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Is Trade Sexist? How “Pink” Tariff Policies’ Harmful Effects Can Be Curtailed Through Litigation and Legislation

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Is Trade Sexist? How “Pink” Tariff Policies’ Harmful Effects Can Be Curtailed Through Litigation and Legislation

Miranda Hatch*

Women in the United States face unconscious and conscious sexism in many aspects of their lives. United States trade policy exacerbates this issue by imposing gender-based tariff rates that cause women to pay more for their apparel and footwear. This is due to the United States placing different tariffs on different products based on whether the product is meant for use by “females” or “males.” While some tariffs favor men and some favor women, the overall tariff burden still rests on women. The goal of this Note is to discuss the likelihood of solving this problem through litigation or legislation. This Note will first analyze and review the two cases regarding this issue that have been heard at the United States Court of Appeals for the Federal Circuit level. It will discuss why the tariffs are facially discriminatory, and why they deserve to be treated with the intermediate scrutiny standard. This Note will also show that with a changing culture and court composition, courts may rule differently on this issue moving forward. It will conclude by analyzing the possibility of these gendered tariffs being abolished through legislation.

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INTRODUCTION

Clothing and footwear design is about so much more than just aesthetics. Clothing manufacturers that import products must constantly be thinking about the tariffs that are assigned to the goods that they are importing and who the end users are. For example, if you have ever purchased a female shirt from Columbia Sportswear you may have noticed that many of their female blouses and shirts have small pockets under the waist.¹ This is because the tariff is much lower when the pocket is present as it is no longer classified as a female good.² This is an interesting phenomenon faced by many corporations country wide. However, this phenomenon is hurting female consumers by making the goods that they purchase more expensive due to the high tariff rates.

1. See Kai Ryssdal, Janet Nguyen, Bridget Bodnar & Maria Hollenhorst, *There's a Reason Your Columbia Shirt Has a Tiny Pocket Near Your Waistline*, MARKETPLACE (May 29, 2019), <https://www.marketplace.org/2019/05/29/theres-a-reason-your-columbia-shirt-has-a-tiny-pocket-near-your-waistline>.

2. See *id.* (explaining that the normal tariff on female blouses is reduced significantly when the pocket below the waist is present because the blouse deviates from a more typical design).

When one thinks about the areas that still need improvement before our country is completely gender equitable, the first thing that one thinks of is likely not United States trade policy. However, sexist trade practices have crept into our country's policies, therefore making things more expensive for women.³

The United States has used tariffs on goods to build revenue since the start of our nation.⁴ While these tariffs started off as simple, the United States now has a complicated tariff "schedule" with different rates for many different types of goods.⁵ However, these tariffs are not gender neutral.⁶ Many tariff rates differ based on if the products are ultimately intended for "male" or "female" users. For example, overalls for women have a 14% tariff but only a 9% tariff for men.⁷ When it comes to swimsuits males face a higher tariff burden at 28% with women at 12%.⁸ When this issue was first discovered, researchers learned that because of the discriminatory duties, U.S. importers had overpaid almost \$1.3 billion dollars to the U.S. government.⁹

While some of these tariffs do burden men more than women, overall, it has been shown that these tariffs fall more on women.¹⁰ In 2015, the New York City Department of Consumer Affairs compared male and female goods and found that women pay 8% more for apparel than men.¹¹ This wide gap in cost, when it comes to apparel, can be traced back largely to the differential tariff rates.

3. See Artur Gales, Tamara Gurevich, Serge Shikher & Marinos Tsigas, *Gender and Income Inequality in United States Tariff Burden* (U.S. Int'l Trade Comm'n Econ. Working Paper Series, Paper No. 2018-08-B, 2018), https://www.usitc.gov/publications/332/working_papers/ggst_-_gender_and_income_inequality_in_tariffs.pdf. See *infra* section II.D.1 for further evidence of how gender-based tariffs disproportionately effect women.

4. See F.W. TAUSSIG, *THE TARIFF HISTORY OF THE UNITED STATES* 16-19 (5th ed. 2010).

5. See Harmonized Tariff Schedule, 19 U.S.C. § 1202 (2021) [hereinafter HTSUS]. Although contained in statute, the HTSUS is maintained and published by the United States Trade Commission, and updated edits can be found at <https://hts.usitc.gov/>.

6. See *id.*; Gales et al., *supra* note 3, at 3.

7. Compare HTSUS, *supra* note 5, at heading 6103, with *id.* at heading 6104.

8. HTSUS, *supra* note 5, at heading 6112.

9. Matt Gersper & Tom Gould, *Gender and Age Discrimination Cost U.S. Importers Billions of Dollars*, RETAIL INFO SYSTEMS (Oct. 23, 2007), <https://risnews.com/gender-and-age-discrimination-cost-us-importers-billions-dollars>.

10. See *infra* section II.D.1 for further evidence of how gender-based tariffs disproportionately effect women.

11. Anne-Marcelle Ngabirano, *'Pink Tax' Forces Women to Pay More Than Men*, USA TODAY (Mar. 28, 2017), <https://www.usatoday.com/story/money/business/2017/03/27/pink-tax-forces-women-pay-more-than-men/99462846/>.

While many recognize that these tariffs are a problem, finding a way to eradicate them is more complicated than it may seem. Potential ways to eradicate the tariffs involve bringing successful litigation to rule the tariffs unconstitutional or passing legislation to change the tariff schedule. Both possibilities have failed to this point. Regarding litigation, even though over 200 companies have attempted to bring claims that these tariffs violate the Equal Protection Clause, all the claims have been dismissed due to being unsuccessful at the pleading stage.¹² Two cases have been heard at the Federal Circuit and have both been denied due to the court ruling failure to state a claim.¹³ The court has not applied typical gender discrimination analysis and has issued frustrating cases that leave the issue unresolved. Regarding legislation, there has not yet been a bill proposed to end gender-based tariffs specifically, and bills presented to end gendered price discrimination have not passed yet.¹⁴

This Note proceeds with three major parts. Part I examines the current landscape of gender-based tariffs and how they came to be. Part II discusses litigation that has been brought to United States federal courts and how litigation may be the proper avenue to end these tariffs. This Part summarizes the two cases (*Totes-Isotoner* and *Rack Room Shoes*) regarding gender-based tariffs that have been heard at the United States Trade Court and the United States Court of Appeals for the Federal Circuit. The Supreme Court has denied granting certiorari in either of these cases.¹⁵ This Part concludes with an analysis of the disparate impact and discriminatory intent of the gender-based tariffs and analyzes if there is any avenue for successful future litigation by considering court makeup, cultural changes, and new evidence acquired since the original two cases were brought. Part III examines current legislative proposals to end gender-based tariffs and the likelihood of them being passed into law. It also looks at other countries that have successfully ended

12. See *infra* Part II for a comprehensive list and further explanation of companies that have brought cases regarding gender-based tariffs.

13. *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346 (Fed. Cir. 2010); *Rack Room Shoes v. United States*, 718 F.3d 1370 (Fed. Cir. 2013).

14. See *infra* section III.A for a further discussion on legislative proposals regarding pink taxes and tariffs.

15. *Rack Room Shoes v. United States*, 572 U.S. 1114 (2014); *Totes-Isotoner Corp. v. United States*, 562 U.S. 830 (2010).

gender-based tariffs and how that model can be followed by the United States. This Note concludes by showing how lowering tariffs multilaterally on apparel and electing more women may also aid in ending gender-based tariffs.

I. CURRENT PINK TARIFF LANDSCAPE

A. A Brief Overview of Apparel and Footwear Tariffs

Tariffs have been used by the United States since 1789 when the Tariff Act was signed as an initial way to collect revenue.¹⁶ When tariffs first began, only a few goods that were imported were attached to tariff rates.¹⁷ However, what was once a simplistic tariff schedule has developed over the past two hundred years into a now hundred-plus page document known as the Harmonized Tariff Schedule of the United States (HTSUS).¹⁸ This tariff schedule contains extremely detailed descriptions of all of the tariffs that the United States levies onto products entering the country.¹⁹ Congress enacts the HTSUS, but the International Trade Commission publishes and maintains the schedule and provides technical information about its structure and modification.²⁰ The President can also unilaterally change tariff rates in retaliation for unfair trading activities or for other statutory reasons such as a national emergency or when U.S. security is at risk.²¹ Tariff rates also are

16. *The History of U.S. Tariff Policies*, U.S. GLOB. INVS., <http://www.usfunds.com/tariff-timeline/> (last visited Oct. 6, 2021). The act was signed because countries were not willing to enter into trade agreements with the United States post-Revolutionary War. *Id.*

17. *Id.*

18. *See* HTSUS, *supra* note 5.

19. *See id.*

20. *Tariff Schedules*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/industry-manufacturing/industrial-tariffs/tariff-schedules> (last visited Oct. 6, 2021).

21. CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF11030, U.S. TARIFF POLICY: OVERVIEW (2021). In general, Congress has the authority to create tariffs. However, various policies allow for the President to unilaterally set tariff rates. Some of the notable powers given to the President are:

Section 232 of the Trade Expansion Act of 1962 empowers the President to adjust tariffs on imports that threaten to impair U.S. national security. Section 5(b) of the Trading with the Enemy Act and Section 203 of the International Emergency Economic Powers Act empower the President in a time of war or emergency to impose tariffs on all imports.

Id. at 2.

usually lower for countries with which we have free trade agreements.²² Tariff rates are usually changed and negotiated during World Trade Organization (WTO) negotiations.²³

As the United States has entered the WTO and more and more free trade agreements, tariff rates overall have gone down dramatically.²⁴ However, this large decrease in overall tariff rates can actually be mostly attributed to low tariffs on goods such as natural resources and farm products.²⁵ While tariffs that do not differentiate on the basis of gender have lowered over the years, tariffs on apparel and footwear that do discriminate on the basis of gender remain extremely high.²⁶ It has been found that almost all clothing and footwear is “dutiable” while other goods are not.²⁷ Apparel tariff rates average around 11.6%; the only product groups with higher tariff rates are tobacco, dairy products, and sugar.²⁸ The total average tariff rate among *all* goods is only 1.4%.²⁹ Even though clothing accounts for only 6% of all imports, it makes up almost half of the United States’ tariff income.³⁰ This commitment to keep apparel and footwear tariffs high has been exemplified in the recent trade war with China that has raised punitive tariffs on apparel to extremely high levels.³¹

22. *Id.*

23. *Id.*

24. Uros Andrejevic, Giuliana Campanelli Andreopoulos & Alexandros Panayides, *Tariffs in Apparel and Footwear: A Gender Approach*, J. DIVERSITY MGMT., Third Quarter 2008, at 1, 1.

25. *Id.* at 1-2.

26. *Id.* at 2. The average tariff rate for apparel and footwear is 11.4% and generates 46.7% of total United States tariff revenue. *Id.*

27. Drew DeSilver, *U.S. Tariffs Vary a Lot, but the Highest Duties Tend to Be on Imported Clothing*, PEW RSCH. CENTER (Mar. 28, 2018), <https://www.pewresearch.org/fact-tank/2018/03/28/u-s-tariffs-vary-a-lot-but-the-highest-duties-tend-to-be-on-imported-clothing/>.

28. *Id.*

29. Courtney Reagan, *You’re Already Paying Tariffs on Clothing and Shoes, and Have Been for Almost 90 Years*, CNBC (Aug 9, 2018, 1:49 AM), <https://www.cnbc.com/2018/04/06/americans-are-already-paying-tariffs-on-clothing-and-shoes.html>.

30. *Id.*

31. Sheng Lu, *US-China Tariff War, the Textile and Apparel Hit-List Updated*, JUST STYLE (Jan. 4, 2021), <https://www.just-style.com/analysis/us-china-tariff-war-the-textile-and-apparel-hit-list>. In August of 2019, Trump raised the punitive tariffs on all apparel entering the United States through China to 15% (on top of the tariff already in the HTSUS). *Id.*

B. A Brief Overview of Gender-Based Tariffs

The HTSUS contains vast amounts of product descriptions for apparel and footwear in order to ensure that different products can be effectively categorized with the proper tariff rate.³² These descriptions can become extremely specific, so instead of simply saying “leather shoe” the HTSUS says “[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather.”³³ Even though these descriptions are already extremely specific, many goods are classified by gender as the last part of the subheading.³⁴ Therefore, everything is materially the same in the goods aside from the gender of the ultimate user. Many tariffs on U.S. goods are adopted from the International Harmonized System of tariffs that has been negotiated during WTO negotiations; however, the part of the U.S. tariff schedule that classifies based on gender has not been adopted internationally.³⁵

In 2014, it was found that “86% of US apparel imports and 79% of US footwear imports were gender-classified by the United States International Trade Commission (USITC).”³⁶ There are currently 155 HTS categories of men-specific apparel and 160 categories of women-specific apparel listed in HTSUS.³⁷ For example, “suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear)’ are split into two subheadings: HTS 6103 for ‘men’s or boys’ and HTS 6104 for ‘women’s or girls’”.³⁸ Some of these gender differential tariffs are set at the same rate, but many are very different for men and women, with the majority hurting women. Right now, there are currently 78 tariff provisions that have *different* rates attached to them solely on the basis of gender.³⁹

32. See generally HTSUS, *supra* note 5.

33. Jason Lewis, *Gender-Classified Imports: Equal Protection Violations in the Harmonized Tariff Schedule of the United States*, 18 CARDOZO J.L. & GENDER 171, 175 (2011).

34. *Id.*

35. *Id.* at 176-77.

36. Lori L. Taylor & Jawad Dar, *Fairer Trade: Removing Gender Bias in US Import Taxes*, 6 MOSBACHER INST. POLICY BRIEFS 1, 3 (2015).

37. Gailes et al., *supra* note 3, at 11.

38. *Id.*

39. See HTSUS, *supra* note 5. See *infra* section II.D.1 for a further explanation of the difference between the tariff rates and how they negatively impact women.

The history of these gender-based tariffs is difficult to parse out due to limited public information regarding trade negotiations. However, each different tariff provision has a different history attached to it. Almost all tariffs started out as gender-neutral and have had gendered provisions added to them over time.⁴⁰ Footwear tariffs exemplify this well. The initial tariffs on footwear were established in 1789 by the Tariff Act and were not differentiated by gender at all. However, in 1951 President Truman signed the Torquay Protocol to the General Agreement on Tariffs and Trade, which amended the Tariff Act and created different tariff rates for men and women's footwear.⁴¹

The federal government is the only entity that has been applying gender-differentiated tariffs.⁴² States themselves have control of their own state tax codes, and although some female goods are unfairly taxed or set at higher price points by sellers, there is no evidence of differential tax rates for goods that are the same for men and women *besides* their gender.⁴³ It is important to note that there is no federal law that prohibits gendered price discrimination.⁴⁴ This means that it is fine for the companies that are getting charged these discriminatory tariffs to then in turn transfer the burden of these tariffs onto the consumer through higher costs on goods.

To understand the existence of these tariffs, it is also important to consider who may benefit from their imposition. The clear winners of these tariffs are the United States government who get to collect the tariffs, American producers of apparel who face less competition from overseas, and men who pay less for goods compared to women. However, it will be shown throughout this

40. Complaint at 4, *Blue Star Imps. LP v. United States*, No. 13-00180 (Ct. Int'l Trade filed May 5, 2013).

41. *A. Zerkowitz & Co. v. United States*, 54 Cust. Ct. 151, 153 (Cust. Ct. 1965).

42. Natasha Bach, *35 States in the U.S. Still Charge Women a Tampon Tax*, FORTUNE (June 11, 2019, 11:00 AM), <https://fortune.com/2019/06/11/tampon-tax-us-states/>. Even though there are not differential rates for the same products, there are high taxes on tampons that are considered discriminatory. *Id.*

43. *Id.*

44. Bourree Lam, *Battle of the Prices: Is It Ever Fair to Charge One Sex More?*, ATLANTIC (Oct. 18, 2014), <https://www.theatlantic.com/business/archive/2014/10/battle-of-the-prices-is-it-ever-fair-to-charge-one-sex-more/381546/>. There are, however, various state laws that make gendered price discrimination illegal such as the Unruh Act in California. *Id.*

Note that these potential benefits do not outweigh the harm that the tariffs impose upon women.

II. ENDING PINK TARIFFS THROUGH LITIGATION

Before 2007, the issue of gender-based tariffs was largely unknown. However, this issue was likely discovered by a trade attorney who spent years exploring the issue.⁴⁵ It was then covered by the New York Times, which caused the issue to gain more traction in the legal field.⁴⁶ In the years between 2007 and 2011, hundreds of companies filed complaints in the U.S. Court of International Trade (CIT) alleging that tariffs were discriminating on the basis of sex and had caused the companies to incur monetary damages in overpaying for goods.⁴⁷ Notable companies to file claims include Steve Madden,⁴⁸ Pacific Sunwear of California,⁴⁹ Ann Taylor,⁵⁰ L.C. Footwear,⁵¹ Blue Star Imports,⁵² Century 21,⁵³

45. Michael Barbaro, *In Apparel, All Tariffs Aren't Created Equal*, N.Y. TIMES (Apr. 28, 2007), <https://www.nytimes.com/2007/04/28/business/28gender.html>; Michael Barbaro, *Clothing Makers Allege Sex Discrimination in U.S. Tariffs*, N.Y. TIMES (Apr. 29, 2007), <https://www.nytimes.com/2007/04/29/business/worldbusiness/29iht-tariffs.4.5494193.html>. It is again interesting to highlight the fact that gender-based tariffs were not commonly discussed or written about before this article. *Id.*

46. *Id.*

47. Complaint, Steve Madden Ltd. v. United States, No. 1:07-cv-00136 (Ct. Int'l Trade Apr. 5, 2007).

48. *Id.*

49. Complaint, Pac. Sunwear of Cal., Inc. v. United States, No. 1:11-cv-00300 (Ct. Int'l Trade Aug. 16, 2011).

50. Complaint, Ann Taylor Inc. v. United States, No. 1:13-cv-00187 (Ct. Int'l Trade May 9, 2013).

51. Complaint, L.C. Footwear LLC v. United States, No. 1:13-cv-00189 (Ct. Int'l Trade May 10, 2013).

52. Complaint, Blue Star Imports LP v. United States, No. 1:13-cv-00180 (Ct. Int'l Trade May 7, 2013).

53. Complaint, Century 21 v. United States, No. 1:13-cv-00188 (Ct. Int'l Trade May 9, 2013).

Columbia Sportswear,⁵⁴ Asics,⁵⁵ Payless,⁵⁶ Target,⁵⁷ Tommy Hilfiger,⁵⁸ Marshalls,⁵⁹ TJ Maxx,⁶⁰ Prada,⁶¹ Ecco,⁶² and Quicksilver.⁶³

The vast majority of cases never got their day in court because they were put on the backburner while the two cases that did reach the CIT were litigated as they were all challenging the same substantial issue.⁶⁴ The court did, however, give these companies permission to file amicus curiae briefs regarding the cases that would end up being litigated.⁶⁵

A. Equal Protection as Applied to Gender Discrimination

Understanding the Equal Protection clause in the context of gender discrimination is critical in navigating the legal issues surrounding gender-based tariffs. The Fourteenth Amendment of the Constitution states that “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”⁶⁶ This means that individuals in similar situations must be treated equally by the law. All equal protection claims are evaluated against three different levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis.⁶⁷ A stricter level of scrutiny corresponds with less deference given to the Government

54. Barbaro, *supra* note 45.

55. *Id.*

56. Gersper & Gould, *supra* note 9.

57. *Id.*

58. Mike Cherney, *Hilfiger, Others Sue US Over Gender-Based Duties*, LAW 360 (Aug. 20, 2009, 3:20 PM), <https://www-law360-com/articles/117517/hilfiger-others-sue-us-over-gender-based-duties>.

59. *Id.*

60. *Id.*

61. Ryan Davis, *Prada, Ecco Latest to Challenge Gender-Based Duties*, LAW 360 (Aug. 17, 2011, 2:01 PM), <https://www-law360-com/articles/265498/prada-ecco-latest-to-challenge-gender-based-duties>.

62. *Id.*

63. Kaitlin Ugolik, *Quicksilver, DC Shoes Sue US Over Gender-Biased Tariffs*, LAW 360 (Oct. 16, 2013, 8:48 PM), <https://www-law360-com/articles/480905/quicksilver-dc-shoes-sue-us-over-gender-biased-tariffs>.

64. Docket, *Steve Madden Ltd. v. United States*, No. 1:07-cv-00136 (Ct. Int'l Trade filed Apr. 5, 2007).

65. *Id.*

66. U.S. CONST. amend. XIV, § 2.

67. Russell M. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 122 (1989).

regarding its explanation for the discrimination.⁶⁸ In cases alleging gender discrimination, the Supreme Court has applied the standard of intermediate scrutiny.⁶⁹

The Supreme Court of the United States has ruled that when the language of a statute or provision of law is facially discriminatory on the basis of sex, that it will apply the intermediate scrutiny standard. This means that when the law is shown to be facially discriminatory, the Government must show that it serves an important government interest *and* that the regulation is substantially related to the goal the distinctions are trying to achieve in order for the facial discrimination to be upheld.⁷⁰

The other way to show discrimination on the basis of gender is through a disparate impact analysis.⁷¹ This analysis comes into play when the language of the law or provision is gender neutral, but one gender is more negatively affected by this rule than another. In this case, it must be shown that the government specifically intended to disproportionately affect one gender over the other.⁷²

Both a facial discrimination philosophy and a disparate impact philosophy have been used to bring forward cases regarding gender-based tariffs. The sections below will analyze the two cases that have been decided by the Federal Circuit, the actual impact of these tariffs, and the likelihood of future litigation succeeding to abolish the gender-based tariffs.

B. Facial Discrimination and Totes-Isotoner

The first case alleging gender discrimination in tariffs was brought by Totes-Isotoner, a company that sells gloves, raincoats, and other products for bad weather.⁷³ The United States places a 14% tariff on men's seamed leather gloves and a 12.6% tariff on seamed gloves for "other persons" (which can be assumed to

68. *Id.*

69. *See id.* at 124.

70. *United States v. Virginia*, 518 U.S. 515, 533 (1996). The case goes on to clarify that "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.*

71. To clarify, disparate impact analysis is only done when something is not discriminatory on its face. It is completely separate from the tiers of scrutiny analysis. *See Galloway, supra* note 67, at 124–25.

72. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

73. *See generally* TOTES-ISOTONER, <https://www.totes.com/> (last visited Oct. 8, 2021).

include gloves for women and children).⁷⁴ Totes-Isotoner argued that these gloves were exactly the same besides the gender classification and that there was no explanation for the different tariff rates beyond gender, which in turn was a constitutional violation.⁷⁵ Totes-Isotoner asserted that the gender-based tariffs violated the Equal Protection guarantees that were incorporated through the Due Process Clause.⁷⁶ Totes-Isotoner used the philosophy that the tariffs were facially discriminatory and sought damages based on the extra money that they have had to pay for their imports based on the discriminatory tariffs.⁷⁷ They alleged that because they import gloves for men at the higher tariff rate that they have lost profits over time.⁷⁸

This case was first brought to the Court of International Trade in July of 2008. The government wanted the case immediately dismissed due to it being a political question and their assertion that Totes-Isotoner did not have standing to bring the claim.⁷⁹ They also claimed that Totes-Isotoner had not met their burden in pleading.⁸⁰ The CIT rejected the political question argument due to the fact that courts commonly are the ones that review Equal Protection claims, and even though tariff agreements may be made internationally, they are enacted into United States law by Congress, therefore making them justiciable laws.⁸¹ They rejected the standing argument because Totes-Isotoner fulfills the standing requirements set previously by the courts: they have suffered an injury through loss of profit, this injury was caused by the defendant's conduct as the government set the allegedly discriminatory tariffs, and the injury is redressable in court because grant of redress can be given.⁸²

74. See *Totes-Isotoner Corp. v. United States*, 32 Ct. Int'l Trade 739, 741 (2008). The tariff schedule actually refers to the classification as "other persons[.]" but since there is a male classification, the suspect classification can be assumed to be for women. *Id.*; see HTSUS, *supra* note 5 for actual language employed by the tariff schedule.

75. Brief of Plaintiff-Appellant at 9-10, *Totes-Isotoner Corp. v. United States*, 32 Ct. Int'l Trade 739 (2008) (No. 2009-113).

76. *Id.* at 5.

77. *Id.* at 6.

78. *Id.*

79. See *Totes-Isotoner*, 32 Ct. Int'l Trade at 740.

80. *Id.*

81. *Id.* at 741.

82. *Id.* at 745.

However, the CIT ruled that Totes-Isotoner did not plead sufficient facts to state a valid claim.⁸³ The CIT followed the pleading standard described in *Twombly* that requires plaintiffs to provide factual allegations that are “enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).”⁸⁴ The CIT seemed to be applying an intermediate scrutiny analysis by ruling that Totes-Isotoner must allege that “the government has engaged in gender-based discrimination without an exceedingly persuasive justification, or in other words, that the government has used discriminatory means that are not substantially related to important governmental objectives.”⁸⁵ It then cited to *United States v. Virginia*, a preeminent case on intermediate scrutiny.⁸⁶ However, it then ruled that Totes-Isotoner must plead facts that show that there was a governmental purpose in discrimination.⁸⁷ It does make a slight nod to facial discrimination by acknowledging that this can prove discriminatory purpose, but the court ruled that this is not a valid argument because the complaint did not say that the Government was discriminating “based on” the gender of the alleged user of the product.⁸⁸ It validated this by saying that the goods are not *necessarily* sold to someone of the gender they were designated for. The court said that “[discriminating] ‘[o]n the basis of’ indicates foundation or fundamental element rather than objective.”⁸⁹ The CIT ruled that:

Nonetheless, because the challenged tariff classifications are, at worst, “in between” classifications that impose a facially discriminatory tax and classifications that are not facially discriminatory, Plaintiff must at least include an allegation that the challenged tariff classifications distribute the burdens of the tax rate imposed in a way that

83. *Id.* at 747.

84. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

85. *Id.* at 748.

86. *Id.*

87. *Id.*

88. *See id.* at 747.

89. *Id.* at 749.

disadvantages one sex as a whole, or has a disproportionate impact based on sex.⁹⁰

After dismissing the case for failure to state a claim, the CIT heard the case again on appeal in November of 2008. Totes-Isotoner wanted again to argue that the tariffs were facially discriminatory, and therefore malicious government intent should be inferred rather than proven through pleadings. The CIT ruled that in order for that inference to be made, it must first be sufficiently shown that the tariffs were facially discriminatory, a burden which they did not believe Totes-Isotoner met.⁹¹ The court does not go into detail about why that burden was not met, but rather just suffices with the conclusion that it was not by saying “[a] product’s mere classification based on the anticipated principal use of the good does not inherently mandate that the articles actually be so used, making the classification’s effect on purchasers of different genders questionable at best.”⁹² However, this reasoning seems faulty when you change the scenario to race instead of gender. For example, if products clearly marketed to Black hair had much higher tariffs than hair products clearly marketed to White hair, there would likely be less acceptance of the differential tariffs. This example highlights the logical fallacies in the court’s quick rejection of the facial discrimination standard.

Probably due to these frustrations, the case was appealed and heard by the Federal Circuit.⁹³ The court spent most of its analysis discussing whether Totes-Isotoner provided enough facts to properly state a claim, rather than focusing on the actual claim itself. It also upheld the lower court’s decision that Totes-Isotoner did not properly state a claim, although on different grounds than the CIT.⁹⁴ When the court decided the issue, it did not use the intermediate scrutiny test like the CIT did before them, but rather applied the rational basis test.⁹⁵ The circuit court used precedent of a tax law case that distinguished items of property of the same class

90. *Id.* at 750.

91. *See* Totes-Isotoner Corp. v. United States, 32 Ct. Int’l Trade 1172, 1178 (2008).

92. *Id.* at 1180.

93. *See generally* Totes-Isotoner Corp. v. United States, 594 F.3d 1346 (Fed. Cir. 2010).

94. *Id.* at 1353-54.

95. *Id.* at 1354.

and applied different tax rates to the different property.⁹⁶ The court ruled that tariffs fit more into this analysis rather than a gender discrimination analysis because the rates were actually differentiating on the basis of products rather than differentiating on the basis of gender.⁹⁷ Due to the ease of passing a rational basis standard, the court ruled that not enough facts had been presented.⁹⁸

When considering sex discrimination, the Federal Circuit only discussed the facial discrimination analysis in a brief footnote and spent the body of the case doing a disparate impact analysis.⁹⁹ The Federal Circuit made a rare distinction and said that tariff discrimination must show *more* than disparate impact.¹⁰⁰ It gave two reasons for this. First, when Congress makes tariffs, it is not concerned with the characteristics of the end user of the good, and tariff rates are based on multilateral negotiations and many different factors.¹⁰¹ It ruled that the gendered rates likely show that the products are actually completely different and go through different channels of trade.¹⁰² The second reason is that Congress has broad deference in setting taxes so it cannot be assumed that this differentiation is “invidious.”¹⁰³ It quoted the Supreme Court in *San Antonio Independent School District v. Rodriguez*: “No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact.”¹⁰⁴

There is a concurrence in the case that does touch on facial discrimination. Judge Prost determined that the tariff rates were not facially discriminatory reasoning that “[i]t imposes a burden on importers, not gender- or age-based classes of people.”¹⁰⁵ However, Judge Prost failed to consider that costs get passed down from

96. *Id.*; see generally *Allegheny Pittsburgh Coal Co. v. County Comm’n of Webster County*, 488 U.S. 336 (1989)

97. *Id.*

98. *Id.* at 1358.

99. *Id.* at 1355.

100. *Id.* at 1356.

101. *Id.* at 1356–57.

102. *Id.* at 1357.

103. *Id.*

104. *Id.* at 1358.

105. *Id.* at 1359.

importers to end users. Totes-Isotoner appealed for certiorari by the Supreme Court, but the appeal was denied.¹⁰⁶

C. Rack Room Shoes and Disparate Impact

Only a few years after the *Totes-Isotoner* decision, a new round of lawsuits began. Rack Room, Forever 21, and Skiz Imports came together as joint plaintiffs to have their case heard yet again at the Court of International Trade regarding the gender-based tariffs.¹⁰⁷ Each of these three companies alleged sex-discrimination regarding the gender-based tariffs.¹⁰⁸

The first time the CIT heard the case in February 2012 it again dismissed for failure to state a claim.¹⁰⁹ Because the court in *Totes-Isotoner* had ruled that the tariffs were not facially discriminatory, and that more than disparate impact was needed, the court held that an inference of *invidious* discrimination needed to be pled in the facts.¹¹⁰ The CIT held the plaintiffs to the high standard of showing that “[r]ather, discriminatory purpose in this particular context arises only when Congress selects or reaffirms a particular course of action ‘because of’ and not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹¹¹ The plaintiffs argued that because Congress could have used many other distinguishing factors besides gender, that it was discriminatory in choosing to use gender above all else.¹¹² The CIT rejected this argument by saying that the plaintiffs were simply restating that the claims were facially discriminatory.¹¹³ The plaintiffs also presented a 1960 Tariff Classification Study which stated that certain age and gender distinctions within the HTSUS were of “questionable” economic justification.¹¹⁴ The CIT also rejected this argument by saying that it does not show any congressional intent or that the tariffs were

106. Ryan Davis, *High Court Won't Weigh In on Gender-Based Duties*, LAW 360 (Oct. 5, 2010), <https://www.law360.com/articles/198955/high-court-won-t-weigh-in-on-gender-based-duties>.

107. *Rack Room Shoes v. United States*, 821 F. Supp. 2d 1341 (Ct. Int'l Trade 2012).

108. *Id.*

109. *Id.* at 1343.

110. *Id.* at 1346.

111. *Id.* (citing *Pers. Admin'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

112. *Id.*

113. *Id.* at 1347.

114. *Id.*

discriminatory, but it did not explain this more than simply rejecting it.¹¹⁵

In June of 2012, the CIT heard an appeal from *Rack Room*. The plaintiffs wanted the court again to look at facial discrimination, but the court simply dismissed this idea by citing a line from *Totes-Isotoner* that says, "Inherent in the power to tax is the power to discriminate in taxation."¹¹⁶ The CIT also ruled rejecting plaintiff's argument that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."¹¹⁷ They ruled that according to the *Twombly* pleading standard, sufficient facts still must be shown.¹¹⁸

One year later, in June of 2013, the case was heard by the Federal Appeals Circuit.¹¹⁹ The Federal Circuit separated out the claims brought by each plaintiff. Rack Room, mainly an importer of footwear, argued that the tariffs on footwear unconstitutionally discriminated on the basis of sex. Their main argument was that "Congress intended to discriminate by directing and implementing classifications based on gender when it could have used other non-gender factors to distinguish or to separate merchandise for duty assessment purposes."¹²⁰ Forever 21, an apparel company, challenged dozens of discriminatory provisions on different goods that they import. They relied on the same arguments as Rack Room.¹²¹ Skiz is different in the sense that they were incorporated solely for the purpose of bringing the lawsuit.¹²² Skiz imports goods that have differential tariffs but does not sell any of them.¹²³ Skiz relied on the same arguments as Rack Room and Forever 21.¹²⁴

The court ruled on whether a sufficient claim had been plead. It did not analyze whether the tariffs were facially discriminatory, but rather assumed that they were facially neutral due to the logic in *Totes-Isotoner* that the differing rates actually just differentiated

115. *Id.* at 1347-48.

116. Memorandum and Order at 4, *Rack Room Shoes v. United States*, 821 F. Supp. 2d (Ct. Int'l Trade 2012) (No. 07-00404).

117. *Id.* at 5.

118. *Id.* at 6.

119. *Rack Room Shoes v. United States*, 718 F.3d 1370 (Fed. Cir. 2013).

120. *Id.* at 1373 (citing *Rack Room Shoes*, 821 F. Supp. 2d at 1346).

121. *Id.* at 1374.

122. *Id.*

123. *Id.*

124. *See id.*

between products rather than between genders.¹²⁵ Due to this, it ruled that the plaintiffs must show discriminatory intent and impact.¹²⁶ The court rejected Rack Room's argument about Congress not using reasonable alternatives to classify goods by saying, "[p]ermitting an inference of discriminatory intent merely on the basis of the government's decision to forgo an alternative that does not mention age or gender would eviscerate the requirement that claimants must plead intent to state an equal protection claim."¹²⁷ Forever 21's claims were also dismissed for failure to state a claim, using the logic that the evidence that they brought (the 1960 tariff study) was not specifically about the tariffs at issue in their case.¹²⁸ Rack Room and Forever 21 petitioned for this issue to be heard by the United States Supreme Court. However, this petition was denied.¹²⁹

D. The Actual Disparate Impact of Pink Tariffs

The question remains: Is there any way for gender-based tariffs to be ruled unconstitutional through litigation? It seems strange knowing that over 200 companies have brought cases about the unconstitutionality of these tariffs, yet none of them have made it past the pleading stage allowing evidence to be uncovered. At this point surpassing the large pleading burden does appear to be a difficult task. It seems that the Federal Circuit ignored previous precedent and did not apply constitutional standards in ways that they typically are applied. The lack of examination of facial discrimination in almost all of the cases seems to be an oversight, so one must now ask what needs to change for it to be considered. It is also noteworthy that neither decision has ever been cited in other appellate court decisions.¹³⁰

If the case is brought again, those bringing it can again argue facial discrimination or they can choose to argue disparate impact, but without significant changes in jurisprudence it is unlikely that

125. *Id.* at 1376.

126. *Id.*

127. *Id.* at 1377.

128. *Id.* at 1378.

129. Zachary Zaggar, *High Court Denies Retailers' Bid To Nix Gender-Based Tariff*, LAW 360 (May 19, 2014, 1:53 PM), <https://www-law360-com/articles/539073/high-court-denies-retailers-bid-to-nix-gender-based-tariff>.

130. This information was found using Westlaw citing references resources.

either will succeed. The easiest way for future litigation to end these tariffs is through showing that they are in fact facially discriminatory and for this argument to be analyzed by the court at long last. If this can be done, then disparate impact does not need to be proven. The Supreme Court has said that “a law or policy is discriminatory on its face if it expressly classifies persons on the basis of race or gender.”¹³¹ Courts have also held that the starting point for determining facial discrimination is looking at the text of the statute.¹³² This seems to apply to the gender-based tariffs as they do explicitly apply different rates to different genders. One of the arguments made by the court was the tariffs were about different products in different markets, but because there are so many vast characterizations regarding material, quality, and function before gender, it seems unlikely that the products are that vastly different besides gender. This is because everything else is already accounted for such as material used, form of the item, purpose of the item, and sometimes even the weight of the item. Because all these things are accounted for it is likely that the end product is vastly similar. The race example presented earlier is also helpful to realize that discriminating on the basis of the end intended user should very clearly be facially discriminatory.

It is important to note when applying current Supreme Court decisions that if a law, tax, or statute discriminates on its face, actual discriminatory impacts do not need to be shown.¹³³ However, the decisions in *Totes-Isotoner* seem to disregard this ruling. In fact, in the *Totes-Isotoner* concurrence that was cited later in *Rack Room*, Judge Prost said that the tariffs were not facially discriminatory because they “[impose] a burden on importers, not gender- or age-based classes of people.”¹³⁴ While this seems like an illogical standard as it is not technically required in facial discrimination analysis, the following section will show how these tariffs do in fact place a burden on gender classes, and that burden is on women.

131. *Berkley v. United States*, 287 F.3d 1076, 1084 (Fed. Cir. 2002).

132. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–34 (1993).

133. *See Berkley*, 287 F.3d at 1084.

134. *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1359 (Fed. Cir. 2010).

1. Gender-based tariffs' impact on women

My own research and others' have shown that gender-based tariffs do impact female consumers more than men. Even though there are certain gender-based tariffs that do charge more for male rather than female goods, the gender-based tariffs overall affect women more.

Previous empirical studies are limited on the matter of how tariffs affect men and women differently. However, in 2018 the International Trade Commission released a report that stated that the tariff burden is heavier on women.¹³⁵ Still, they found that "while the average applied U.S. tariff on men's apparel is about 12%, the average applied U.S. tariff on women's apparel is about 15%."¹³⁶ The researchers found that "the tariff burden for U.S. households on women's apparel was \$2.77 billion more than on men's clothing. This gender gap [grew] about 11% in real terms between 2006 and 2016."¹³⁷ Overall, they found that the tariff burden on apparel is twice as large for women as it is for men.¹³⁸ In order to calculate this differential, they not only looked at the tariff rate on paper, but also at consumption habits and how often new products are purchased.¹³⁹ Even though they looked at spending, they concluded that "the growth of the gender gap in tariff burden is mainly due to the faster growth of the average applied tariff rate on women's apparel."¹⁴⁰

Because research is sparse on the absolute tariff burden due to purely the gender-based tariffs, I used data from the United States International Trade Commission Dataweb to calculate the gender-based tariffs that have been collected for the last five years.¹⁴¹ I first found the seventy-eight provisions in the HTSUS that were exactly the same, except for the intended gender of the user of the goods. These provisions contained different tariffs for the female and male goods. Using the Dataweb's data request portal, I requested the dutiable value of the goods based on the individual tariff codes. I

135. Gales et al., *supra* note 3, at 3. Note that this is still a working paper that does not purport to show the views of the Commission as a whole.

136. *Id.*

137. *Id.*

138. *Id.* at 1.

139. *Id.*

140. *Id.* at 20.

141. *See generally* USTICDATAWEB, <https://dataweb.usitc.gov/> (last visited Oct. 5, 2021).

used the years 2015–2019 to calculate this (excluding 2020 for likely trade discrepancies due to the COVID-19 pandemic). After identifying the dutiable value, I applied the tariff rate found in the HTSUS to calculate the tariff that would have been paid. This information may not be the complete picture as I did not include tariff discounts made through Free Trade Agreements that the United States has agreed upon, as these specific tariff rates are very difficult to obtain. Below is the table showing the different tariff rates paid for female and male goods, clearly showing that more tariffs are paid on female goods. This, along with the higher averaged tariff rate for women, shows a clear disparate impact on women. Especially because researchers have shown that in many cases, the burden of tariffs can impact the consumer more than the corporation selling the goods.¹⁴²

	Tariffs Assigned to Goods Intended for Male Use	Tariffs Assigned to Goods Intended for Female Use	Difference
Total Tariffs Collected	\$4,242,230,280	\$4,922,454,931	\$680,224,651 ¹⁴³

Neither *Totes-Isotoner* nor *Rack Room* claimed in their pleadings that one gender is more impacted by the tariff rates than others. Instead, they focused on the pure fact that there are differentials in the rates.¹⁴⁴ Adding this newly found information from the 2018 study and the data shown from the ITC Dataweb may provide strong evidence that women in fact are more impacted, which may persuade the court of facial discrimination.

However, the court in *Rack Room* ruled that something *more* than disparate impact is required, and it is difficult to know what that exactly means. One can hope that if the court was presented

142. Taylor & Dar, *supra* note 36, at 2.

143. Another vital analysis would be to apply male tariff rates to the female goods to determine if women face the higher tariff burden because they purchase more. This will be further analyzed in later iterations of this paper, that focus more completely on the idea that it may depend on the individual consumer and whether or not the tariff rates burden them. Even if this proves to be true, it is still worrisome that the Government is determining tariffs on the basis of sex. There is also significant evidence that goes against this initial finding, so further research will need to be done.

144. See *supra* sections II.B–C for clarifying discussion of the claims brought in the *Totes-Isotoner* and *Rack Room* litigation.

with this evidence, it would at least consider the tariff burden faced by women and how it exacerbates inequality.

2. *Government discriminatory intent*

If in future litigation the court asks for government discriminatory intent to be shown in the pleadings, it may also be difficult to prove. Once disparate impact is shown, it is also necessary to show that those making the tariffs had some form of discriminatory intent while creating the tariff schedule. This point is harder to find because there has been no case that has reached the point of requiring discovery on the side of the government. There is almost no evidence that the government created these differential tariffs for any valid governmental reason; however, there is also not strong evidence against it due to the almost secretive nature of tariff negotiations and lack of public information regarding the behind-door deal making.

The main argument for discriminatory intent is that by choosing to include the different classifications on the basis of gender, the discriminatory intent is evident on its face. Goods are classified in extremely numerous ways in the tariff schedule before gender is even applied. Type of material, quality of the workmanship, and many other considerations are included in the schedule before the gendered distinctions.¹⁴⁵

However, there is also some other valuable information available that may prove discriminatory intent. Some scholars have the theory that the differing tariffs can actually be attributed to powerful lobbying in Washington.¹⁴⁶ They believe that the companies producing apparel want to limit competition and that Washington is okay with this trade-off because it means that they will in turn receive more revenue.¹⁴⁷ In contrast, many have reported that it is hard to find any valid fiscal explanation for why these tariffs exist.¹⁴⁸ Also, the 1960 study was done on tariff

145. See generally HTSUS, *supra* note 5.

146. Andrejevic et al., *supra* note 24, at 3.

147. See *id.*

148. Timm Betz, David Fortunato & Diana Z. O'Brien, *Women's Descriptive Representation and Gendered Import Tax Discrimination*, 115 AM. POL. SCI. REV. 307, 309 (2020). "Finally, although changes to the tariff schedule can have meaningful revenue consequences for governments there is no obvious fiscal justification for imposing *gendered* tariff rates of the kind displayed above." *Id.*

classifications and found that the classifications regarding gender were “often difficult if not impossible to make and their economic justification is questionable.”¹⁴⁹ The study continued to say that, “[W]e feel that the [Tariff] Commission is acting wisely in its proposal to eliminate differentiation by gender, and we would not recommend continuing that differentiation, and that is the reason why we have established the single rate for [specific goods] in our proposal.”¹⁵⁰ Further evidence in the lack of purpose for these tariffs is that they have not always been present. In fact, when the United States’ first tariff schedule was released, there were absolutely no distinctions by gender.¹⁵¹

One thing that is known is that gendered tariffs have been negotiated at previous trade rounds. For example, “[f]ollowing the negotiations of the Uruguay round, the United States rate for men’s leather gloves increased while the rate for women’s leather gloves decreased.”¹⁵² This shows that government officials are aware of these trade differentials, and that they are apparent in trade negotiations meaning that there *is* in fact useful information that could be uncovered if discovery were ever ordered.

The government’s main arguments against any sort of discriminatory intent are that the negotiations that go into making the HTSUS are highly technical, that the HTSUS does not discriminate against people, but it just treats products differently, and that commercial considerations go into why tariffs are set.¹⁵³ Jason Lewis introduced and debunked all of these arguments in his note on gender-classified tariffs.¹⁵⁴

Regarding the first issue of the fact that multilateral negotiations take place in highly technical landscapes, he responds that even though the base tariff rates are set at these technical multilateral trade rounds, it is the United States who has added

149. Complaint at 6, *Pac. Sunwear of Cal., Inc. v. United States*, No. 1:11-cv-00300 (Ct. Int’l Trade Aug. 16, 2011) (quoting *Tariff Classification Study*, Schedule 7, U.S. Tariff Commission (1960)).

150. Complaint at 6, *Tommy Hilfiger U.S.A., Inc. v. United States* (Ct. Int’l Trade Aug. 14, 2013) (quoting *Tariff Classification Study*, Schedule 7, U.S. Tariff Commission (1960)).

151. Complaint at 3, *L.C. Footwear LLC v. United States*, No. 1:13-cv-00189 (Ct. Int’l Trade May 10, 2013).

152. Lewis, *supra* note 33, at 177.

153. *Id.* at 190.

154. *Id.* at 190-95.

gender classifications after the trade talks.¹⁵⁵ Even if these negotiations were made in a technical matter, it is still vital that they comply with United States law and not be discriminatory.¹⁵⁶ The second argument made by the United States government that the discrimination is against products and not people also relies on faulty logic. The major issue here is that neither of the government's briefs (for *Totes-Isotoner* or *Rack Room*) show that the male and female goods are in fact substantially different in any way.¹⁵⁷ The government also fails to show that the tax is not something exclusively based on gender.¹⁵⁸ The third argument presented is that commercial considerations drive the difference in tariff rates.¹⁵⁹ It seems hard to imagine a commercial consideration that would pass a rational basis test. Lewis argues that the commercial reasons for tariffs are to raise revenue and protect certain industries.¹⁶⁰ Surely for these considerations to be valid, the difference in tariff rates between genders would have to be much larger than they are. Right now, the tariff differences are large enough to cost more for women than men but small enough not to adequately protect the domestic female apparel industry.

E. The Future of Pink Tariff Litigation

The case in *Rack Room* was brought in 2014. Since then, there have been large movements to end gender discrimination. The #metoo movement in 2017 brought discussions about women's rights and sexual assault to the forefront of public discussion and debate.¹⁶¹ In 2016, Hilary Clinton became the first woman to receive a presidential nomination from a major political party. In 2018, more women than ever were elected to Congress. In 2021,

155. *Id.* at 191.

156. *Id.*

157. *Id.* at 194.

158. *See id.*

159. *See id.* at 196.

160. *See id.*

161. #MeToo: A Timeline of Events, CHI. TRIB. (Feb 4, 2021, 1:52 PM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htlmlstory.html>. Although the #metoo movement officially started in 2017, there have been events continually occurring that have been connected and attributed to the movement as found in this timeline. *Id.*

Kamala Harris was elected as the first woman Vice President.¹⁶² Katherine Tai has just been nominated as the U.S. Trade Representative, only the third woman to ever hold this position.¹⁶³ I pose that the outcome of future pink tariff cases might come out differently with the strong evidence of disparate impact and an ever-changing cultural landscape.

1. United States trade court composition

The issue of pink tariff litigation is unique in that it cannot just be brought up for appeal in another circuit with the hope of a circuit split. This is because the U.S. Trade Court has exclusive jurisdiction over all the issues that arise out of customs and international trade laws, and all of their cases are appealed to the same circuit court.¹⁶⁴ However, different judges on the CIT may come to a completely different outcome. There are currently seven active judges on the Court of International Trade. Of those judges, three were appointed by Barack Obama, three were appointed by Donald Trump, and the Chief Justice was appointed by President Barack Obama.¹⁶⁵ Two of the eight justices are female. All seven justices (besides the Chief Justice) have begun their judgeships since the *Totes-Isotoner* and *Rack Room* decisions.¹⁶⁶ Due to the completely new makeup of the court, and the greater presence of females and appointees by Democratic Presidents, it may also be likely for a different decision to come out of the court.

162. *Women's History Milestones: A Timeline*, HISTORY.COM, <https://www.history.com/topics/womens-history/womens-history-us-timeline> (last updated July 21, 2021).

163. Timm Betz, David Fortunato & Diana Z. O'Brien, *The Pink Tax That's Costing Women Billions of Dollars a Year – and What We Can Do About It*, MS. MAGAZINE (Dec. 23, 2020), <https://msmagazine.com/2020/12/23/holiday-christmas-gifts-shopping-pink-tax-costing-women-billions-dollars/>.

164. *About the Court*, U.S. CT. OF INT'L TRADE, <https://www.cit.uscourts.gov/about-court> (last visited Oct. 5, 2021). "The court has a residual grant of exclusive jurisdictional authority to decide any civil action against the United States, its officers, or its agencies arising out of any law pertaining to international trade." *Id.*

165. *U.S. Court of International Trade: Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-court-international-trade-judges> (last visited Sept. 15, 2021).

166. *Id.*

2. *New evidence of government recognition of the issue*

One of the biggest issues when bringing pink tariff cases has been the inability to show governmental recognition of the issue, or any evidence that the tariffs were applied in or created with discriminatory intent. However, in 2016, a report prepared by the Democratic party staff of the U.S. Congress Joint Economic Committee (JEC) identified the higher tariff rates placed on women's goods as the first possible explanation for the pink tax.¹⁶⁷ This report focused on the price differentials that men and women pay for different goods. The report found that across numerous industry categories that women simply pay more for their goods than men for no apparent reason. They acknowledged that "the higher costs of importing may be passed on to consumers and contribute to the markup on some goods targeted to women."¹⁶⁸ This simple acknowledgement of the issue may be further evidence that can be presented to the court for lack of rationale for these tariffs. Another piece of evidence is the working paper released by the U.S. International Trade Commission discussed earlier.¹⁶⁹ This paper, although it does have the warning associated that it does not say that the Commission agrees with all of the views proposed, is still momentous as it very directly condemns gendered tariffs and connects their usage to price discrimination.¹⁷⁰

Although troubling legal precedent imposes a high hurdle for future cases, a new court makeup, alongside a shifting culture, and new evidence may lead to a different decision.

III. ENDING PINK TARIFFS THROUGH LEGISLATION

Even with the positive cultural changes, relying on the unpredictable court system can seem futile since cases have been continuously dismissed when claims do not reach the necessary level of pleading. The court has heightened the standard of litigation to somewhere seemingly unreachable. Therefore, if the courts are not capable of ending gender-based tariff discrimination, they may have to be ended through legislation.

167. DEMOCRATIC STAFF OF THE JOINT ECONOMIC COMMITTEE, U.S. CONGRESS, *THE PINK TAX: HOW GENDER-BASED PRICING HURTS WOMEN'S BUYING POWER* 5 (2016).

168. *Id.*

169. See generally Gailes et al., *supra* note 3; *supra* Section I.B.

170. Gailes et al., *supra* note 3, at 21.

While federal and state legislatures have not yet proposed bills to end gender-based tariffs, there have been large scale movements to end the “pink tax.” The “pink tax” focuses on gender-based pricing in general, claiming that women pay more for apparel, hygiene products, and other goods than men. Ending the well-known “pink tax” has received much more traction in the legislature than any discussion of gender-based tariffs.¹⁷¹ Because tax laws can differentiate by state, it is more likely for the pink tax to be successfully abolished at the state level. For pink tariffs to change, however, the federal government will need to be on board because states cannot change the tariff schedule.

A. Legislative Proposals to End the Pink Tariffs

As of now, no federal law specifically bans gendered price discrimination, which scholars have acknowledged to be a gaping hole in protections, especially for females.¹⁷² Because of this, much of the lobbying and litigation that has been proposed is to end price discrimination. One of the issues here is that when analyses are done to determine if gendered price discrimination exists, usually a full deep dive into gendered tariff policies is not included.¹⁷³ This is short-sighted because legislators need to acknowledge that price differentials (especially in apparel) can be rooted back to gender-based tariffs.

Still, some groundwork has been done. The 2016 report prepared by the Democratic party staff of the U.S. Congress Joint Economic Committee focused on the price differentials that men and women pay for different goods and identified the higher tariff rates placed on women’s goods as the first possible explanation for the pink tax.¹⁷⁴ This research was connected to the Pink Tax Repeal Act that was first introduced in 2016, but a revised version was

171. See generally ‘Tampon Tax’ Paid Around the World, BBC (Aug. 21, 2015), <https://www.bbc.com/news/world-32883153> (showing that the “pink tax” has been vigorously covered in the media).

172. Kenneth A. Jacobsen, *Rolling Back the “Pink Tax”: Dim Prospects for Eliminating Gender-Based Price Discrimination in the Sale of Consumer Goods and Services*, 54 CAL. W. L. REV. 241, 251–52 (2018).

173. See generally Jacobsen, *supra* note 172. Many different studies that show that the pink tax exists look mostly at sanitary and hygiene products and cost of services, rather than apparel, which seems to touch tariffs in the most tangible way. *Id.*

174. Betz et al., *supra* note 148, at 310.

introduced in 2018.¹⁷⁵ The bill was presented by Jackie Speier with twenty-four co-sponsors.¹⁷⁶ The bill would simply make it illegal for two products that are substantially similar to be sold at different prices based on gender.¹⁷⁷ However, the bill did not pass and died on the floor.¹⁷⁸ A similar bill was presented in California in 2016, but there was a lot of opposition to it from retailers and manufacturers of women's products and clothing, and it also did not pass.¹⁷⁹ One potential explanation of this actually goes back to gender-based tariffs. Because importing products can cost more for one gender rather than another, the clothing manufacturers and retailers do not want to have to be the ones to bear the brunt of the tariffs and therefore want to be able to pass the price differentials on to consumers.

Due to the current political landscape (a democratic majority Senate and House of Representatives) it might be a very opportune time for a new bill to be proposed. However, it is vital that the bill not only address gender-based pricing, but also address one of the roots of the problem: gender-based tariffs.

B. The International Landscape of Ending Pink Tariffs Through Legislation

Gender-based tariffs are not unique to the United States. Other countries have successfully ended gender-based tariffs, giving the United States examples to follow. Because tariff schedules are usually determined multilaterally, many countries have chosen to implement tariffs based on discriminatory gender policies.¹⁸⁰ Looking worldwide, female products are taxed 0.7% more than male products.¹⁸¹ While not a comprehensive list, other countries that also have gender-based tariff rates are India, Indonesia,

175. Jacobsen, *supra* note 172, at 260; see Rep. Speier Introduces Pink Tax Repeal Act to End Gender-Based Pricing Discrimination, JACKIE SPEIER (April 10, 2018), <https://speier.house.gov/2018/4/rep-speier-introduces-pink-tax-repeal-act-end-gender-based-pricing>.

176. Rep. Speier Introduces Pink Tax Repeal Act to End Gender-Based Pricing Discrimination, *supra* note 175.

177. Jacobsen, *supra* note 172, at 260–61.

178. *Id.* at 261.

179. Teri Sforza, 'Pink Tax' Bill Dies: You'll Still Pay More for Products Marketed to Women, ORANGE CNTY. REG. (Jun. 30, 2016), <https://www.ocregister.com/2016/06/30/pink-tax-bill-dies-youll-still-pay-more-for-products-marketed-to-women/>.

180. See generally Betz et. al, *supra* note 148.

181. See *id.* at 307.

Australia, and Japan.¹⁸² However, other developed countries have recognized the harmful practices of gender-based tariffs and have outlawed their use, mainly through legislation and executive order, rather than through litigation and the court system. In the United States, changes to the HTSUS require congressional approval, unless the President issues changes in the face of emergency or for national security reasons, which are unlikely to apply with gender-based tariffs.¹⁸³

Switzerland is one country that has at least acknowledged gender-based tariffs exist and taken the first steps to abolish them.¹⁸⁴ Originally women's apparel had higher tariff rates because the tariffs were set on the basis of the weight of the clothes.¹⁸⁵ Because men's clothes used to weigh more than female clothes, female clothing had higher tariffs to make them equal.¹⁸⁶ When this was discovered, the federal government started an inquiry to examine all of the different tariff rates and ensure that they were gender equal.¹⁸⁷ Switzerland has planned at the next WTO negotiation round to get rid of gender-based tariffs; however, due to the stalling of the Doha round, they still have their gender-based tariffs in place.¹⁸⁸

Canada is one example of a country that has ended their gender-based tariffs. When outlawing the tariffs, their trade department said:

Some gender bias has crept into the Customs Tariff over the years, with differing tariff rates being applied to textiles depending on whether they are used in men's/boy's or women's/girl's apparel. The replacement of these gender-specific tariff items with gender-neutral provisions will help to modernize the Customs Tariff. The CITT report makes progress on this issue by recommending the consolidation of a number of existing gender-specific tariff items into new gender-neutral duty-free provisions. However, even with the implementation of these recommendations, there will still remain a number of gender-specific tariff items. To address

182. *See id.* at 309.

183. *See CASEY, supra* note 21, at 1–2.

184. Betz et. al, *supra* note 148, at 310.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

these remaining items, the Department of Finance will be issuing a Canada Gazette Notice in the near future identifying the tariff items in question, proposing new wording to eliminate the gender-bias and indicating the requirements for submissions by interested parties.¹⁸⁹

Canada's example provides an effective model that the United States can follow legislatively. The first important step is that this price differential be acknowledged as an issue by Congress and by the International Trade Commission, and then it can be rooted out at its cause.

C. The Future of Pink Tariff Legislation and the Equal Rights Amendment

The passage of the Equal Rights Amendment could also aid the abolishment of gender-based tariffs, especially with regards to future litigation. We are one of the few countries in the developed world that does not have a constitutional provision providing for equal treatment of women. Scholars have theorized that one of the reasons that women are not receiving equal treatment with regards to taxes and pensions is because the Equal Rights Amendment has not yet been passed.¹⁹⁰ While some that oppose the Equal Rights Amendment do so because they feel like the Fourteenth Amendment's Equal Protection Clause grants women all of the necessary protection that they may need, this is not the case.¹⁹¹ One of the issues is that under the Equal Protection Clause, courts use only intermediate scrutiny in sex discrimination cases.¹⁹² However, if the Equal Rights Amendment passes, there will not be any laws that can differentiate on the basis of gender. Gender-based tariff litigation would be easier to win under the Equal Rights Amendment than under current available causes of action.

189. Complaint at 10, *Pac. Sunwear of Cal., Inc. v. United States*, No. 1:11-cv-00300 (Ct. Int'l Trade Aug. 16, 2011).

190. Carolyn B. Maloney, *Why the United States Needs an Equal Rights Amendment*, 89 N.Y. STATE BAR ASS'N J. 53, 53 (2017).

191. *Id.*

192. *Id.*

D. Other Legislative Solutions to Effectively End Gender-Based Tariffs

The World Trade Organization and World Bank Group released a document entitled “Women and Trade, the Role of Trade in Promoting Gender Equality.”¹⁹³ It found that trade openness in general will increase women’s purchasing power by providing them with more economic opportunities.¹⁹⁴ It also found that women feel the tariff burdens at higher rates than men.¹⁹⁵ This is due to the fact that one of the areas with the most tariffs is apparel, where women spend comparatively more.¹⁹⁶ The World Trade Organization has said that “[e]liminating the gender-related tariff differentials (for the same products) or reducing or removing altogether the relevant applied tariffs would help women business owners to access more and bigger markets.”¹⁹⁷ Free market policies have been shown repeatedly to lift up countries and economies. Therefore, one solution (though potentially more difficult to achieve) could be fighting for abolition of all gender-based tariffs.

Advocating for more women in politics can also lead to less gender-based tariffs. Political Science researchers Timm Betz, David Fortunato, and Diana Z. O’Brien have examined other countries use of gender-based tariffs in depth and found an interesting correlation between the number of women that hold office and the amount of gender-based tariffs that a country imposes.¹⁹⁸ By analyzing almost 200,000 pairs of tariff rates across 167 countries they discovered that women’s goods are taxed at rates 0.7% higher than men’s goods.¹⁹⁹ Because tariffs and taxes are usually levied by the legislature, it makes sense that in countries with more females in the legislature that there would be fewer gender-based tariffs.²⁰⁰ The researchers discovered that “a 10% gain in seat share decreases the pink tax by approximately 0.44%.”²⁰¹ They also showed that the same result did not play through in non-

193. WORLD TRADE ORGANIZATION & THE WORLD BANK GROUP, WOMEN AND TRADE: THE ROLE OF TRADE IN PROMOTING GENDER EQUALITY (2020).

194. *Id.*

195. *Id.* at 5.

196. *See id.* at 11.

197. *Id.*

198. Betz et. al, *supra* note 148, at 312.

199. *Id.* at 307.

200. *Id.* at 310.

201. *Id.* at 312.

democracies, which makes sense if tariffs are not decided democratically in these locations.²⁰² As more and more women are elected into the legislature, this is more evidence that gender-based tariffs could soon be abolished, or at least the landscape has been created for this to be a viable possibility.

CONCLUSION

What the future holds for United States trade policy and gender-based tariffs remains an open question. It is a worrisome fact that in general tariff rates are low, but when they are discriminatory, they are very high.²⁰³ Gender-based tariffs have been shown to hurt women by lessening their spending power thus exacerbating the gender wage gap. While this is a recognizable challenge, the abolition of these tariffs remains a difficult task. Still, the two major avenues for change lie clearly in successful litigation or new proposed legislation.

Although over 200 companies have brought claims asserting that these tariffs are unconstitutional because they discriminate on the basis of sex, only two of these cases have had their day in court. Both *Totes-Isotoner* and *Rack Room* contained confusing and frustrating logic as the court denied both cases for failure to state a valid claim. Even though the standard of intermediate scrutiny used to analyze gender discrimination cases should apply, the courts did not apply this in a satisfying way. The courts did not consider facial discrimination and said that the claimants must show *more* than disparate impact. While the precedents set in *Totes-Isotoner* and *Rack Room* seem to set the bar for a successful pleading at an unreachable height, cultural changes may lead to a new result if a new claim were brought. With a new cultural backdrop that is seemingly more ready to discuss gender issues, strong new evidence of the disparate impact of these tariffs on women, new evidence of governmental recognition of the issues, and a new Trade Court makeup, there may be an open possibility for a successful new case.

If the litigation avenue continues to be filled with roadblocks, there is also a likelihood that gender-based tariffs can be abolished

202. *Id.* at 313.

203. See *supra* section I.A for an explanation of tariff rates and how they are substantially higher for apparel than other goods.

through legislation. Legislation to end price discrimination has been proposed, and it is likely that gender-based tariffs could be included in these proposals if more people become aware of their connection to price discrimination. The United States could follow other countries' examples such as Canada to root out these tariffs and pass legislation to end them. With current Democratic control of both the Senate and the House of Representatives and more women than ever serving in positions of power, the United States may be in a prime position for successful legislation. Other avenues could be potentially used to end this issue as well, such as unilateral lowering of apparel tariffs, passing the Equal Rights Amendment, or electing more women to positions of power.

Regardless of how it is done, the public needs to be aware of the impact of gender differences in apparel tariffs. These tariffs drive up consumer prices, which have a negative impact on women. It is time for these arcane tariffs to die.

