significant of these efforts was a bill first sponsored in 1992 by Senator Tom Harkin, an outspoken anti-child labor advocate, called the Child Labor Deterrence Act, which, if implemented, would have effectively banned the import of goods made by children under fifteen years of age.³⁴³ In the Act's Findings, Purpose and Policy section, it is made clear that a primary purpose of the bill was to promote the welfare of children and to spur sustainable economic development.³⁴⁴ It is only in the last of the bill's nine subsections that unfair competition is mentioned—specifically, the fear that adult workers in the United States could have their jobs imperiled.³⁴⁵ The bill did not get out of committee that year, or in the subsequent years that it was introduced in both the Senate or in the House.³⁴⁶ It was also widely criticized by some analysts who argued that the consequences for children who were deprived of an income as a result of the bill could be grave.³⁴⁷ Indeed, some believe that the mere threat of the law led to the widespread dismissal of many children in Bangladesh's garment industry, resulting in worse welfare outcomes for those children.³⁴⁸ Yet

341. *Id.*

342. *Id.* at 567.

343. Child Labor Deterrence Act of 1992, S.3133, 102d Congress (1992).

344. Child Labor Deterrence Act (2)(a)(7–8). “(7) The employment of children under the age of 15 commonly deprives the children of the opportunity for basic education and also denies gainful employment to millions of adults. (8) The employment of children under the age of 15, often at pitifully low wages, undermines the stability of families and ignores the importance of increasing jobs, aggregated demand, and purchasing power among adults as a catalyst to the development of internal markets and the achievement of broad-based, self-reliant economic development in many developing countries.”

345. Child Labor Deterrence Act (2)(a)(9) (noting that adult workers in the United States and other developed countries should not have their jobs imperiled by imports produced by child labor in developing countries).

346. A house version was first introduced by Representative Don Pease in 1989. Child Labor Deterrence Act of 1989, H.R. Res. 2485, 101st Cong. (1989–1990).

347. BENJAMIN POWELL, *OUT OF POVERTY: SWEATSHOPS IN THE GLOBAL ECONOMY* 84 (Cambridge Univ. Press 2014).

348. *Id.* (citing reports that some 50,000 children lost their jobs after the Harkin bill was proposed, some turning to prostitution).

despite the potentially perverse outcomes, at the time of the bill's discussion, consumers in the United States and in Europe were actively engaging in boycotts based on ethical and moral grounds of Bangladeshi garments,³⁴⁹ and multinational corporations such as Levi Strauss were making proactive efforts to use codes of conduct to eliminate child labor in their supply chains.³⁵⁰

In another example following the failure of the Child Labor Deterrence Act, Congress in 2000 amended 19 U.S.C. § 1307, which bans the importation of goods made by forced, prison, or indentured labor generally, to explicitly include forced or indentured child labor in the definition.³⁵¹ A significant loophole in the original law, however, was that it carved out an exception for products made with forced and indentured labor that were necessary to import in order to meet domestic consumptive demand.³⁵² But in 2016, the Obama administration signed an amendment to the law that removed the consumptive demand exception.³⁵³ What partly motivated the removal of the provision were revelations in the media about the use of slave labor in the American seafood supply, particularly in Southeast Asia.³⁵⁴

These recent developments reflect a move by some governments to move away from an economic, protectionist-motivated trade and labor policy toward a justification grounded in labor and human rights. That is, it is a claim that citizen-consumers have begun to demand, through legislative and not just market channels, that their governments include labor, environmental, and human rights concerns in their trade policy, as well as their corporate governance.

There are several limitations to generalized import bans, however. One limitation is that to apply the ban, the importing country must be able to identify specific kinds of activities that are traceable to a specific country or supplier.³⁵⁵ This can be rather difficult given the multiple intermediaries through which goods can travel, concealing their origins. Second, determinations of whether or not an import ban is warranted rests upon a binary finding that a violation either exists

349. See Ethel Brooks, *Transnational Campaigns Against Child Labor: The Garment Industry in Bangladesh*, in COALITIONS ACROSS BORDERS: TRANSNATIONAL PROTEST AND THE NEOLIBERAL ORDER 128 (Joe Bandy & Jackie Smith eds., 1995).

350. *Id.* at 126–27.

351. Bonded Child Labor Elimination Act, Pub. L. No. 106-200, § 411 (2000).

352. 19 U.S.C. § 1307 (2016) *amended by* Pub. L. No. 114-125 (2016) (“but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.”).

353. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910 (2016).

354. Trevor Sutton & Avery Siciliano, *Seafood Slavery*, CTR. FOR AM. PROGRESS (Dec. 15, 2016, 5:00 AM), <https://www.americanprogress.org/issues/green/reports/2016/12/15/295088/seafood-slavery/> [<https://perma.cc/H6GK-MNMR>] (archived on Aug. 24, 2019).

355. See 19 C.F.R. § 12.42 (2018).

or does not exist in the manufacturing of the good. Otherwise, it would be very difficult for governments to make determinations as to whether or not a good is made with forced or child labor. While such binary determinations might work for child labor, and to a lesser extent forced labor, other rights violations, such as freedom of association violations or gender discrimination, can be harder to make finite determinations on. Third, import bans could be subject to WTO challenges because apart from prison labor, there is no explicit exception made for import discrimination based on labor or human rights standards.³⁵⁶

Due in part to these limitations, policymakers and activists turned to other trade-related mechanisms to engage the consumer imaginary and mobilize citizen-consumers. One such mechanism was unilateral labor standards and labor rights conditionality, which has been part of the trade policy of a number of countries for several decades now. In the United States, conditionality was first included in a unilateral, preferential trade arrangement in 1983 in the Caribbean Basin Initiative,³⁵⁷ and then was incorporated the next year into the Generalized System of Preferences.³⁵⁸ In these laws, the president is directed to take into account “whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights.”³⁵⁹ This language aims to remedy the domestic labor governance deficit of trading partner countries, by creating incentives for them to respect core international labor standards. The European Union, too, has included human rights and labor rights conditionality in its own unilateral trade programs, known as GSP+.³⁶⁰ Human rights have been incorporated into EU trade policy since the early 2000s, and have become codified in the Lisbon Treaty in 2009, and more recently in the Strategic Framework on Human Rights and Democracy, adopted in 2012.³⁶¹

In recent decades, labor provisions have become a central element of bilateral and regional trade agreement practice of a number of countries. According to a recent ILO study of labor provisions in FTAs, there were seventy-seven trade agreements in place (covering 135

356. For a discussion of how Article XX could be applied to labor rights violations, see MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, *THE REGULATION OF INTERNATIONAL TRADE* 733–38 (4th ed. 2013).

357. See 19 U.S.C. § 2702(b)(7) (2018).

358. GSP Renewal Act of 1984, Pub. L. No. 98-573, 98 Stat. 3019 (1984). See Compa & Vogt, *supra* note 27, at 200–02 (discussing the incorporation of labor conditionality into GSP and its contents).

359. Caribbean Basin Initiative, 19 U.S.C. § 2702(c)(8) (2018); Generalized System of Preferences, 19 U.S.C. § 2462(c)(7) (2018).

360. See Loran Bartels, *The WTO Legality of the EU's GSP+ Arrangement*, 10 J. INT'L ECON. L. 869, 871–72 (2007).

361. Daniela Sicurelli, *The EU as a Promoter of Human Rights in Bilateral Trade Agreements: The Case of the Negotiations with Vietnam*, 11 J. CONTEMP. EUR. RES. 231, 231 (2015).

economies) that included labor provisions.³⁶² By 2016, some 28.8 percent of trade agreements registered with the WTO contained labor provisions, an increase from 7.3 percent in 1995, indicating a dramatic increase in the percentage of trade agreements that currently include labor provisions.³⁶³ Significantly, labor provisions have also been increasingly included in investment treaties. According to the ILO, twelve out of the thirty-one international investment arrangements that were concluded in 2014 include labor rights protections.³⁶⁴ While the success record of these initiatives has been mixed,³⁶⁵ the laws have opened the door to incorporating labor provisions in bilateral and regional trade agreements more broadly. This has been particularly important given that any possibility of including labor provisions in the WTO have been basically foreclosed.³⁶⁶

While some have derided labor provisions in trade agreements as protectionist both in intent and in practice,³⁶⁷ the structure and application of labor provisions fail to support this claim.³⁶⁸ In fact, while protectionism from some constituencies surely is part of the calculus,³⁶⁹ labor provisions have been motivated far more by demands from citizen-consumers and labor activists to include social conditionality in trade policy. That is, citizen-consumers want to ensure that the goods that they consume are made using processes that conform to their ethical and political expectations. The United States has made a policy choice that trade liberalization must be accompanied by guarantees that citizen-consumers will be assured that certain conditions exist that they deem necessary for trade liberalization to be

362. ILO HANDBOOK ON LABOUR PROVISIONS, *supra* note 28, at 11.

363. INTERNATIONAL LABOUR ORGANIZATION, ASSESSMENT OF LABOUR PROVISIONS IN TRADE AND INVESTMENT ARRANGEMENTS 1, 12 (2016) (indicating that over 80% of trade agreements negotiated since 2008 contain labor provisions); ILO HANDBOOK ON LABOUR PROVISIONS, *supra* note 28, at 11.

364. *Id.* at 27.

365. See, e.g., Gerda Van Roozendaal, *Where Symbolism Prospers: An Analysis of the Impact on Enabling Rights of Labour Standards Provisions in Trade Agreements with South Korea*, 5 POL. & GOVERNANCE 19, 19–20, 26–27 (2017) (suggesting labor provisions have heretofore been relatively ineffective and symbolic); Kolben, *A Supply Chain Approach to Trade and Labor Provisions*, *supra* note 336, at 61–64 (arguing that extant approaches to trade and labor provisions are ineffective and need to adopt experimental approaches combining private and public regulation).

366. See, e.g., Kevin Kolben, *The WTO Distraction*, 21 STAN. L. & POL'Y REV. 461 (2010) (arguing that the WTO is not a viable or desirable forum to include labor provisions).

367. See JAGDISH BHAGWATI, *FAIR TRADE TODAY* 57 (Princeton Univ. Press 2002).

368. See Andrew Schrank, *From Disguised Protectionism to Rewarding Regulation: The Impact of Trade-related Labor Standards in the Dominican Republic*, 7 REG. & GOVERNANCE 299, 300 (2013) (arguing labor provisions do not serve protectionist ends but rather are a “beneficial constraint” by promoting a high road to development).

369. EMILIE M. HAFNER-BURTON, *FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS* 38 (Cornell Univ. Press 2013).

considered legitimate.³⁷⁰ Labor provisions are a means of ensuring that they be assured that those expectations are satisfied.

B. *Transparency Laws*

A second significant form of legal intervention is the increasing use of mandated transparency laws. According to Susan Ariel Aaronson and Ethan Wham, transparency laws “wed government mandates delineating the ‘right to know’ with corporate governance and voluntary corporate social responsibility (CSR) strategies.”³⁷¹ They typically require that companies undertake certain forms of good faith efforts to discover certain labor rights violations in their supply chains.³⁷² The expanding implementation of such laws has been one of the more interesting developments in recent years. The EU and its member states as well as the United States have implemented such legislation,³⁷³ as well as most recently Australia.³⁷⁴ The primary objective of disclosure mandates as they have been designed has been to generate accurate information for consumers to make purchasing decisions, and to provide information to stakeholders to better enable them to pressure companies to change their supply chain practices.³⁷⁵ But there are other mechanisms that are also activated through mandatory disclosure laws. As Stephen Park points out, disclosure can also help generate internal, or what he calls integrative, processes to align corporate managers’ noneconomic commitments with their economic ones.³⁷⁶ As Park puts it, “in order for MNEs to maximize the utility that they derive from complying with [Targeted Social Transparency] (TST) disclosure requirements, they must be able to recognize the extent to which the social values underlying the TST regime bear on their own self-conceptions.”³⁷⁷

In the United States, the first of these laws, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), provides that public companies that purchase certain minerals from the Great Lakes Region of Africa must file reports that describe their

370. For an expanded argument on this point, see Kolben, *A New Model For Trade And Labor?*, *supra* note 15, at 1065–79.

371. Aaronson & Wham, *supra* note 30, at 1.

372. *See id.* at 6.

373. *See id.* at 6–12.

374. *Modern Slavery Act 2018* (Cth) (Austl.).

375. Chilton & Sarfaty, *supra* note 328, at 4.

376. Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 *NW. J. INT’L L. & BUS.* 87, 115–17 (2014).

377. *Id.* at 115.

due diligence efforts at determining if the minerals are conflict free.³⁷⁸ This report must also be posted on the covered company's website.³⁷⁹ The aim of Congress was to require disclosure of the sourcing of minerals from regions in which the proceeds would go to armed groups in the region, which it believed was perpetuating armed conflict "characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein."³⁸⁰ Again, the effectiveness of this law has been debatable. One problem is that if the goal of Congress was to mobilize citizen-consumers to pressure covered firms to take action to improve their supply chains, it is unclear if these kinds of reports are particularly effective in doing so. Reporting on a company's due diligence efforts to eradicate conflict minerals from a supply chain is a far more technical kind of reporting than one might find with, say, a label. A second problem is that it is very hard to trace the supply chain all the way back to mineral extraction, and only large companies are likely to have the resources to significantly vet their supply chains. Indeed, some 67 percent of companies that filed reports with the U.S. Securities and Exchange Commission were unable to determine whether their sourced minerals come from the Democratic Republic of the Congo or one of the other adjoining countries.³⁸¹ So, even if consumers were able to discern from the reports what the companies were doing to avoid conflict minerals, and even if consumers understood what they were, it is unclear if the information they were getting was accurate.³⁸²

378. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. XV, § 1502, July 21, 2010, 124 Stat. 2213, as amended by Pub. L. No. 114-301, § 3(b), Dec. 16, 2016, 130 Stat. 1515 (2018) [hereinafter Dodd-Frank Act]. Specifically, the Act requires companies to file if "conflict minerals are necessary to the functionality or production of a product manufactured by such person." Dodd-Frank Act § 1502(c)(2)(B). Dodd-Frank specifically calls for covered companies to include in a report a) "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and (ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free ('DRC conflict free' is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity." Dodd-Frank Act § 1502(c)(1)(A)(i-ii). For a discussion, see Aaronson & Wham, *supra* note 30, at 7.

379. Dodd-Frank Act § 1502(b)(1)(E)

380. Dodd-Frank Act § 1502(a).

381. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-544T, CONFLICT MINERALS INSIGHTS FROM COMPANY DISCLOSURES AND AGENCY ACTIONS 6 (2017).

382. See *id.*

A second major transparency law is the California Transparency in Supply Chains Act (CTSCA).³⁸³ This law covers retailers or firms doing business in California with worldwide gross receipts of more than \$100 million worldwide.³⁸⁴ Each covered firm is required to report on “its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.”³⁸⁵ The report must disclose, at a minimum, various aspects of the processes by which the company monitors its supply chain for slavery and human trafficking, and implements processes to ensure that the supply chain is compliant.³⁸⁶ These include, *inter alia*, the degree to which a manufacturer or seller (1) engages in verification of supply chains to evaluate and address risks of human trafficking and slavery, (2) conducts audits of suppliers, (3) requires direct suppliers to certify that materials are compliant, (4) maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking, and (5) provides training to supply chain managers on trafficking and slavery.³⁸⁷ The only remedy available to a plaintiff is injunctive relief.³⁸⁸

But like Dodd-Frank, the CTSCA also suffers from problems. As is clear from these disclosure requirements, and as pointed out by Adam Chilton and Galit Sarfaty, the Act requires companies to file reports on fairly technical *processes*, and not on the specific products or the final results of their findings.³⁸⁹ What results is that the consumer imaginary is given little to work with. If what motivates consumers to “boycott” and boycott is the imagined connection to producers, then fairly technical reporting on internal sourcing process will not likely motivate consumers to take action. Moreover, according to Chilton and Sarfaty, consumers are generally unable to discern between companies that engage in “high” due diligence versus those that engage in “low”

383. California Transparency in Supply Chains Act, Cal. Civ. Code § 1714.43 (2012) [hereinafter CTSCA].

384. CTSCA § 1714.43.

385. CTSCA § 1714.43(a)(1).

386. CTSCA § 17.14.43(c)(1-5).

387. CTSCA § 17.14.43(c)(1-5). The text of the Act provides: “(C) The disclosure described in subdivision (a) shall, at a minimum, disclose to what extent, if any, that the retail seller or manufacturer does each of the following: (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party; (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit; (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business; (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.”

388. CTSCA §§ 17.14.43(c)(1-5), 17.14.43(d).

389. Chilton & Sarfaty, *supra* note 328, at 23.

due diligence.³⁹⁰ Chilton and Sarfaty conclude from this that mandatory disclosure might be generally ill-suited to human rights issues.³⁹¹ But they also suggest that perhaps disclosure could be designed more effectively, such as by (1) using a standard template for companies across industries; or (2) requiring “targeted transparency” to require that consumers receive information, not on websites (as required by Dodd-Frank and the CTSCA, for example), but right at the checkout counter using some kind of “rating system whereby the government or a third party converts disclosed information into a grade or label (e.g., a trafficking-free label) that is presented to consumers at the time of purchasing.”³⁹²

C. *How to Improve?*

Chilton and Sarfaty propose a move toward a regime that translates the technical process-oriented approach of current transparency law in the United States into one that is more easily digestible by consumers. Focusing on the end user—the consumer—takes supply chain labor governance in a more effective direction. But this Article takes the discussion a step further both conceptually and in practice. That is, how should trade and labor provisions, as well as transparency laws, be reoriented toward triggering the consumer imaginary? On the one hand, trade and transparency regimes are currently legitimized and grounded to various degrees in consumer citizenship frameworks.³⁹³ In other words, they either are justified by, in the case of import bans and trade and labor provisions, or are only effective, in the case of transparency laws, if consumers are willing to mobilize and pressure companies. But none of them are designed to actually mobilize or trigger the consumer imaginary. What steps might be taken to make that happen? This Article does not present a comprehensive set of policy recommendations, but rather proposes some areas of consideration for further investigation to be pursued in future work.

1. Trade and Labor Provisions

As of now, US trade and labor provisions primarily utilize what has been termed in previous work a state action–state sanctions approach.³⁹⁴ That is, they aim to change the conduct of states by evaluating state conduct through intergovernmental processes, providing for intergovernmental complaint and dispute mechanisms,

390. *Id.* at 24.

391. *Id.* at 45–46.

392. *Id.* at 43–44.

393. For more discussion of this idea, see Kolben, *A New Model For Trade And Labor?*, *supra* note 15, at 1071–75.

394. *Id.* at 1080–81.

and providing for remedies if the dispute cannot be settled by the parties.³⁹⁵ While in the United States there are federal regulations that provide a mechanism for third parties to file complaints with the US government to request,³⁹⁶ the mechanisms that can trigger TLANs or citizen-consumers to mobilize are limited.

One example of how US trade and labor provisions hinder consumer mobilization is that the complaint process for violations of labor chapters is kept secret until a report is issued by the US government. Although it would be contrary to typical state practice, there is no reason why more transparent mechanisms could not be negotiated into the labor chapter complaint processes. There could be more public forums in which the affected workers could give testimony about labor rights violations in their workplaces, and that testimony could be made public in various fora.³⁹⁷ Lead firms could be required to post links and copies of worker testimony in supplier factories. Archon Fung *et al.* have argued for a ratcheting labor standards (RLS) regime of supply chain governance that would foster experimentalist regimes of monitoring benchmarking and therefore drive consumer pressure on lead firms to improve their supply chains.³⁹⁸ Building on the RLS work, it has been argued elsewhere that labor chapters should implement an “integrative approach” that proposes experimenting with private governance mechanisms that will help develop domestic labor law regimes.³⁹⁹ But one remaining question in these proposals and other proposals that rely on consumers and private regulation is that, while consumers are central to the success of these governance regimes, the proposals do not sufficiently address the question of what kinds of information about working conditions in supply chains will in fact motivate consumers to take action.⁴⁰⁰ Such information might include more direct testimony and stories by and about the affected workers, such that consumer imaginary mechanisms could be better triggered.

2. Domestic Transparency Laws

Domestic transparency laws are also well positioned to trigger the consumer imaginary. But oddly, the ones that have been implemented

395. *See id.*

396. *See* 40 C.F.R. Part 63., 71 Fed. Reg. 245 (Dec. 21, 2006).

397. Of course there would also have to be a parallel set of protective laws that the parties agree to implement to prevent retaliation against those workers akin to anti-retaliation rules in the National Labor Relations Act. *See* 29 U.S.C. §§ 157, 158(a) (2018).

398. *See* ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS?: A NEW DEMOCRACY FORUM ON RAISING GLOBAL LABOR STANDARDS 1 (Beacon Press 2001).

399. *See generally* Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203 (2007).

400. *See* Mark Levinson, *Wishful Thinking*, in CAN WE PUT AN END TO SWEATSHOPS?: A NEW DEMOCRACY FORUM ON RAISING GLOBAL LABOR STANDARDS, *supra* note 398, at 54–55.

in US federal and state law are somewhat misaligned with achieving this goal. Chilton and Sarfaty's suggestion that consumers be provided with information at the checkout counter holds some promise, despite the somewhat tepid endorsement by the authors.⁴⁰¹ But this Article suggests moving beyond simply ratings or labels, which are relatively cold and impersonal. Instead, transparency laws should aim to create psychic and imagined linkages between the consumers, the suppliers, other consumers, and, of course, the workers. This would perhaps entail direct forms of communication from the workers themselves.⁴⁰² This might include, for example, worker testimonies that have been provided by NGOs and TLANs that work in the field. To ensure fairness to companies, the NGOs could go through a governmental certification process that requires them to meet certain accreditation standards and that requires them to comply with their own due diligence standards.

Rather than prescribing a template of specific policy proposals, one solution drawn from the governance and democratic experimentalism literature is that NGOs and companies could be left to compete for the best and most accurate means of conveying the degree to which they either effectively ensure that their supply chains are compliant with a certain set of human rights goals, or the ways in which they are pursuing those ends.⁴⁰³ Companies could be incentivized to convince their customers to "boycott" in their favor, and if they are required to provide information on the product itself, much like a cigarette warning label, they might innovate in figuring out how to convince consumers to buy their goods. Of course, all of this must be subject to constant evaluation and monitoring by third parties, so that consumers can be assured that what they see on the products is in fact accurate and real. In this sense, we do not want the consumer imaginary to be deceived by the "corporate" imaginary.

What this means is that disclosure laws can have internal impacts at the firm level, reorienting priorities and commitments to certain social goals. By forcing managers to engage with these issues and requiring that managers engage their own social imagination through confrontation with real people—real producers—their own management priorities might change.

401. Chilton & Sarfaty, *supra* note 328, at 44.

402. See Figors & Rockenbach, *supra* note 253, at 3126 (discussing direct communication).

403. For an example of governance and democratic experimentalism as applied to labor in global value chains, see FUNG ET AL., *supra* note 398. For a review of the governance literature and a critique as it applies to transnational labor regulation, see Kolben, *Transnational Labor Regulation and the Limits of Governance*, *supra* note 115, at 403–04.

VII. CONCLUSION

The global economic system is under strain in part because of what many perceive to be the dehumanizing elements and consequences of the new globalization. One of those consequences has been the rending of consumer and producer relationships. While there are many complicated aspects and causes of the disaffection with the new economic order, one reaction has been the mobilization of citizen-consumers who seek to improve conditions in the global supply chain through their purchasing decisions. This Article has argued that the concept of the consumer imaginary can help describe the relationships between consumers and producers, and guide policymakers in developing tools and institutions to utilize its potential. Activating and mobilizing consumers and the consumer imaginary is not a magic solution to improving working conditions and protecting labor and human rights in the supply chain. Rather, it is but one of the many filaments that constitute the fabric of supply chain governance. It is an avenue of study that requires more empirical and theoretical attention from scholars, and one that holds promise to address at least one of the cleavages and tensions that the shift to a supply chain economy has helped create.