
A DEVELOPMENT APPROACH TO TRADE AND LABOR REGIMES

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INTRODUCTION

While the World Trade Organization (“WTO”) has effectively rejected the “linkage” of labor and trade at the multilateral level,¹ labor provisions have become a standard component of U.S. bilateral and regional free trade agreements (“FTAs”). How these provisions ought to be designed, however, continues to be a subject of intense debate. In an agreement between congressional leaders and the Bush administration in 2007, a policy compromise was reached that pleased many advocates of strong labor provisions in FTAs.² The agreement provided for several “legalistic” elements that required that signatory countries incorporate and enforce International Labor Organization (“ILO”) core labor standards, and that violations of that requirement be subject to the same dispute settlement procedures and remedies as the commercial provisions of the agreement.³

But while considered to be an important victory by many advocates of trade and labor linkage, I believe that the emphasis on a legalistic approach to trade and labor regimes is limited in its ability to achieve the goals of linkage. Rather than focus on

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1. For an extended treatment of this proposition and for the argument that the WTO is a suboptimal location for linkage, see Kevin Kolben, *The WTO Distraction*, 22 STAN. L. & POL’Y REV. (forthcoming 2010).

2. Steven R. Weisman, *Bush in Accord with Democrats on Trade Deals*, N.Y. TIMES, May 11, 2007, at A1; see *A New Trade Policy for America*, WAYS & MEANS E-NEWSLETTER (House Comm. on Ways & Means, Washington, D.C.), May 11, 2007, at 1, <http://waysandmeans.house.gov/media/enewsletter/5-11-07/07%2005%2010%20New%20Trade%20Policy%20Outline.pdf>.

3. See *infra* Part I.B.

sanctions and punishment approaches to trade and labor regimes that seek to punish state behavior of states with limited regulatory capacity, this Article argues that trade and labor regimes ought to be primarily oriented toward furthering labor law *development* objectives. To that end, I argue that trade and labor regimes should be oriented toward catalyzing and reinforcing the development functions of labor regulation, and toward creating institutions that further labor-development objectives. These objectives include expanding worker capabilities and promoting democracy and citizenship both in the workplace and in the nation-state. My goals in this Article, however, are broader than promoting a particular approach to trade and labor regimes. I also seek to place the subject of labor regulation, both domestic and transnational, more squarely into the development discourse, and conversely place development into the labor regulation discourse.

In Part I of this Article, I describe several justifications for the inclusion of labor provisions in trade agreements and suggest that a particularly strong justification for an approach to trade and labor linkage should be grounded in “development.” To understand what a development approach to trade and labor linkage, and more generally to labor regulation, might entail, I turn in Part II to a discussion of contemporary development theory. I focus on the work of three prominent development scholars who have argued for richer conceptions of development, and I examine how labor is treated in their work. In Part III I draw upon this scholarship to help construct a development approach to labor law regulation, arguing that labor and labor regulation ought to play a central role in development discourse. While my main focus in this Article is not institutionally prescriptive, in Part IV I bring the discussion back to trade and briefly discuss what I term an “Integrative Linkage” approach to trade and labor regimes, which attempts to harness new forms of transnational and domestic labor governance to achieve development objectives.

I. TRADE AND LABOR IN U.S. POLICY

A. *Justifications for Trade and Labor*

To begin the argument that U.S. trade and labor regimes ought to be embedded in a development framework, we should first examine *why* we think it is legitimate and desirable to create such regimes through the incorporation of labor provisions into FTAs. Some arguments are economic. One such argument is that labor provisions are necessary to prevent a destructive “race to the bottom”⁴ toward lower labor standards.⁵ Others put forth another

4. See, e.g., Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT'L ECON. L. 43, 49 (2000).

5. The empirical and theoretical validity of this argument, however, is

version of this argument, suggesting that labor provisions in trade agreements might solve coordination problems for countries seeking to raise labor standards that feel constrained from doing so because of collective-action problems.⁶

There are also strong political arguments for linking trade and labor. That is, citizens might be willing to liberalize their economies only if certain conditions are met that conform to their values and preferences—such as the preference that products imported into their country are manufactured in conditions that comport with basic labor rights. If these preferences are not taken into account in the design of the trade regime, then citizens might withdraw their support for trade liberalization altogether.⁷ Other political arguments are grounded in claims about consumer autonomy and consumer citizenship. The proponents of these arguments claim that a trade regime should both respect the autonomy of consumers to make decisions about their consumption and facilitate consumer citizenship, which furthers the ability of citizens to shape global policy through their consumer choices.⁸ Others find a basis for trade and labor linkage in human-rights arguments, arguing from both a legal and moral perspective that a nonprotectionist trade policy that permits discrimination between products based on human-rights considerations, such as labor rights, is legally sound, normatively desirable, and consistent with the underlying principles of free trade.⁹

While these are to greater and lesser extents compelling arguments for trade and labor linkage, I believe that “development” provides a particularly strong justification and framework for trade

contested. For evidence against the race-to-the-bottom hypothesis, see the sources cited in Alan Hyde, *A Stag Hunt Account and Defense of Transnational Labour Standards—A Preliminary Look at the Problem* 11 n.28 (Cornell Law Sch. Legal Studies Research Paper Series, Research Paper No. 06-008, 2005), available at <http://ssrn.com/abstract=896362> (listing a large range of scholarship finding no connection between low labor standards and high trade or foreign direct investment, and calling into question the existence of a general race to the bottom). For theoretical discussions, see David Charny, *Regulatory Competition and the Global Coordination of Labor Standards*, 3 J. INT'L ECON. L. 281 (2000); Brian A. Langille, Essay, *Re-reading the Preamble to the 1919 ILO Constitution in Light of Recent Data on FDI and Worker Rights*, 42 COLUM. J. TRANSNAT'L L. 87 (2003).

6. See WERNER SENGENBERGER, *GLOBALIZATION AND SOCIAL PROGRESS: THE ROLE AND IMPACT OF INTERNATIONAL LABOUR STANDARDS* 9, 88 (2005), available at <http://www.gtz.de/de/dokumente/en-FES-Intern-labour-standards.pdf>; Hyde, *supra* note 5, at 7–16 (using the stag-hunt game to explain the collective-action challenge).

7. Kolben, *supra* note 1.

8. See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 527 (2004).

9. Michael J. Trebilcock & Robert House, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 271–73 (2005).

and labor regimes. First, it is widely acknowledged that a central objective of trade is to achieve sustainable economic development.¹⁰ While sustainability is most commonly used in the context of environmental issues, sustainability can arguably be pursued in a more expansive sense to incorporate other development goals, including labor development.¹¹ Indeed, as I will argue below, the concept of development has undergone a marked change in how it is conceptualized by scholars and policymakers. Second, a development framework for trade and labor linkage is compelling because it emphasizes that trade and labor regimes are not intended to be economically destructive (i.e., protectionist), but rather growth oriented, both in economic and in human-development terms. This approach aims to enhance rather than reduce welfare, particularly of workers in trading-partner countries. Third, a development framework for trade and labor places the institutional focus on the individual worker, asking how a particular trade and labor regime impacts workers on a number of developmental measures. Finally, a development framework provides more conceptual space to shift the emphasis away from legalistic provisions that focus on state behavior toward an emphasis on creating experimental institutions that combine and network together a range of state and nonstate actors to achieve developmental and regulatory goals in the workplace. That is, a development-based trade and labor regime will ask not whether a state is applying the law, but rather whether a labor regulatory regime is achieving developmental outcomes—a subject to which I will return later.

B. A Brief Background to the Current Trade and Labor Regime

Extant labor provisions in U.S. trade policy, however, are not primarily embedded in a development framework, although there are some developmental components in them. In this Subpart I will briefly survey the structure and current state of labor-rights provisions in U.S. FTAs. These provisions are composed primarily of “legalistic” elements that are designed to require adoption and

10. The trade-and-sustainable-development nexus is articulated at the multilateral level in the Marrakesh Agreement, establishing the World Trade Organization, as well as in the “Doha Declaration,” issued during the Doha Round of trade negotiations. Marrakesh Agreement Establishing the World Trade Organization pmb., Apr. 15, 1994, 33 I.L.M. 1144; World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). The Doha Round of negotiations is often referred to as the “development round.”

11. The relationship between sustainable development and labor is beginning to be explored. For example, in 2009 a conference was held by the British Academy entitled “The Role of Labour Standards in Sustainable Development: Theory in Practice.” British Academy, *The Role of Labour Standards in Sustainable Development: Theory in Practice*, <http://www.britac.ac.uk/events/2009/labour-standards/index.cfm> (last visited Apr. 28, 2010).

enforcement of International Labor Organization (“ILO”)–designated core labor rights and secondarily of cooperation and capacity-building provisions that have received less attention, even though in some cases they have committed large amounts of resources¹² (such as in the Dominican Republic–Central America Free Trade Agreement¹³ (“CAFTA-DR”)).

The inclusion of labor provisions in FTAs began with NAFTA in 1994¹⁴ and became standard in the U.S.-Jordan agreement in 2000.¹⁵ Inclusion was codified by the passage of the Bipartisan Trade Promotion Authority Act of 2002¹⁶ (“BTPAA”), which, among other things, directed the President in its Principal Negotiating Objectives (1) to “ensure that a party to a trade agreement . . . does not fail to effectively enforce its . . . labor laws, through a sustained or recurring course of action or inaction in a manner affecting trade”;¹⁷ (2) to recognize that parties have the right to exercise discretion with respect to labor law enforcement and regulation;¹⁸ and, in a provision often overlooked by analysts, (3) to “strengthen the capacity of United States trading partners to promote respect for core labor standards.”¹⁹

The BTPAA expired in 2007, but in May 2007, an agreement

12. This is one of two basic ways in which labor is treated in U.S. trade policy. The other way is through unilateral trade legislation such as the Africa Growth and Opportunity Act (“AGOA”), the Generalized System of Preferences (“GSP”), and the so-called 301 trade preferences, among others. The GSP model, which is the template for many U.S. unilateral trade and labor provisions, requires the President to take into account, when designating a country as a beneficiary, whether or not that country is “taking steps [to afford its workers] internationally recognized worker rights.” 19 U.S.C. § 2462(c)(7) (2006). If the President determines that a country is doing so, the United States may extend special tariff reductions above and beyond the standard Most Favored Nation tariff levels agreed to in the WTO.

“Internationally recognized worker rights” are defined to include “(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children, and a prohibition on the worst forms of child labor . . . ; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.” *Id.* § 2467(4). For a description of the history of the GSP regime and an evaluation of its success, see Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL’Y J. 199 (2001).

13. *See infra* note 31.

14. MARY JANE BOLLE, CONG. RESEARCH SERV., NAFTA LABOR SIDE AGREEMENT: LESSONS FOR THE WORKER RIGHTS AND FAST-TRACK DEBATE 1 (2001), available at <http://fpc.state.gov/documents/organization/6211.pdf>.

15. Agreement on the Establishment of a Free Trade Area, U.S.-Jordan, art. 6, Oct. 24, 2000, 41 I.L.M. 63 (2002); *see also* MARY JANE BOLLE, CONG. RESEARCH SERV., JORDAN-U.S. FREE TRADE AGREEMENT: LABOR ISSUES 13 (2001), available at <http://www.policyarchive.org/handle/10207/bitstreams/3488.pdf>.

16. 19 U.S.C. §§ 3801–3813 (2006).

17. *Id.* § 3802(b)(11)(A).

18. *Id.* § 3802(b)(11)(B).

19. *Id.* § 3802(b)(11)(C).

was reached between the Democratic leaders of Congress and the Bush administration entitled “A New Trade Policy for America.”²⁰ Reflecting a mixed set of justifications for linkage that reflect concerns for both externally oriented development and domestic economic protection, the agreement specifies, among others, these two overarching objectives: (1) to “[e]nsure that U.S. free trade agreements raise standards of living [and] create new markets for U.S. goods;” and (2) to “[s]tand up for American workers, farmers and businesses, especially in the hard-hit U.S. manufacturing sector.”²¹

This agreement succeeded in strengthening the legalistic aspects of the trade provisions, which pleased many pro-linkage advocates who believed that the labor provisions negotiated by the Bush administration were too weak. The agreement provided that four elements would be incorporated into four FTAs pending at the time and into future FTAs.²² These elements are (1) a fully enforceable commitment that parties to FTAs would adopt and maintain in their laws and practices the ILO *Declaration on Fundamental Principles and Rights at Work*, (2) a fully enforceable commitment against FTA countries lowering their labor standards, (3) “new limitations on ‘prosecutorial’ and ‘enforcement’ discretion” (i.e., countries would not be able to defend failure to enforce laws concerning the five basic core labor standards on the basis of “resource limitations or decisions to prioritize other enforcement issues”), and (4) the same dispute-settlement mechanisms and penalties would be applicable to the labor provision that were available for other FTA obligations (such as commercial interests).²³

In addition to these “legalistic” provisions, the BTPAA had also included several provisions that suggest more development-oriented objectives. These include an overall objective “to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO . . . and an understanding of the relationship

20. *A New Trade Policy for America*, *supra* note 2.

21. *Id.* The motivations of lawmakers in linking trade with labor provisions are in fact likely mixed. For some lawmakers, the goal is economic and arguably protectionist—to “level the playing field” between the United States and its developing trading partners whom they perceive to have an unfair competitive advantage because of weak labor law and weak labor law enforcement. See MARY JANE BOLLE, CONG. RESEARCH SERV., TRADE PROMOTION AUTHORITY (TPA) RENEWAL: CORE LABOR STANDARDS ISSUES 3–4 (2007), available at <http://www.nationalaglawcenter.org/assets/crs/RL33864.pdf>. For others, the goals might in fact be more “humanitarian”—to improve the working conditions of workers worldwide because it is intrinsically important. See *id.* at 3.

22. See *A New Trade Policy for America*, *supra* note 2.

23. *Id.*; see also MARY JANE BOLLE, CONG. RESEARCH SERV., OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS 4 (2008), available at <http://www.policyarchive.org/handle/10207/bitstreams/19093.pdf>.

between trade and worker rights”²⁴ and the aforementioned principal negotiating objective “to strengthen the capacity of United States trading partners to promote respect for core labor standards.”²⁵ In other words, the cooperation and capacity-building programs are intended to help partner countries develop their labor-regulatory and industrial-relations systems, which is a component of a development-based approach.

The institutional manifestation of the latter objective is reflected primarily in an ad hoc, nonbinding provision of the FTAs that explicitly provides for the creation of various cooperative and capacity-building programs designed to address a large number of issues. In the Peru agreement, for example, the institution is called a “Labor Cooperation and Capacity Building Mechanism,” which is found in an annex to the agreement.²⁶ Such mechanisms are also included in the Colombia²⁷ and CAFTA-DR²⁸ agreements, and there

24. 19 U.S.C. § 3802(a)(6) (2006).

25. *Id.* § 3802(b)(11)(C).

26. Trade Promotion Agreement, U.S.-Peru, Annex 17.6, Apr. 12, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>. This includes “cooperation and capacity building priorities” such as:

- a) cooperat[ing] on law and practice related to implementation and public awareness of the principles and rights contained in the ILO declaration . . . ;
- b) worst forms of child labor . . . ;
- c) labor administration . . . ;
- d) labor inspectorates . . . ;
- e) alternative dispute resolution . . . ;
- f) labor relations . . . ;
- g) occupational safety and health . . . ;
- h) working conditions . . . ;
- i) . . . mechanisms and best practices to protect . . . the rights and welfare of migrant workers . . . ;
- j) social assistance and training . . . ;
- k) technology and information exchange . . . ;
- l) development of labor statistics . . . ;
- m) employment opportunities . . . ;
- n) gender . . . ;
- o) . . . best labor practices, including corporate social responsibility, that enhance competitiveness and worker welfare; and
- p) issues related to small, medium, and micro-enterprises, and artisans: [related to rights and working conditions].

Id. Annex 17.6(2)(a)–(p) (follow “17. Labor” hyperlink).

27. Trade Promotion Agreement, U.S.-Colom., Annex 17.6, Nov. 22, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text> (follow “17. Labor” hyperlink).

28. Dominican Republic–Central America–United States Free Trade Agreement, art. 16.5, Aug. 5, 2004, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> (follow “16. Labor” hyperlink).

There is nothing that requires the parties to address the identified issues or appropriate any specific amount of funding to enact any specific set of development activities. In the CAFTA-DR example, congressional Democrats, led by Senator Jeff Bingaman of New Mexico, struck an agreement with the

are “cooperation clauses” in several others, such as FTAs with South Korea, Oman, and Morocco.²⁹

The International Labor Affairs Bureau of the Department of Labor (“ILAB”) is primarily responsible for implementing and executing the programs.³⁰ According to a recent report by ILAB, there are twenty-eight different development programs that are being supported.³¹ The broad programmatic areas of these development programs were developed through a white paper that was issued by the Vice Ministers responsible for trade in each of the CAFTA-DR countries. Most of these programs are not administered directly by the U.S. Government, but rather by a broad range of nongovernmental organizations (“NGOs”), unions, for-profit development organizations,³² and the ILO.³³

Thus, it is interesting to note that in the instance of CAFTA-DR, while most public attention has focused on the legalistic provisions of the trade agreement (i.e., norms and dispute settlement), in fact most of the activity on the ground has taken place in the form of various “capacity building” programs, that are what might be thought of as essentially development projects, broadly conceived. These programs ostensibly address issues that

executive branch to allocate money for trade capacity building, a portion of which would go to strengthening labor-rights enforcement. WASH. OFFICE ON LATIN AM., DR-CAFTA AND WORKERS’ RIGHTS: MOVING FROM PAPER TO PRACTICE 2 (2009). In the end, about \$72 million was appropriated to the U.S. Department of State and to the U.S. Agency for International Development (“USAID”) to implement labor capacity-building programs in several priority areas, including “(a) [l]abor law and implementation (freedom of association, trade unions and labor relations, inspections and compliance); (b) [b]udgetary and personnel needs of the Ministries of Labor; (c) [s]trengthening the judicial systems for labor law; (d) [p]rotections against discrimination in the workplace; (e) [w]orst forms of child labor; and (f) [p]romoting a culture of compliance.” BUREAU OF INT’L LABOR AFFAIRS, U.S. DEPT’ OF LABOR, PROGRESS IN IMPLEMENTING CAPACITY-BUILDING PROVISIONS UNDER THE LABOR CHAPTER OF THE DOMINICAN REPUBLIC–CENTRAL AMERICA–UNITED STATES FREE TRADE AGREEMENT 6 (2009).

29. Free Trade Agreement, U.S.-S. Korea, Annex 19-A, June 30, 2007, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (follow “19. Labor” hyperlink); Agreement on the Establishment of a Free Trade Area, U.S.-Oman, Annex 16-A, Jan. 19, 2006, <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text> (follow “Annex 16-A” hyperlink); Free Trade Agreement, U.S.-Morocco, art. 16.5, June 15, 2004, <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> (follow “16. Labor” hyperlink).

30. See WASH. OFFICE ON LATIN AM., *supra* note 28, at 5.

31. BUREAU OF INT’L LABOR AFFAIRS, *supra* note 28, Annex 2.

32. Most of these are U.S.-based organizations, but some are local. One program, for example, to promote the capacity of local labor ministries to enforce gender discrimination laws, is administered by the Foundation for Peace and Democracy, a Costa Rican development NGO. See *id.* at 10; WASH. OFFICE ON LATIN AM., *supra* note 28, at 5.

33. See BUREAU OF INT’L LABOR AFFAIRS, *supra* note 28, at 7.

were identified in a “white paper” that was issued by the ministries of labor as weaknesses in the CAFTA-DR countries.³⁴

My goal here is not to examine the effectiveness of these programs,³⁵ but rather to explore the more conceptual issue of the relationship between trade, labor regulation, and development. To design a trade and labor regime that can be oriented toward achieving development goals, there needs to be an examination of what constitutes labor development and the linkages and connections between labor regulation and development. It is to these questions that I now turn.

II. DEVELOPMENT THEORY

To argue that trade and labor provisions ought to be embedded in a development framework and ought to promote the creation of development-oriented regulatory regimes and institutions, we need to examine what constitutes a development framework of labor regulation. To begin to address this question, we must first look at development theory and at how labor has been conceptualized in those theories.

It is increasingly accepted that development means more than just income growth, industrialization, or increased Gross Domestic Product (“GDP”). While GDP growth may be a useful rough proxy for development, they argue, it does not cover the full range of transformation required or desired for human development.³⁶ Instead, more human-centered notions of development have taken root, both in the academic literature and in the work of development agencies. Scholars now articulate broader conceptions of development, describing it, for example, as a transformative process³⁷ that seeks to develop civil society and political

34. *See id.* at 7–14 (describing these programs).

35. At least one NGO in the CAFTA-DR countries has criticized the development programs, as well as the structure of the CAFTA-DR labor provisions more generally. *See* WASH. OFFICE ON LATIN AM., *supra* note 28, at 21–23 (arguing that the U.S. should inter alia continue to support programs that strengthen the labor ministries and courts, redirect support to the work of labor unions and NGOs, and require in the trade agreement that member countries comply with and enforce ILO core labor principles and provide for equal remedies for commercial and labor violations in addition to advocating for the criminal prosecution of national and transnational companies that violate labor laws and labor conditionality for *maquila* industries to receive preferential status).

36. *See* David M. Trubek & Alvaro Santos, *Introduction: The Third Movement in Law and Development Theory and the Emergence of a Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 1, 7 (David M. Trubek & Alvaro Santos eds., 2006).

37. *See, e.g.*, Joseph Stiglitz, Keynote Address at the Industrial Relations Research Association: Democratic Development as the Fruits of Labor 19 (Jan. 25, 2000), *available at* <http://www.libertyparkusafd.org/lp/Hancock/speeches/Democratic%20Development%20as%20the%20Fruits%20of%20Labor.pdf>

institutions,³⁸ protect human rights,³⁹ and expand human freedoms.⁴⁰

Rather than explore the entire gamut of new development theories, there are three conceptions of development that I review and build on here. The first is Amartya Sen's capabilities-and-freedom approach.⁴¹ The second is Martha Nussbaum's notion of freedom and capabilities,⁴² which is more focused on institutional transformation and the role of the state. The third is Joseph Stiglitz's notion of development as "transformation."⁴³ In this Subpart, I review these scholars' approaches to development more generally and then look at how these thinkers apply their ideas to labor and labor-market regulation.

A. *Amartya Sen*

Amartya Sen's work on development has been among the most influential of the last decade.⁴⁴ In Sen's conception, mainstream economics has adopted an overly narrow definition of what constitutes development by focusing on gross-national-product growth, personal-income growth, or industrialization.⁴⁵ Instead, Sen maintains, development must be understood to be the process of increasing people's freedoms—or capabilities—to achieve a given set of "functionings" and to lead the lives that they desire.⁴⁶ Development, as he puts it, is the "process of removing unfreedoms" that people have in order to achieve the things that they "have

(arguing that development ought to be understood as transforming society and effecting a change of mindsets through internal and democratic processes).

38. See Steven Golub, *Less Law and Reform, More Politics and Enforcement: A Civil Society Approach to Integrating Rights and Development*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 297 (Philip Alston & Mary Robinson eds., 2005) (arguing for a "legal empowerment approach" to development that seeks to support civil society and build capacity rather than focus on the judiciary and state-centered programs).

39. See PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT 122 (2004) (arguing for a definition of development of which human rights is a constitutive part).

40. See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

41. See *id.* (applying a capabilities approach to development questions); Amartya Sen, *Equality of What?*, in EQUALITY 160, 174–76 (David Johnston ed., 2000) (sketching the initial concept of a capability approach to equality).

42. See MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 70–96 (2000) (discussing development in terms of human capabilities and the necessity for political protection of these capabilities).

43. Stiglitz, *supra* note 37, at 18.

44. In addition to his academic influence, the U.N. Development Index is directly based on his capabilities theory of development. See Martha Nussbaum, *Women and Equality: The Capabilities Approach*, 138 INT'L LABOUR REV. 227, 233 (1999).

45. SEN, *supra* note 40, at 3.

46. *Id.* at 18, 75.

reason to value.”⁴⁷ Freedom then is both the ends and the means of development.⁴⁸ Poverty, in Sen’s framework, should be understood not simply as low income (which is the traditional development measure), but rather as a capability deprivation, which can be caused by a number of factors. In this conception, low incomes are not necessarily intrinsically bad—rather, low incomes should be understood as instrumentally bad because they can often deprive people of the freedoms to achieve various functionings.⁴⁹

Sen does not extensively discuss how labor and labor rights fit or do not fit into his theory, although a number of freedoms that he identifies could be extended to the realm of labor regulation.⁵⁰ In fact the primary treatment that Sen gives to labor in *Development as Freedom* is in a section entitled “Markets, Liberty and Labor.”⁵¹ Here, Sen focuses on what seems like the concern of traditional development economics—expanding opportunities for work. Specifically, Sen argues that markets are a freedom that we value, and one such freedom is the freedom to seek employment.⁵² He cites four examples in particular where this freedom is lost: (1) labor bondage, (2) the lack of freedom in former socialist countries to seek certain forms of employment, (3) child labor, and (4) “the freedom of women to seek employment outside the family.”⁵³

It is notable that there is little if any reference to trade unions or workplace collective organization in much of Sen’s writing,⁵⁴ although it is notable that he does make reference to “the need for open discussion of social issues and the advantage of group activities in bringing about substantial social changes.”⁵⁵ Instead, regarding

47. *Id.* at 86.

48. *Id.* at 36–37.

49. *Id.* at 87.

50. For example, Sen identifies five of what he terms “instrumental freedoms”: (1) “political freedoms,” (2) “economic facilities,” (3) “social opportunities,” (4) “transparency guarantees,” and (5) “protective security.” *Id.* at 38 (emphasis omitted).

51. *Id.* at 112–16.

52. *See id.*

53. *Id.* at 113–15.

54. This is the case even in an essay that is specifically on the subject of work, in which Sen does not explicitly engage the question of how freedom of association or collective workplace organization might or might not fit into his framework. *See* Amartya Sen, *Work and Rights*, 139 INT’L LABOUR REV. 119 (2000). The lack of discussion by Sen of labor or labor rights, and particularly collective labor rights such as the right to freedom of association, does not necessarily mean that Sen believes that labor-market freedom is the only capability related to work, for he is generally reluctant to identify a highly specified list of capabilities, apart from the more generalized set of freedom types that he identifies. But it does possibly suggest either that these other kinds of labor-related capabilities do not seem particularly central to him, or that he is purposefully avoiding them.

55. SEN, *supra* note 40, at 116.

the subject of work, Sen focuses his attention primarily on the freedom, or capabilities, of people to engage in work free from coercion. But while the right to be free from forced labor (which is, of course, identified as a core labor right by the ILO) and to enjoy opportunities to participate in the labor market as a freely contracting individual are legally and intuitively core freedoms, Sen's is a fairly constricted notion of labor freedom, and there is room to expand on what labor freedom entails. Moreover, a focus on labor-market freedoms can also have problematic implications for another ILO core labor right, the right to freedom of association. For example, does the right to participate freely in the labor market mean that unions should not be permitted to engage in certain labor-market restrictive practices, such as negotiating closed-shop agreements with employers?⁵⁶

B. Martha Nussbaum

Martha Nussbaum has also argued for a capabilities approach to development, focusing particularly on the issue of women's human development.⁵⁷ Nussbaum, however, in contrast to Sen, is more specific in her articulation of what constitutes a list of central human functional capabilities.⁵⁸ Whereas Sen's project is primarily geared toward changing the way development institutions and economists conceptualize development, Nussbaum's project is more prescriptive and political than Sen's, and her project is "to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires."⁵⁹

Indeed, while both Sen and Nussbaum recognize the importance of institutions and the state in facilitating the promotion and realization of people's capabilities, Nussbaum argues that, "[T]he structure of social and political institutions should be chosen, at least in part, with a view to promoting at least a threshold level of these human capabilities."⁶⁰ While Sen focuses on economics and economic arrangements, Nussbaum's focus is on the role of law and the state,⁶¹ and she argues that achieving "threshold" capabilities of citizens ought to be the explicit aim of governments and that such a goal should be constitutionalized such that the "structure of social and political institutions should be chosen . . . with a view to

56. Closed-shop agreements provide that as a condition of employment, employees must be members of the union that has representation rights.

57. NUSSBAUM, *supra* note 42, at 1-6.

58. *See id.* at 13, 70, 78-80.

59. *Id.* at 5.

60. *Id.* at 75.

61. *See id.* at 103 (stating that "a fundamental role remains for the nation state").

promoting at least a threshold level of these human capabilities.”⁶²

Nussbaum defines capabilities to be “what people are actually able to do and to be—in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being.”⁶³ Nussbaum provides a useful working list of universalizable central human capabilities, which have easy application in relation to labor-market regulation, making her work perhaps more readily drawn upon for this project than Sen’s. These capabilities include “life,” “bodily health,” “bodily integrity,” “play,” “control over one’s environment,” and “affiliation.”⁶⁴ I will address each of these in turn, describing their application to labor and labor regulation.

“Life” refers to the ability to live a life of normal length and not die prematurely.⁶⁵ Workplace health and safety and the hours that one works are essential elements of the ability to lead a life of normal length, particularly in developing countries where workplace safety is poor. According to the ILO report from 2005, there are approximately 2.2 million work-related deaths annually around the globe.⁶⁶ A high percentage of these are concentrated in the developing world.⁶⁷

“Bodily health” concerns the “ab[ility] to have good health, including reproductive health.”⁶⁸ Again, the link with work is clear. The ILO reports that there are about 160 million cases of work-related diseases per year,⁶⁹ and only 5% of fatal occupational injuries are concentrated in what are termed “established market economies.”⁷⁰

“Bodily integrity” concerns the ability to be secure against sexual assault and violence.⁷¹ Sexual harassment and gender discrimination are pervasive in the workplace.⁷² This fact is true, of course, in both developed and developing countries, but the nature of harassment can have different characteristics and challenges in developing-country environments. First, in developing countries women might have fewer institutional channels for recourse because

62. *Id.* at 75.

63. *Id.* at 5.

64. *Id.* at 78–80.

65. *Id.* at 78.

66. See Int’l Labour Org. [ILO], SafeWork, *Introductory Report: Decent Work—Safe Work* 5 (Sept. 2005) (prepared by J. Takala), available at http://www.ilo.org/public/libdoc/ilo/2005/105B09_281_engl.pdf [hereinafter *Decent Work—Safe Work*].

67. See *id.* at 6; see also Press Release, ILO, Global Workplace Deaths Vastly Under-reported, Says ILO (Sept. 18, 2005), available at http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_005176/index.htm.

68. NUSSBAUM, *supra* note 42, at 78.

69. *Decent Work—Safe Work*, *supra* note 66, at 10.

70. *Id.*

71. NUSSBAUM, *supra* note 42, at 78.

72. DEIRDRE McCANN, SEXUAL HARASSMENT AT WORK 4 (2005).

the law and its enforcement mechanisms are undeveloped. Many countries do not have legal regimes that can accommodate harassment claims or that even recognize sexual harassment as a violation of the law, although the number of countries that recognize sexual harassment as illegal is growing.⁷³ A second reason is cultural. In some cultures, the notion of sexual harassment is new or undeveloped or is simply variable.⁷⁴ In many situations, the risk of shame from community and family might suppress women's opportunities to speak out and seek recourse.⁷⁵

Nussbaum also highlights the capability of "affiliation." This concept has two components. Affiliation refers first to the act of engaging in, for example, "various forms of social interaction," which include in part "protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech."⁷⁶ In the second component of her definition, Nussbaum describes affiliation capabilities as:

[h]aving the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin. *In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.*⁷⁷

In the first part of her definition, Nussbaum highlights that social interaction and community are key elements of human flourishing. In the second part, she highlights the importance of "meaningful relationships of mutual recognition with other workers."⁷⁸ This sounds very close to an underlying justification for the legal right to freedom of association. While on one hand freedom of association might be understood to be an instrumental vehicle to achieve economic returns for workers, Nussbaum articulates a key philosophical underpinning of what the right is about at a humanistic level. Freedom of association is fundamentally about workers forging solidarity with other workers in an effort to achieve dignity at work. Focusing on the capability of affiliation develops

73. *Id.* at 17 n.57 (listing countries that have banned sexual harassment in the workplace).

74. Rebecca S. Merkin, *Cross-Cultural Differences in Perceiving Sexual Harassment: Demographic Incidence Rates of Sexual Harassment/Sexual Aggression in Latin America*, 10 N. AM. J. PSYCHOL. 277, 278 (2008).

75. See Jennifer Zimbroff, Note, *Cultural Differences in Perceptions of and Responses to Sexual Harassment*, 14 DUKE J. GENDER L. & POL'Y 1311, 1318 (2007) (reviewing academic literature surveying a woman's risk of shame).

76. NUSSBAUM, *supra* note 42, at 79.

77. *Id.* at 79–80 (emphasis added).

78. *Id.* at 80.

institutions that aim to cultivate that fundamental human drive.

Nussbaum also identifies what she calls “play” as a central capability. Play requires leisure time, and leisure time is directly related to work. Nussbaum explicitly notes that maximum-hour protections, which provide leisure time, are an example of providing workers with the capability to play (versus work).⁷⁹

Finally, the ability to have “control over one’s environment” is also directly applicable to the workplace. Nussbaum applies this capability to at least two work-related contexts. She relates this right to effective political participation, including “protections of free speech and association,” as well as the capability “to seek employment on an equal basis with others.”⁸⁰ This capability is similar to Sen’s emphasis on market liberties but is far more developed in its articulation and expansive in its coverage.

C. Joseph Stiglitz

Like Sen and Nussbaum, Joseph Stiglitz seeks to redefine development to constitute something more than just increasing GDP or net incomes. Rather, Stiglitz defines it as a fundamental element of human functioning and flourishing. Stiglitz defines development as a process of transformation:

a movement from traditional relations, traditional ways of thinking, traditional ways of dealing with health and education, traditional methods of production, to more “modern” ways. . . . [T]he modern perspective recognizes change, it recognizes that . . . individuals and societies[] can take actions that, for instance, reduce infant mortality, increase lifespans, and increase productivity.⁸¹

This transformative change occurs in part through deliberation and the establishment of democratic processes and institutions. Stiglitz argues that such an inclusive, democratic process can, and should, occur at two levels—the micro firm level and the broader political level.⁸²

In an effort to apply his conception of development to labor, Stiglitz argues two broad points. First, he argues that traditional economic models of the labor market do not take into account various market imperfections or the asymmetries in bargaining power that arise from them.⁸³ Accordingly, government interventions in the labor market could be, in fact, contrary to conventional economic thought, Pareto-optimal and hence desirable. Stiglitz thus argues for a more democratic “high road” labor-

79. *Id.* at 87–88.

80. *Id.* at 80.

81. Stiglitz, *supra* note 37, at 18.

82. *Id.* at 20.

83. *Id.* at 7–8.

development strategy in which labor is a stakeholder in corporate governance and has more participation and control rights.⁸⁴ Heightened involvement by workers in the workplace, Stiglitz suggests, might overcome principal-agent problems that exist between workers and shareholders and potentially elicit greater labor productivity.⁸⁵

Stiglitz's second broad point is that there is value in democracy that is greater than that of economic efficiency, and accordingly democracy is constitutive of development, regardless of its economic impact.⁸⁶ Thus democracy has important intrinsic value.

Stiglitz's conception of democracy is grounded in deliberative democratic processes that facilitate "government by discussion."⁸⁷ These processes do not occur only at the national or political levels, but also at the workplace. Notably, then, democracy in Stiglitz's conception includes not only *political* democracy, but also what he terms *economic* democracy. Economic democracy, he explains, is exercised in part through workplace structures, including unions.⁸⁸

Stiglitz also puts forth an instrumental argument for the importance of economic democracy. He writes:

[E]conomic democracy is essential to effect the systemic change in mindset associated with the democratic transformation, and to engender policies that make change—which is at the center of development—more acceptable. And because labor and other affected social groups have had a voice in shaping the changes, in making them more acceptable, change is likely to be accepted or even embraced, rather than reversed at the first opportunity.⁸⁹

Thus, Stiglitz is trying to make economic and political arguments for the instrumental and intrinsic value of economic and labor democracy. Yet despite Stiglitz's strong statement in support of economic democracy and of unions, he also couches his argument in a note of caution and notes that there can be economic tradeoffs in a regime of economic democracy.⁹⁰ While on one hand, he writes, "excessive labor market rigidities . . . can have adverse effects," he also believes that excessive power imbalances in society can be

84. *Id.* at 12–16.

85. The connection between unionization and productivity was postulated in the American context in RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 180 (1984). For recent work challenging the productivity link, see Barry T. Hirsch, *What Do Unions Do for Economic Performance, in WHAT DO UNIONS DO?: A TWENTY YEAR PERSPECTIVE* 193, 205 (James T. Bennett & Bruce E. Kaufman eds., 2007) (finding no positive unionization effects on productivity).

86. Stiglitz, *supra* note 37, at 19–20.

87. *Id.* at 20.

88. *Id.*

89. *Id.* at 19.

90. *Id.* at 16.

counterproductive because “excessively strong unions can through collective action ‘hold up’ the rest of the country.”⁹¹

III. BUILDING A FRAMEWORK FOR LABOR LAW AND DEVELOPMENT

We have just reviewed three influential theoretical articulations of development and the role of labor in those articulations. Each emphasizes, in different degrees and ways, the importance of freedom, individual transformation, and political and economic democracy. In this Part, I seek to build upon these theories and construct a development approach to labor regulation and, by extension, to trade and labor regimes. First, I argue that labor development should be grounded in a capabilities framework rather than a market-freedom or flexibility-centered framework. Second, I argue that a development approach to labor regulation recognizes work as a central source and locus of unfreedoms. Consequently, labor regulation can and should play an important role in achieving development through increasing workers’ capabilities. Third, I argue that a development approach to labor regulation and trade and labor linkage would seek to promote workplace democracy and what can be termed labor or industrial citizenship.

A. *Labor Freedom Beyond Flexibility*

Traditional development approaches to labor law regulation focus on *labor-market* “freedoms,” particularly the freedom of workers to seek employment, with its corollary freedom of employers to hire and fire workers at will.⁹² This limited conception of labor freedom and development, however, is part of what Stiglitz terms the “neoclassical” approach to labor development; as he puts it, “If one didn’t know better it might seem as if [these approaches] were designed to undermine the rights and positions of labor.”⁹³

A richer conception of labor law development, however, would conceptualize a more nuanced and non market-focused notion of labor freedom. It would understand labor freedom to be constituted by more than just labor-market freedoms and to be embedded in, and supportive of, democratic functioning in society as well as in work. Achieving this kind of labor development would entail, as Sen

91. *Id.* (emphasis omitted).

92. See Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT’L L. 43, 47–55 (2009) (reviewing the debates on flexibility and rigidity in labor-market institutions). Labor-market flexibility has traditionally been an indicator, called the Employing Workers Indicator, of the World Bank’s *Doing Business* report. However, as of 2010 the Employing Workers Indicator will be removed from the methodology. *Id.* at 102; Press Release, World Bank Group, Revisions to the EWI Indicator (Apr. 27, 2009) (on file with author), available at http://www.doingbusiness.org/documents/EWI_revisions.pdf. For a critique of both the *Doing Business* report and the conception of flexibility, see Santos, *supra*, at 65–80.

93. Stiglitz, *supra* note 37, at 3.

has noted, not only requiring legislatively or judicially mandated rights, but rather developing institutions in society that can effectively realize those rights and taking note of the linkages that exist between the economic, social, and political spheres.⁹⁴

B. Work and Capabilities

A development approach to labor regulation also recognizes that work and the workplace are central sources and reflections of unfreedom in society. Consequently, work is and can be a key site of capability deprivation and conversely of capability enhancement.⁹⁵ There are several reasons for this. First, as Nussbaum makes clear, the workplace is a locus of central human capabilities.⁹⁶ Indeed, Nussbaum's list should be considered a starting point of linkages, and more work could be done to fully articulate what capabilities

94. See SEN, *supra* note 40, at 127.

95. Nussbaum has made an important set of connections between the realization of central human capabilities and work and the workplace. See discussion *supra* Part II.B.2 and accompanying footnotes. But there remains more work that can be done to make the connections between the workplace and human development and to make the connections between development theory and labor. This should be an area pursued by labor and development scholars. While by and large there has been little scholarship on the link between development and labor law and even less on capabilities and work, some scholars have drawn on Sen's ideas in trying to adapt them to work regulation. Brian Langille, relying on Sen, has argued for a highly procedural account of workplace freedom. See Brian Langille, *Core Labour Rights—The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409, 427–34 (2005). Just as Sen places a great emphasis on agency and on process, Langille focuses on the process of freedom of association in order to achieve certain sets of functionings at the workplace. See *id.* Judy Fudge is critical of Langille's procedural account, however, calling it a "thin" account of capabilities and arguing that a thicker account is necessary, especially because of workplace inequality that freedom of association might be inadequate to address on its own. See Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 COMP. LAB. L. & POL'Y J. 29, 58–63 (2007). Instead, she draws on Jude Browne, Simon Deakin, and Frank Wilkinson's sophisticated account of capabilities and labor-market regulation, in which they emphasize what she calls the "market-creating role of social rights." *Id.* at 63 (citing Jude Browne, Simon Deakin & Frank Wilkinson, *Capabilities, Social Rights and European Market Integration*, in EUROPE AND THE POLITICS OF CAPABILITIES 205, 205 (Robert Salais & Robert Villeneuve eds., 2004)). Simon Deakin and Frank Wilkinson, in other work that builds on this idea, argue that labor-market regulatory interventions should be considered a kind of social right. See SIMON DEAKIN & FRANK WILKINSON, *THE LAW OF THE LABOUR MARKET* 277 (2005). These can take the form of "immediate claims to resources" such as welfare payments or sick pay or "particular forms of procedural or institutionalized interaction." *Id.* at 351 (emphasis omitted). The latter include freedom-of-association rights, as well as antidiscrimination laws. Deakin and Wilkinson favor a capability account of social rights because it does not prescribe any particular distributive outcome, but instead provides an ability to make choices to achieve their particular set of functionings. *Id.* at 353. As such, social rights facilitate labor markets rather than hinder them.

96. See *supra* notes 63–80 and accompanying text.

and freedoms are most connected to work and the workplace.

Second, work and the workplace should be a central focus of attention for the simple reason that workers spend large amounts of their waking hours engaged in processes of work, whether it is formal work or informal work.⁹⁷ In developing countries, people tend to work longer hours in order to offset low earnings.⁹⁸ There is in fact a correlation between hours of work and human flourishing, which Nussbaum makes reference to through her identification of “play” as a central human capability; thus, work can serve as a source of leisure deprivation.⁹⁹ But the large amount of time spent at work not only means that there is a tradeoff or cost in terms of the ability to play—it also means that work is a central point of human interaction and functioning in people’s lives.¹⁰⁰ Labor regulation, which structures the rules of that interaction and functioning, is therefore a potentially effective and strategic mechanism to achieve human development because it has the potential to reach a large number of people in a site in which capabilities can be enhanced. The recognition of the freedom-promoting function of labor regulation is particularly important given the traditional liberal conception of work and the workplace as a private economic sphere that should be subjected to limited intervention.

A third reason that the workplace is a central site for development is that it often both reflects and is a source of inequalities in social spheres outside of the workplace. For example, gender inequality in the workplace is a key component and determinant of gender inequality in society.¹⁰¹ Such inequalities include, for example, wage gaps,¹⁰² sexual harassment,¹⁰³ disparities in labor-market participation,¹⁰⁴ education and skill differentials,¹⁰⁵ and the burden of having primary childcare duties.¹⁰⁶ Violence in

97. Henry Bruton & David Fairris, *Work and Development*, 138 INT’L LABOUR REV. 5, 6 (1999).

98. ILO, *Key Indicators of the Labour Market 6. Hours of Work*, at 7 (2009), available at <http://kilm.ilo.org/KILMnetBeta/pdf/kilm06EN-2009.pdf>.

99. NUSSBAUM, *supra* note 42, at 87–88.

100. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 7 (2003).

101. TASK FORCE ON GENDER AND TRADE, UN INTER-AGENCY NETWORK ON WOMEN AND GENDER EQUALITY, TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES 25–26 (Anh-Nga Tran-Nguyen & Americo Beviglia Zampetti eds., 2004) (charting gender wage differentials in various countries).

102. ILO, *Global Employment Trends for Women Brief 2007*, at 11 (Mar. 2007), available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---trends/documents/publication/wcms_114287.pdf (reviewing data in six occupation groups and finding that women earn 90% of what men earn).

103. MCCANN, *supra* note 72, at 4.

104. ILO, *supra* note 102, at 2–3.

105. *Id.* at 2, 6.

106. NUSSBAUM, *supra* note 42, at 1.

the workplace provides another example of the relationship between workplace and societal inequalities and problems. Workplace violence creates significant costs to the individual, the organization, and society at large.¹⁰⁷ Conversely, violence in society at large permeates workplace boundaries, meaning that larger social problems can seep into and be found in the social space of work.¹⁰⁸

These inequalities can be the basis of capability gaps and sources of unfreedom. Because work reflects and is the cause of these societal inequalities and capability deprivations, work can be a key leverage point to address inequalities in society at large. If a broad development goal is to address forms of inequality and discrimination that impede human and political development, then labor regulation can play an important interventionist role in that pursuit, increasing the capabilities of people in a key area of capability deprivation.

C. *Democracy*

I argue that a third key objective of a development approach to labor regulation is the promotion of workplace democracy and the related concept of what can be termed labor, or industrial, citizenship.¹⁰⁹ Workplace democracy, I argue, has both intrinsic and instrumental values that are related to arguments for political democracy, the fostering of which has long been a central goal of development.

1. *The Role of Democracy in Development*

Democracy is a central theme of development practice and theory.¹¹⁰ At the level of practice, the promotion of political

107. DUNCAN CHAPPELL & VITTORIO DI MARTINO, *VIOLENCE AT WORK* 136–40 (3d ed. 2006) (describing the costs of violence at work to the organization, individual, and community).

108. *Id.* at 131. Another such example of the relation between work and social inequality is caste inequality found in South Asia. See PATRICK HELLER, *THE LABOR OF DEVELOPMENT: WORKERS AND THE TRANSFORMATION OF CAPITALISM IN KERALA, INDIA* 168 (1999). Particular kinds of work are caste specific, and thus a caste that traditionally engages in “lower” forms of work, such as cleaning toilets, is locked into particular forms of work that reflect its low status in society. Similar dynamics can be found along ethnic and racial lines, where specific jobs, often those considered undesirable, are populated by minorities. Here, workplace hierarchies and inequalities often replicate that of the society at large, particularly in the unorganized sector. *Id.* (describing the “social embeddedness” of the unorganized labor market in India). The relationship between work and inequality can go both ways, however. Minorities might have certain jobs because they are considered to be “lowly” jobs. But the inverse might also be true, that people are considered to be lowly because of the jobs that they have.

109. See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 512 & n.19 (2007) (discussing “labor citizenship” and “industrial citizenship”).

110. For essays on the relationship between democracy and development,

democracy and democratic institutions is a major objective of the development programming of many governments, including the United States,¹¹¹ as well as of international-development and U.N. organizations, including the ILO.¹¹²

Democracy is also an important theme found in development scholarship, which puts forth a number of different justifications for its importance. A traditional approach to democracy is to argue that it is instrumental to promoting economic development because it facilitates the creation and maintenance of free markets.¹¹³ Sen, however, provides a richer justification for democracy in development, arguing that strengthening democratic institutions and processes is an essential component of a freedom-oriented approach to development.¹¹⁴ This is so for three reasons. First, democracy and civil and political freedoms are *intrinsically* important to people.¹¹⁵ Second, democracy is *instrumentally* important, for example, by making it more likely that there will be a policy response to people's economic needs.¹¹⁶ Third, democracy plays a *constructive* role by helping people form values through communication and argument.¹¹⁷ While Sen specifically refers to political democracy and rights, this Article suggests that there are compelling and somewhat analogous arguments for focusing on

see DEVELOPMENT AND DEMOCRACY: NEW PERSPECTIVES ON AN OLD DEBATE (Sunder Ramaswamy & Jeffrey W. Cason eds., 2003) [hereinafter DEVELOPMENT AND DEMOCRACY]. For a discussion of democratic themes in the law-and-development literature, see Amy Chua, *Markets, Democracy, and Ethnicity: Toward A New Paradigm For Law and Development*, 108 YALE L.J. 1, 15–17 (1998) (arguing that most law-and-development literature can be divided into marketization or democratization literature); David Trubek, *The Rule of Law in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 36, at 74, 84 (describing the rise of rule of law as the confluence of two forces: “the project democracy and the project of markets”).

111. See, e.g., U.S. AGENCY INT’L DEV., USER’S GUIDE TO DG PROGRAMMING 5 (2006) (“USAID has identified ‘building sustainable democracies’ as one of the Agency’s four overarching goals.” (emphasis omitted)).

112. ILO, *Organizing for Social Justice* 8–9 (2004), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-i-b.pdf> (describing the relationship between the right to freedom of association and democratic development).

113. For a description of the debate, see Amy Chua, *Markets, Democracy, and Ethnicity*, in DEVELOPMENT AND DEMOCRACY, *supra* note 110, at 145, 147–48 (describing the prevailing orthodoxy regarding the relationship between markets and democracy). Some scholars have challenged the connection between democracy and market development, however. See, e.g., Deepak Lal, *Is Democracy Necessary for Development?*, in DEVELOPMENT AND DEMOCRACY, *supra* note 110, at 17 (arguing that democracy is not necessary to maintain the market order).

114. SEN, *supra* note 40, at 148.

115. *Id.*

116. *Id.*

117. *Id.*

workplace democracy as well.

2. *The Role of Democracy in Labor Law and Governance*

Just as democracy is embedded in the development project, democracy and democratic values are also foundations of labor law and industrial relations,¹¹⁸ as well as in the concepts of labor citizenship,¹¹⁹ and industrial citizenship.¹²⁰ What constitutes workplace democracy, however, is indeterminate and expansive, sometimes having variable and sometimes contradictory meanings.¹²¹ In theory, the institutional possibilities are broad and can take the form, for example, of outright employee control and ownership,¹²² coequal governance rights between owners and workers, worker management without ownership rights,¹²³ and workplace union representation and collective bargaining.¹²⁴

In practice, the forms in which democratic institutions take shape are variable and context specific.¹²⁵ Some industrial-relations

118. See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 761–62 (1994) (articulating the underlying value of democracy and democratic deliberation in U.S. labor law); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 402–04 (2005); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1515 (1981) (describing the workplace as a “mini-democracy” in the American industrial-pluralism model).

119. According to Jennifer Gordon, for example, labor citizenship “encompasses the normative expectation of solidarity among workers and active participation by them in the democratic governance of their own institutions.” Gordon, *supra* note 109, at 505. For Gordon, the concept of labor citizenship, in contrast to the concept of “industrial citizenship,” places less emphasis on the state and instead focuses on the creation of democratic worker organizations that seek to improve working conditions and achieve dignity at work. *Id.* at 510–12.

120. The notion of industrial citizenship also emphasizes democracy at work through, according to Judy Fudge, the extension of political rights, i.e., representation, into the relationship between employer and employee. See Judy Fudge, *After Industrial Citizenship: Market Citizenship or Citizenship at Work?*, 60 INDUS. REL. 1, 6 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896168.

121. David Montgomery, *Industrial Democracy or Democracy in Industry?: The Theory and Practice of the Labor Movement, 1870–1925*, in INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE 20 (Nelson Lichtenstein & Howell John Harris eds., 1996) [hereinafter INDUSTRIAL DEMOCRACY IN AMERICA].

122. See ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 91 (1985).

123. See Nien He Hsieh, *Survey Article: Justice in Production*, 16 J. POL. PHIL. 72, 82 (2008).

124. Nelson Lichtenstein & Howell John Harris, *Introduction: A Century of Industrial Democracy in America*, in INDUSTRIAL DEMOCRACY IN AMERICA, *supra* note 121, at 1, 6.

125. For a discussion of how principles of industrial democracy operate in Japan, see, for example, Sanford M. Jacoby, *Pacific Ties: Industrial Relations and Employment Systems in Japan and the United States Since 1900*, in

systems, such as Germany's, have codetermination regimes in the workplace.¹²⁶ Other systems, such as the pluralist system of the United States, have developed methods of self-governance in which collective bargaining is the primary mode of workplace governance,¹²⁷ although some commentators have urged that the concept of workplace democracy be expanded into other forms of democratic workplace governance as well.¹²⁸

Accordingly, in this Article I use the concept of workplace democracy broadly, in a way that is not institutionally prescriptive. The general principle is that labor law and regulation, and institutions that seek to develop labor law and regulation, ought to be broadly oriented toward facilitating mechanisms of worker engagement and participation in workplace governance in order to exercise control and influence over their work lives. The resulting institutional forms of democratic governance that are possible depend on the given political context as well as on the particular governance forms that workers might choose to adopt.¹²⁹ Statutorily enforced freedom-of-association rights that permit collective representation of interests are an important aspect of democratic work arrangements. But other forms of participation and democratic functioning are also possible, particularly where such rights do not exist or in informal work environments where clear employer-employee relationships do not exist.

3. *Linkages Between Political and Labor Democracy*

It is also important in making the case for workplace democracy as a key development goal that political democracy and workplace democracy not be conceptualized as discrete phenomena. Labor scholars and advocates have long drawn parallels and links between labor democracy and political democracy.¹³⁰ For early American reformers and unionists, for example, the discrepancy between having a democratic regime in politics and an autocratic regime at work presented a conceptual contradiction,¹³¹ for if democracy in the form of representative government was desirable in the political sphere, it should be equally appropriate and necessary in the

INDUSTRIAL DEMOCRACY IN AMERICA, *supra* note 121, at 206.

126. MANFRED WEISS & MARLENE SHMIDT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY* pt. II, ch. 6, §§ 1–5, paras. 626–66 (2008).

127. Van Wezel Stone, *supra* note 118, at 1511.

128. See Barenberg, *supra* note 118, at 947.

129. For an example of a deliberative democratic approach to labor regulation in which workers have an array of governance options in the form of work teams and management participation, see *id.* at 956–83.

130. See Gordon, *supra* note 109, at 512 (drawing the parallel between labor citizenship and nation-state citizenship).

131. Howell John Harris, *Industrial Democracy and Liberal Capitalism, 1890-1925*, in *INDUSTRIAL DEMOCRACY IN AMERICA*, *supra* note 121, at 43, 48.

industrial sphere.¹³² Jennifer Gordon, for example, draws on the logic of political democracy to make the case for labor citizenship, arguing that “[d]emocracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers’ rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.”¹³³

We see that democratic goals and principles are inherent in development theory and programming as well as in labor regulation and concepts of labor citizenship, and that they should be conceptualized as related notions that are mutually supportive. But how do we coordinate and direct the democratic values inherent in each? What are the arguments that we might wield to make the case for workplace democracy as an important development objective? It is to some of these questions that I now turn.

4. *The Values of Democracy at Work*

a. *Intrinsic Value of Labor Democracy.* First, at a conceptual level, democracy in the workplace, as facilitated and constructed by the law and legal institutions, should provide a similar *intrinsic* value as does political democracy.¹³⁴ Workers tend to believe that having a voice in their workplace is intrinsically important. This is borne out by studies that have shown that workers want influence and say—a voice—in company decisions affecting the workplace.¹³⁵ One survey found that workers were evenly divided about whether they should be heard through collective voice or individual voice.¹³⁶ Eighty-seven percent believed that they would enjoy their jobs more with more control over production and operations, seventy-five percent believed the company would be stronger against competitors, and seventy-nine percent believed that product quality would be better if they had a say in how workplace problems were solved.¹³⁷

b. *Instrumental Values of Labor Democracy.* Second, workplace democracy also potentially serves important *instrumental* functions.¹³⁸ In particular, it might be instrumental in achieving

132. DAHL, *supra* note 122, at 111; Harris, *supra* note 131, at 50.

133. Gordon, *supra* note 109, at 521 (quoting 79 CONG. REC. 7571 (1935)).

134. See *supra* note 115 and accompanying text.

135. See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 40–47 (1999); cf. Bruton & Fairris, *supra* note 97, at 14 (“That work possesses (or should possess) special meaning for workers is a belief held by many of the most important thinkers of the modern era. . . . [T]his view[] maintain[s] that the essence of human happiness is the freedom to be creative in work, actively to create the world around us according to our conception of how it should be.”).

136. FREEMAN & ROGERS, *supra* note 135, at 54–55.

137. *Id.* at 42.

138. See *supra* note 116 and accompanying text.

broader political democracy, which is a central object of development theory and practice. The instrumental channel can occur (1) through increasing individual capabilities of workers to be effective political actors in a democratic society, and (2) through the creation of institutions, such as unions, that can then become important political actors in democratizing societies.

i. *Increasing Individual Democratic Capabilities.* A number of scholars have argued that workplace democracy can potentially lead to broader political democracy through its sociopolitical development effects on individual workers. As Jennifer Gordon argues in her work on transnational labor citizenship:

From the union perspective, bounded citizenship aids in the development of democracy and solidarity within the union, and *enhances the capacity of union members to realize full and equal citizenship outside the workplace as well.* From the perspective of the nation-state, it is often said to be a precondition for the creation of community and the flourishing of democracy.¹³⁹

Some political scientists have also argued that there are key linkages between workplace and political democracy because workplace democracy will enhance the democratic capabilities of workers and lead to enhanced political participation.¹⁴⁰ As the political theorist Robert Dahl has summarized the arguments (although ultimately expressing skepticism of them):

Workplace democracy, it is sometimes claimed, will foster human development, enhance the sense of political efficacy, reduce alienation, create a solidary community based on work, strengthen attachments to the general good of the community, weaken the pull of self-interest, produce a body of active and concerned public-spirited citizens within the enterprises, and stimulate greater participation and better citizenship in the government of the state itself.¹⁴¹

If workplace democratic institutions can potentially help workers develop capabilities to participate in the broader political system, how might this occur?

First, democratic processes and institutions in the workplace

139. Gordon, *supra* note 109, at 506 (emphasis added).

140. For the seminal work supporting this proposition, see CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

141. DAHL, *supra* note 122, at 95 (citation omitted). Dahl, however, is skeptical that the empirical data supports arguments that workplace democracy will lead to greater political democracy. *Id.* at 94–98. He instead bases his argument on the proposition that the principles that justify political democracy also apply to economic enterprises. *Id.* at 111–35.

can potentially serve, in Sen's terms, a "constructive" role, helping shape individual consciousness and expectations about democracy at the larger political level and helping train workers to articulate those demands and become more "self-governing."¹⁴² This in turn can help catalyze democratic reform of processes at the political level as well as within social institutions.¹⁴³

One catalyst for these democratic reforms is the education of workers to encourage participation in otherwise-hierarchical environments. That is to say, through the creation of institutions that promote or facilitate industrial democracy, workers can become accustomed to, and develop expectations of, control over other hierarchical institutions.¹⁴⁴ The workplace in this conception becomes a "training ground" for opposition and participation in societies with nondemocratic or highly nonegalitarian social and political systems.¹⁴⁵

This is particularly valuable and applicable in many developing societies to the situation of female workers. In many developing countries, women constitute a majority of the workforce in certain industries, particularly the export-oriented garment industries.¹⁴⁶ In some countries where there have been active efforts to develop trade unions, particularly independent trade unions that seek to have internal democracy, women often take leadership roles.¹⁴⁷

Once women take leadership positions in workplace institutions or become accustomed to participation and more equalized workplace relationships, they can sometimes rise from the shop floor to take leadership roles in other civil-society organizations. This can provide them political power in societies that, if not fully democratic, have some degree of active and influential civil society where civic organizations can exercise political power.

Drawing on the American case, in which the workplace and societal norm is a high level of diversity, Cynthia Estlund has

142. Per Adman, *Does Workplace Experience Enhance Political Participation? A Critical Test of a Venerable Hypothesis*, 30 POL. BEHAV. 115, 115–17 (2008) (summarizing the argument of PATEMAN, *supra* note 140).

143. See NANCY BURNS, KAY LEHMAN SCHLOZMAN & SIDNEY VERBA, *THE PRIVATE ROOTS OF PUBLIC ACTION: GENDER, EQUALITY, AND POLITICAL PARTICIPATION* (2001).

144. PATEMAN, *supra* note 140, at 97–102.

145. *Id.*

146. See, e.g., Shahidar Rahman, *Bangladesh: Women and Labour Activism*, in *WOMEN AND LABOUR ORGANIZING IN ASIA* 84, 84 (Kaye Broadbent & Michele Ford eds., 2008).

147. Rates of female union leadership are low worldwide. In Bangladesh, however, the Bangladesh Independent Garment Workers Union Federation is under female leadership. *Id.* at 91–92. In Cambodia, the Free Trade Union of the Workers of Cambodia has a number of female leaders, including the "Honorary President." Free Trade Union of Workers of the Kingdom of Cambodia, Leadership, <http://www.ftuwkc.org/leadership.php> (last visited Apr. 28, 2010).

argued that the workplace and workplace regulation can enrich democratic life.¹⁴⁸ This is because the workplace can be a unique locus of connection between different communities and groups. Workplace regulation that mandates equality through, for example, bans on racial and gender discrimination can create bonds between workers and other members of society and serve a mediating function that facilitates cooperation and communication in peoples' personal and civic lives.¹⁴⁹

ii. *Institutional Development.* The second instrumental function of workplace democracy is that it can potentially create structural and institutional bridges to achieving broader political democracy. This might occur through the creation of trade unions, other workplace and deliberative organizations, or organizations in civil society that stem from the workplace. While this might be less likely to succeed in highly undemocratic political regimes, it might be more useful in nominally democratic systems where democratic functioning is low because of weak civil society, cultural constraints, or weak interest-group mobilization.

Unions and workplace organizations can constitute an important component of civil society.¹⁵⁰ Civic organizations, it has long been noted, are key to robust democratic politics.¹⁵¹ Even where not explicitly political, these organizations create important bases of political mobilization around issues of interest to workers. Because they are membership organizations, there is more capacity to mobilize the members in support of a given issue.

One branch of literature strongly argues that unions are powerful forces for external democratic functioning, particularly when those unions operate democratically themselves.¹⁵² Another branch of literature argues that trade unions are not necessarily monolithic supporters of democracy, but are rather, at least in a study of Latin American unions, "contingent democrats" that fight for democracy when it is in their material and organizational

148. See ESTLUND, *supra* note 100, at 4.

149. *Id.* at 16.

150. See Barbara J. Fick, *Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society*, 12 WORKINGUSA: J. LAB. & SOC'Y 249 (2009) (reviewing the literature and arguing that unions play a key role in creating, maintaining, and rebuilding democratic societies).

151. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55–56 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835); see also ESTLUND, *supra* note 100, at 105 (discussing Tocqueville).

152. See RUTH BERINS COLLIER, PATHS TOWARD DEMOCRACY 165 (1999); DIETRICH RUESCHEMEYER, EVELYNE HUBER STEPHENS & JOHN D. STEPHENS, CAPITALIST DEVELOPMENT AND DEMOCRACY 270 (1992); Fick, *supra* note 150, at 257–60; Geoffrey Wood, *Conclusion: Broadening Democracy and the Labour Movement*, in TRADE UNIONS AND DEMOCRACY 397, 398 (Mark Harcourt & Geoffrey Wood eds., 2004).

interests.¹⁵³ Thus, while the literature is not completely clear that in all contexts unions work toward democratic ends in society at large, there is substantial evidence of a correlation when certain conditions are satisfied.

A second institutional outcome that can serve as a bridge to a better-functioning democracy is the development of workplace democratic institutions that help workers learn to channel complaints through formal institutions and engagement rather than through strikes. In Cambodia, for example, the number of strikes has dramatically decreased as the number of unions has increased: workers have learned to voice their dissent through formalized channels, and they have developed institutions to do so.¹⁵⁴ Strikes occur, in part, because the industrial-relations system and workplace institutions fail to provide an adequate channel for redress of grievances. Much of the same dynamic can occur in nondemocratic regimes where there are few outlets for influencing the political system and decisions affecting citizens. Pent-up pressure frequently results in general strikes and sometimes violence, which occasionally is met with violent repression.

IV. NEW ACTORS—NEW GOVERNANCE

In the previous Part I proposed a development approach to labor regulation that seeks to promote freedom beyond labor-market flexibility, increase worker capabilities, and promote workplace and political democracy. While my primary goal in the Article is to map the conceptual ground for a development approach to trade and labor regimes and labor regulation, in this Part I briefly turn to the question of how a development-grounded trade and labor regime might be designed and oriented to realize and promote these labor law development goals, taking into account the realities of labor governance in developing countries. I argue for what I term an “Integrative Linkage” approach to trade and labor regimes. An Integrative Linkage framework is grounded in the notion that, particularly in states with weak domestic regulatory capacity, trade and labor regimes need to harness the potential of nonstate actors and alternative mechanisms of governance to achieve their development goals.

153. Steven Levitsky & Scott Mainwaring, *Organized Labor and Democracy in Latin America*, 39 COMP. POL. 21, 21 (2006).

154. See ILO, Kingdom of Cambodia Ministry of Labour and Vocational Training, *National Strategy on Labour Dispute Prevention and Settlement in Cambodia* 68 (2004) (prepared by Robert Heron & Hugo van Noord), available at <http://www.betterfactories.org/content/documents/1/National%20Strategy%20on%20Labour%20Dispute%20Prevention%20and%20Settlement.pdf>; ILO, Better Factories Cambodia, *Cambodian Garment Industry: Challenges and Opportunities* 2 (Apr. 2008), available at [http://www.betterfactories.org/content/documents/Fact%20sheet%20April%202008\(En\).pdf](http://www.betterfactories.org/content/documents/Fact%20sheet%20April%202008(En).pdf).

A. *Weak Regulatory Capacity and the Private Response*

Integrative Linkage regimes are grounded in the recognition that traditional forms of labor governance that are centered on the state have given way to new forms of global labor governance. A major obstacle to achieving effective labor regulation in developing countries is the weakness of many states and state regulatory regimes, particularly in their ability or sometimes willingness to enforce the law. In response to this regulatory deficit, new nonstate or “private” forms of labor regulation have played an increasingly important role in labor governance.¹⁵⁵ The rise in private forms of labor governance has led to a broader conception of labor governance that incorporates not only public regulatory regimes (i.e., the state and its legal and regulatory institutions), but also private regulatory regimes that function outside of the state.¹⁵⁶

Private regulatory regimes take a number of forms. In most instances, nonstate actors—specifically multinational corporations (“MNCs”) with international supply chains—function independent of governments by policing their supply chains through internal systems of code generation and monitoring.¹⁵⁷ In other instances, they operate in cooperation and coordination with multistakeholder initiatives to design and implement systems of factory monitoring, remediation, and training.¹⁵⁸ A key driver of private regulatory mechanisms is transnational activist networks, composed of domestic and international civil-society groups, which mobilize pressure against MNCs and governments to take action in a given campaign and often participate in various governance schemes.¹⁵⁹

In addition to the private regulatory regimes described above, new forms of private regulation that have more hybrid public/private characteristics have also begun to emerge that use private regulatory methods, but combine it with government involvement to differing degrees. Because I believe that these hybrid models hold out some promise for a development approach to

155. 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, 226–28 (2007); see Shelley Marshall, John Howe & Colin Fenwick, *Labour Law and Development: Creating an Enabling Regulatory Environment and Encouraging Formalisation* 27–28 (paper presented at Conference on Regulating for Decent Work: Innovative Labour Regulation in a Turbulent World, July 8–10, 2009, on file with ILO), available at <http://www.ilo.org/public/english/protection/condtrav/pdf/rdwpaper27a.pdf>.

156. Marshall, Howe & Fenwick, *supra* note 155, at 18.

157. See Kevin Kolben, *Towards an Integrative Theory of Transnational Labor Regulation* 4–6 (paper presented at Conference on Regulating for Decent Work: Innovative Labour Regulation in a Turbulent World, July 8–10, 2009, on file with ILO), available at <http://www.ilo.org/public/english/protection/condtrav/pdf/rdwpaper43a.pdf>; see also Kolben, *supra* note 155, at 225–27.

158. See Kolben, *supra* note 155, at 228, 233.

159. GAY W. SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS AND TRANSNATIONAL ACTIVISM* 16–23 (2007).

trade and labor regimes and to labor regulation, I will briefly highlight one example.

Better Work and Better Factories are somewhat *sui generis* programs that are notable examples of what might be considered to be hybrid regulatory mechanisms. Cambodia's Better Factories ("BF") program is a project of the ILO that receives support from a number of domestic and international donors and was initially the product of a trade agreement between the United States and Cambodia.¹⁶⁰ The BF program consists of ILO-trained, independent monitors that track Cambodia's garment factories.¹⁶¹ Using a specially developed Information Management System ("IMS"), it gathers information and generates reports on factories.¹⁶² If factories consent, buyers can access the reports on individual factories.¹⁶³ The information generated is published on a semiannual basis in "synthesis reports" that are publicly available online and that synthesize the data at a more general level.¹⁶⁴

Building on the BF model, a new program jointly administered by the ILO and World Bank's International Finance Corporation ("IFC") has been developed that seeks to extend the basic model to more countries and industries. This program is called Better Work ("BW"),¹⁶⁵ and it is currently operating in Cambodia, Haiti, Jordan, and Vietnam.¹⁶⁶ Its basic methodology is similar to that of BF—it develops monitoring regimes and generates information to be recorded and managed by a proprietary data-management system.¹⁶⁷

160. Better Factories Cambodia, About Better Factories, <http://www.betterfactories.org/ILO/aboutBFC.aspx?z=2&c=1> (last visited Apr. 28, 2010) [hereinafter About Better Factories]; Better Factories Cambodia, Donors, <http://www.betterfactories.org/ILO/donors.aspx?z=14&c=1> (last visited Apr. 28, 2010).

161. About Better Factories, *supra* note 160.

162. Better Factories Cambodia, About Better Factories: Better Access to Information, <http://www.betterfactories.org/aboutBFC.aspx?z=2&c=1&#BAI> (last visited Apr. 28, 2010).

163. ILO, Better Factories Cambodia, *Twenty-Second Synthesis Report on Working Conditions in Cambodia's Garment Sector 1* (Apr. 30, 2009), available at [http://www.betterfactories.org/content/documents/1/Synthesis-Report%2022nd-30-04-2009\(EN\).pdf](http://www.betterfactories.org/content/documents/1/Synthesis-Report%2022nd-30-04-2009(EN).pdf).

164. Until the sixteenth report, individual factories were named in the public reports. Now the reports only provide aggregate data. Compare *id.* at 2, with ILO, Better Factories Cambodia, *Sixteenth Synthesis Report on Working Conditions in Cambodia's Garment Sector* (Mar. 2006), available at [http://www.betterfactories.org/content/documents/1/16th%20Synthesis%20Report%20\(en\).pdf](http://www.betterfactories.org/content/documents/1/16th%20Synthesis%20Report%20(en).pdf).

165. Better Work, <http://www.betterwork.org/public/global> (last visited Apr. 28, 2010).

166. ILO, Int'l Finance Corp. [IFC], Better Work, *The Better Work Programme: Stage II: July 2009–June 2012*, at 8 (Mar. 20, 2009), available at http://www.betterwork.org/internal/geneva/communications/brochures/better-work-stage-ii/at_download/file [hereinafter *Better Work Programme*].

167. ILO, IFC, Better Work, *STAR and Better Workspaces*, <http://www.betterwork.org/internal/geneva/communications/information-sheets>

The particular form of each country's program is context dependent, but the general goal is to enable MNCs to reduce their own monitoring efforts and to rely on the BW program.¹⁶⁸ Public reporting is part of the process, but how the public-reporting process will take place is unclear, and it seems to play a smaller role in BW than it did in BF, at least in its prior incarnation. But this remains to be seen. In an effort to bring in public actors, BW attempts to use tripartite advisory committees in the countries in which it operates, bringing together business, government, and labor in its governance.¹⁶⁹ It also encourages extensive involvement of the buyers through its Buyer's Forum.¹⁷⁰

B. *The Limits of Nonstate Regimes*

While private regimes are part of the new landscape of transnational labor governance, private regimes confront challenges. First, critics argue that nonstate regulatory regimes are by their nature more oriented toward advancing the interests of the corporations that implement and support them and as such they are not necessarily focused on the goals of human and democratic development.¹⁷¹ The primary objective of these regimes, it is argued, is to remedy labor problems in supply chains in order to avoid pressure from transnational activist networks and other concerned stakeholders.¹⁷² Second, some argue that these forms of workplace regulation tend to be top-down and nondemocratic in themselves with little participation by workers in their design and implementation.¹⁷³ While the right to freedom of association—a significant aspect of labor citizenship—is generally provided for in codes of conduct,¹⁷⁴ the degree of enforcement is variable.¹⁷⁵ Third, some argue that private forms of regulation are not sustainable because they are driven by consumer and stakeholder demand and mobilization.¹⁷⁶ If that demand wanes, then enforcement wanes. Finally, some are concerned that private systems of governance lack

/star-and-better-workspace/at_download/file (last visited Apr. 28, 2010).

168. *Better Work Programme*, *supra* note 166, at 2.

169. *Id.* at 5.

170. Better Work, International Buyers' Forum, <http://www.betterwork.org/public/global/international-buyers> (last visited Apr. 28, 2010).

171. *See, e.g.*, Kolben, *supra* note 155, at 229–30.

172. *See generally id.* at 229 (discussing limitations of nonstate regulatory regimes).

173. *See id.* (citing Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *IND. J. GLOBAL LEGAL STUD.* 401, 418 (2001)).

174. *See* World Bank [WB], *Corporate Soc. Responsibility Practice, Company Codes of Conduct and International Standards* pt. I, at 57–63, 134–38 (Oct. 2003), available at http://siteresources.worldbank.org/INT/PSD/Resources/CSR/Company_Codes_of_Conduct.pdf.

175. Kolben, *supra* note 155, at 229–30.

176. *Id.* at 229.

democratic legitimacy. While some have argued that systems of nonstate governance are good solutions to the lack of state capacity¹⁷⁷ and have promulgated theories of transnational systems of labor governance that potentially leapfrog the state,¹⁷⁸ others, such as myself, believe that there are potentially serious democratic deficits with such regimes, and that effective labor regulation needs a strong presence of a democratically legitimate state.

C. Integrative Linkage Approaches to Labor Development

I have thus argued elsewhere for an approach to trade and labor regimes that would be grounded in development and human rights,¹⁷⁹ and that would actively combine the new and emergent forms of private global labor governance with traditional public forms. The central goal of such an approach is to develop context-specific systems of regulation that (1) take into account the new forms of nonstate regulation, (2) leverage the global demand for socially compliant goods, (3) reinforce state regulatory capacity where it is weak, and that (4) are grounded in a development-centered labor regulatory approach. Such a system would utilize the promise and advantages of nonstate regulatory mechanisms, and at the same time it would ground the system in a baseline of norms and seek to develop public institutions of governance that are more intrinsically suited to advancing the goals of democracy and development.¹⁸⁰

In my proposal to achieve these objectives, I argued that an Integrative Linkage regime might create regionally tailored institutions that would be designed to suit the particular needs and context of a given country.¹⁸¹ A primary function of these institutions would be to monitor and generate information about workplaces that would be made public.¹⁸² Such a system would require a set of standards that would be monitored; presumably those standards would derive from domestic labor law or some specified subset of it, such as freedom-of-association rights, so long as the domestic law complied with the core ILO standards.¹⁸³ A multistakeholder governance council at local and national levels would oversee the program.¹⁸⁴ Importantly, as much control as

177. See John Braithwaite, *Responsive Regulation and Developing Economies*, 34 *WORLD DEV.* 884, 889–90 (2006). *But see* Kolben, *supra* note 157, at 26–27 (arguing that state labor governance capacity should be enhanced).

178. See Braithwaite, *supra* note 177, at 890; Archon Fung, Dara O'Rourke & Charles Sabel, *Realizing Labor Standards, in CAN WE PUT AN END TO SWEATSHOPS? 3* (Joshua Cohen & Joel Rogers eds., 2001).

179. Kolben, *supra* note 155, at 208–09.

180. *Id.* at 209.

181. *Id.* at 246.

182. *Id.* at 246–47.

183. *Id.* at 250–51.

184. *Id.* at 248.

possible would be pushed down to the local levels to design local monitoring regimes. The local and national governance councils, in the spirit of democratic deliberation and participation, would also provide a forum where workers and other stakeholders could engage in open discussion of and deliberation over context-specific workplace issues and the Integrative Linkage regime.¹⁸⁵

Such deliberative mechanisms are potentially important tools for fostering democratic processes and institutions by bringing debate and discussion on workplace governance and conditions into public fora.¹⁸⁶ The use of such deliberative mechanisms would also realize the instrumental and potentially *constructive* functions of democracy, as articulated by Sen, by helping workers form values and opinions, as well as by helping them achieve the aims they seek from the regulatory regime.¹⁸⁷ Finally, an independent monitoring body or group of bodies would be created to monitor and compare, based on a set of benchmarks, the quality of various monitoring regimes and factories.¹⁸⁸ The performance of local councils could also be evaluated and compared, creating a set of best practices based on transparency levels and deliberative democratic principles.¹⁸⁹

It is possible that the Integrative Linkage regime described above could be specifically adapted to further labor-development goals, such as worker capabilities and workplace and political democratic functioning. One way in which this could occur is by developing worker-capability indicators and democratic development goals to be monitored and compared. Current measures of worker development tend to focus on traditional measures of labor development, such as productivity, employment levels, and reduction of poverty levels.¹⁹⁰ In contrast, a workplace democracy or citizenship indicator, for example, could be developed that would measure *genuine* levels of democratic workplace functioning.

What this means in practice is dependent on the given political context and preexisting industrial-relations regime. In contexts where unions can adequately serve the democratic function, union density would be a good proxy for democratic workplace functioning.

185. *Id.*

186. See Archon Fung, *Deliberative Democracy and International Labor Standards*, 16 GOVERNANCE 51, 52–53 (2003).

187. See *supra* note 117 and accompanying text.

188. Kolben, *supra* note 155, at 247.

189. *Id.* at 250.

190. The ILO identifies four indicators of new employment: (1) “[g]rowth rate of labour productivity (GDP per person employed),” (2) “[e]mployment-to-population ratio,” (3) “[p]roportion of employed people living below the poverty line,” and (4) “[p]roportion of own-account and contributing family workers in total employment (vulnerable employment rate).” ILO, *Guide to the New Millennium Development Goals Employment Indicators* 12 (June 2009), available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_110511.pdf.

But in countries where other institutions might genuinely enable labor citizenship, those institutions would indicate workplace functioning.

To measure development of individual democratic functioning and the degree of institutional democratic spillovers, one might also look at the degree to which workplace leaders become involved in civil-society organizations or in political parties. Linkage regimes can establish the creation of institutions that measure such indicators and/or make trading privileges contingent on meeting certain development indicators.

This set of tools and principles can also potentially be incorporated into domestic regulatory regimes absent a trade and labor agreement. Such a regulatory approach, however, would potentially require funding. What is key is that new experimental regulatory regimes further the goals of development, including increasing worker capabilities and promoting workplace democracy and democratic functioning at the larger political level.¹⁹¹

CONCLUSION

This Article has argued that trade and labor linkage regimes ought to be grounded in a development approach.¹⁹² This means that instead of focusing on sanctions-based, legalistic linkage institutions, such regimes should rather seek to create and encourage regulatory instruments that are designed to achieve labor-development goals. They should catalyze the development functions of domestic regulatory regimes and potentially create new

191. At least two prominent thinkers have proposed that we have transitioned or are in the process of transitioning to a new form of democracy in which accountability is centered not in the state and its "hierarchical" relationships, but rather in a new transnational democratic space where global actors hold each other accountable through forms of peer review. Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763, 778 (2005). But the problem with this conception is that it too quickly disregards the inherent importance of national and local democratic institutions, as well as the way in which they may be linked with local work arrangements. See Kolben, *supra* note 157, at 2.

192. Some critics might argue that development-centered labor law and trade and labor frameworks might distract from a rights-based framework with specified standards and adequate legal remedies. This might be true. But perhaps rights-based and legalistic trade and labor regimes are too limited, particularly in contexts of limited state capacity. Maybe the binaries of legal/illegal or of compliance/noncompliance are inadequate measures of what is happening in a given workplace or informal work area. Perhaps a regulatory regime that is focused on rights-based indicators, rather than on broader and more expansive development indicators, risks losing the nuance and richness of what makes the workplace such a fruitful source of human development and citizen formation. While there is insufficient space in this Article for a broader discussion of rights-based versus development-based approaches to labor law regulation and linkage, or how the two might or might not be synergistic, that topic is worthy of future debate.

institutions that can help further labor development through some of the instruments that I have proposed above. Such an approach to trade and labor linkage requires an analysis of what constitutes labor development and how labor regulation can further the objectives of development, which I have attempted to do. I have argued that to achieve development, labor regulation should be directed toward decreasing the unfreedoms that people experience in the context of work. It entails creating democratic regimes in which workers can meaningfully participate and derive meaning from their work lives. It recognizes and develops the linkages between labor democratic institutions and citizenship at work and democracy and citizenship in society and polity. Trade and labor regimes, accordingly, should be directed toward achieving these broad labor development goals.

My approach to doing so in the Article has not been to prescribe a particular institutional design, for it is impossible and unwise to prescribe one-size-fits-all programs. Rather I have highlighted a broad set of tools, and a sample institutional design, that utilize the new shape of transnational labor governance. Other approaches also exist, some of them complementary to an Integrative Linkage approach. For example, perhaps trade and labor regulatory regimes ought to incorporate experimental programs like Better Work into their design, as was implicitly done in the HOPE II trade-preferences law in Haiti,¹⁹³ and proactively direct them toward the specific development objectives and needs of a particular regulatory context. This task I leave for policymakers and for future discussion.

193. As part of the HOPE II legislation, ILAB granted \$2.5 million to the Better Work program to implement a project in Haiti. Press Release, Congressman Kendrick Meek, U.S. House of Representatives, The U.S. House of Representatives Passes Legislation Expanding Trade Preferences to Haiti (May 14, 2008), <http://kendrickmeek.house.gov/index.cfm?sectionid=30&parentid=6§iontree=6,30&itemid=515>; Press Release, U.S. Dep't of Labor, U.S. Department of Labor Awards \$6.4 Million in Grants to Support International Worker Rights, PR Newswire (Sept. 30, 2009), <http://www.prnewswire.com/news-releases/us-department-of-labor-awards-64-million-in-grants-to-support-international-worker-rights-62912697.html>.