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Labor sustainability in Global Supply Chains

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I. *Introduction*

As a principle for governance, the concept of sustainability has been most closely linked to the regulation and protection of the environment. The concept is malleable and can support a range of policy objectives¹. Multiple intellectual traditions also support the concept ranging from cost-benefit analysis commonly associated with neoliberalism to indigenous concepts of self-determination and “planning practices”². At the heart of all of these versions of sustainability is a basic recognition that social, political, and economic decisions today will impact future generations.

Against this backdrop, this paper considers whether the concept of sustainability might be helpful in strategies for fighting coerced and child labor, a problem that exists within labor markets all across the globe. In developing a model for “labor sustainability”, I focus on the interests of three sets of stakeholders: consumers, workers, and firms. Obviously, these are not mutu-

¹ See POLLANS, *Eaters, Powerless by Design*, in *Mich. L. Rev.*, 2022, 643, pp. 670-672.

² See WHYTE, CALDWELL, SCHAEFER, *Indigenous Lessons about Sustainability Are Not Just for “All Humanity”*, in SZE (ed.), *cit.*, p. 152.

ally exclusive categories given that most people and entities engage in behavior that cut across these lines of division. For this reason, I will use this basic framework for much of the paper though I will address the limits of this framework towards the end. At the same time, these identity categories provide a good, basic vocabulary for working through the different social and economic interests that any model of labor sustainability must address.

For any “labor sustainability” model of governance to succeed, any good that is produced and sold within consumer markets must satisfy consumer preferences, provide basic protections for workers, and make a profit for firms. As a starting point, this paper provides three case studies of different governance schemes that attempt to create synergies between consumers and workers. This paper will focus on these issues in the context of U.S.-based food systems, which present sensible markets for examining these issues. The size of the U.S. market for food items means that consumer demands can send ripples through supply chains in a globalized economy. Advocacy efforts aimed at eliminating exploitative work conditions within different parts of the U.S. food system have drawn attention for decades. Moreover, consumers have to make food-related choices everyday, sometimes multiple times in a single day. Thus, the market for food goods presents the opportunity to examine the idea of labor sustainability within a set of economic transactions that reflect ordinary commercial and consumption activity.

Part II of the paper will provide a basic overview of the concept for labor sustainability. Part III will explore the three case studies. Part IV identifies some of the insights that those case studies provide for developing a more broadly, generalizable idea of labor sustainability. Part V then concludes.

2. *An Overview of Labor Sustainability*

As an organizing principle, the concept of sustainability is associated with the various strands that loosely make up what is often referred to as the environmental protection movement³. Many different strands of this

³ See TAI, *The Rise of U.S. Food Sustainability Litigation*, in *SCLR*, 2012, Vol. 85, p. 1076.

movement attempt to define the idea of sustainability and for this reason several models for sustainable governance exist.

One version of this idea reflects a pragmatic and market-based response to the problems of pollution and other forms of environmental degradation. Over the long-term, pollution harms everyone but many firms and stakeholders are unwilling to take action to avoid this harm because of economic and other costs of changing course. In an attempt to balance our collective long-term needs to maintain a habitable environment against the present-day desires of firms to achieve economic prosperity, advocates of sustainable business practices argue that this approach can do both thereby creating a kind of “win-win” path forward. This type of governance strategy gives significant weight to consumer preferences in setting moral limitations on business practices that affect the environment and it assumes that consumers will be willing to pay for goods and services that promote or at least do not worsen environmental integrity. Such an approach is often associated with neoliberal forms of governance, an approach to law that views regulations as raising costs without providing justifiable benefits. Sustainability on these terms means deregulation and permitting firms to sort out in the marketplace how best to protect the environment through investment choices. Corporate law scholars have explored these ideas in the context of “corporate social responsibility” and “environmental, social, and corporate governance” investment strategies⁴.

Another version of sustainability draws from indigenous traditions and focuses on economic and development practices reflecting a kind environmental stewardship. To take one example, Menominee tribes developed a sustainable timber practice that “seeks to pay respect to the agency of the forest itself as a living ecosystem that has cultural and spiritual significance for the Menominee people[,]” an approach that pivots away from mooring concepts of sustainability to economic baselines and profit-maximization⁵. Given the long history of displacement and dispossession policies under U.S. settler colonialism, these indigenous notions of sustainability that seek to preserve land reflect, not a lack of vision or ambition for development, but instead a deliberate policy of governing as stewards of the land for the

⁴ See POLLMAN, *The Making and Meaning of ESG*, working paper (Oct. 2022), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857; LUND, *Corporate Finance for Social Good*, in *CLR*, 2021, Vol. 121, No. 5, p. 1617.

⁵ See WHYTE, CALDWELL, SCHAEFER, *cit.*, p. 152.

benefit of future generations. Again, the concept of sustainability is no monolith. Many different models for sustainability operate outside of the two examples I have provided. Different social movements and laws attempt to define and leverage the concept of sustainability to achieve broader political and economic goals. At the same time, all of these versions enjoy a degree of conceptual overlap⁶. In the simplest terms, these different versions of sustainability strive to balance present needs against future consequences.

Building on this basic framework, the concept of labor sustainability is one in which firms create working conditions free from coercion and other workplace practices and policies that are dangerous or degrading. On-going discussions of sustainable farming practices have already grappled with how worker interests fit into this model. Among food law and labor law scholars, a persistent critique of sustainability frameworks has been the omission of farmworkers from most discussions of how sustainable food systems create economic and social value for farms, consumers, and society as a whole⁷. Taking a closer look at the example of agriculture, it is clear that there is no reason why the basic framework for sustainability cannot be expanded or adjusted to accommodate the interests of farmworkers. For example, the demand for organic goods has increased steadily over the last several decades, providing opportunities in food markets to incorporate labor-centric measures for protections⁸. Ostensibly, the turn towards organic farming was meant to protect both the environment and consumers against the dangers of toxic pesticides, but such farming practices also improve the safety of the workplace for farmworkers⁹. Such practices foster long-term benefits for workers

⁶ See TAI, *cit.*, p. 1078. See also NESTLE, MCINTOSH, *Writing the Food Studies Movement: With a Response by W. Alex McIntosh of Texas A&M University*, in *FC&S*, 2010, Vol. 13, p. 160 and p. 175.

⁷ See LUNA, *The Dominion of Agricultural Sustainability: Invisible Farm Labor*, in *WLR*, 2014, p. 265. Some of this has to do with longstanding exclusions in federal law regarding agricultural workers, which omits this class of workers from major wage and other protections thereby devaluing them. And by remaining silent on farmworker interests, sustainability frameworks effectively reinforce this baseline of protections. See *id.* at pp. 275–277.

⁸ Sales of U.S. organic food products nearly doubled from \$26.9 billion in 2010 to \$52 billion in 2021. See ECONOMIC RESEARCH SERVICE, USDA (last updated Feb. 23, 2023), at <https://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/>.

⁹ See SHRECK, GETZ, FEENSTRA, *Social sustainability, farm labor, and organic agriculture: Findings from an exploratory analysis*, in *AHV*, 2006, 23, p. 439.

by reducing the risk of injury or death and improving the life expectancy of the workforce.

Like other forms of sustainable food production, those forms of production incorporating labor sustainability principles require firms to spend more to meet such standards. Such a model requires firms to pass on the added costs to consumers in the form of a premium. Common examples include “fair trade” labels or certificates ensuring ethical production¹⁰. A variety of scholars have explored this idea in the context of U.S. food systems specifically. Again, although workers across multiple industries face the problem of coerced labor, the food system is unique in that it forces consumers to consistently grapple with the moral and economic consequences of buying goods produced under exploitative conditions. Unlike other necessities like apparel, for most people food is a good or material that they purchase regularly, sometimes every day. Thus, consumers have a chance to make choices that shape the market for ethical goods on a daily basis.

Finally, it is worth emphasizing that the concept of labor sustainability is not just a topic of interest to academics and scholars. Public enforcement agencies in the United States have begun grappling with how this idea might be incorporated into policies. Most notably, in 2016, the Occupational Safety and Health Administration (OSHA), a federal workplace safety agency, published a white paper expressly calling for more expansive approaches to workplace safety enforcement that incorporates sustainability principles¹¹.

3. *Legal Controls Over Coerced Labor*

To further develop the idea of labor sustainability, this Part examines how existing legal protections are designed and implemented to deter coerced labor. Because consumer-interests are central to any sustainability model, this Part focuses on coerced labor in the U.S. food system, which, as noted earlier, creates repeated opportunities for consumers to support (and therefore reward) or avoid (and therefore punish) food producers based on their labor and supply chain purchasing practices. It is important to emphasize that for

¹⁰ POLLANS, *cit.*, p. 672; BROWN, GETZ, *Towards domestic fair trade? Farm labor, food localism, and the ‘family scale’ farm*, in *Geojournal*, 2008, 11.

¹¹ See OSHA, *Sustainability in the Workplace: A New Approach for Advancing Worker Safety and Health*, Dec. 2016.

American consumers, choices made within most food systems implicate not just local or national economies but also ones that are global in reach¹². Often, the foods and food materials on a consumer's plate can be traced to other countries throughout the world. Moreover, the set of laws regulating this food system are diverse in character, design, and origin. The economic and legal foundation of the modern food system thus reveals a sprawling and disjointed cluster of entities and relationships, making it unclear whether or how a concept of labor sustainability might operate as an organizing principle for governance. To help focus this discussion, I provide three sets of laws that attempt to deter or disrupt the production of food and food materials through coerced labor. These examples illustrate the scale of the modern food system and highlight the complex set of reasons behind the law's content and purpose.

3.1. Federal Law (*Tariff Act of 1930*)

Firms and businesses rely on global supply chains to provide goods and services to American consumers. At the same time, these firms reap significant profits by utilizing parts, raw materials, and goods that are made in cheaper labor markets overseas. Many of these markets also rely on coerced labor. The widespread use of coerced labor is closely associated with a number of conditions that make conventional forms of regulation and enforcement practically impossible. Some work, such as mining or deep sea fishing, are inherently dangerous making it hard for regulators to pinpoint who or what was the cause of injury or death. Relatedly, some types of work happen in private settings such as domestic work, which frustrates the ability of officials to identify coerced labor. And the practice of utilizing workers with tenuous legal status, like unauthorized migrants, only compounds these challenges¹³.

Against this backdrop, the first case study focuses on a cluster of federal laws that attempt to limit the importation of goods generated by exploitable labor such as child labor or slave labor. Central to this story is the Tariff Act of 1930. After the civil war, slavery was outlawed in the United States with the ratification of the Thirteenth amendment in 1865. In 1890, Congress passed a law prohibiting the importation of goods made by convict labor¹⁴.

¹² See POLLANS, WATSON, *FDA as Food System Steward*, in *HELR*, 2022, Vol. 46, p. 1.

¹³ See FEASLEY, *Eliminating Corporate Exploitation: Examining Accountability Regimes as Means to Eradicate Forced Labor from Supply Chains*, in *JHT*, 2016, p. 15.

¹⁴ See Section 51 of the McKinley Tariff Act of 1890, 26 Stat. 567. This prohibition was

Recognizing that firms outside of the United States were not bound by U.S. law and thus could continue relying on slave labor, Congress passed the Tariff Act which prohibited the importation of goods and materials produced or manufactured not just through convict labor but also through forced or coerced labor. Although some legislators noted the humanitarian and ethical concerns with permitting importation markets to prop up or be complicit in exploitative labor markets, the overriding concern was expressed in terms of protecting American business interests. The primary purpose of the Tariff Act was to neutralize the unfair “competitive advantage” that firms in other nations enjoyed over American firms¹⁵.

Importantly, the Tariff Act created an exception to this importation ban: federal officials would not enforce the act where domestic supply could not meet consumer demand for a particular product. For decades, global firms like the Nestle Chocolate company continued to import cacao beans into the United States from West Africa despite overwhelming evidence of the use of child labor to harvest the beans. This “consumptive demand” exception provided firms with a huge loophole in the Tariff Act ban, which remained in place until 2015 when Congress finally removed the exception.

The President and other officials within the Executive branch implement the Tariff Act and other trade controls. Agencies like the U.S. Customs and Border Protection (CBP) implement Section 307 of the Tariff Act, which prohibits the importation of “goods ... produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor[.]”¹⁶. Today, policy concerning the importation of goods made through forced labor is tied up with anti-trafficking policies which aim to stop the movement of people across borders into the United States for the purposes of exploitation¹⁷. Indeed, the CBP which oversees the implementation of the Tariff Act is the same agency that oversees the admission

eventually incorporated into the Tariff Act of 1930. See 19 U.S.C. § 1307 (prohibiting the importation of goods produced by certain categories of labor including “convict labor”). See generally CONGRESSIONAL RESEARCH SERVICE, *Section 307 and Imports Produced by Forced Labor*, updated July 26, 2022.

¹⁵ See CONGRESSIONAL RESEARCH SERVICE, *cit.*

¹⁶ See 19 U.S.C. § 1307. The statute defines “forced labor” means “all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily”. This includes “forced or indentured child labor”.

¹⁷ Cite The Victims of Trafficking and Violence Prevention Act of 2000.

of migrants at ports-of-entry and houses the Border Patrol, which enforces immigration laws at all U.S. borders.

In the trade and importation context, the CBP plays a central role in regulating goods by seizing and inspecting goods¹⁸, but it isn't the only agency with a mission orientation and mandate that focuses on these issues. Federal law empowers a range of agencies to regulate labor exploitation including the Department of Labor (DOL), which issues annual findings on the "worst forms of child labor"¹⁹. Moreover, governmental agencies routinely partner with private parties or contractors to carry out discrete tasks. Through the exercise of their executive authority, different presidents have enlisted the resources of agencies to fight the use of coerced labor. President Obama prohibited federal agencies from entering into contracts with parties that use coerced labor²⁰. In an earlier era, President Clinton required the DOL to publish a list of products including country of origin for which there was a reasonable basis to believe that the goods were produced through coerced or child labor²¹.

The Tariff Act and other trade controls reflect the globalized nature of food systems. Today, the "slave labor" ban has become a key part of discussions surrounding U.S.-China relations. With mounting evidence that firms in China target ethnic minorities such as Uyghurs and other Turkic Muslims as forced labor, many stakeholders in the United States have pushed officials to train their attention on restricting goods imported from China²². In 2021, Congress passed a law that tweaks the enforcement aspects of the Tariff Act

¹⁸ The CBP uses "withhold release orders" to manage this flow. See 19 C.F.R. § 12.42(a). Where the CBP has reason to believe that inspected goods violate the importation ban, they "withhold release" of the goods with the importer bearing the burden of providing "satisfactory evidence" that the goods were not produced in violation of the Tariff Act. See 19 C.F.R. § 12.42(g).

¹⁹ The DOL's Bureau of International Labor Affairs has issued findings each year as required under the Trade and Development Act of 2000. The Secretary of Homeland Security and the Secretary of State also play key roles in enforcing different provisions of Section 307 of the Tariff Act.

²⁰ See Strengthening Protections Against Trafficking in Persons in Federal Contracts, Exec. Order No. 13,627, 77 Fed. Reg. 60029 (Sep. 25, 2012).

²¹ See Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, Exec. Order No. 13126, 64 Fed. Reg. 32383 (June 12, 1999).

²² See LEHR, *Addressing Forced Labor in the Xinjiang Uyghur Autonomous Region Toward a Shared Agenda*, Center for Strategic and International Studies, 2020.

by creating a presumption that all goods imported from the Xinjiang region were created through forced labor²³.

The United States has also entered into multi-national agreements to disrupt coerced labor markets through coordinated enforcement efforts with other countries. For example, the Uyghur Forced Labor Prevention Act (UFLPA) states that a policy objective is to coordinate with Mexico and Canada to prohibit the importation of goods produced through forced labor²⁴. Most notably, the United States–Mexico–Canada Agreement also commits parties to prohibit imports produced by forced labor and to cooperate over identifying such goods. This agreement along with the Tariff Act and other examples above reflect the core aim of these laws: to shut down the free flow of goods into the United States and other countries in the region to disrupt the use of coerced labor at the course of production or manufacturing.

3.2. State Laws (California Transparency in Supply Chains Act)

The global nature of coerced labor highlights the limits of public or government enforcement measures in addressing the problem. A second case study focuses on a law that recognizes the limited ability of officials in the U.S. to directly enforce laws against bad actors outside of the United States. For these reasons, lawmakers have attempted to foist some of the burden of deterring the importation of “coerced labor goods” on firms and other mar-

²³ See Uyghur Forced Labor Prevention Act, P.L. 117-78 (Dec. 23, 2021). See also 22 U.S.C. § 7107(b)(3)(B)(iii) (instructing the Secretary of State to consider a pattern of forced labor as “proof of failure to make significant efforts” on the part of a country). See also U.S. Customs and Border Protection Operation Guidance for Importers (June 13, 2022) (describing how customs officials will enforce the rebuttable presumption that goods imported from the Xinjiang region were produced by forced labor). The calls for greater enforcement of the Tariff Act have been offset by disruptions to supply chain issues caused by the pandemic. Lawmakers and officials seem reluctant to press too hard with scrutinizing forced labor goods given a domestic U.S. economy that is still sputtering back to life.

²⁴ Section 741 of the United States–Mexico–Canada Agreement Implementation Act established the Forced Labor Enforcement Task Force. See P.L. 116-113, 134 Stat. 11 (Jan. 29, 2020) (codified at 19 U.S.C. § 4681). Section 1 of the Uyghur Forced Labor Prevention Act, P.L. 117-78 (Dec. 23, 2021), states that one of the purposes of the act was “to coordinate with Mexico and Canada ... to prohibit the importation of goods produced in whole or in part by forced or compulsory labor, including those goods mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region[.]” See P.L. 117-78, 135 Stat. 1525 (Dec. 23, 2021).

ket actors. Such a model of enforcement both expands the reach of public actors by enlisting the help of private actors as well as utilizes market pressures to nudge firms into making more ethical choices about their sources in a global supply chain. The most significant mandatory disclosure law of this kind has come at the state level, specifically in California. The California Transparency in Supply Chains Act (Supply Chains Act) is an attempt to affect the behavior of these bad actors through indirect means, ones that rely on structuring or limiting the cross-border choices made by large buyers and distributors in the United States²⁵.

The Supply Chains Act was signed into law in 2010. Under this law, large firms that wish to conduct business in California must disclose efforts it has made to identify and prevent the purchase of good or services from distributors who rely on exploitative labor practices up the supply chain. Large firms doing significant business in California must the actions they have taken to verify that products in their supply chains present risks of “slavery and human trafficking”²⁶. The disclosure requirements focus on the firms doing business in California rather than on the other actors in the supply chain²⁷. Firms must disclose these efforts on their website²⁸.

²⁵ KOEKKOEK ET AL., *Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains*, in *GPol*, 2017, 8, pp. 522 and 523.

²⁶ See Senate Bill No. 657

²⁷ The Supply Chains Act requires firms to “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”.

See Senate Bill No. 657 (codified at California Civil Code § 1714.43(c)(1)-(5)).

²⁸ See California Civil Code § 1714.43(b).

The Supply Chains Act attempts to leverage California's economic power to bend the market choices of large and influential economic actors towards an ethical baseline set by the state. This law does not prevent consumers from purchasing goods that are associated with exploited labor but instead makes relevant information available so that consumers can decide for themselves how best to incorporate moral imperatives into their economic choices.

Scholars and commentators have criticized the Supply Chains Act as an ineffective or potentially harmful intervention into the effort at eradicating coerced labor in global supply chains. The law severely limits the ability of interested parties like consumers from enforcing violations against firms. The law expressly reserves enforcement powers for the state Attorney General. Some have critiqued the Supply Chains Act for this toothless enforcement design. California has some of the most expansive consumer protection laws in the country. Thus, denying consumers the opportunity to act as private attorneys general stands at odd with the general tenor of California consumer protection statutes²⁹. In the early years after the passage of the Supply Chains Act, some consumer advocates attempted to use a firm's minimal or vague disclosure under the Supply Chains Act to establish violations under one of several California consumer laws but courts have routinely resisted interpreting the Supply Chains Act in this manner³⁰.

Others have raised the question of whether the Act might even hurt long-term efforts to eradicate slave labor. Specifically, commentators have noted that the vague and malleable disclosure requirements allow companies to engage in "strategic legitimization," which allows firms to selectively disclose information they want to disclose thereby assuaging investor and consumer concerns without actually providing a meaningful guarantee that it had made a good faith effort to extricate themselves from morally compromised supply chains³¹.

²⁹ See FEASLEY, *cit.*, p. 20.

³⁰ California's consumer protection laws include the Unfair Competition Law (UCL), the False Advertising Law (FAL), and the California Legal Remedies Act (CLRA), all of which in theory could support a claim based on a company's disclosure requirements. Courts have held that a firm's failure to comply fully with the Supply Chains Act, without more, cannot support a claim under one of the other state statutes. See *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075 (N.D. Cal. 2017); *Hodson v. Mars, Inc.*, 891 F.3d 857 (9th Cir. 2018).

³¹ See BIRKEY, *Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010*, in *JBE*, 2015, 152, p. 827.

3.3. Fair Food Program - Coalition of Immokalee Workers

A third example is the Fair Food Program (FFP), a worker monitoring program created by the Coalition of Immokalee Workers (CIW). Unlike the Tariff Act and the Supply Chains Act, the Fair Food Program was created and continues to be enforced by private, non-state actors. No agency or other public entity is charged with enforcing the terms of the program. Instead, large-scale food buyers like national grocery stores and restaurant groups agree to buy produce specifically tomatoes only from farms that are certified through the FFP, a program that monitors farms for labor abuse.

Of the three case studies covered in this paper, this is the only one that was expressly designed to respond to coerced labor in the agricultural context, a market that has long been synonymous with human misery in the United States. Not only was the slave trade central to growing and producing cotton, one of America's largest agricultural exports in the 19th century³², even after slavery was formally eradicated with the ratification of the 13th Amendment, many scholars have well-documented that coerced and exploited labor in American agriculture continued well into the 20th century as beyond. Most relevant to this article is the latter-half of the 20th century, when farmers and other agricultural employers especially in the western and Southwestern part of the United States began relying heavily on migrant labor especially from Mexico and Central America. Bracero workers, H-2A temporary visa holders, and unauthorized workers have all figured into this history. For CIW's part, it focuses on farmworkers in the tomato industry³³.

As a political and economic actor, the CIW is not a union or labor organization, concepts that are regulated and constrained by federal laws such as the National Labor Relations Act (NLRA). Although unions do enjoy certain advantages under the law, over the decades, the Supreme Court has interpreted the NLRA in ways that undermine the power that unions have to organize workers. Instead, the CIW has opted to remain a human rights organization, which frees it up to engage in behavior which federal law prohibits for unions, namely secondary boycotts which are political and economic actions that target buyers instead of employers.

³² See BECKERT, *Empire of Cotton: A Global History*, Knopf, 2014.

³³ See ASBED, HITOV, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, in *WFLR*, 2017, 52, pp. 497 and 502.

One of CIW's key strategies is to pressure large-scale tomato buyers to participate in the Fair Food Program, which certifies that tomatoes were picked on farms free of exploitation, coercion, and other unlawful labor practices. Employing the motto "Consumer Powered, Worker Certified," the Fair Food Program targets food distributors (or buyers within the supply chain) such as grocery stores to agree to purchasing agricultural products only from growers that are certified by the program as worker friendly.

For this strategy to be effective, CIW focuses on large food buyers with recognizable brands, which might be damaged if the public learned that these buyers contributed to or were complicit in the exploitation of workers. Advocates have successfully used such a strategy in the related context of the fashion and the garment industry, which also relies on global supply chains. Once the public learned that Nike relied on factories in Southeast Asia with inhumane working conditions including child labor, for example, the company quickly took steps to more closely monitor the where and under what conditions their shoes were manufactured³⁴. The CIW takes a similar approach targeting food or tomato buyers who have recognizable brands that would be damaged in the marketplace with negative publicity. This includes Walmart, Whole Foods, McDonald's, Burger King, and Aramark³⁵. By agreeing to participate in the FFP, these food buyers agree to buy their tomatoes only from farms that also agree to be monitored through the program. This both ensures that the tomatoes that companies like Walmart and Whole Foods are free from exploitation thus preserving their market reputation and puts pressure on other firms to also join the FFP or miss losing out on selling their tomatoes to the food buyers that dominate the market.

Notably, state actors play virtually no role in this scheme. Statutes passed, and agencies created, by federal and state legislatures play only a secondary role in this governance strategy. Instead, growers and buyers effectively enter into a contract, which is an extension of the common law and subject to monitoring by courts. Growers participating in this program agree to submit their workplaces to monitoring by third-parties in exchange for the "fair food" certification. Even first-time violations of workplace protections can lead to decertification and expulsion from the Fair Food Program. This cer-

³⁴ See WEIL, MALLO, *Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance*, in *BJIR*, 2007, 45, pp. 791 and 794.

³⁵ See <https://ciw-online.org/campaign-for-fair-food/#agreements>.

tification is valuable because it allows growers to food buyers at a price that more fairly reflects the work performed in picking tomatoes, which in turn allows these buyers to sell these goods to the public with a premium markup. At the same time, the FFP differs from other governance measures that fall within the broad umbrella term “corporate social responsibility” (CSR). Many CSR programs use internal measures to hold firms accountable, but for obvious reasons such programs can suffer from problems of selective monitoring and disclosure. The FFP stands apart from these CSR programs in that farms agree to subject themselves to monitoring by a third-party, not a public entity but instead a private set of actors whose investigations and findings can lead to the termination of a farm’s relationship with the FFP and with it, access to the most profitable food buyers with a national reach.

4. *Implications*

These three examples – the Tariff Act, the Supply Chains Act, and the Fair Food Program – provide a useful descriptive picture to begin developing a generalizable framework for “labor sustainability”. None of these laws are expressly labeled as “sustainability” measures but all of these legal systems revolve around the consumer-worker relationship in one way or another and therefore provide the basic infrastructure for a labor sustainability governance strategy. These examples give rise to several observations.

4.1. *Constitutional Parameters*

These case studies suggest that developing governance strategies grounded in principles of labor sustainability will likely not emerge from a single set of laws. The global presence of markets defined by coerced labor makes a unified or centralized response challenging. The Tariff Act and the broader set of trade policies demonstrate that it is possible for the federal government to achieve some degree of coordinated policymaking. Existing trade laws implicate a cross-section of federal agencies with distinct missions such as the Department of Labor, Department of Homeland Security, and the Secretary of State, which can promote the consistent enforcement of this principle across many contexts – i.e., labor and trade, domestic and foreign markets, and banal and high security transactions. Moreover, the focus on

coerced labor also implicates broader efforts to fight human trafficking, a policy arena that enjoys a degree of support at least compared to those aimed singularly at coerced labor. For this reason, agency resources and attention can be diverted into the trade context.

At the same time, the complicated and sprawling nature of trade policy makes it hard to imagine using existing legal structures to maintain a continuous set of interventions that disrupts coerced labor abroad. At the very least, trade policy implicates parallel topics of migration and labor protections for domestic workers³⁶. Trade policy implicates the interests of multiple stakeholders: native-born workers, migrant workers, domestic firms, and American consumers³⁷, which means that a change in party affiliation in the White House or of the majority party in Congress can make it hard to maintain a sustained, and long-lasting set of interventions. For example, once President Biden assumed office in 2021, he sought to end or rescind various asylum procedures at the U.S.-Mexico border that originated under his predecessor, President Trump. This rescission invited a legal challenge in *Biden v. Texas*. In ruling that the decision to rescind such a policy belonged to the President, the Supreme Court noted that tying the President's hands on immigration policy at the border was complicating on-going discussions with Mexican officials over a range of other policies³⁸. This example illustrates the broad level of deference that courts give to the President and the Executive branch more generally on matters implicating relationships with other nations and over foreign affairs generally.

One way to mitigate the problem of oscillation is to incorporate labor sustainability principles into American law as a broadly applicable principle that applies to all agencies charged with the administration of federal law. Perhaps most relevantly, the National Environmental Policy Act (NEPA) requires agencies to consider the environmental impacts of their actions and decisions, which requires all agencies to include a statement of "the environmental impact" of any federal actions "significantly affecting the quality

³⁶ See MOTOMURA, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, in *CorLR*, 2020, 105, p. 457. See also CLAUSING, *Open: The Progressive Case for Free Trade, Immigration, and Global Capital*, Harvard University Press, 2019.

³⁷ Obviously, these identity categories can overlap. For example, native-born workers and migrant workers are both consumers.

³⁸ See *Biden v. Texas*, No. 21-954 (decided June 30, 2022).

of the human environment”³⁹. This model could easily serve as the basis for incorporating language from the Tariff Act that similarly instructs agencies to consider the impact of their proposed actions on the production or manufacturing of goods by convict labor, forced labor, and indentured labor.

Obviously, many policies would have no meaningful connection to the importation of tainted goods, but the goal of a labor sustainability principle would be to develop an ethos within governance strategies, one in which eradicating forced labor from markets was a baseline principle. This is one of the contributions of NEPA – it required agency officials to at least account for the environmental impact of their actions even when they are carrying out their duties under the leadership of a President or appointed officials who embraces values antagonistic to the environmental protection. An even clearer example of this “norm setting” is in the rise of neoliberalism and the embrace of efficiency as a core principle for governance. Since the 1980s, agencies have been required to engage in cost-benefit analysis of any major policy promulgated through the notice and comment process. Similar sorts of requirements bind agencies in setting policy involving the collection of information from the public⁴⁰. The purpose of these laws has been to advance a broader shift in governance focused on shrinking the administrative state, lowering costs to taxpayers, and advancing a deregulatory agenda. This approach to governance models point to what might be possible if lawmakers and the President committed to implementing a labor sustainability approach to the administration of laws. In this scenario, every agency – not just those regulating trade – would have to make some effort to identify whether policies implicated forced labor in either the domestic or foreign context.

The Tariff Act model for pursuing labor sustainability goals is the most directive and punitive of the three case studies presented. This federal law enables officials to seize and withhold goods that are imported into the United States, a significant exercise of governmental power that deprives the property interests of importers and directly cuts into their earnings and profits. And with the added layer of anti-trafficking laws, affected parties face the possibility of not just a loss of goods or diminishment of profits but also criminal penalties like prison and public stigma. By comparison, the Supply Chains Act in California embraces a soft, market-based approach that does not outright ban the importation of goods made through forced labor but

³⁹ See 42 U.S.C. § 4332(C).

⁴⁰ See Paperwork Reduction Act of 1995 (codified at 44 U.S.C. 3501(11)).

instead creates disclosure requirements that would empower consumers to vote with their dollars in the marketplace.

The soft nature of the Supply Chains Act is consistent with doctrine that courts use to assess the constitutionality of these sorts of laws. As described earlier, *Biden v. Texas* allowed the Supreme Court to reaffirm the historical deference that courts have given to decisions made by the Executive branch – especially by the President as opposed to subordinate officials – in areas concerning foreign affairs, which is a common separation-of-powers justification. But this deference also has implications for the ability of state and other subfederal entities to regulate in domains traditionally left to the President’s discretion. If California amended its laws to not only foist a disclosure obligation on firms but also outright banned the importation of goods made through forced labor, such a law might be found unconstitutional or preempted under existing preemption doctrine to the extent it conflicted with the Tariff Act⁴¹.

4.2. *Harnessing Market-Based Solutions*

The concept of labor sustainability reflects a pragmatic compromise that attempts to reconcile competing interests that can stand in tension with one another. As a result, the concept is malleable and can fit within different frameworks. First, although workers face economic insecurity and exploitation across numerous sectors, the food industry provides an useful starting point for developing notions of labor sustainability. As noted earlier, food is a product that everyone must purchase thereby forcing consumers to regularly grapple with the social consequences of their food choices. Moreover, food production and distribution have obvious environmental consequences, therefore providing an ideal setting for outlining the conditions in which sustainable food practices can advance both environmental and labor goals.

Second, these examples illustrate the range of possibilities for structuring the implementation of sustainability principles. Some of these examples, like the Supply Chains Act, employ soft regulatory tools such as information-gathering and disclosure requirements, which are commonly used in the environmental context. At the same time, examples like the Fair Food Program

⁴¹ See *Arizona v. United States*, 567 U.S. 387 (2012).

illustrate how information-gathering and disclosure requirement combined with robust monitoring programs can lead to successful results. Moreover, because of the globalized nature of the food market – at least, the agricultural goods market – sustainability schemes created and implemented within the United States can have a global reach as reflected in the Tariff Act example.

The programs discussed above illustrate how different design choices can empower workers and food producers to varying degrees. The Supply Chains Act provides workers with very little power to leverage consumer outrage in setting working conditions. Firms seeking to do business in California need only disclose efforts they have made to identify whether they have utilized goods produced by exploited labor. Such a soft disclosure requirement leaves non-U.S. workers vulnerable. By contrast, the CIW's Fair Food Program empowers workers to play a major role in shaping the kinds of conditions necessary for certification. The Supply Chains Act provides broad coverage with very little impact while the Fair Food Program focuses on narrow economic channels like buying relationships between grocery stores and farms that are subject to significant regulation and monitoring.

At the same time, the labor sustainability framework faces some limitations especially in a moment of widespread economic insecurity. The malleability of the sustainability concept can minimize or erase distinctions that can sometimes matter. Many consumers cannot afford to pay for the premium of purchasing exploitation-free goods. This kind of market can work when focusing on luxury or non-essential goods but faces more challenges when dealing with everyday food items and products.

Even with these shortcomings, the labor sustainability framework is helpful in focusing modern debates about the U.S. economy in a moment when economic insecurity is widespread. The Tariff Act of 1930, which was passed at a moment in American history when the public was vigorously debating interrelated questions related to political, social, and economic life. Front and center in this debate was how to curb the power of large firms within a market that was recovering from the Great Depression which generated widespread economic insecurity. Although the Tariff Act is a law governing international trade, it must be understood within this broader context.

A few years before the Tariff Act, Congress passed the Immigration Act of 1924, which effectively barred migration from Asian countries – an important source of unskilled and cheap labor for firms. Turning off this migration flow empowered white native-born workers who were central to

the effort of passing key legislation a few years after the Tariff Act. In 1935, Congress passed the National Labor Relations Act (NLRA), which created the right of workers to organize and elect a bargaining agent and in 1938, Congress passed the Fair Labor Standards Act (FLSA), creating a minimum wage requirement. Importantly, these protections excluded large classes of workers in industries filled with descendants of former slaves thereby fostering a clear sense that access to “good work” would be limited to white native-born Americans. All of these laws helped create a legal and political culture in which the public began to understand work and workplace protections as key vehicles for achieving economic security. This broader context shows how using workplace protections to stabilize the economy figured into broader questions about race and identity and other social issues.

Today, American society is confronting similar challenges related to immigration as well as to the relationship between firm power and economic inequality. On the topic of immigration, the presence of a large unauthorized immigrant workforce is closely associated with the presence of coerced labor. Thus modern debates about immigration policy could sensibly account for coerced labor as another concern that ought to be factored into lawmaking. Modern immigration policy has focused on coerced labor in terms of fighting trafficking schemes. This activates various enforcement policies, inviting a kind of hammer to be brought down on bad actors who profit off of the transportation and abuse of vulnerable populations. But another way to address coerced labor would be to create opportunities for migrants to regularize their status. Many forms of coerced labor do not appear violent or immediately dangerous, which can frustrate prosecution efforts in the anti-trafficking context. Thus, for less obvious forms of coerced labor, regularization laws could remove the legal condition responsible for the inequality and powerlessness of the migrant, namely the lack of status.

In addition to balancing enforcement policies with regularization opportunities, immigration debates have also wrestled with the degree to which laws should be enforced domestically in the United States or in concert with other countries. For example, Mexico assists the United States in deterring unauthorized migration from Central American countries by enforcing migration laws in Mexico thereby stymieing the flow into the United States. But again, this intensification of enforcement policies can contribute to worsening rather than alleviating the conditions for coerced labor. At the same time, these sorts of bi-lateral or multi-lateral agreements are also proper

settings for coordinating policies against coerced labor. As discussed earlier, the U.S.–Mexico–Canada agreement binds each country to a prohibition on the importation of goods made through coerced labor. At some point, the countries could build on this model to include mobility between the countries, a kind of regionalism loosely based on the European Union model⁴². Such a model would not address the problems of coerced labor only in the bound region. And it would not eliminate so much as simply move flash-points for potential disagreement. Instead of enforcement policies targeting the U.S.–Mexico border, those policies would likely shift to the U.S.–Guatemala border, for example.

As for firm power and economic inequality, in the 1930s, the public began coalescing around the labor movement and a worker identity as the basis for advancing an agenda of economic equality. The existential threats posed by climate change and environmental disaster invite a broader response and setting for reconfiguring identity-based politics. To meet the inequality defining this part of the twenty-first century, advocates will have to embrace hybrid identities, ones that embrace that people are both consumers and workers who live and transact within the United States and beyond.

5. *Conclusion*

This paper attempts to define and explore how a labor sustainability framework might inform the effort to eradicate coerced labor in global supply chains. This effort would borrow from and build on the different movements that contest the meaning of sustainability in the environmental context. In both instances, the malleability or plasticity of the term helps to erase distinctions, which facilitates the process of generating broadscale support. At the same time, these distinctions can matter in defining the limits of this framework. Using labor sustainability principles to analyze the modern problem of coerced labor also provides the opportunity to link that discussion with broader debates about economic insecurity that affects consumers, workers, and firms alike.

⁴² See MOTOMURA, *cit.*, p. 457.

Abstract

The concept of sustainability has been an effective organizing principle in the environmental context, illuminating how firm policies and practices can both protect the environment and grow the economy, thereby creating a kind of “win-win” path forward. This type of governance strategy expressly adopts market-based rationales – that is, it gives significant weight to consumer preferences in setting moral limitations on environmental degradation. Put differently, sustainability models assume that consumers will be willing to pay for goods and services that promote – or at least do not worsen – environmental integrity. Recently, labor advocates and officials in the United States have begun wrestling with whether and how sustainability principles might advance the interests of workers. My primary aim in the paper is to explore how this model of governance might operate in the labor context. A key question will be whether advocates and officials can find areas of agreement between consumers and workers. As a starting point, this paper provides three case studies of different governance schemes that attempt to create synergies between consumers and workers.

Keywords

Labor, Supply chains, Immigration, Agriculture, Trade.

