## Offcase

**1NC – DA – Wage-Price**

**Declining union power and higher profit margins systematically eliminated risk of wage price spirals.**

**Ma and Woods 23** [Adrian Ma, Darian Woods (Adrian became interested in journalism while studying media law at the University of Maryland School of Law. Later, while working for a federal judge in Baltimore, he decided to roll the dice and change careers. In 2016, he obtained a master's degree in journalism from Columbia University. Darian Woods is a host of The Indicator from Planet Money. He blends economics, journalism, and an ear for audio to tell stories that explain the global economy. He's reported on the time the world got together and solved a climate crisis, vaccine intellectual property explained through cake baking, and how Kit Kat bars reveal hidden economic forces. Before NPR, Woods worked as an adviser to the Secretary of the New Zealand Treasury. He has an honors degree in economics from the University of Canterbury and a Master of Public Policy from UC Berkeley.)), "One economist calls it a doom loop, others say it's a myth: The 'wage-price spiral'", 02/17/2023, NPR, https://www.npr.org/2023/02/17/1157999699/one-economist-calls-it-a-doom-loop-others-say-its-a-myth-the-wage-price-spiral, Accessed 08/30/2025] //SG

A wage-price spiral — when wages and prices cause each other to rise in perpetuity — is considered a nightmare scenario for inflation. But do we really need to fear it?

JUANA SUMMERS, HOST:

It's a phrase that strikes fear into the hearts of central bankers everywhere - wage-price spiral - a nightmare scenario of ever-increasing inflation. But some economists say the idea of wage price spirals is overblown. They even go so far as to call it a myth. Adrian Ma and Darian Woods from our daily economics podcast, The Indicator, explain.

ADRIAN MA, BYLINE: Economist John O'Trakoun describes wage price spirals as a kind of doom loop.

JOHN O'TRAKOUN: Workers demand higher wages to keep up with the elevated cost of living. And businesses, they raise the prices of their products and services in order to cover these higher labor costs. And so it just keeps reinforcing itself. Higher wages leads to higher prices, leads to higher expectations, all spiraling around, swirling around the toilet bowl, leading to very bad outcomes.

DARIAN WOODS, BYLINE: John works at the Federal Reserve Bank of Richmond, and he recently wrote about the wage price spiral for the bank's blog. He says that the last time the U.S. saw something like a wage price spiral was in the 1970s. And by the end of that decade, the inflation rate peaked at over 14%. And while multiple causes added to the inflation during that period, John says that one big factor was this feedback loop between wages and prices.

O'TRAKOUN: So back then, more of the economy was in manufacturing. A lot of these workers were in unions, and so they had wages that were pegged to inflation.

MA: It was in their contract, right? So if inflation went up, so did the workers' wages. But rising wages really ate into the company's profit margins. So they passed that cost on to the customers, leading to more inflation. John says this really strong link between wages and prices contributed to the inflation spiraling higher and higher.

WOODS: But in the decades that followed, the tight relationship between wages and prices starts to break down. John points to a few reasons. For one thing, union membership plummeted, so those contracts requiring inflation-adjusted raises for big groups of workers became less common.

MA: Meanwhile, companies found ways to grow their profit margins - for example, by getting cheaper production materials from overseas, outsourcing and automating jobs or combining with other companies. That way they could afford to give workers the occasional raise and not have to raise prices. And this is part of the reason that by the time we get to the late 2010s...

O'TRAKOUN: It seemed like wage price spirals were just in the '70s, and they were, like, a thing of the past. We vanquished it, and it's over.

MA: And that was pretty much the consensus until the pandemic. The past couple years, prices and wages have increased faster than usual. And John says there are signs that these two things are starting to move together more. So does that mean the conditions for a spiral are making a comeback? Well, Jason Furman, an economist at Harvard, wouldn't go that far. I mean, he doesn't worry about a wage price spiral going up and up and up into an infinite doom loop. But what Jason is worried about is something he calls wage price persistence.

JASON FURMAN: Which is where once inflation gets high and once wage growth gets high, they both stay high for a while, and they feed into each other staying high for a while.

MA: And if that's what happens, Jason says we're probably not going to get that soft landing we're all hoping for - right? - the one where we whip inflation but avoid a recession.

**Strong union power triggers the spiral.**

**Suthaharan and Bleakley 22** [Neyavan Suthaharan and Joanna Bleakley (The authors are from Economic Analysis Department.), "Wage-price Dynamics in a High-inflation Environment: The International Evidence", 09/15/2022, Reserve Bank of Australia, https://www.rba.gov.au/publications/bulletin/2022/sep/wage-price-dynamics-in-a-high-inflation-environment-the-international-evidence.html, Accessed 08/30/2025] //SG

One example where a shock occurred during a period of tight labour markets was when Australia's terms of trade surged during the late 2000s, largely owing to demand for Australian resources from emerging economies, particularly China (Battelino 2010). Price inflation initially increased, soon followed by a pick-up in wages growth, which kept inflation elevated above target for some time. By the early 2010s, however, the effects of the global financial crisis, a stronger Australian dollar and rising interest rates all dampened growth, which lowered both wages growth and inflation. The additional buffer provided through exchange rate adjustment in a flexible exchange rate regime was a marked difference compared with earlier episodes of terms of trade shocks that occurred when fixed or managed exchange rates were commonplace.

The self-defeating nature of wages chasing inflation in the face of supply shocks

Once a wedge between prices and wages has emerged (e.g. because of a supply shock), attempts by workers to push for higher wages to ‘catch-up’ to inflation may not necessarily be successful in maintaining real wages over the medium term. In one sense this is because the rise in nominal wages to restore purchasing power can spur firms to increase prices further, which would negate the catch-up effect of the initial increase in wages. But ultimately, this inability to restore real wages reflects that if fundamental factors have increased the equilibrium price of intermediate inputs relative to wages, attempting to reverse that shift in relative prices will create a disequilibrium (unless firms don't have the pricing power to pass on increases in their costs). In those circumstances, wages constantly ‘chase’ inflation, resulting in a wage-price spiral (Figure 2).

A canonical example of such a spiral occurred in the 1970s in most advanced economies – known as ‘The Great Inflation’. Political instability in the Middle East at that time resulted in two severe oil price shocks that pushed inflation to very elevated rates. Workers resisted cuts to real wages, and were supported by high rates of unionisation and automatic inflation indexation clauses (discussed further below). Monetary policy also did not tighten by as much as the increase in inflation, so that real interest rates fell; in part, this reflected that a number of economies still had managed exchange rate regimes in this period, and so monetary policy was directed at keeping the exchange rate at the desired level rather than controlling domestic inflation. (Higher interest rates would have attracted foreign capital and put upward pressure on the exchange rate, which in turn would have required the central bank to expand domestic money supply, thereby easing policy again.) It is also relevant that US fiscal policy was very expansionary, partly because of spending related to the Vietnam War (Federal Reserve 2013).

In spite of all this, the sharp lift in nominal wages growth still fell short of inflation in most economies. This partly reflected the fact that wages tend to respond to prices with a lag because of the nature of wage-setting mechanisms, while prices are able to be reset more frequently in response to changing cost pressures and demand conditions. Historically, it has generally been the case that wages growth has tended to fall below the rate of inflation as the latter moves to high rates (Graph 6).

What causes a wage-price spiral?

While supply shocks can push up inflation, these have not translated into wage-price spirals in the inflation-targeting era. This is because several other factors influence whether an initial shock to inflation will turn into a wage-price spiral, including:

how tight the labour market is

the balance of bargaining power between workers and firms

the inherent stickiness of wages

the prevalence of wage indexation arrangements

the pricing power of firms allowing them to preserve margins

inflation expectations.

A tight labour market

A tight domestic labour market can support attempts by workers to ensure wages keep pace with inflation. This is because workers have more bargaining power in such an environment, even when there are supply shocks, because it is harder for firms to find suitable labour. A reverse example of this can be observed in the lack of wages growth in many economies after the global financial crisis, when demand was weak, and as inflation pushed higher on the back of rising oil prices.

The balance of bargaining power

Institutional factors can affect workers' bargaining power and the likelihood of ‘real wage resistance’. For example, high rates of trade union membership or collective bargaining coverage will tend to strengthen workers' power. Both of these factors were high in the 1970s but have declined in most advanced economies since then – especially outside of continental Europe (Graph 7; Graph 8). Similarly, workers in economies with more centralised wage setting – such as in the euro area – have greater bargaining power, and so the responsiveness of wages to prices is likely to be higher (BIS 2022). Moreover, stricter job protection regulations that limit the ability of firms to dismiss workers can give workers greater protection to push for higher wages, which may increase the responsiveness of wages growth (such rules are stricter in the euro area than in the United States and Canada). Higher minimum wages and unemployment benefits (relative to wages) also increase bargaining power and shift up the level of wages, although it is less clear that they amplify the responsiveness of wages to inflation. Overall, when workers have stronger bargaining power, their ability to push for larger wage increases (as prices rise) is enhanced (BIS 2022).

Global factors also matter for the balance of bargaining power, since the prospect of replacing domestically produced goods with imports can hold down wages in a tight domestic labour market; in addition, increased availability of imported inputs reduces the impact of non-labour input costs on domestic inflation pressures. This was one factor contributing to low wages growth in the early 2000s: the US economy was strengthening, with inflation rising steadily and the unemployment rate below estimates of its natural rate, but wages growth did not pick up. Over this period, there had been a boost to global labour supply (relative to demand) as China entered the World Trade Organization in 2001, increasing global competition – particularly for manufacturers in the United States (Goodhart and Pradhan 2020). While increased competition in the goods market reduced manufacturers' pricing power and the relative price of manufactured goods, the implied threat of import competition was broadly based and so weighed more heavily and more broadly on wages growth.

The ‘stickiness’ of wages

**That causes a global debt crisis and collapses the defense budget. Extinction.**

**Brands 22** [Hal Brands (Hal Brands is a Bloomberg Opinion columnist. The Henry Kissinger Distinguished Professor at Johns Hopkins University’s School of Advanced International Studies and a senior fellow at the American Enterprise Institute, he is co-author of "Danger Zone: The Coming Conflict with China" and a member of the State Department's Foreign Affairs Policy Board. He is a senior adviser to Macro Advisory Partners.), "Inflation’s Biggest Risk Is Geopolitical Unrest", 01/20/2022, Bloomberg, https://archive.ph/lCkOW, Accessed 08/31/2025] //SG

Inflation isn’t just a domestic problem. Sure, year-on-year inflation hitting 7%, the highest rate in four decades, is threatening to derail Joe Biden’s presidency. As my Bloomberg colleague John Authers has written, the inflationary trend appears broad and durable.

Yet now as before, inflation is a geopolitical phenomenon, which is rooted partly in rising global tensions and could have deeply corrosive effects on the U.S.-led world order.

That’s what happened the last time the U.S. faced this problem, from the late 1960s to the early 1980s. “To all Americans,” Ronald Reagan said while running for president in 1980, inflation had become "something as violent as a mugger, as frightening as an armed robber and as deadly as a hit man." The causes were closely tied to global affairs.

In the late 1960s, the combined costs of the Vietnam War and President Lyndon B. Johnson’s Great Society programs sent prices rising. In the 1970s, the chief drivers were soaring energy costs and supply disruptions caused by the Yom Kippur War of 1973 and then the Iranian revolution of 1978-1979. It was a vicious cycle: Geopolitical upheaval caused economic upheaval, which then added to the underlying global instability.

High oil costs and scarce supplies caused ruptures within the democratic world, as Japan, France and other U.S. allies scrambled to cut bilateral deals with oil producers. Inflation ate away at an American defense budget that was already falling as a result of post-Vietnam retrenchment.

Secretary of State Henry Kissinger worried that economic chaos might destabilize the Western world. It certainly contributed to a general malaise in America and other advanced democracies, feeding fears that the Soviet Union — then benefitting from record oil prices — might win the Cold War after all. “Can Capitalism Survive?” Time magazine famously asked in 1975. Only when the Federal Reserve finally broke the inflationary cycle with bone-crushing interest rates did the U.S. regain its geopolitical footing.

Today, rising energy costs are again pushing prices higher. The messy divorce of economies between the U.S. and China is disrupting supply chains and generating inflationary pressure. The economic messiness provoked by another geopolitical breakup — Brexit — isn’t helping matters. Not least, the inflation surge has resulted from the massive stimulus that governments pumped into their economies in response to Covid, the greatest global crisis of this century.

In countries where there is lots of revolutionary kindling, inflation can provide the fatal spark. Historically, rising prices contributed to political upheavals such as the French Revolution, which touched off a quarter-century of war in Europe, and the Arab Spring, whose effects are still roiling the Middle East. This month, a doubling of fuel prices triggered protests, revolt and then Russian-backed repression in Kazakhstan. There’s probably more of this to come. In late 2021, the Food and Agriculture Organization at the United Nations reported that global food prices had reached their highest point in a decade.

Look out for geo-economic turbulence, as well. Argentina, the European Union, Russia and other countries have restricted the export of commodities such as grain to keep domestic food prices manageable. If Washington ratchets up interest rates to tame rising prices, it could unintentionally batter deeply indebted countries that have already lost years, even decades, of economic progress due to Covid. Indeed, when the Fed slayed inflation in the early 1980s, a decade-long Latin American debt crisis was part of the collateral damage.

Finally, there is the question of what will happen to the U.S. Biden isn’t entirely wrong to argue that inflation is actually a sign of strength: The U.S. economy rebounded quickly from Covid, fueling demand that is outstripping supply. Yet inflation is rarely a good-news story.

Inflation is psychologically demoralizing because it makes growth meaningless, and stagnation crippling, for people whose real wages are in decline. It fosters a sense that the people are victims of forces that their leaders cannot control. It gives credence to arguments that America’s true problems are at home, rather than abroad, and thus threatens to create a more distracted, inward-looking superpower just as global threats are intensifying.

Bottom of Form

The damage isn’t hypothetical: As John Ferrari of the American Enterprise Institute points out, the U.S. defense budget is already at risk of being strangled by the “inflation anaconda.” The 5% bump that Congress approved for the Pentagon this year sounds impressive, but only until one considers that inflation is running at 7% and the military is particularly exposed to rising costs for energy and materials such as steel. As inflation builds up, Pentagon is forced to build down — just as China is racing to expand its military capabilities, Russia is threatening a major conflict in Eastern Europe and relations with Iran deteriorate.

The Biden administration appears to be recognizing, perhaps belatedly, that rising prices pose a severe threat to its domestic agenda and political fortunes. Inflation may also have nasty geopolitical effects in a world that hardly seemed stable before.

**1NC – T – Trumping Power**

**The strength of a right refers to withstanding competing considerations. That’s distinct from the scope of a right.**

Julie **Copley 23**, Lecturer in Construction and Property Law at University of Southern Queensland, PhD from University of Adelaide, LLM from Queensland University of Technology, LLB(Hons) from University of Queensland, "A right to adequate housing: Translating 'political' rhetoric into legislation," Australian Property Law Journal, vol. 31, 12/01/2023, p. 71, Lexis

In constitutional and human rights theory and practice, rights have two components.139 One is the scope of a right: the specific protections falling within the reach of the right.140 The other is the strength of a right: the right’s ‘power to withstand opposing considerations’, described also as the ‘core’ of the right.141 Örücü argues that positivisation of human rights is assisted greatly by identifying a right’s ‘inviolable and indefeasible content’.142 For a legislative process, Örücü says an identified core serves to check the tendencies of legislatures to confine rights, and to create extra awareness of the role and significance of a right among citizens, courts, scholars and those exercising public power.143

**That means topical affs must make existing labor rights more absolute---expanding the scope of labor rights is not topical.**

Jacob **Weinrib 23**, Associate Professor at Queen's University, "The Essence of Rights and the Limits of Proportionality," The Promise of Legality: Critical Reflections upon the Work of TRS Allan (eds, Geneviève Cartier and Mark Walters), SSRN

I. The Bifurcated Model

Constitutional rights have two structural features, scope and strength. The scope of a right consists in the particular protections that fall within its reach. The strength of a right consists in its power to withstand opposing considerations. My aim in this chapter is to formulate an account of the strength of constitutional rights.

In debates about the strength of rights, constitutional theory and practice have become disconnected. As a matter of constitutional practice, in recent decades a bifurcated model of the strength of constitutional rights has assumed increasing prominence. The model divides the scope of a right into a core (or an essence) and a periphery.2 [FOOTNOTE 2 BEGINS] 2 In a pathbreaking article on the essence of rights, Esin Örücü outlines the structure in terms of a core, circumjacence, and an outer edge, before adding that the core is “that part of a right which is essential to its definition.” See Örücü, “The Core of Rights and Freedoms: The Limits of Limits” in Tom Campbell, ed, Human Rights: From Rhetoric to Reality (New York: Blackwell, 1986) 37 at 38. I accept this structure, but to avoid cumbersome and archaic formulations, I will simply refer to the core (or essence) and the periphery that lies beyond it. [FOOTNOTE 2 ENDS] The core possesses absolute strength and is therefore not susceptible to limitations. In contrast, the periphery is subject to limitations that satisfy the doctrine of proportionality.3 [FOOTNOTE 3 BEGINS] 3 According to a prominent formulation of the doctrine, when government seeks to justify the limitation of a constitutional right, it must demonstrate that the limitation pursues an appropriate objective, that it employs means that are rationally connected to this objective and minimally impairing of the right, and, finally, that the extent to which the objective is furthered justifies the extent of the right’s restriction. [FOOTNOTE 3 ENDS] In some jurisdictions, these commitments appear explicitly in constitutional texts4 and human rights instruments. 5 In others, these commitments emerge through interpretation.6 This bifurcated model of the strength of rights is presented in Figure 1.

A diagram of core and core

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Each of the leading models of constitutional rights rejects the bifurcated model. What I will call the absolutist model conceives of rights as unlimited in strength but limited in scope.7 When the scope of an absolute right is appropriately specified, it binds without exception. Accordingly, any restriction to any absolute right is necessarily unjustified. In this way, absolute rights maintain a categorical distinction between permissible and impermissible state actions and omissions. What I will call the relativist model reverses this structure.8 Relative rights are unlimited in scope but limited in strength. Persons have a relative right to engage in any conceivable form of conduct. Because this right inevitably conflicts with other rights and interests, this right is subject to justified limitations, as determined by the doctrine of proportionality. Each of these models offers a non-bifurcated account of the strength of rights: the entire scope of an absolute right is immune from incursion; the entire scope of a relative right might be balanced away.

These non-bifurcated models have received extensive exploration by legal, political, and constitutional theorists. In contrast, the bifurcated model has been the preserve of constitutional lawyers and judges elaborating legal doctrine, disconnected from an explicit overarching theoretical framework. Trevor Allan’s innovative and illuminating engagements in the world of constitutional theory form an important exception to this trend.

In discussing the strength of rights, Allan distances himself from both the absolutist and relativist models. On the one hand, he rejects the absolutist tradition by claiming that the subjection of rights to proportional limits is integral to constitutional justice:

Because justice consists in the correct regulation of affairs or resolution of disputes, according to the moral principles applicable, it invokes the notion of proportionality: there must be an appropriate weighting of relevant principles to reflect their proper balance in all the circumstances. Principles of justice are always dependent on context in the sense that what they permit or require must be determined by analysis of all the relevant facts… Restrictions of individual rights must be proportionate to the aims and benefits envisaged.9

On the other, Allan rejects the relativist model by maintaining that each right has an “irreducible core” that may never be breached regardless of the benefits to be attained or the burdens to be avoided.10 Referring to the right to procedural fairness, he explains that a limitation of a right’s periphery might be justified or unjustified, but a limitation of a right’s core is unjustifiable:

[P]owerful considerations of public interest may properly qualify the procedural rights that would otherwise apply: reasons of national security, in particular, may justify restrictions on the disclosure of evidence or relevant sources. But such limitations or qualifications must not be so extensive as wholly to undermine procedural rights, making a trial or hearing unfair…Like other fundamental rights, procedural fairness has a conceptual core that cannot properly be ignored or overridden.11

For Allan, the limitations to which procedural fairness and other rights are subject must cease wherever the core of the right begins. As he puts the point: “No matter how important the countervailing interests,” the essence of rights “must be preserved.”12

Allan’s pioneering account of the strength of rights joins what the leading theories sever: a commitment to the absolute strength of rights and to the idea of justified limitations, as determined through doctrine of proportionality. Within Allan’s bifurcated account, these ideas can be combined because each takes a different object. The idea that rights possess absolute strength applies solely to the core of a right, while the idea that rights are subject to proportional limits applies solely to the periphery.

In a recent article, Koen Lenaerts, the President of the Court of Justice of the European Union (CJEU), makes the following methodological remark about the bifurcated model:

[T]he case law of the CJEU reflects the fact that that court will first examine whether the measure in question respects the essence of the fundamental rights at stake and will only carry out a proportionality assessment if the answer to that first question is in the affirmative. The application of that method of analysis is not simply empty formalism, but rather seeks to emphasize the point that the essence of a fundamental right is absolute and not subject to balancing. 13

In this passage, Lenaerts identifies two methodological pillars on which the bifurcated model rests. The first is that one can determine whether a measure has respected the essence of a right without engaging in balancing. The second is that when a measure breaches the essence of a right, proportionality justification is precluded. Each pillar has attracted extensive criticism.

The claim that the bifurcated model offers a method of identifying the essence of a right without engaging in balancing is attacked on both doctrinal and theoretical grounds. 14 As a doctrinal matter, critics of the bifurcated model observe that the case law surrounding the essence of rights is “rife with ambiguities and inconsistencies”15 and fails to disclose “a consistent methodology.”16 As a theoretical matter, critics claim that the bifurcated model is doomed from the outset: “The problem with the ‘very essence’ is that it is almost impossible to define usefully without reference to competing public interests” that might override the right in a particular setting.17 But if the essence cannot be determined without considering the reasons that oppose constitutional protection in a given context, then the “final untouchable areas of a right” will depend upon the balance of reasons that support and oppose constitutional protection.18 With this, critics conclude that the bifurcated model short-circuits by relying on balancing, the very method that the model repudiates.

The second methodological challenge concerns the status of the doctrine of proportionality within the bifurcated model. As we have seen, the bifurcated model claims that when the essence of a right is breached, justification is impossible and the doctrine of proportionality is inapplicable. Relativist critics of the bifurcated model regard these claims as baseless. Even when a right is restricted in its entirety, it remains possible that the breach will be justified because the reasons that oppose the right might outweigh the reasons that support it. Accordingly, critics claim that where a right is restricted, the restriction might be justified or unjustified depending on the interplay of the reasons apposite to that context. But there is no basis, critics conclude, for the bifurcated model’s claim that the restriction of the essence of any right is unjustifiable as such. 19

My overarching aim in this chapter is to continue Allan’s project of elaborating the bifurcated model by confronting the methodical challenges that surround it. If one proceeds on the assumption that a general balancing of interests represents the exclusive method of justifying claims about rights, then these methodological challenges will seem irresolvable. However, this assumption need not be accepted. Our constitutional practices present doctrines concerning the scope and strength of rights that both form an alternative to a general balancing of interests and illuminate the inner workings of the bifurcated model. These doctrines explain how the methodological challenges surrounding the bifurcated model can be overcome.

I proceed as follows. Part II explores the diverging structures of the non-bifurcated models of rights and shows that each converges on the idea that balancing is the method of identifying the essence of rights. Parts III shows how purposive interpretation offers resources for identifying the essence of rights without engaging in balancing. Part IV explains why justification is impossible when the essence of a right is breached, by articulating the distinctive conception of proportionality on which the bifurcated model relies. Part V concludes that the key to elucidating the bifurcated model lies in identifying and elaborating the distinctive doctrines that animate it.

II. The Non-Bifurcated Models

Debates between the absolutist and relativist models of rights are often staged as though relativists support and absolutists oppose the idea that rights hang in the balance. This is not the case. Here, I contrast the structure of each model, locate their fundamental dispute, and explain why both models are ultimately committed to the idea that every judgment about what constitutional rights demand ultimately depends on balancing.

The absolutist and relativist models mirror the other’s structure. Absolute rights are indefeasible in strength but narrow in scope, while relative rights are boundless in scope but defeasible in strength. Table 1 contrasts the structure of these models.

Table 1

Models of Constitutional Rights

|  |  |  |
| --- | --- | --- |
|  | Absolute Rights | Relative Rights |
| Scope | Limited | Unlimited |
| Strength | Unlimited | Limited |

Each of these models draws our attention to different justificatory projects.

From the standpoint of the relativist model, what stands in need of justification are claims about the strength of rights rather than their scope. Since the 18th century, relativists have claimed that, as a matter of the scope of rights, persons have a “right to everything indiscriminately.”20 Contemporary proponents of rights relativism embrace the radical ramifications of this idea by claiming that wherever a constitution protects liberty or autonomy, persons possess a prima facie right to engage in any conceivable form of conduct, including theft and even murder.21 This claim about the scope of rights has ramifications for their strength: “rights do not have a special importance, and precisely because of the lack of special importance they do not have special normative force.”22 Because relative rights encompass conduct that is virtuous, vacuous, and even vicious, such rights enjoy no necessary primacy over opposing claims. 23 From this standpoint, the justificatory task that rights present involves determining their strength, that is, their capacity to withstand whatever reasons oppose constitutional protection in a given context.

In contrast, the absolutist model insists that if we are to retain the simple idea that constitutional rights distinguish between permissible and prohibited conduct, then the relativist understanding of rights must be inverted. Constitutional rights must be regarded not as prima facie claims that are forfeited whenever the opposing reasons are sufficiently weighty, but as categorical claims. Once rights are conceived of as prevailing over any opposing consideration, the protections that rights afford must be confined to specific claims of overriding importance.24 Absolute rights are “specific high-priority requirements, and thus though their force is great, their scope is narrow.”25

What divides the leading models of constitutional rights is the question of what it is about rights that stands in need of moral justification. Absolutists insist that it is their scope, while relativists maintain that it is their strength. However, when it comes to the method of identifying what rights demand, each of these models endorses balancing.

Absolutists often attack their relativist counterparts for being unable to accommodate the idea that rights have a “core content that cannot be compromised under any circumstances.”26 Once constitutional rights are subject to balancing, “[a]nything which the Constitution says cannot be done can be done if…the interests thereby served outweighed those which were sacrificed.”27 Because relative rights occupy a constitutional world devoid of categorical constraints, even the right not to be tortured or enslaved may, in principle, be set aside in contexts where the benefits obtained (or the burdens avoided) are sufficiently weighty. Thus, absolutists conclude that wherever the relative model prevails, “everything, even those aspects of our life most closely associated with our status as free and equal, is, in principle, up for grabs.”28

Defenders of relative rights respond to this charge in two ways. The first seeks to accommodate the objection by stipulating that certain constitutional rights – for example, those that protect persons from torture and enslavement – are exempt from balancing.29 I will set this response aside as it stands in tension with relativism’s organizing idea: “Constitutional judgments are only correct if they correspond to the outcome of an appropriate balancing of principles.”30 The second response follows this idea to its conclusion: “There is no such thing as an absolute principle.”31 From this standpoint, even the prohibition of torture “is only an apparently categorical claim,” true in most circumstances but susceptible to being “outweighed.”32

When proponents of rights relativism encounter constitutional provisions that proclaim that the core or the essential content of a constitutional right may not be restricted, they maintain that balancing is the method of identifying the essence of a right. Consider, for example, article 19(2) of Germany’s Basic Law, which imposes a limit on the restrictions to which rights may be subject: “In no case may the essence of a basic right be affected.”33 Robert Alexy, the leading theorist of the relativist model, interprets this provision as follows:

[T]he essential core is what is left over after the balancing test has been carried out. Limitations which correspond to the principle of proportionality do not infringe the essential core, even if they leave nothing left of the constitutional right in an individual case. This reduces the guarantee of an essential core to the principle of proportionality. Since this applies anyways, this would mean that article 19(2) Basic Law simply has declaratory effect.34

When confronted by a provision that prohibits restricting the essence of any right, relativists explain that the essence of the right is what (if anything) survives balancing in a given context. Since balancing determines the extent to which rights may be restricted, rights are susceptible to being balanced away in their entirety.35 From this standpoint, a constitutional prohibition against restricting the essence of a right has no impact on the constitution’s meaning.36

When absolutists repudiate relativism for placing categorical rights in the balance, relativists respond that absolutism does not know itself. Absolutists insist that a right is “designated only after the final interaction of all of the reasons bearing upon the justifiability of a given action.”37 Once this designation occurs, whatever falls within the scope of the right is essential to it, conclusive in strength, and exempt from balancing. Relativists object that the absolutist opposition to balancing is more apparent than real: wherever the reasons bearing upon the justifiability of a given action divide into supporting and opposing reasons, there is no alternative to assessing the weight of the competing reasons, and that is what balancing is. Even if absolute rights cannot be balanced away, the scope of each right is nevertheless “the outcome of an underlying balancing approach.”38 Far from offering an alternative to balancing, absolutism merely resists applying the label rights until after the task of balancing all of the reasons bearing upon the justifiability of a given act has concluded.

Ultimately, rights relativists and absolutists conceive of claims about the essence of rights as dependent on balancing. Relative rights are the inputs of balancing, and whatever aspect of a right is not balanced away in a given context constitutes its essence. Absolute rights are the outputs of balancing, and what is essential to the right is whatever the balance assigns to its scope.39 Thus, each of these opposing models converges on the same conclusion: balancing is the method for identifying the essence of a right. If this conclusion is inescapable, then the bifurcated model finds itself in the hopeless position both of requiring the essence of a right to be identified and of repudiating the only method for identifying it.

III. Identifying the Essence

However, as I will now argue, there is a familiar constitutional doctrine that enables the essence of a right to be identified without engaging in balancing. What then is that method?

Proponents of the bifurcated model usually shy away from this question. On those rare occasions where an answer is advanced, the magnetic pull of balancing proves overwhelming. In a recent article, Takis Tridimas and Giulia Gentile embrace the bifurcated model and reject rights relativism when they write: “Respect for essence is … best understood as an autonomous condition that must be satisfied separately from the requirement of proportionality.”40 However, when turning to the question of how the essence of a right is to be identified, the authors state: “Although the concept of essence as a legal threshold must be understood as an autonomous limit, in effect, it is impossible to determine it without engaging in a balancing process which is best carried out through a proportionality analysis.”41 With this, the authors’ allegiance to the bifurcated model collapses into a hardboiled relativism.

When lawyers and judges claim that the essence of a right has been breached, they set aside the language of infringement or limitation and speak of the right being abolished,42 destroyed,43 extinguished,44 emptied of its contents,45 or having its very existence called into question.46 What unites these formulations is the idea that the essence of a right is breached by public acts and omissions that treat the purpose of the right as a nullity and public power as plenary with respect to it. In what follows, I explain how purposive interpretation determines the essence of a constitutional right without engaging in balancing.

Purposive interpretation is a method of determining the scope of a constitutional right. This doctrine integrates a series of ideas.47 First, a charter of rights is a system of standards (or what we might call purposes) that regulate the relationship between public authorities and the free persons subject to their governance. Second, purposive interpretation is interpretive insofar as its task is not to determine which provisions in a charter of rights are to be given effect, but to explain how each provision can be given effect. Accordingly, when imputing purposes to provisions, purposive interpretation eschews purposes that render particular provisions inert or duplicative of others and instead seeks to formulate an interlocking set of general and particular purposes that make sense of a charter of rights in whole and part. Because different constellations of purposes may inform different charters of rights, both the scope of rights and the boundary delineating the core and the periphery of rights may vary from one jurisdiction to the next. Third, the purpose of each right must be fulfilled by public authorities in the context of a constantly changing world. Thus, the “social reality” to which a provision applies “becomes an integral part of interpretation.”48 Fourth, a right is fulfilled when the acts and omissions of public authorities conform to what the relevant purpose demands in a given context. In contrast, a right is breached to the extent that public acts or omissions deviate from what that purpose demands. So conceived, purposive interpretation identifies the purposes that animate a charter of rights and requires the legal order to live up to them.

A right might be breached in two ways. The first limits some aspect of the right’s purpose. The second negates that purpose and thereby compromises the right’s essence. An illustration of the distinction between a limitation and a negation arises in Schrems v Data Commissioner with respect to the rights to private life and to access effective judicial protection. 49

Schrems is the first case in which the CJEU declared a measure invalid because it compromised the essence of rights held under the Charter of Fundamental Rights of the European Union (the EU Charter). The case concerned the transfer of personal data of Facebook users in Europe to the United States where the company’s servers are located. The European Union’s General Data Protection Regulation authorizes the transfer of data to third countries that ensure an adequate level of data protection.50 In its Safe Harbour Decision, the European Union determined that the United States provided adequate protection, and authorized companies to store the personal data of Europeans in the United States.51 In the aftermath of Edward Snowden’s disclosures regarding the access that public authorities in the United States had to personal data transferred from Europe, an Austrian national challenged the Safe Harbour Decision.52 In Schrems, the CJEU interpreted the General Data Protection Regulation as requiring third countries to provide “a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order.”53 On this basis, the CJEU declared the Safe Harbour Decision invalid because the Commission failed to ensure that the United States offered equivalent protection. More specifically, the decision breached the essence of two rights held under the EU Charter.

First, the decision breached the essence of the right to private life. Schrems was handed down a few months after Digital Rights Ireland, in which the CJEU held that the retention of metadata54 constituted a “particularly serious interference” with the right to private life,55 but did not breach that right’s essence because “the content of the electronic communications” remained private.56 In Schrems, the Safe Harbour Decision enabled public authorities in the United States, such as the National Security Agency, to access both metadata and the content of all personal data transferred from the European Union to the United States.57 As the CJEU noted, the Safe Harbour Decision “does not contain any finding regarding the existence, in the United States, of rules adopted by the State intended to limit any interference with the fundamental rights of the persons whose data is transferred from the European Union to the United States.”58 Because the subjection of the content of personal communications to unrestricted surveillance by public authorities treats the right to private life as a nullity – an empty claim imposing no constraint on the exercise of public authority – the decision breached the essence of the right.59

Second, the CJEU held that the essence of the right to effective judicial protection was breached because domestic legislation in the United States failed to provide individuals with an “administrative or judicial means” of pursuing “legal remedies in order to have access to personal data … or to obtain the rectification or erasure of such data.”60 Accordingly, the right of individuals to seek a remedy to protect their rights was treated as non-existent because persons were left without any mode of legal recourse to constrain the use of their personal data.61

As these examples show, the essence is breached in contexts where the purpose of the right is not limited but denied. This idea extends in two directions. First, where the purpose of the right requires public authorities to exercise restraint, the essence of the right is breached where a public authority acknowledges no limit on its power to interfere with that purpose. The prospect of an unrestricted invasion of privacy in Schrems illustrates this possibility. Second, where the purpose of the right demands state action, the essence of the right is breached where the public authority fails to act to create the conditions of the right’s protection. In Schrems, the absence of any mode of legal recourse negates the right to effective judicial protection. Similarly, the European Court of Human Rights has held that the essence of the right to vote is “completely denied” in contexts where a state creates no mechanism for its exercise.62

Of course, the distinction between limits and denials will not always be easy to draw. The structure of constitutional adjudication addresses this ambiguity by placing the onus on the party seeking to establish the breach of a constitutional right. In cases where the claimant fails to establish that the breach compromises the essence of a right, justification remains possible. Whether it is actual depends upon considerations of proportionality.

Purposive interpretation is not a form of balancing. Balancing seeks to resolve conflicts between competing principles by considering the intensity of the interference to one principle, the importance of satisfying a competing principle, and, finally, whether the “importance of satisfying the competing principle justifies the detriment to, or nonsatisfaction of the first.”63 Purposive interpretation is not a form of balancing because it does not apply to competing principles. As we have seen, purposive interpretation concerns the relationship between the purpose of a right and the context in which public authorities must give effect to it. Purpose and context are not principles that compete against one another. Rather, context must conform to purpose. From the standpoint of purposive interpretation, the opposite idea – that there is some context to which the purpose of rights must conform – is inadmissible because it would render rights powerless to protect persons from the various social realities to which they apply, including historical traditions, societal consensus, and policy preferences. Because determinations about whether (and the extent to which) context conforms to purpose does not involve competing principles, purposive interpretation is not a form of balancing.

One might object that the bifurcated model is incapable of accommodating nonderogable rights, such as the right not to be tortured or enslaved. Because these rights may not be restricted under any circumstances, they resist the distinction between a core that is immune from restriction and a periphery that may be restricted in accordance with the doctrine of proportionality. In the terminology of the birfurcated model, a non-derogable right has a core but no periphery. And so, it would seem, non-derogable rights cannot be reconciled with the bifurcated model. My response to this objection hinges on an earlier claim: purposive interpretation presumes that a charter of rights is an interlocking set of general and particular standards that regulate the acts and omissions of public authorities. From this standpoint, the rights not to be tortured or enslaved are not stand-alone rights, but instead form the core of a standard embodied by a more general right. For example, torture violates the core of the broader right to security of the person, while enslavement violates the core of the broader right to liberty. These rights are derogable insofar as their peripheries remain subject to justified limitations. However, the cores of these rights are non-derogable insofar as their breach cannot be justified. In this way, the bifurcated model subsumes the distinction between derogable and non-derogable rights.

The bifurcated model offers a distinctive answer to the question: What exceptionless rights do we have? Relativists answer that because the strength of every right is determined through balancing, there are no exceptionless rights. In contrast, absolutists answer that because what is susceptible to restriction is not a right, there are only “a small number of rights,” such as “the right not to be tortured, not to be subject to cruel and unusual punishment, and not to be held in slavery or servitude.”64 All other supposed rights are subject to the vicissitudes of the political process. The bifurcated model departs from each of these approaches by maintaining that the core of every right imposes an unconditional obligation, including the right to privacy, the right to effective judicial protection, the right to vote, and – as Allan reminds us – the right to procedural fairness.65

IV. Why the Essence is Absolute

The bifurcated model claims that when the essence of a right is breached, the breach is not unjustified but unjustifiable. I will now explain why the bifurcated model is entitled to the claim that derogation from the essence of the right is unjustifiable.

Relativist critics of the bifurcated model insist that “[t]he conviction that there must be rights which even in the most extreme circumstances are not outweighed … cannot be maintained as a matter of constitutional law.”66 Relativists buttress this conclusion with a series of familiar ideas: rights are reasons that support constitutional protection; limits are reasons that oppose constitutional protection; and balancing is the appropriate method of determining the relative moral weight of these reasons in a given context.67 If the strength that constitutional rights possess is determined by balancing, then it follows that every claim of right is subject to balancing, that rights may be balanced against any consideration that opposes them, and that rights are susceptible to being outweighed in part and whole.

To be sure, the relativist claim is that rights always hang in the balance, not that rights will always be balanced away. Within the relativist model, the more a right is restricted, the stronger the countervailing reason must be if that restriction is to be justified. Accordingly, as the severity of a restriction increases, the likelihood of its justification diminishes.68 What relativists resist is the further claim that certain restrictions on rights are not merely unlikely to be justified but unjustifiable as such. From the relativist standpoint, this further claim cannot be maintained because it conflates improbability with impossibility. From the relativist standpoint, the bifurcated model rests on a simple error.

This objection takes the form of a conditional: if the bifurcated model relies on the relativist account of justification, then the bifurcated model would not get off the ground. However, if the bifurcated model had something of its own to say about why it is that justification is impossible when the essence of a right is breached, then it is the objection that would not get off the ground. After all, the objection does not show that the bifurcated model cannot succeed on its own terms. The objection simply observes that the bifurcated model is committed to a conclusion that does not follow from relativist premises.

In claiming that there is no justification for breaching the essence of a right, the bifurcated model relies on its own distinctive understanding of what justification means in the realm of constitutional rights.69 This understanding proceeds from the organizing idea that constitutional rights, by virtue of their status as supreme law, enjoy categorical priority over any legal norm that lacks the same pre-eminence. This idea has ramifications for both the scope and strength of constitutional rights. With respect to the scope of rights, the bifurcated model resists the relativist idea that the function of constitutional rights is to “put every conceivable form of conduct under their special protection.”70 Instead, a charter of rights articulates a set of purposes integral to the relations of free and equal persons, elevates these purposes to the rank of supreme law, and looks to these purposes to distinguish what the constitution protects from what “is left to the rules and remedies of ordinary law.”71 With respect to the strength of rights, the bifurcated model rejects the relativist idea that rights enjoy no priority over sub-constitutional considerations of policy, preference, expediency, and tradition. 72 Instead, the bifurcated model preserves the priority of rights by maintaining that a right may be limited only to provide “equivalent protection to the rights and freedoms of others, or for the protection of other legal interests which are essential if man is to continue to enjoy his rights and freedoms.”73 In this way, the bifurcated model resists the twin tendencies of rights relativism to reduce all rights into interests and to elevate all government interests to the rank of rights.74

The bifurcated model’s commitment to the priority of rights generates a distinctive account of the final proportionality substage.75 This substage presupposes a series of prior determinations: that one member of the system of rights has been breached, that the breach furthers the fulfillment of the purpose of another member of that system (appropriate objective and rational connection), and that there is no means of fulfilling the purpose of each member of the system of rights undiminished (minimal impairment). At issue in the final proportionality substage is the question of how conflicts between members of the system of rights are to be resolved where the constitution presents each member as possessing “equal validity and rank” and offers “no specific limitations clauses” for resolving conflicts that might arise between them.76

These conflicts may not be resolved by appealing to the familiar idea that rights are trumps. This idea is decisive when a constitutional right is confronted by a sub-constitutional consideration, but the idea offers no resources for resolving conflicts in which opposing claims issue from the normative apex of law’s hierarchy. Nor may these conflicts be resolved by “postulating an abstract hierarchy” in which one member of the system of rights, say, freedom of expression, is always prioritized over another, say, the right to a fair trial.77 As an interpretive matter, this approach is precluded wherever the constitutional text presents particular rights not as standing in relations of superior and inferior, but as making an equally valid claim to “effective implementation.”78

Where conflicts arise between members of the system of rights, the task “is not to determine which one prevails but to find a solution which leaves the greatest possible effect to both of them (Pracktische Konkordanz).”79 Accordingly, where each member of the system of rights issues an equally valid claim to fulfillment, conflicts may not be resolved by negating one member of the system in order to advance another. The sacrifice of any member of the system of rights is unjustifiable because it violates the idea that animates the final proportionality substage, namely, that each member of the system of rights makes an equally valid claim to implementation. Thus, when the essence of a right is breached, it is not the case that, given the severity of the interference, an adequate justification remains possible but is unlikely to materialize. Rather, justification is impossible because the nullification of a member of the system of rights can neither be justified by appealing to a sub-constitutional consideration nor to another member of the system of rights. In the former case, justification is precluded by the priority of each member of the system of rights over any subconstitutional legal norm. In the latter, justification is precluded because if each member of the system of rights makes an equally valid claim to fulfillment, no member can justify another’s nullification. Thus, where the essence of a right is breached, the final proportionality substage necessarily remains unsatisfied because there is no kind of consideration capable of justifying the breach.

In our collective constitutional terminology and imagination, the metaphor of balancing has become enmeshed with the final proportionality substage. From the standpoint of the bifurcated model, this metaphor is misleading because it denies the priority of the system of rights by subjecting each of its members to a general balancing of interests, in which rights may be restricted by any sub-constitutional consideration, whether political or economic, social or cultural.80 Further, the metaphor suggests that rights may be balanced away in their entirety whenever the benefits to be achieved or the burdens to be avoided possess sufficient magnitude. The relativist model embraces both of these ideas. The bifurcated model rejects both, but for its own distinctive reasons. On the one hand, the priority of rights precludes restricting any right to advance any consideration that does not sound in a constitutional register. Each member of the system of rights possesses absolute strength against any sub-constitutional consideration. On the other, where the members of the system of rights possess an equal claim to fulfilment, no member may be nullified to advance another. Instead, members of the system of rights may be restricted at their periphery to ensure that no member is breached at its core.

V. Conclusion

Allan’s immense contributions to the world of constitutional theory include his articulation of the bifurcated model of constitutional rights. This model leads a double life. As a matter of constitutional practice, judges and lawyers in jurisdictions around the world appeal to the model to conceptualize the strength of rights. As a matter of constitutional theory, however, the model has come in for a rough ride. Critics claim that the model is defective both because it offers no method of identifying the essence of a right and because it provides no basis for its claim that when the essence of a right is breached, justification is impossible. This chapter argues that the key to overcoming these methodological challenges lies in appreciating the distinctive doctrines on which the model relies. On the one hand, purposive interpretation identifies the essence of a right with its purpose. Any public act or omission that treats the purpose of a right as a nullity breaches its essence. On the other, there is a conception of proportionality that explains why justification is impossible when the essence of a right is breached. Where each member of the system of rights makes an equally valid claim to implementation, no member may justify the nullification of any other. Uniting each of these doctrines is the shared idea that a constitutional right enjoys priority over any legal norm that lacks the same pre-eminence. These doctrines and the shared idea that animates them are, as Allan might say, “implicit in our existing constitutional arrangements.”81

**Those rights are the ones historically protected by the NLRA.**

Anne **Mayerson et al. 16**, Attorneys, "Amicus Curiae Brief for the Amalgamated Transit Union (ATU) in Support of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, and in Opposition to Plaintiffs' Motion for Summary Judgment," United States District Court Eastern District of California, Case No. 2:13-CV-02069-KJM-DAD, 04/05/2016, Lexis

When Congress enacted Section 13(c)(2) in 1964, it obviously did not draw the term “collective bargaining rights” out of thin air; rather, it had something specific in mind. And, considering the circumstances that led Congress to enact Section 13(c)(2) in 1964 to provide for the “continuation” of “collective bargaining rights”—viz., a trend towards public acquisitions of private sector transit companies whose employees and their unions would continue to be covered by and enjoy the protections of the National Labor Relations Act (“NLRA”) but for such public acquisitions—that something specific could only have been “collective bargaining rights” of the kind historically made available to private sector employees under the NLRA. See generally ATU v. Donovan, supra, 767 F.2d at 948-49. Accordingly, in its determinations on remand, the DOL was right to look to “[t]he prevailing [case] law” under the NLRA “when section 13(c) was enacted” in determining what Congress meant when it used the term “collective bargaining rights” in Section 13(c)(2). See SacRTD Determination, at 11-13.

**Violation---the aff protects (conduct / people) not previously covered by the NLRA. That’s scope and content expansion, NOT strength.**

**Prefer it:**

**1. PRECISION. Our ev’s grounded in a coherent philosophy of rights.**

**2. LIMITS. Affs could cover literally any union behavior. A single ‘unions good’ card can become an unbeatable aff AND circumvent functional limits, which presume the NLRA framework.**

**1NC – CP – Unjust Enrichment**

**The United States federal government should award restitution for unjust enrichment from employers refusing strong collective bargaining protections for journalism industry workers in relation to Google and Meta.**

**Unlike damages for rights violations, unjust enrichment forces wrongdoers to disgorge ill-gotten gains, solving better than the plan.**

Andrew **Strom 25**, union lawyer based in New York City, adjunct professor at Brooklyn Law School, "A Roadmap for More Effective NLRB Remedies," OnLabor, 1/27/2025, https://onlabor.org/trump-judge-offers-roadmap-for-more-effective-nlrb-remedies/

The Ninth Circuit recently issued an opinion that addressed the National Labor Relations Board’s decision in Thryv Inc., regarding the scope of remedies available for victims of unfair labor practices. In Thryv, the Board held that in addition to backpay, workers should be able to recover for “direct or foreseeable pecuniary harms” that flow from losing their jobs. In Int’l Union of Operating Engineers, Local 39 v. NLRB, a divided Ninth Circuit panel ruled that the Thryv remedies were within the Board’s authority. Judge Patrick Bumatay, a Trump appointee dissented, arguing that any remedy must focus on the wrongdoer’s gain or benefit rather than the harm to the victim. Whether or not he’s correct on the law, his suggested approach could actually lead to stronger remedies.

When workers are unemployed as a result of an employer’s violation of the National Labor Relations Act (typically because the employer fired them, but the Operating Engineers case involved an unlawful lockout), the Board’s standard remedy has long been to award backpay, less any interim earnings, with additional deductions for any periods when the worker did not actively look for work. This remedy does not make workers whole because when workers lose their paychecks, they predictably suffer a range of additional monetary losses. These losses will vary from case to case, but they may include interest payments and late fees on credit cards, penalties for early withdrawals from retirement accounts, medical expenses that would have been covered by insurance, and moving expenses to find a less expensive home. In Thryv, the Board finally agreed that workers should be able to recover the “direct and foreseeable pecuniary harms” they suffer when an employer illegally throws them out of work.

The remedies that the Board authorized in Thryv are still far less than the remedies available in an employment discrimination case or in many other wrongful discharge cases. Most notably, workers are not entitled to recover for pain and suffering, emotional distress, or harm to reputation. In addition, the Board ruled that any questions about what counts as “direct and foreseeable pecuniary harms” will be deferred to the compliance stage, and it has yet to rule on whether any particular harms meet that test. The Board has stated that it will not award damages for any harms that are “unquantifiable, speculative, or non-specific.”

In Operating Engineers, the Ninth Circuit majority held that the Thryv remedies are within the Board’s statutory authority because they are merely an attempt to remove or avoid the consequences of a violation and to restore the situation to that which would have occurred if not for the violation. Judge Bumatay dissented, arguing that the Thryv remedies are barred by the Seventh Amendment.

Bumatay asserted that to avoid the need for a jury trial, any relief sought by the Board must be “equitable” rather than “legal,” as those terms were understood in the 18th century. As he put it, “equitable relief should ask only what the employer has unjustly gained,” rather than focusing on what the worker has lost. I say, let’s take that and run with it. We know that when employers make a decision to fire a union activist, or to engage in other illegal tactics to stop a union organizing drive or defeat an incumbent union, the employers are likely making at least an informal cost-benefit analysis. The “union avoidance” industry wouldn’t be a multi-billion dollar enterprise if employers didn’t think they would profit by preventing their employees from organizing. Of course employers are unjustly enriched when they engage in illegal anti-union conduct. And, the enrichment likely far exceeds the harms suffered by an individual union activist who the employer fired in order to defeat the organizing drive. Perhaps the best part of focusing on the employer’s unjust enrichment is that it opens the door for substantial discovery regarding the extent of any unjust enrichment. So, if the employer had conducted some analysis about how much a union contract might eat into its profits, that should become a matter of public record.

I’m not suggesting that Bumatay is right about the Seventh Amendment. But, I recognize that on a practical level, “right” just means whatever five Justices are willing to go along with. So, if the turn back the clock crowd wants us to use unjust enrichment as the measure of damages under the NLRA, I will gladly take it.

**When disconnected from an underlying right, the CP sets precedent that unjust enrichment can establish freestanding liability.**

Henry E. **Smith 9**, Professor of Law, Harvard Law School, "Does Equity Pass the Laugh Test?: A Response to Oliar and Sprigman," Virginia Law Review In Brief, vol. 95, 04/01/2009, pp. 9-17

But is copyright the only alternative to decentralized norms? In this Response, I will argue that Oliar and Sprigman's case for cautious endorsement of the norm system and lack of legal protection is impressive but incomplete. They may well be correct that the current system is the best, considering the alternatives, but they have not [\*11] considered all the alternatives. In particular, the nature of the norms involved and the types of misappropriation they target suggest that some version of misappropriation law and unjust enrichment may be a candidate to add to the institutional mix of devices to deal with joke thieves. Although the dangers of an overexpansive law of misappropriation are well known and counsel caution in any extension into the sphere of stand-up comedy, a more equitable approach--as opposed to the formal law that Oliar and Sprigman take as their baseline and foil--may avoid some of the problems with copyright, mitigate some of the problems with the norm system itself, and do less damage to the systems of norms than would an extension of copyright. Finally, and in a more speculative vein, I will consider the possibility that the expansion of intellectual property law--which partly motivates Oliar and Sprigman to seek a nonlegal alternative--might in part be driven by a lack of any way station between formal in rem property rights on the one hand and community or occupational norms on the other.

CUSTOM VERSUS COPYRIGHT

At every turn, Oliar and Sprigman compare the system of norms with formal copyright law. 6 In this they are well within the usual practice of the law and norms literature. 7 It is certainly most striking when norms supplement, as here, or even contradict formal law, as they do among lobster gangs in Maine in delineating their territories, or among Chicagoans claiming shoveled parking spots on the Windy City's snowy streets. But the fascination with norms as an alternative to law has displaced an older question: when and how should law incorporate norms? Or in an older formulation: when is custom law?

For custom to be enforceable as law--or in a more modern vein, to be adopted into the law--it must possess certain features. To take one oft-cited formulation, Blackstone set out seven requirements for custom to have legal force: antiquity, continuity, peaceable use, certainty, reasonableness, compulsoriness (not by license), and consistency. 8 It is instructive to look at the norms of stand-up comedy through this lens. [\*12] Antiquity could be a problem for the norms of comedy: certainly they do not date back to 1189 or even for a very long time in the United States. They may, however, date to the beginning of the current era in stand-up comedy (that is, the era following Oliar and Sprigman's "post-vaudeville"), and the norms have probably been around long enough to know they are here to stay and are serving a purpose. Continuity and peaceable use both seem to be satisfied, notwithstanding the occasional fracas like that between Joe Rogan and Carlos Mencia, which are really examples of enforcement actions. Comics feel compelled to follow the norm, as Oliar and Sprigman amply document. As for reasonableness, Oliar and Sprigman have made a strong case that the norm serves the purpose of fostering creativity in stand-up comedy by protecting investments in developing material. Whether the norm is consistent with the law in general turns on questions of preemption and possible conflict with copyright--issues to which I return in a moment. Blackstone's remaining requirement is certainty.

As I have argued elsewhere, part of the certainty requirement involves communication of the norm to the relevant duty holders. 9 Customs can be vague, and this problem only worsens when a custom might be enforced outside its community of origin: what makes a spot subject to exclusive rights to work may be obvious to fellow miners in a given area but not so obvious to outsiders or to courts. Something very similar is going on here with the comics' norms. Oliar and Sprigman express concern that the norm against joke theft is too vague and might chill behavior. 10 The norm certainly approaches the outer reaches of copyright near the idea/expression dichotomy, the importance of which in copyright law reflects similar worries. But we would need more empirical evidence to determine whether the norm is all that vague to the participants themselves. To take an example closer to home, academics probably have a clearer sense for what is plagiarism than others do, even though it might be a little hard to articulate to a nonexpert.

So whether the norm of stand-up comedy is appropriate for incorporation into the law is really an open question, subject to further empirical work. Militating in favor of limited enforcement is that the norm itself arose in an intermediate-knit group in which the amount of background knowledge is less than among a smaller, more close-knit group. Consistent with this character of the community, the norm itself [\*13] is somewhat formal. The authors rightly point out that the norm shows a strong numerus clausus-like standardization and simplicity, 11 with a view towards ease of enforcement: if a joke cannot be co-owned and two people are using it, one of them is a thief. Simple priority rules interact with a more complicated social sense of working things out and getting along. There is a danger of enforcing the surrounding relationship-preserving norms in litigation, where relations have broken down. But it is the simplicity in the delineation of the entitlement itself that makes it even a candidate for some kind of enforcement.

THE MISAPPROPRIATION ALTERNATIVE

Another reason that custom is not as welcome at the table as it once was is that the customs that reflected commercial morality mainly have entered the law (or equity) through doctrines of misappropriation and unjust enrichment. These areas of the law are both underappreciated and regarded with suspicion these days. For one thing, the seeming danger of using misappropriation to deal with the appropriation of ideas makes people nervous because of its potential for overexpansion. In this Part, I call this reflexive distaste into question and even suggest that overreaction against it may have contributed to the overexpansiveness of the formal intellectual property rights that Oliar and Sprigman take as the main alternative to the norms of stand-up comics.

The cautionary tale here conventionally starts with International News Service v. Associated Press, 12 in which the Supreme Court held that the use of a competing news service's stories in one's own news service and newspapers is a misappropriation enjoinable by a court of equity. Aware of the criticism that it might be creating a property right in news, the Court declared the protected interest to be quasi-property rather than an in rem right. In his famous dissent, Justice Brandeis criticized the majority for doing precisely what it claimed not to be doing--creating new property rights--in an area in which legislatures are better judges of the situation. Perhaps more importantly for present IP debates, Justice Brandeis also made a strong case for a presumption that information exists in the public domain, such that where the limited IP protections provided by Congress (and to a lesser extent state law) do [\*14] not apply, information is "free as the air to common use." 13 Brandeis' dissent has been taken as a clarion call for IP skeptics ever since. 14

Although unfair competition is treated as an adjunct to trademark law these days, at other times and in other legal systems it has been closely associated with unjust enrichment. 15 Some commentators have also seen an implicit theme of unjust enrichment in intellectual property law itself. 16 The problem becomes how to prevent this theory from becoming too broad, both in order to protect the public domain and to avoid preemption by copyright or patent law. 17 Although the doctrine of misappropriation can be viewed as preventing a competitor from reaping where he has not sown, there needs to be a limit to this principle. 18 Such concerns apply to unjust enrichment more broadly, so that although one can speak in general terms of how one who is unjustly enriched at another's expense is liable in restitution, 19 the problem lies in defining what enrichment is unjust. Some see unjust enrichment as a substantive and expansive concept, while others see it as merely an organizing principle for thinking about liability, the main sources of which come from other branches of law. 20

Misappropriation also connects with custom. Richard Epstein has argued that because news organizations had a norm of respecting hot news and would only use it as a tip for independent investigation, the result in International News Service is correct for being in accord with custom. 21 Whether Epstein's conclusion follows turns in part on the informational demands that the custom makes in light of the set of duty [\*15] holders. Limiting the duty holders to direct competitors helps. If anything, the custom among stand-up comics is less vague than the one in International News Service governing "hot news." The anti-joke-stealing norm does not require defining what is hot (or what is funny, for that matter). But it is much more expansive, because it has no time limit at all, although some temporal limitation might appropriately be grafted onto a misappropriation claim, whether under the doctrine of laches or otherwise.

My purpose here is not to argue for extending International News Service to jokes. Indeed, Oliar and Sprigman advert to some of the problems such an approach could present. One, just noted, is that the custom may be too expansive, and this is always a concern with incorporating industry customs into IP law. 22 Too expansive use of custom, particularly as the set of duty holders grows, would pose large information costs and subvert the numerus clausus. 23 Would such a misappropriation claim in the realm of stand-up comedy derogate from the public domain more or less than copyright? The set of duty holders is far smaller than in copyright, which is in rem. Would misappropriation threaten to displace the existing norm and its informal enforcement mechanism as much as copyright would? It is hard to say, but unlike copyright, a misappropriation regime would dovetail substantively with the comedians' norm because a large amount of the content of the misappropriation regime would derive from the norm itself. Would use of equity-style judicially-managed misappropriation law invite less rent seeking than would industry-specific statutory IP regimes, which Oliar and Sprigman rightly view as rife with rent-seeking possibilities? 24 Finally, would use of the norm in the law make it less certain than would informal enforcement or arbitration within the stand-up world? The fact that, at least in contractual disputes, parties in the same business often prefer what appear to the outsider as formal bright line rules should give us pause. 25 But although Oliar and Sprigman very convincingly argue that the norm system is probably [\*16] better than any version of formal copyright, they leave unaddressed the question whether the norm should be supplemented with an equity-style misappropriation theory based on unjust enrichment.

The larger question here is whether an ex post equity-style standard based on morality and existing norms would be better or worse than formal law and norms alone. This is a difficult question in general but might be easier to assess in a given business like stand-up comedy. At the very least, misappropriation and the law of equity do pass the laugh test.

LAW AND EQUITY IN INTELLECTUAL PROPERTY

Finally, we might entertain a hypothesis about the nature of law and equity in intellectual property. What if our fears of equity and the "Chancellor's foot" 26 and of expansive readings of International News Service--which was itself an equity case--have led to the kind of overexpansiveness in the formal law of IP that troubles Oliar and Sprigman (and many others)? There has always been a suspicion of equity and the need to keep it cabined (for example, only acting in personam, and only when the legal remedy is inadequate and not in derogation of property rights) but after the fusion of law and equity, our view of formalism versus context-based discretion has become polarized. Some want to banish judicial discretion and others want contextualized decisionmaking to be available at all times.

In IP there has been, in reaction to International News Service, a tendency to use formal IP law where once misappropriation might have served. Might some of the impetus for business method patents and expansive uses of copyright have been somewhat dulled if the most egregious problems of freeriding in violation of existing industry custom could have been addressed through suits for misappropriation and unjust enrichment? Again, it is hard to say because it has hardly been tried. The dangers inherent in International News Service should not rule out misappropriation as a safety valve that might prevent even worse approaches. It is a testament to the richness of their study of stand-up [\*17] comedy that Oliar and Sprigman cast these long-buried issues in such sharp relief.

**Solves climate change---extinction.**

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I. THE CLIMATE CRISIS

There is broad scientific consensus that climate change has become the "defining issue of our time,"39 a "super wicked" issue,40 or a problem "from hell."41 [\*1048] Decades of research have led to the clear conclusion that human activity is the primary driver of many of the effects of climate change around the world.42 Climate change substantially disrupts natural systems,43 which, in turn, inevitably disrupts social and economic systems.44 Among the damages of climate change documented in scientific evidence are shifts in seasonal timing,45 loss of species,46 severe crises in food supply and water scarcity,47 and more frequent gastrointestinal infections due to higher temperatures and increased rain and flooding.48 The social harms of the crisis include increased risk of displacement and involuntary migration,49 [\*1049] exacerbated global income inequality,50 and greater risk of violence.51

While some climate change harms are already taking place, many are estimated to occur far into the future with high probability.52 The 2022 Intergovernmental Panel on Climate Change (IPCC)53 report predicts high levels of global warming by the end of the twenty-first century in certain scenarios.54 The following Sections describe three prominent, interconnected, future harms of climate change: temperature changes (and in particular climate heat waves), sea level rise, and marine-species extinction.55 The purpose of this Article is to call attention to a key, common theme: the fact that the harms of climate change are dispersed, difficult to quantify and attribute to specific actors, and carry substantial effects mostly observable in the medium-to-far future. For all these reasons, tort law, insisting on a clear showing of specific harm, is largely ill-equipped to serve as a doctrinal framework for climate litigation. At the same time, the perpetuation of the climate crisis is immensely profitable for strong commercial actors.56

A. TEMPERATURE CHANGES

Recent scientific assessments suggest that the global average temperature increased by about 1.0°C from 1901 to 2016.57 Evidence points to human activity, [\*1050] and in particular emission of greenhouse gases (GHGs), as the dominant cause of global warming.58 Emission of carbon dioxide, methane, nitrous oxide, and fluorinated gases contribute to warming the atmosphere59 "by absorbing energy and slowing the rate at which the energy escapes to space."60 Carbon dioxide and methane released from thawing permafrost contribute to the warming of the atmosphere as well.61 The fossil fuel industry, responsible for the bulk of GHG emissions, is now more profitable than ever.62

According to recent assessments, without a significant reduction in these emissions, the increase in average global temperatures could reach 5.7°C and higher by the end of this century.63 Global warming resulting from current emissions will continue to affect future generations, leaving "a multi-millennial legacy, with a substantial fraction of the warming persisting for more than 10,000 years."64

Among the worrying influences of the climate-driven rise in temperature is its expected negative effect on human health and well-being.65 Studies have found connections between higher temperatures and increases in the occurrence of diarrheal diseases, including cholera and other gastrointestinal infections.66 The increase in heatwave intensity67 is expected to significantly increase mortality [\*1051] rates globally.68 Temperature rise is also associated with many other potentially devastating outcomes, such as droughts69 and tropical storms.70 Temperature increases also cause sea level rise. We turn to discuss this issue next.

B. SEA LEVEL RISE

Studies show that between 1902 and 2020, sea levels rose by more than 6.3 inches.71 As GHG emissions increase and global temperatures climb, sea levels will continue to rise.72 Some projections indicate that by the end of this century, sea levels may rise by more than 6.5 feet.73 The scientific community perceives the rise of sea [\*1052] levels as a pressing threat,74 with one estimate indicating that by the year 2100, over one billion people will be exposed to environmental and climatic risks caused by rising sea levels.75 Perhaps the most pressing problem related to sea level rise is the existential threat to low-lying island states, whose land area will be rendered uninhabitable or overrun by seawater.76 Many coastal areas will similarly disappear under water,77 and their inhabitants will lose their homes, causing them to become climate refugees.78 Currently, this problem has no clear legal solution.79

The devastating impact of sea level rise will not affect all people equally. Despite their relatively "infinitesimal contributions to the causal drivers of climate change," it is low-lying island states such as Tuvalu, Kiribati, or the Maldives that are most vulnerable to sea level rise.80 The problem of climate refugees is also expected to influence states and regions in which refugees will [\*1053] eventually resettle,81 as those regions will need to provide their fast-growing populations with increasing amounts of housing, food, and jobs.82

C. SPECIES EXTINCTION

Not only humans are expected to suffer from climate change. Research shows that climate change is likely to lead to catastrophic outcomes for many other species as well. A recent study indicates the potential collapse of marine and amphibian populations as a result of temperature changes.83 Such species cannot escape heat events and are therefore more sensitive to heat failure.84 In addition to rising temperatures, sea level rise may also cause immense harm to animals, on top of the harm to humans.85 In particular, sea level rise may cause flooding of intertidal areas, putting the existence of various species who reside in those areas at risk.86

Adding these projections to the declines in different marine species due to the expansion and overcapacity of many industrial fisheries,87 some climate models show that by the year 2100, local species of fish and invertebrates will lose more than fifty percent of their animal population in many regions.88

[\*1054]

I. STATE OF THE LAW

The immense harms of the climate crisis, as described in Part I, give rise to a tragic puzzle. Namely, if overwhelming scientific evidence so strongly suggests the harmful nature of current production and consumption activities, why have existing legal frameworks failed to stop the foreseeable adverse outcomes described above?

This Part reviews existing legal frameworks currently used in the governance of the climate crisis, with an emphasis on domestic regulation, international treaties, and tort litigation. It shows that existing legal tools fail to offer effective solutions for two main reasons. First, short-term monetary incentives, coordination problems, and free-rider effects make climate change particularly difficult to regulate, thereby contributing to its status as a "super wicked" problem.89 Second, the harms associated with the climate crisis are mostly future harms with complicated causal histories,90 while incentives to profit are immense, immediate, and direct.91 By clarifying these points, this Part serves as a background for our argument in Parts III and IV, where we show the promising potential of the doctrine of unjust enrichment as a response to the tragic puzzle of the current legal treatment of the climate crisis.

A. REGULATION

Current legal responses to the climate crisis are focused on regulatory schemes and public law solutions through national law as well as public international law.92 At first glance, this focus seems obvious from an economic perspective. Climate stability is a classic case of a "public good"93: it is non-excludable (no single entity can prevent others from enjoying the benefits of a stable climate) and non-rivalrous (a stable climate benefits everyone simultaneously).94 Classic examples of public goods are national security, public broadcasting, public parks, and clean air.95 It is well-known that private markets tend to undersupply public [\*1055] goods96 because of the free-rider problem involved in supplying them: every beneficiary prefers that the goods are supplied but no one wants to invest private resources to supply them.97 In the context of the climate crisis, everyone prefers that GHG emissions would be lowered, but each country or firm wishes to avoid the costs this goal entails and prefers that others bear them.

Since markets tend to undersupply public goods, a common solution is to supply them through a public authority, which (hopefully) takes into account the public interest.98 In the case of climate change, a public authority could take various measures, including engaging in enforcement (for example, by prosecuting polluters under criminal law),99 subsidizing private litigation,100 imposing a tax on production, or regulating production (for example, intervening in the actions of polluters more directly).101 Such endeavors may take place at both the national and international levels.

1. Domestic Regulation in the United States

Until the 1960s, responsibility for climate change policies in the United States resided with the states rather than with the federal government, leading to jurisdictional variation in the degrees of environmental protection between states.102 [\*1056] The Clean Air Act (CAA), enacted in 1963,103 was first established as a federal framework for air pollution control and is now administered by the Environmental Protection Agency (EPA).104 The fundamental problem with this regulatory framework is that the CAA has not been amended since the 1990s and did not explicitly authorize the EPA to regulate GHG emissions. In response, in 2007, the Supreme Court decided the landmark case of Massachusetts v. EPA, holding that the EPA not only has the authority to regulate GHG emissions, but has an obligation to do so.105 In 2021, the EPA issued a set of new GHG emission standards involving cars and light trucks.106 However, the Supreme Court severely limited the ability of the EPA to regulate GHG emissions in the recent case of West Virginia v. EPA.107 In response to this decision, Congress strengthened the ability of the EPA to regulate GHG emissions,108 although scholars debate whether or not this response effectively repealed West Virginia v. EPA.109

As this brief review illustrates, the history of environmental regulation in the United States has been rocky and likely will continue to be so. So far, the EPA has had little success in reducing GHG emissions sufficiently to satisfy the United States' climate obligations.110 Politicization of the issue together with increasing polarization hinder decisive regulatory action, and lobbying efforts seem all too effective in preventing a consistent regulatory response.

[\*1057] More broadly, public choice theory readily explains the inability of national regulatory frameworks to offer effective solutions to the climate crisis.111 Public officials, including regulators, strive to maximize their own utility,112 and the pursuit of selfish interests often interferes with the choice of an optimal policy for society as a whole.113 Thus, lobbying by polluters may hinder the effectiveness of reaching coordinated environmental regulations.114 In the context of climate change, even if regulators faithfully represent the interests and wishes of their constituencies, regulatory policy greatly diverges from the social optimum. Regulators, guided by elected public officials, respond to interests and problems that concern and affect the constituents in their jurisdiction.115 There is no reason to believe that the interest of future generations and the long-term sustainability of environmental systems are fully represented within this framework. Future generations, by definition, are at a disadvantage in the political field and cannot express their interests in the political system.116 It is therefore unsurprising that the interests of future generations are underrepresented in current political and regulatory systems.

Regulatory focus on short-term goals may also be driven by behavioral effects, such as overoptimism and myopia, or "present bias."117 Specifically, regulators may be overconfident in their ability to solve the climate crisis quickly and therefore do not feel the need to consider the fate of future generations, mistakenly assuming that these generations will not face the problem at all.118 Moreover, behavioral economics literature has repeatedly shown that individuals are "myopic" and may systematically prefer short-term benefits over long-term gains.119 This [\*1058] might be caused by "hyperbolic discounting," where individuals place extremely low weights on future outcomes.120 The problem is further exacerbated in the context of the climate crisis, due to people's systematic tendency to underestimate exponential growth.121 Policymakers and regulators are not immune to such cognitive biases and are therefore prone to ignore or downplay the risks associated with the climate crisis.122

2. Regulation at the International Level

The climate crisis is difficult to tackle at the level of individual countries. In a classic free-rider dynamic, each country has a strong incentive to allow corporations to pollute, rather than adopt restricting environmental regulations. Supposedly, the solution can be found in international coordination, allowing countries to jointly commit to battling the crisis.

Indeed, a series of international treaties have been established as a framework for cooperation in the fight against climate change. The United Nations Conference on the Human Environment was held in 1972 in Stockholm, Sweden, and was the first world conference to focus primarily on environmental issues.123 This conference yielded the Stockholm Declaration, a document containing twenty-six principles on safeguarding the earth and the environment for the benefit of mankind and future generations.124 The Declaration was accompanied by an "Action Plan" and led to the establishment of the United Nations Environmental Programme (UNEP).125 Alas, the declaration proved largely ineffective.126 Twenty years later, a climate-focused convention took place as part of the United Nations Conference on Environment and Development (UNCED), colloquially known as the "Earth [\*1059] Summit," in Rio de Janeiro, Brazil.127 Following this conference, the 1992 United Nations Framework Convention on Climate Change (UNFCCC) was established.128 The UNFCCC strived for a more modest goal stabilizing GHG concentrations by lowering emissions and focusing on industrialized countries.129 These countries accepted a nonbinding commitment to reduce emissions by the year 2000,130 yet it quickly became apparent that this goal was not to be achieved. In 1997, another UNFCCC conference took place in Kyoto, Japan, and yielded the Kyoto Protocol.131 The Kyoto Protocol sets binding emission reduction goals for industrialized countries, but has also been heavily criticized and widely considered to be a failure.132 Over the following years, meetings of the parties to the UNFCCC-the Conference of the Parties (COP) continued taking place.133 A high-profile convention took place in Paris in 2015, yielding the Paris Agreement.134 The Paris Agreement, adopted [\*1060] by 196 parties,135 is a legally binding agreement that strives to limit global warming by keeping temperature rise to well below 2°C, and preferably only 1.5°C, compared to preindustrial levels.136 It is not yet clear whether this framework is effective.137 The Paris Agreement has been criticized as "a dangerous form of incrementalism" because it "repackages existing rules that have already proven inadequate."138

Recent attempts at international consensus can be found in the COP meetings in Glasgow, Scotland, and Sharm el-Sheikh, Egypt, in 2021 and 2022, respectively. The "Glasgow Climate Pact" focuses on work programs, agendas, and dialogue,139 with some new provisions such as a call for countries to reduce the use of coal power and to avoid inefficient subsidies for fossil fuels.140 More importantly, in the more recent Sharm el-Sheikh meeting, general drafts of decisions were released concerning "loss and damage" for vulnerable countries that are hit the hardest by climate disasters.141 However, these decisions do not seem to have concrete content at the moment, so it remains unclear who needs to compensate whom and under what conditions. John Kerry, who currently serves as the United States Special Presidential Envoy for Climate, has already declared publicly that the United States would not accept an "imposed standard of liability" that [\*1061] generates a legal duty to help countries vulnerable to climate change.142 Furthermore, the "loss and damage fund" agreed upon in Sharm el-Sheikh could "take years to pay out."143

More broadly, this review illustrates the continuous inability to achieve consensus and an effective legal response to the climate crisis at the international level. Countries, even when coordinating under international law, struggle to give up the competitive advantage and short-term benefits of environmentally harmful policies.144 Thus, the same difficulties that hinder regulation at the national level are also present at the international level.

A prime example of this dynamic can be found in Donald Trump's decision in 2017 to withdraw from the Paris Agreement145 because it supposedly imposes unfair environmental standards on American businesses (a decision later overturned by President Biden, who rejoined the Agreement).146 Trump's actions perfectly reflect the free-rider problem: environmental policies are costly at the country level, so there is insufficient incentive to adopt them. In other words, so long as pollution remains immensely profitable,147 the failure of regulatory efforts to reduce it is unsurprising.

B. TORT LITIGATION

Faced with a dead end at the regulatory level, private citizens have been attempting to battle the climate crisis through the courts, using private litigation.148 Turning to litigation is a sensible response to regulatory and political deadlock. When regulators fail to act, private individuals and organizations can call for legal action by approaching the courts. Even if most courts reject the claim, it is enough that some courts accept it to create significant pressure on relevant industry players. Thus, even if governmental consensus on environmental policies cannot be reached due to regulatory and legislative capture, litigation can provide a push in the right direction.

[\*1062] Litigation can also offer inroads when political deadlock hinders effective legal action at the international level. For instance, an American citizen can sue a foreign company (say a Chinese corporation) in an American court. If the foreign company operates in the United States or if its actions affect American nationals, a decision by the American court, based on American law, will be binding against the Chinese company as a matter of conflict of law rules, or private international law. This is true even if on the level of international treaty law, the American and Chinese governments cannot agree on desired levels of GHG emissions. Finding the correct doctrinal hook for climate litigation is therefore important to unlock the institutional advantages of this legal course of action.

Unfortunately, current litigatory attempts, focusing on tort law claims,149 have largely proven unsuccessful. As Douglas Kysar observed more than a decade ago,

[T]ort law seems fundamentally ill-equipped to address the causes and impacts of climate change: diffuse and disparate in origin, lagged and latticed in effect, anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible.150

In what follows, we demonstrate the difficulties in advancing climate litigation based on the four traditional elements of tort law: duty, breach, harm, and causation.151 The purpose of this demonstration is not to provide a general review of the intersection of tort law and environmental litigation;152 rather, it is intended to serve as background for our proposal in Part III, highlighting the structural advantages of unjust enrichment doctrine as a vessel for climate litigation.

1. Duty and Breach

As John Goldberg and Benjamin Zipursky rightly observe, tort law is not just the law of harms, but is more accurately understood as the "law of wrongs."153 That is, a successful tort claim must demonstrate some wrongful conduct, or a breach of duty by the defendant, as defined under tort doctrine.154

[\*1063] In the case of climate litigation, however, the conduct causing the harm is often not wrongful in the sense required under tort doctrine. Admittedly, in some instances, contribution to global warming can be characterized as a wrong, for example, if a producer violates environmental regulations or otherwise creates a "'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law."155 Yet, this is not always the case, and climate change is also caused through activities entailing high levels of GHG emissions that do not necessarily violate existing regulatory standards. Thus, heavy reliance on fossil fuels, even to the degree currently legal, is known to be the chief cause of the crisis.156 The centrality of the duty and breach requirements, therefore, make tort claims a relatively ineffective legal response to the climate crisis.

2. Harm

Tort law compensates for harms.157 If no harm was caused, a tort remedy is unavailable.158 This is a major challenge in the context of climate litigation, which is primarily concerned with future harms that is, estimated harms that have not yet occurred and that may not occur at all.159 Tort damages are meant to place the injured party "as nearly as possible in the condition he would have occupied if the wrong had not occurred."160 This conceptual legal mechanism loses much of its internal coherence in cases in which the harms in question are primarily future harms.161

The recent litigation in the matter of Conservation Law Foundation, Inc. v. Shell Oil Co. demonstrates this incompatibility of compensatory damages to [\*1064] climate litigation.162 This case was brought by an environmental group claiming that the defendant oil company did not protect its fuel terminals located in New Haven, Connecticut, from risks of climate change in violation of the Clean Water Act and the Resource Conservation and Recovery Act.163 In the case, the federal court explicitly acknowledged the fundamental incompatibility of the remedy of compensatory damages with the types of claims brought before it, focusing on future harms.164

This incompatibility between the remedy of compensatory damages and the unique characteristics of climate litigation is not merely conceptual or theoretical but has immediate practical implications. First, future harms are difficult to prove. Once the plaintiff cannot show that future harm will indeed occur, the force of a harm-based claim is incredibly diminished. This is a tragic and paradoxical outcome. Scientific evidence shows that global warming is a major threat and horrifically harmful.165 But these future harms are too abstract and insufficiently clear for tort doctrine, with its focus on harms and compensation. These conceptual difficulties alone may spell the failure of tort-based climate litigation.

Future harms are not only difficult to prove; they are also difficult to measure accurately. For instance, ample scientific evidence projects catastrophes resulting from expected heat waves, such as enhanced mortality rates of humans and animals, droughts, and tropical storms.166 Yet, putting an exact dollar sum on such future harms, even if we can prove they will indeed occur, is nearly impossible. As the magnitude of the harm is impossible to determine, it is also impossible to offer a convincing measure for compensatory damages. Such difficulties in determining remedy measures are important. If damages are set too low, defendants receive a free pass for polluting, and the legal regime provides insufficient incentives to avoid high GHG emissions.

3. Causation

To establish a tort claim, it is not enough to show that the defendant acted wrongfully and that some harm occurred; it must also be shown that the harm is a but-for result of the defendant's actions, meaning a plaintiff is required to preponderantly prove that its harm would not have occurred absent the defendant's [\*1065] wrongdoing.167 The nature of climate litigation makes it difficult for plaintiffs to overcome the tort requirements of causation.168 It is difficult to attribute the future harms of global warming to specific defendants in terms of proving a causal link.169

Climate change is not a result of any single polluting activity, but rather a complex result of actions taken over years by multiple entities. Douglas Kysar points out the following difficulties: first, some climate events (such as hurricanes and droughts) do occur irrespective of climate change;170 second, the "extraordinary numerosity of greenhouse gas emitters" might give rise to a tort defense of "consequentialist alibi" by showing that any polluter's emissions are so small in comparison to total emissions that the effect is negligible.171

To illustrate these difficulties, consider a recent case in which the city of Hoboken, New Jersey, filed a lawsuit against a group of oil and gas companies, led by Exxon Mobil Corp., demanding compensation for harms caused by sea [\*1066] level rise.172 In its decision, the New Jersey district court stated that "[a]lthough it is more than plausible that fossil fuels ... led to the effects of global warming that Hoboken is now facing, this does not amount to but-for causation."173 This statement shows that not much has changed in the way courts approach the difficulties in establishing the requirement of causation in climate litigation, as there exist "daunting evidentiary problems for anyone who undertakes to prove ... the degree to which the actions of any individual oil company, any individual chemical company, or the collective action of these corporations contribute, through the emission of greenhouse gasses, to global warming."174 The problem that these statements address is straightforward. Even if all scientists generally agree that GHG emissions cause global warming in the long run, it is very difficult to identify the amount that each specific emitter contributes to, for example, the global processes of melting glaciers and resulting sea level rise.175 This is especially true given that many of these massive losses are expected to materialize in the far future. Tort doctrine and compensatory damages, with their strong emphasis on harms, cannot overlook these difficulties and therefore fail to provide a remedy when the causal link to a concrete harm cannot be established. Proposals for more relaxed theories of causation176 have not been accepted in climate litigation and are largely considered controversial by tort scholars.177

[\*1067] Against this backdrop, it is unsurprising that courts have been reluctant to accept climate litigation claims based in tort law, at times even considering climate change as lying outside the scope of adjudication given its complexity.178 Note that these difficulties are not only applicable for negligence, but also for strict liability, which also requires proof of causation and harm.179

III. FROM TORT TO UNJUST ENRICHMENT

This Part explores the use of unjust enrichment doctrine as a basis for climate litigation. In this Part, we focus on introducing only the core concept of climate enrichment; further doctrinal details, including remedy measures, are introduced in Part IV. This Part is divided into two Sections. The first offers a general overview of the elements of a claim of unjust enrichment. The second Section then explains why these elements might fit the structure of climate litigation claims. We also explain the outer boundaries of liability in unjust enrichment to avoid overly broad application of the doctrine.

A. THE LAW OF UNJUST ENRICHMENT

A person unjustly enriched at the expense of another must make restitution of any undeserved benefits.180 Subject to some interjurisdictional variation,181 this is [\*1068] the general maxim of the law of unjust enrichment, at times also referred to as the law of restitution.182 This maxim is typically divided into three key elements: (1) the defendant's benefit or enrichment, (2) the key normative requirement of the injustice of that enrichment, and (3) the fact that the enrichment is at the expense of another.183

The legal categories associated with the law of unjust enrichment allow for some degree of judicial discretion, as this area of law is often considered a flexible residual category,184 meant to provide equitable solutions where more established legal categories run out.185 In particular, there is some flexibility in the factors that can render the defendant's enrichment "unjust" in different situations.186 This flexibility makes the law of unjust enrichment a promising avenue for climate litigation, as we discuss below.187

In preparation for this argument, we first introduce the two central lanes through which a plaintiff can establish a claim of unjust enrichment. One requires the plaintiff to show that the defendant obtained their benefit through committing a wrong, while the other does not include such a requirement. Through this analytical juxtaposition, we further explain the different doctrinal elements of an unjust enrichment claim.

[\*1069]

1. Unjust Enrichment Through a Wrong

In some restitutionary claims, the doctrinal requirement of the "injustice" of the defendant's enrichment can be satisfied by the finding that this enrichment was obtained through the defendant's crime or wrong188 -for example, securities fraud;189 patent190 or copyright infringements;191 and, under certain conditions, opportunistic breach of contract.192 This makes intuitive sense. After all, if a benefit is obtained through a civil wrong or a crime, it would seem bizarre to consider such a benefit justly obtained. The role of unjust enrichment doctrine in such cases is primarily remedial. Thus, other areas of law inform us that the defendant is a wrongdoer (or a criminal), and the law of unjust enrichment simply introduces an additional remedy. This type of restitutionary remedy, often termed "disgorgement of profit," is designed to strip the wrongdoer of any gains obtained through the wrong in order to remove perverse incentives and ensure that wrongdoing and crime are not profitable endeavors.193

[\*1070] A paradigmatic example of enrichment through a wrong comes from the infamous Riggs v. Palmer case, which incorporates both criminal and private law aspects.194Riggs v. Palmer is an all-time classic, fundamental to any study of unjust enrichment law and theory. The defendant in this case, Elmer Palmer, was to receive the bulk of his grandfather's estate.195 Elmer feared his grandfather might change his will, and decided to poison him preemptively.196 After he was caught and prosecuted, Elmer was facing prison time,197 but state law still permitted Elmer to inherit his grandfather's estate.198 Following a civil lawsuit, the New York Court of Appeals saw this outcome as offensively unjust and "an offense against public policy."199 The court therefore decided that Elmer's share of the estate constituted unjust enrichment and must be given to his two aunts, the plaintiffs in the case.200 Primarily, this outcome was deemed necessary to prevent Elmer from benefiting from his crime.201Riggs is illustrative of a core principle in the law of unjust enrichment, according to which a person cannot be allowed to retain gains obtained through their wrongdoing.202

In Riggs, both the defendant's enrichment and its injustice are easy enough to show, as the defendant benefited through a horrific crime. The doctrinal element of the enrichment being at the expense of the plaintiff merits further attention. Thus, in this case, there was no clear showing of harm to the plaintiffs (the defendant's aunts), or of a causal link between any harm and the wrong, as would be required in a tort claim.203 The reason for this is that there was no proof in this case that but for Elmer's crime, his aunts would actually have inherited the estate: it was not proven the will would have been changed but for the murder, and in what way.204 In this sense, the court considered the defendant's enrichment to be "at the expense" of the plaintiff, but not because the benefit correlated with some identifiable loss to the plaintiff. Rather, Elmer's enrichment in this case was considered to be at the expense of his aunts since his abhorrent actions violated their rights or were wrongful towards them (even if not directly harmful in the monetary sense).205 In actuality, the plaintiffs in Riggs serve as "an imputed beneficiary" [\*1071] who are allowed to bring forth a claim for unjust enrichment.206 The court allowed the aunt's monetary recovery in order to achieve the public policy goal of stripping the defendant of the profits obtained through his crime.207 The "imputed" plaintiff in such cases is allowed access to the court not because they were directly harmed, but because they are the closest private actor to the wrong that was committed.208 Such plaintiffs are allowed to recover from the wrongdoer and are entrusted with the task of pursuing a sanction against the wrongdoer through civil liability in unjust enrichment.209 This is meant to achieve the goal of ensuring that wrongdoing is not profitable.

This important point can be further illustrated through another case, Olwell v. Nye & Nissen Co.210 Compared to Riggs, Olwell offers a mundane set of facts but is nevertheless an unjust enrichment classic. In this case, the defendant took machinery belonging to the plaintiff out of storage and used it in its manufacturing process.211 The defendant argued that even if it was indeed enriched, and even if this enrichment was unjust and wrongful (as it was derived from the knowingly unauthorized use of another's asset), it was not at the expense of the plaintiff.212 The reason for this was that the plaintiff kept the machine in storage, had not used it for years, and had no use for it or intention to use it.213 Therefore, the defendant reasoned that the plaintiff suffered no harm, and the defendant's enrichment was not at its expense. The court rejected this claim, explaining that the defendant's enrichment must be considered at the plaintiff's expense even absent a specific monetary harm to the plaintiff, simply because it came through the defendant's wrong, which was directed at the plaintiff and was in violation of the plaintiff's rights.214

More broadly, both Riggs and Olwell illustrate a general principle, according to which enrichment can be considered "at the expense" of the plaintiff even absent a clear showing of monetary or physical harm to the plaintiff when it can be shown that the enrichment was derived through a wrong directed at the plaintiff and that violated the plaintiff's rights.215 This fundamental doctrinal structure [\*1072] will prove crucial below when we turn to discuss climate enrichment and the use of unjust enrichment doctrine as a basis for climate litigation.

2. Unjust Enrichment Without a Wrong

The defendant's enrichment can be considered unjust for a wide variety of factors216 and not necessarily owing to the defendant's wrongdoing.217 Thus, a payment made by mistake is typically considered unjust enrichment,218 and the recipient of such payment is under a duty to return it to the payer,219 subject to some defense rules.220 This is the case even if the mistake was caused by the negligence of the payer and through no fault of the recipient.221 Liability in such cases does not signify any wrongful conduct by the recipient, but simply the fact they received a benefit they had no right to receive.222 Note that in such a case, the requirement for the enrichment being "at the expense" of the plaintiff is simply satisfied by the fact the defendant's gain correlates to the plaintiff's loss the payment.223 Thus, the "at the expense" requirement can be satisfied by the fact that the enrichment comes from the plaintiff's loss; yet, as explained above, it can also be satisfied in other ways.224

[\*1073] The case of emergency medical services is another similar example and a core category of liability in unjust enrichment. A patient can be considered unjustly enriched if they received life-saving treatment while unconscious in an emergency for which they did not pay. The seminal case of Cotnam v. Wisdom demonstrates this rule.225 In this classic case, two physicians provided medical aid (surgery) to an unconscious person thrown out of a streetcar without receiving payment for the service they provided.226 The Supreme Court of Arkansas awarded restitution.227 The ruling in Cotnam has been reaffirmed and has become the general rule when physicians provide emergency services to unconscious patients.228 In such cases, restitution is available without any type of wrongdoing by the defendant, simply because the defendant was enriched, at the expense of the plaintiff, with no justification.

In other types of cases, a defendant might be considered unjustly enriched if they derived benefits from a valid court decision, such as a preliminary injunction,229 that was later reversed.230 Again, even if the enrichment is not obtained through a wrong and is not in this sense unlawful, the principles of the law of unjust enrichment require the restitution of such benefits.

[\*1074] In all of these cases, enrichment is unjust simply because the defendant enjoyed a benefit that did not belong to them and not because the defendant's conduct was in some way wrongful or illegal.231 Thus, in the mistaken payment scenario, the recipient's enrichment is unjust because the mistaken payer had no intention to make a payment.232 In the case of emergency medical services, the patient is unjustly enriched because they enjoyed a windfall;233 the recipient of a preliminary injunction that was later reversed is considered unjustly enriched for the benefits "obtained at the expense of the defendant as a result of the wrongfully-issued preliminary injunction."234

In conclusion of this very brief review, unjust enrichment doctrine offers two key doctrinal advantages that are worth exploring in the context of climate litigation. First, when enrichment is obtained through a wrong, liability may be available even when harm cannot be clearly attributed to specific actions (as would be required under tort doctrine). Plaintiffs can bring claims even if they cannot show they suffered a direct and clear harm, as long as they can show they are, in some other way, the targets of the defendant's wrongful conduct. Second, liability in unjust enrichment can be available also absent a wrong (which is, again, not the case in tort law) when a defendant enjoyed a benefit not properly owed to them.

A. CLIMATE ENRICHMENT

This Section outlines the use of unjust enrichment as a doctrinal basis for climate litigation. The motivation for this move is simple: while the harms of climate change are future abstract harms, profits exist in the here and now.235 These profits are easier to identify and measure and can serve as the basis for a claim of unjust enrichment. It is crucial to have such profits taken away. As long as global warming remains profitable for strong commercial actors,236 we can expect it to persist (and even escalate). Therefore, to offer effective legal solutions, we must develop the legal tools to ensure that global warming does not remain profitable.

In what follows, we develop the concept of climate enrichment in the two charters of liability described above: unjust enrichment through a wrong and unjust enrichment without a wrong. In discussing each of the two categories, we further detail the operation of the three key elements of unjust enrichment doctrine in the context of climate litigation.

[\*1075] Note that the analysis offered here should not be taken to mean that all profitable activities can be a cause of civil action. A key point in developing our proposal, therefore, lies in offering criteria for determining when enrichment, in specific cases, is unjust. We outline several such possibilities below, offering categories of cases in which polluters' profits can be considered unjust enrichment.

1. Climate Enrichment Through a Wrong

In some cases, defendants contribute to the climate crisis through activities and conduct that can be classified as wrongful. This can be the case when defendants: (1) benefited while acting in violation of environmental regulations; (2) benefited while operating in an environmentally unreasonable manner, thereby committing a tort of gross negligence; or (3) benefited while maliciously circumventing regulatory efforts or deceiving regulators. We detail these categories below.

Note that in all such cases, sanctions from other areas of law, including regulatory fines or tort damages, are supposedly available, since the requirement of "wrong" is satisfied.237 Yet, these sanctions often prove insufficient.238 Thus, pollution in violation of regulatory standards is often profitable for companies because regulatory penalties for such violations are set too low.239 An added remedy coming from the law of unjust enrichment can therefore be beneficial. In particular, a sanction based on the disgorgement of profits can prove helpful in such cases to eliminate the monetary incentive to violate regulatory standards. Similarly, tort suits can also be based on a scenario in which commercial actors acted in violation of environmental regulations. Despite the clear wrongfulness of the action, in such cases, the resulting harm may be difficult to measure and attribute to the specific action. Therefore, a tort action is very likely to prove ineffective due to a failure at the causation stage.240 Enrichment-based liability can sometimes overcome these hurdles.

If the defendant acted while violating environmental regulations, any gain made through that activity can be considered unjust.241 Such gains exist in the present and are therefore relatively easy to measure. Taking away such gains is necessary to ensure deterrence. Note that in such cases, the reason the defendant's activity is considered unjust is probably related in some indirect way to its [\*1076] harmfulness.242 Yet it is not required as part of a claim of unjust enrichment to prove a specific harm, as would be required under a tort action.243 Similarly, a showing of harm is not required to establish the "at the expense" element. To see why, recall the Riggs case described above.244 In Riggs, restitution was available because the wrongdoer benefited from a wrong and the court needed to decide upon "an imputed beneficiary" who could have a valid legal action for this benefit.245 Likewise, suppose a polluter benefited while violating environmental regulations. In this case, any citizen or governmental body that can be construed as having its rights violated (such as local communities246 or municipalities247 ) may have a cause of action against the polluter, even if it is not possible to identify and measure concrete harms and attribute them to the violation of environmental regulations. More generally, recall that in cases of wrongful enrichment, disgorgement can be available even if the defendant's benefit is different from the plaintiff's harm,248 and even if no harm to the plaintiff can be proven.249 Of course, this type of liability has its natural limits. Specifically, it will depend on the court's willingness to recognize, in a specific case, that the plaintiff's right was violated through the defendant's violation of environmental regulations.

In other cases, the defendant's enrichment can be considered wrongful not because it violates some explicit environmental regulation, but because it is grossly unreasonable or negligent, meaning that the defendant was able to operate its business in a way that is less environmentally harmful without incurring high costs for doing so. In such cases, again, the injustice of the defendant's action closely relates to its harmfulness. Yet a tort claim may not be available under such circumstances: Even though it is clear that the defendant's conduct was unreasonable and unnecessarily harmful, it is difficult to preponderantly prove the magnitude of the harm when its occurrence or magnitude can only be assumed at the time of litigation. Such proof is, however, required to sufficiently [\*1077] establish a tort action.250 However, it is not required for a claim of unjust enrichment.251 Thus, if the defendant's conduct is wrongful, any gain obtained through this conduct can be considered unjust enrichment, even if the future harms caused by this conduct are yet to materialize and are currently unknown.

Yet in other cases, the defendant's enrichment can be considered wrongful because they acted to hide the environmental harms they caused.252 This form of liability might prove especially relevant in the case of key industry players in the energy sectors, as those are increasingly being blamed for hiding information regarding the climate crisis from both regulators and the public.253 If such allegations prove credible, a remedy based on unjust enrichment can offer an important venue for recovery and sanction, since despite the immense harm represented by such deceptive practices, it is not clear what other legal response is available.

The common thread in the three aforementioned categories violation of environmental regulations, clearly unreasonable levels of precautions, and attempts to conceal environmental harms is that wrongful conduct is identifiable, and yet a harm-based remedy or sanction may be insufficient. In all such cases of enrichment through a wrong, the tortious conduct needed to establish a tort is usually easily recognized. However, a full tort action may not be possible since the elements of harm and causation might be difficult to prove. In such cases, where tort law may fail to provide a remedy and yet the enrichment of the defendant can be much more easily proved, the law of unjust enrichment offers an important avenue for plaintiffs in climate litigation through the remedy of disgorgement of profit.254

To see why this is a dramatic difference, consider the 2021 claim filed by a group of nongovernmental organizations (NGOs) representing Indigenous people in the Amazon against Casino, a French supermarket chain.255 The standing lawsuit is based on Casino's connection to slaughterhouses that are linked to illegal [\*1078] deforestation in the Amazon256 and is formally based on violations of human rights and environmental laws257 rather than unjust enrichment. The plaintiffs demanded compensation in the sum of $ 3.7 million for "damages done to their customary lands and the impact on their livelihoods,"258 but the revenues of Casino in 2020, according to Joana Setzer and Catherine Higham, were a staggering $ 15 billion just in Latin America.259 Even if a small fraction of this amount can be credibly attributed to unjust enrichment, it is clear why disgorgement of profits in this case would be far more meaningful in terms of deterrence rather than compensation for the harm.260 Compensation measured according to harms will be ineffective as a deterrent, as the defendant will continue the socially wrongful activity in the future as long as it is privately profitable.261

The straightforward doctrinal analysis we propose here, if adopted by courts, can lead to more just litigation outcomes. Consider, for example, the recent decision in the matter of State v. Tobin.262 In this case, the defendant was criminally charged for illegally harvesting crab and geoduck.263 Along with restitution for the authorities' expenses in surveying the illegal harvest and documenting evidence, the state also claimed a remedy measured according to the profit the defendant made from selling the illegally harvested crab and geoduck.264 The state presented evidence indicating that it may take thirty-nine years (and possibly more) for the geoduck population to recover from the defendant's excessive harvest.265 The Supreme Court of Washington determined that the defendant must only pay for the state's expenditures, but that he may keep his additional [\*1079] profits.266 As the defendant's profit was higher than the portion of the state's direct expenditure he was required to pay,267 this unfortunate decision sends a clear signal to other potential wrongdoers: climate crime pays.268 We argue not only that this decision is objectionable as a matter of policy but also that a correct application of unjust enrichment doctrine could obtain a better outcome.

2. Climate Enrichment Without a Wrong

Some commercial activities greatly contribute to global warming without constituting a wrong under current definitions. That is, some profitable undertakings entail high levels of GHG emissions even when they involve no violation of any specific environmental regulation or standard. Can gains obtained through such activities be considered unjust enrichment, and if so, under what circumstances?

As explained above, the law of unjust enrichment recognizes the possibility of liability even when the defendant committed no wrong.269 Such liability attaches in cases in which the defendant enjoyed a windfall they did not pay for or held assets that did not rightfully belong to them.270 This applies, for instance, in the cases of mistaken payment,271 medical treatment in an emergency,272 and a temporary injunction that was ultimately reversed.273 In all of these cases, the defendant unjustly benefited at the expense of others, even though they did not act in violation of any specific legal standard.274

This mode of liability may prove applicable, in some circumstances, to climate enrichment. This may be the case when a particular defendant enjoys resources that rightfully belong to others. This form of legal argument can be advanced in relation to the resource of climate stability.

As explained above, climate stability is a global public good.275 Resources such as breathable air, reasonable temperature, and inhabitable environments [\*1080] belong to all people.276 Yet in practice, through a series of practical limitations, the distribution of these resources does not reflect the rights of all stakeholders in those resources.277 Due to obvious limitations, future generations cannot act to secure their part of the asset for themselves. In this vacuum, some current stakeholders, with strong commercial interests, enjoy assets that rightfully belong to others.

This means that we are currently witnessing unjust enrichment through massively disproportional consumption of climate stability.278 Climate stability is a finite resource in the sense that the atmosphere can only absorb a limited amount of GHG emissions without climate conditions being irrevocably destabilized. Currently, a small number of large firms strong commercial actors in the energy sector benefit immensely through activities involving extremely high GHG emissions.279 This limited resource, the environmental capacity to absorb GHG emissions, is being depleted to the benefit of specific, identifiable actors, with nothing left for subsequent stakeholders. This type of enrichment is unjust, as future generations also have an entitlement to the common good of climate stability,280 which is a necessary condition to a peaceful and safe existence.

Doctrinally, climate enrichment can only be established in cases in which plaintiffs can show that profits are concentrated in the hands of a select few. Conversely, if everyone is benefiting, it cannot be said that a particular plaintiff is enriched at the expense of another. Therefore, the fact that climate winners and climate losers can be identified281 is crucial for any claim based on unjust [\*1081] enrichment. Without committing to the analysis of any specific case, it seems that this type of doctrinal pattern can be found in contemporary markets, where strong commercial interests benefit immensely through activities that perpetuate the climate crisis.282

Based on this analysis, we propose that a defendant's enrichment be considered unjust, absent wrongdoing, under the following conditions, together manifesting the idea of unjust climate enrichment283: when (1) the defendant's activity makes an oversized contribution to climate change, meaning that it is related to a significant share of worldwide GHG emissions, (2) the same activity is highly profitable for the defendant, and (3) the defendant is an exceptional profits center, in the sense that the gains from its activity are not equally enjoyed by the population as a whole. When these conditions are met, climate enrichment is both "at the expense of another" and "unjust," as a select few profit at the expense of the many through activities that render future prosperity virtually impossible.

These three conditions fit well with the internal logic of a claim in unjust enrichment and also ensure a limited and narrow scope of liability. Under the conditions we delineate, consumers, small and medium firms (manufacturers and service providers), employees, etc., will never be held liable for contributions to climate change, as they are not making exceptional profits and are not acting as concentrated profit centers of climate enrichment. Rather, this form of liability may pertain, if at all, only to the clearest examples of large multinational corporations that make immense profit through activities that are responsible for large shares of worldwide GHG emissions.284 This outcome is also normatively appealing. If the biggest winners of the climate crisis are made to forgo their profits, or some significant part of those profits, this may finally pave the way for the systematic changes necessary for addressing the crisis.

### 1NC – CP – Waivers – AI

#### The United States federal government should

#### cede labor law jurisdiction to subfederal territories that implement laws according to federally-administered goals of press freedom, local news density, information accuracy, AI information diversity; establish performance thresholds for these goals based on the simulated effects of strengthening collective bargaining rights for journalism industry workers in relation to Google and Meta; provide grants to above-threshold territories and leverage financial penalties against below-threshold territories; fund and enforce federal monitoring and data collection to track subfederal progress.

#### adopt a policy foreswearing political interference with this process.

#### Preemption waivers solve better than uniform national labor law AND revive experimental federalism.

Andrew Stern & Eli Lehrer 17, Stern is President Emeritus of Service Employees International Union, Senior Fellow at Economic Security Project, author; Lehrer is President of R Street Institute, BA in Medieval Studies from Cornell University, MA in Government from Johns Hopkins University, "How to Modernize Labor Law," National Affairs, Winter 2017, https://www.nationalaffairs.com/publications/detail/how-to-modernize-labor-law

In short, regardless of which side of the labor-management divide that one sits, there's good reason to be skeptical that national reforms are feasible or that they would change much even if they were enacted. Indeed, efforts to reform and update our federal labor laws to meet new realities have failed for more than a generation. It's time for a new path, one that takes advantage of one of the most successful public-policy innovations of the past 50 years: waivers from federal law to allow state experimentation.

Such waivers are already allowed under a wide range of laws, including the Social Security Act, the Elementary and Secondary Education Act (2002's No Child Left Behind Act expanded their use greatly), and the Affordable Care Act. A system to allow state waivers from major labor laws similarly could give every interest group a chance to try bold reforms the federal framework doesn't currently allow. If properly structured, such waivers could facilitate experiments with new business and revenue models for labor organizations, provide new opportunities for entrepreneurs, create new jobs, and expand prosperity. No one will like everything waivers might make possible, but everyone could find something to like. And in the end, American workers and employers could both be better off.

THE CASE FOR WAIVERS

Nearly all recent public-policy innovations that anyone would count as a triumph have been the result of innovations in state and local laws, rather than federal ones. The left, most recently, has been successful in pushing through raises in state and local minimum-wage standards, with a $15 per-hour minimum becoming law in New York, California, and the District of Columbia, to name a few. Bills calling for higher minimum wages are likely to be introduced in nearly all states, and, regardless of federal action (which President-elect Donald Trump has signaled some support for), it's safe to predict that at least a few more will pass them this year. Paid leave has become a government-mandated benefit in a number of states and cities, while new scheduling laws have passed in Seattle and San Francisco and are under consideration elsewhere.

Indeed, in many ways, the success of these efforts belies the story of unions' shrinking public influence. Unions have retained power in many cases by expanding the ranks of public-sector employees covered by collective-bargaining contracts, and by modifying many state laws to make the public sector more union-friendly. The growth of mandatory paid family and medical leave — a concept endorsed and outlined by both the Republican and Democratic candidates in the 2016 presidential election and included in President-elect Trump's formal list of campaign promises — probably would not have happened without a concerted union effort to call for it. Unions, in many ways, have expanded their influence beyond their own membership to call for a variety of reforms that they see as benefiting society more broadly. In the absence of the decentralized, firm-based collective-bargaining process envisioned by the NLRA, the United States may be evolving toward a more European-style system of greater universal social benefits.

But the left's successes on the state level have been more than matched by successes on the right. Efforts to make right-to-work a national policy or to allow employers to place new limits on organizing have been turned back again and again at the federal level, but have thrived at the state level. Over the past five years, right-to-work has expanded from its historical stronghold in the South to such traditionally union-heavy, union-friendly states as West Virginia, Michigan, Indiana, and Wisconsin. On the other hand, Virginia, which voted for Hillary Clinton and clearly leans more toward the Democratic column, narrowly rejected a state constitutional amendment enshrining a version of "right to work" in the constitution (although it was a more straightforwardly anti-union proposal since, unlike most right-to-work laws, it didn't protect employees from being fired for union membership).State-level "paycheck protection" efforts, which restrict unions' ability to spend money on politics without members' express approval, also have gained ground, as have procedures to make de-certification easier in states like Wisconsin.

There even have been some labor-law innovations moving forward at the state level with what could be described as broad ideological support. For example, the only concrete legislative proposals to create new worker categories and benefit structures for "gig economy" workers have been made at the state level. A few of these laws, mostly limited to the on-demand transportation industry, have even come into force.

In short, partisans across the political spectrum should agree that all real labor-law "progress," however one defines the term, has come from the state level. Moreover, nearly all of this progress has been facilitated by an approach that allows states to promulgate their own laws and procedures. The Fair Labor Standards Act, which establishes the national minimum wage, is explicitly subject to state-level preemption for states that want to set a higher minimum. The Taft-Hartley Act, likewise, bans fully "closed shops" (which allow workers to be fired for joining or refusing to join a union) and allows union-only shops by default, but allows states to opt for right-to-work laws of their own.

Allowing these sorts of experiments to expand and thrive will require more of the same — specifically, a waiver process for all major labor laws of the sort already seen in right-to-work and minimum-wage laws.

WAIVERS IN ACTION

Ideally, the waiver process would be modeled on what Harvard Law School's David Barron and Todd Rakoff call "big waiver" in a 2013 article for the Columbia Law Review. In a nutshell, it would allow states, localities, firms, and unions to fundamentally rewrite many of the major laws that govern labor relations in the United States. Labor-law waivers would be broad grants of new and different authorities to achieve broad goals by means different from those currently allowed by statute.

The goal would be to encourage an environment of "experimental federalism," in which states, localities, and even individual firms could serve as true laboratories of democracy, trying new and innovative models for worker-employer relations. The laws eligible for waivers should include, at minimum, the National Labor Relations Act, the Fair Labor Standards Act, the Labor-Management Reporting and Disclosure Act, the Employee Retirement Income Security Act, and the Taft-Hartley Act. Some experiments may require waivers from more than one of these laws, while some waiver requests might be combined with existing waiver provisions, such as those allowed under the Affordable Care Act (insofar as it continues to exist in its current form) and the Social Security Act.

Labor-law waivers, like the "big waivers" currently granted under education and social-welfare laws, would have to follow a few fundamental rules. An absolute necessity is that the waivers would have to accomplish the stated purpose of the law; barring this, as Barron and Rakoff argue, waivers wouldn't pass constitutional muster anyway. Their impact on the federal budget would have to be neutral or yield cost savings, although they might require increases in state or local spending.

The waivers also typically should have a time limit, probably in line with the five-year default used for programs like Medicare and Medicaid. After that time, they could be renewed, extended, or canceled. Within that window, the waivers couldn't be canceled without a hugely compelling public-policy rationale; as is typical with existing waivers, they shouldn't be undone simply because of a change of administration. They also should be subject to a public-comment and review process, which could be expedited if local governments, major employers, and labor organizations all requested the same specific waiver.

Most of the fundamental rules and standards governing labor-law waivers wouldn't differ significantly from those already seen in American administrative and regulatory law. What would differ is who could apply for them. While existing "big waiver" requests always stem from a governmental unit (usually a state, sometimes a school district or local government), the labor-law-waiver application process could also be opened to firms and labor organizations.

For example, a manufacturer could request a waiver to begin using formal workplace committees, similar to those common in continental Europe, that include workers to discuss quality, productivity, and worker morale, but without actually initiating the process of collective bargaining. Such a structure was contemplated under the Teamwork for Employees And Managers Act introduced in the mid-1990s by Republican congressman Steve Gunderson and senator Nancy Kassebaum, which drew some bipartisan support. More recent efforts to create "works councils" that take on certain union-like responsibilities have faced resistance, with a study by the U.S. Chamber of Commerce concluding they are flatly illegal under current federal law. Permitting experimentation with such councils or committees might be one of the first and most promising waivers to be granted.

Local waivers also could permit experimentation within larger organizations. Union locals and local units of national enterprises could request waivers that wouldn't necessarily apply across the entire union or company. The retailer Target might apply for a waiver to experiment with a 44-hour default workweek in Colorado, or Las Vegas's Culinary Workers Local 226 might ask for a waiver to sell benefit-plan services to outsiders.

Given the administrative complexity of the waiver-application process (applications for Social Security Act waivers can run into the thousands of pages), caution must be exercised to ensure it does not simply become a rent-seeking opportunity for larger firms and better-established unions, who would unavoidably have built-in advantages by virtue of scale. Insisting on public hearings and open-comment periods would help ensure the process is transparent. There also should be an expedited process to grant waivers to similarly situated companies and labor organizations. For example, if the department-store chain Macy's were to receive a waiver, a smaller competitor like the regional chain Belk could expect that its application for the same waiver would be processed very quickly with a minimum of paperwork.

The waiver process itself shouldn't offer an obvious advantage either to labor or to management. It should instead promote joint agreement, collaboration, and compromise. For every way it might be used to allow unions to expand their membership and influence, it should also offer opportunities for employers to enhance their profitability and experiment with new business models. Nearly every aspect of the world of work could be the subject of some form of waiver, but three broad categories of waiver bear further examination as potentially transformative: wage and hour rules, labor-organization structure, and benefits provision.

WAGE AND HOUR RULES

A 2005 National Bureau of Economic Research paper showed that, from the 1970s to the early 2000s, the number of men working more than 50 hours per week grew among those in the highest quintile of wage earners, but actually fell among those in the lowest quintile. On one hand, first-year associates starting out with big law firms are often asked to put in workweeks of more than 90 hours, while medical-residency accreditors had to take action in 2003 to limit the average medical resident to "only" an 80-hour week. (Doctors, not coincidentally the highest earners of the categories tracked by the Bureau of Labor Statistics, work nearly 60 hours a week on average through their entire careers.)

Meanwhile, the growth of single-parent and single-earner households have made full-time work logistically difficult for many on the lower rungs of the income ladder, and overall workforce-participation rates for males are at the lowest levels on record. As firms make more expanded use of on-call scheduling, partly due to improvements in scheduling software, it has also become difficult for lower-income service-industry workers to stitch together hours, even at multiple part-time jobs.

The Obama administration's signature legislative achievement, the Affordable Care Act, mandates that large employers provide health benefits to those who work at least an average of 30 hours per week or 130 hours per month or pay penalties. This has attracted cheers from organized labor and some workers, as well as criticism from many employers that rely on mostly part-time workforces. The administration also promulgated rules, which were enjoined by court order in late November, that expand by more than 4 million the ranks of those eligible for overtime pay. Such changes could open up slightly more jobs and raise wages for some individuals. But they also could lead to pay cuts when employers decide to hire additional workers rather than paying time and a half.

As the employment landscape continues to evolve, the idea of a set number of hours in a workweek may become obsolete in some fields. For those performing "gig" work in the on-demand economy with companies like Uber, Lyft, and TaskRabbit, the very idea of "work hours" is hard to define. Does work begin when someone switches on an application? Arrives at the job site? What about "breaks"? Is there any way to pay for them? As currently defined in the law, overtime can't apply to a worker who picks his own start and end times on a daily basis.

The wage and hour system doesn't come close to reflecting current realities, but waivers might point the way toward a fix. Employers and employees both might benefit from new flexible arrangements that allow for various tradeoffs. Most simply, waivers might allow some private employers to experiment with allowing workers to bank additional paid time off as "comp time" — already widespread among public-sector workers — in lieu of the time-and-a-half overtime legally mandated for most hourly workers. Waivers might also allow averaging of overtime over several weeks or a month, perhaps in tandem with mandates that employers provide part-time flex-scheduled workers a greater degree of schedule predictability.

Within the gig economy, waivers might be used to extend the reach of laws requiring time-and-a-half pay to select workers who put in large numbers of hours, or it might limit workers' hours. Some jurisdictions might also experiment with different definitions of full time for purposes of benefits and other protections offered to workers. Localities and states might seek waivers to experiment with shorter or longer default work weeks, either for all workers or for certain select categories of workers, based on factors like experience and the physical demands of a given job. It might be reasonable, for example, to require that coal miners get time-and-a-half pay after only 35 hours on the job, while the overtime threshold might be raised to 45 hours for office administrators.

Both federal and state waivers also could be used to extend certain full-time employment benefits to people who would otherwise legally remain freelancers. Sharing-economy companies like Uber and Lyft have already expressed their openness in private and in public to make it possible for gig-economy workers to assure that employers pay them as promised through administrative procedures, rather than court hearings. Waivers also could be used to resolve some of the most controversial and fraught issues in labor law, such as the treatment of franchisors.

Many firms would probably elect to extend workers' compensation to freelance and self-scheduled employees — immunizing the employer from most lawsuits for on-the-job injuries while guaranteeing the employee scheduled benefits on a no-fault basis — but avoid doing so now for fear of being declared "full-time" employers. Labor-law waivers could make it possible for them to do so without fear. Indeed, experiments with such waivers for workers' comp deserve quick consideration.

Some of these experiments are relatively simple and would have easy-to-predict outcomes for all the stakeholders. For example, there's already extensive research on the widespread use of comp time in lieu of overtime for public-sector employees, making clear its advantages like flexibility and job satisfaction and its disadvantages such as somewhat lower pay. Other experiments might well produce controversy from the moment they are proposed. Nullifying right-to-work laws through a local waiver would be sure to raise enormous objections from the right while an exemption from benefit mandates would likely move many on the left to protest. Nonetheless, there are distinct and important possibilities to find new and innovative ways to schedule workers and regulate their hours that current law doesn't allow. Waivers could make those possible and allow for broad experimentation.

LABOR-ORGANIZATION STRUCTURES

Current labor law puts both labor unions and employers in an all-or-nothing situation: Employers that recognize a union, something they're legally required to do if employees vote to certify one in a secret-ballot election, must engage in "good faith" collective bargaining. They generally are in a lifelong relationship with their "union partner," whether or not they want to be and whether or not their competitors have the same relationships.

Likewise, employers face significant hurdles to allowing rank-and-file workers a management role in the enterprise outside of a collective-bargaining context. As a result, labor organizing becomes a high-stakes, winner-take-all game. Most non-union employers desperately want to remain union-free, for both competitive and ideological reasons, and will engage in costly campaigns to prevent unions from becoming certified.

To maximize the opportunities allowed under current law, unions sometimes expend energy on maladaptive behaviors that really don't serve anyone's long-term interests. Since 2011, organized labor groups have been able to create new "micro unions" that represent only a very small percentage of a worksite's employees. One of the earliest efforts allowed a department store's cosmetics-department workers, but not anyone else at the store, to form a union. To defeat these unions, employers may decide to abolish certain job categories altogether, an approach the anti-union Workplace Policy Institute has actually recommended in some cases.

While this may be an effective strategy to resist organized labor, it's probably not the best business practice in many industries. Basic economics suggests the division of labor and gains from specialization are among the best ways to increase productivity. For their part, private-sector unions might be pleased to reverse their declining numbers even in a minor way, but they probably aren't going to restore their glory days by organizing workers in groups of five or 10 at a time.

Given the perceived and real costs of a unionized workforce, many employers are willing to push or break the law (and even to pay fines for doing so) in order to prevent union certification. In practice, employees are fired or disciplined far too often for merely expressing interest in unions, despite a profusion of laws that theoretically protect them. The fact that employers can require employees to listen to anti-union presentations, while unions typically can't do the same, has served to tilt the playing field decisively against organized labor in many contexts. Legal waivers could help to change this.

Under the waiver approach, the biggest potential change for both employers and unions could be granting unions the ability to "unbundle" their services and benefits. Right now, union officials can face criminal charges if they sell anything to employers — even services like a health plan that employers might be willing to spend good money to buy in a free and open market. Over the long run, it might be possible to find political consensus to repeal these prohibitions from the U.S. code. But in the meantime, waivers could allow some experiments with unbundling, for instance, union representation and job-benefits services, or give them the space to create entirely new structures.

New modes of representation offer tremendous promise. Unions might look into whether to represent individuals in dealings with work providers outside the context of collective bargaining. Although some aspects of employer-employee relationships are probably best left to lawyers, the day-to-day grievance-handling and workplace-mediation processes provided by good shop stewards ought to be available to non-union workers willing to pay for such services either individually or collectively. Either existing unions or new types of labor organizations might meet and confer with management and even negotiate work conditions, but leave matters of wages or benefits or both to negotiations between managers and individual employees. Unions could offer lobbying or regulatory advice, or could allow their apprenticeship and training-center expertise to be offered in the market.

#### Reviving experimental federalism is key to reign in existential AI.

David S. Rubenstein 7/9, James R. Ahrens Chair in Constitutional Law and Director, Robert Dole Center for Law and Government, Washburn University School of Law, "Federalism & Algorithms," Arizona Law Review, Vol. 67, Issue 4 (forthcoming Winter 2025), 05/30/2025

2. AI Safety

The next case study focuses on policy approaches for AI safety. Broadly defined, AI safety is a field of study addressed at large-scale harms caused by rogue actors using AI systems or socially misaligned AI systems that eclipse human control.255 Both became a headline concern in 2023 on the heels of ChatGPT’s public release.256 In a zeitgeist moment, OpenAI’s CEO Sam Altman, testified before the Senate Judiciary Committee about the transformative potential and risks of frontier AI models.257 Addressing the dangers, Altman was candid: “If this technology goes wrong, it can go quite wrong.”258

Shortly thereafter, the CEO of Anthropic testified before a Senate Judiciary subcommittee that the misuse of advanced AI models could lead to catastrophic events, such as biochemical attacks.259 To punctuate the point, a group of highly acclaimed AI researchers and hundreds of industry insiders issued a one-sentence open letter, stating in full: “Mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks such as pandemics and nuclear war.”260 That the warnings hail from within the industry is a reason to pay attention. But, also within industry, there is vitriolic disagreement about the nature of the risk, what to do about it, when, and who should decide.261 For politicians and public citizens looking for cues or clues, it is hard to know what to think. The utter lack of consensus is why this is such a compelling case study for AI policy in general, and AI federalism specifically.

Those who are concerned about AI safety are especially concerned about the lack of national safeguards. President Biden’s landmark EO 14,110 took AI safety quite seriously. Even then, it imposed no restrictions on the industry juggernauts, just some reporting requirements that were never triggered. In any event, President Trump repealed EO 14,110 in his first day back in the White House.262 The repeal was fully anticipated; the Republican party platform described EO 14,110 as “dangerous,” saying it hinders innovation and “imposes Radical Leftwing ideas on the development of this technology.”263

The mood swings in Congress were also telling. After giving much attention to the issue of AI safety in 2023, a bipartisan caucus led by Senator Schumer released a highly anticipated “Roadmap for AI Policy” in the U.S. Senate in May 2024.264 It said almost nothing about AI safety. 265 Instead, it emphasized the need for a light-touch regulatory approach and significantly more government funding for AI research and development.266 In December 2024, a bipartisan House AI Report echoed these priorities and downplayed AI safety.267

As momentum stalled in Congress, AI safety advocates pivoted to the states. Enter California: the global technology hub and the world’s fifthlargest economy.268 In 2024 alone, more than 50 AI-related bills were introduced in the Golden State. But one bill—SB 1047—stood out above all the others combined.269 If enacted, SB 1047 would have imposed risk mitigation requirements, state oversight, and liability in the event of “critical harm,” defined to include damages incurred in the state that exceed $500 million.270 SB 1047 would have applied only to future AI systems that exceed high computational and cost thresholds,271 thereby “targeting the largest frontier labs while exempting startups and academics.”272 The bill contained no pre-clearance requirement and no private rights of action. Despite its narrow scope, SB 1047 the industry and its allies rallied to kill the bill.273 After months of high-profile national debate, Governor Newsom vetoed SB 1047.274 However, SB 1047 is not the end of the discussion; it is a catalyst for many more, both narrower and broader.

SB 1047 instigated fundamental questions about whether AI systems pose catastrophic risks and, if so, how to regulate such systems without stifling innovation. 275 It also forced debates about risk allocation, accountability, and regulatory design.276 Meanwhile, supporters of the bill were pressed to justify why regulation of speculative risks was necessary now and why existing laws, such as tort law, would not suffice to compensate for catastrophic harm that might occur.277

SB 1047 also brought AI federalism into sharper focus.278 Several of the leading AI labs argued that AI safety is a national security issue that should be regulated by the federal government, not states.279 Moreover, in a rare display, California’s representatives in the U.S. Congress wrote open letters to the bill’s sponsor, state Senator Scott Weiner, urging him to pull the plug on SB 1047 as it was heading to Governor Gavin Newsom’s desk.280 Senator Weiner clapped back. The assault on SB 1047, he argued, only reinforced the need for it: “With Congress gridlocked over AI regulation ... California must act to get ahead of the foreseeable risks presented by rapidly advancing AI while also fostering innovation.”

Governor Newsom’s veto statement agreed on this point, stating: “[A] California-only approach may well be warranted, especially absent federal action by Congress.”282 While concerns about stifling innovation prematurely, Newsom rejected the notion that AI should be left to the federal government alone.283 Indeed, the veto of SB 1047 was especially notable because California enacted 20 other AI-related laws in 2024, with many more expected from the state in 2025.284

If not California, then New York may be the first to enact an AI safety bill. Like SB 1047, New York’s Responsible AI Safety and Education (RAISE) Act targets developers of large-scale AI models. It mandates the creation of comprehensive safety plans to prevent “critical harm,” defined as catastrophic events causing substantial fatalities or severe economic damage. Developers would be required to conduct thorough risk assessments and report any significant safety incidents to the state and would be overseen by state officials with no private right of action. [At the time of this writing, the Act awaits Governor Hochul’s approval or veto.]

<<PARAGRAPH INTEGRITY PAUSES>>

3. Preemption Moratorium The third case study examines the dramatic, albeit brief, federal proposal to halt all state-level AI regulation. Unlike the previous studies, which focused on substantive policy debates over specific risks, this account centers on a structural battle over the authority to regulate AI. More specifically, it highlights the powerful push for federal preemption and the surprising coalitions that formed to defend state power. In mid-May, House Republicans quietly inserted a sweeping 10year moratorium on state AI regulation into the One Big Beautiful Bill Act, a massive budget reconciliation package of the Trump administration’s signature tax and spending priorities. 285 The preemption provision was a direct reaction to the proliferation of state-level AI laws and had no clear relation to the key components of the Act.286 The specific language was sweeping: “no State or political subdivision thereof may enforce any law or regulation regulating artificial intelligence models, artificial intelligence systems, or automated decision systems during the 10-year period beginning on the date of the enactment of this Act.”287 If enacted into law, the provision would have quashed state-level efforts to regulate AI, without any federal framework to replace them.288 The use of the reconciliation process was a calculated strategy. Budget reconciliation allows for an expedited legislative process, in general. Moreover, the bill’s sweeping reach—from Medicaid and tax cuts, to significant immigration funding and deficit increases—made focused debate around the preemption provision less likely. At first, the strategy seemed to work: many House members were reportedly unaware of the moratorium's inclusion in the bill, much less its socio-political implications.289 Under pressure from Republican leadership to quickly pass the bill, the preemption moratorium received no dedicated debate in the House and was approved on a narrow party-line vote along with the larger bill.290 But blowback swiftly followed. The first significant objections came not from the political left, but from within the Republican party itself. House Rep. Marjorie Taylor Greene (R-GA) led the charge.291 She admitted she “did not know about this section ... that strips states of the right to make laws or regulate AI for 10 years” and insisted she “would have voted NO if [she] had known this was in there.”292 Giving “free rein” to AI while “tying state hands,” she argued, “is potentially dangerous.”293 Meanwhile, legal scholars and state attorneys general warned that a direct federal command to states to not legislate in a particular field could constitute unconstitutional commandeering under the Supreme Court’s Tenth Amendment jurisprudence.294 In response, Senate Republicans attempted a tactical rewrite. Ted Cruz (R-TX), as Chair of the Senate Commerce Committee, transformed the provision from a direct prohibition on state AI regulation into a conditional grant.295 Rather than forbidding state action, the revision made federal funding for new technology and infrastructure grants conditional on a state’s agreement not to enforce AI regulations for ten years.296 The technology industry and its allies, led by the U.S. Chamber of Commerce, mounted a vigorous defense of the preemption provision.297 They argued that a “patchwork” of fifty different state AI laws would stifle innovation, create immense compliance costs, and hinder the United States’ ability to compete with China.298 However, this did little to quell the backlash. In effect, the revised provision would make states choose between critical infrastructure funding and protecting their citizens from AI-related harms. As the Senate prepared to vote, an unusual constellation of voices on both the left and right converged in opposition to the preemption provision. On the right, Senators like Marsha Blackburn (R-TN), Senators Josh Hawley (R-MO) and Rand Paul (R-KY), along with the Heritage Foundation, objected to the measure as a federal overreach. 299 Steve Bannon, a former Trump advisor and MAGA influencer, blasted the provision on his influential War Room podcast.300 At the same time, a wide coalition of civil rights organizations, consumer protection groups, and labor unions argued that the moratorium would create a regulatory vacuum, gutting state-level protections against algorithmic discrimination in hiring, housing, and credit.301 Perhaps most impactfully, a bipartisan coalition of 260 state legislators across all 50 states signed a letter declaring their “strong opposition, warning that “AI will raise some of the most important public policy questions of our time, and it is critical that state policymakers maintain the ability to respond.”302 In parallel moves, 40 state attorneys general from both parties signed a letter objecting to the proposal,303 and the Republican Governors Association urged Congress to excise the preemption provision from the Big Beautiful Bill Act.304 In a last-ditch effort to save the moratorium, Senators Ted Cruz (R-TX) and Marsha Blackburn (R-TN) announced a compromise that would have reduced the moratorium on state regulation to five years and carved out exemptions for state regulations addressing child safety, deepfakes, and publicity rights. 305 But the compromise unraveled within hours.306 Under intense pressure from both wings of her party, Blackburn withdrew her support and teamed up with Senator Cantwell (D-WA) to entirely eliminate the preemption provision from the reconciliation bill.307 In the early morning hours of July 1, 2025, the Senate voted 99-1 to strip the moratorium from the bill.308 Even Senator Cruz, the provision's chief architect, voted for its removal.309 When the reconciliation bill returned to the House, it quickly passed and was signed into law by President Trump on July 4, 2025 (minus any AI preemption provision). Still, the battle over AI federalism is far from over. What began as a stealth provision quickly ignited a widely publicized debate about the future of AI and the role of federalism itself. Though this attempt at federal preemption failed, the structural incentives that produced it remain firmly in place. They are likely to be more targeted, perhaps attached to sector-specific federal laws governing AI in employment or healthcare, or quietly inserted into future must-pass spending bills, such as the annual National Defense Authorization Act. Industry representatives and sympathetic think tanks have already signaled their intent to pursue similar measures, potentially paired with a light-touch federal framework that would provide the constitutional basis to preempt state law. 310 In the meantime, however, the episode has put stakeholders across the political spectrum on high alert.311

<<PARAGRAPH INTEGRITY RESUMES>>

If the aim of AI governance is to maximize the benefits and minimize the harms of AI technologies, then we will need all that federalism offers. Although not without its drawbacks, federalism offers a range of values to a well-functioning democracy that are not reproducible or available in a fully centralized system. In the Supreme Court’s canonical articulation, federalism “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government;” and it provides “a check on abuses of government power."312 Whether the values of federalism will be valued in the AI era remains to be seen. But they have endured through other social, political, and technological transformations. At least for now, federalism offers much to celebrate in the dawning AI age.

To start, the political dynamics of decentralized AI governance can accommodate more political preferences than a one-size-fits-all national approach. The diversity of state approaches also allows for a kind of natural experiment in AI regulation. Not only do they provide occasions to learn what works and does not, but also for whose benefit, whose detriment, and at what cost. Unlike in a fully centralized system, the statelevel experiments can run in parallel, thus enabling faster feedback loops for adaptation. Rather than regulate too soon and all at once, or too little too late, decentralized states can regulate iteratively and incrementally.

Beyond real-world experiments, states can force thought experiments. When states act as staging grounds, it often brings more voices and viewpoints to bear on issues of shared concern. SB 1047 is a case in point. Unlike the stalled initiatives in Congress, the credible possibility that SB 1047 could become law forced conversations and clarified positions that otherwise might not have occurred.313 The attempt to hold the industry accountable and potentially liable for their AI creations surfaced fault lines, etched battle lines, and revealed which side of those lines stakeholders stand. 314 We learned, for example, that industry giants like OpenAI, Microsoft, and Google vehemently oppose regulation of their frontier AI models, despite expressing support for government oversight in congressional hearings and public relations campaigns.315

While industry advocates bemoan regulatory patchworks, it is partly self-inflicted. 316 At the national level, they lobby hard to block AI regulation.317 But the very success of those efforts has created both the incentives and conditions for states to fill the voids. Moreover, the industry’s rhetoric of 50 independent laboratories is belied by political reality. Closer to the truth, states are staging grounds for networked interest groups and national political parties who run policy preferences through any state where they have political leverage.318 Thus, regulatory preferences often sort along party lines, not state borderlines. 319 In addition, model legislation and multi-state working groups enable a great deal of regulatory cohesion.320

**1NC – T – Negotiation**

**‘Collective bargaining’ excludes non-process provisions that are merely the outcome of collective negotiations.**

Mitchell N. **Reinis et al. 16**, Reinis is Attorney at Thompson Coburn LLP, California State Bar No. 36131; Santos is Attorney at Thompson Coburn LLP, California State Bar No. 210185; Higgins is Attorney at Thompson Coburn LLP, Pro Hac Vice; Kraft is Attorney at Thompson Coburn LLP, Pro Hac Vice, "California v. United States DOL," U.S. District Court for the Eastern District of California, Sacramento Division, 04/15/2016, Lexis

C. The Department's Other Arguments Conflate 13(c)(1) and 13(c)(2), Improperly Rely on NLRA Case Law, Employ an Inapplicable Preemption Doctrine, and Do Not Rationally Distinguish PEPRA From the Law Impacting MBTA.

The Department asserts that Plaintiffs can argue that 13(c)(2) protects the "collective bargaining" process only by ignoring 13(c)(2)'s use of "collective bargaining rights." The Department's suggestion that 13(c)(2) protects more than process, however, improperly conflates the distinct protections afforded by 13(c)(1) and (2) 8 and conflicts with 13(c)'s legislative history and Donovan. Congress intended for 13(c)(2) to protect "collective bargaining," a term that by definition means a "procedure looking toward the making of collective agreements." 9 And Donovan clearly described 13(c) as protecting the process of meaningful, good faith negotiations. 10 767 F.2d at 950-51; id. at 953 (13(c) "protects the process of collective bargaining"). The Department knows this; it has acknowledged 13(c)(2)'s protection of process in its decisions on remand (ECF No. 100 at 26, S.A.R. at 25), its pending motion (id. 99-1 at [\*10] 14: "collective bargaining rights … are … rights to a process"), and in prior certification decisions. 11

[\*11]

The Department attempts to salvage its overreliance on NLRA case law by arguing those cases determine what Congress intended the "generic" term "collective bargaining" in 13(c) to mean. (ECF No. 107 at 14-15.) True, Congress did not "employ a term of art devoid of all meaning," but the Department need look no further than Donovan to divine the meaning of "collective bargaining rights" Congress incorporated into 13(c). "Then as now, collective bargaining was universally understood to require, at a minimum, good faith negotiations, to a point of impasse, if necessary, over wages, hours and other terms and conditions [\*12] of employment." Donovan, 767 F.2d at 949; see id. at 950 (holding that "continuation of collective bargaining rights" requires that employees "be represented in meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions of employment").

**That excludes scope, terms** (recognition, security)**, methods** (strikes)**, or remedies**

Christian **Dippel &** Zachary **Sauers 22**, Dippel is affiliated with University of California, Los Angeles, CCPR, and NBER; Sauers is affiliated with University of California, Los Angeles, "Does Increased Union Power Cause Pension Under-Funding in the Public Sector?" Working Paper, 03/12/2022, https://drive.google.com/file/d/1-Aon3GrEKSNtEJ8F95MO7zmFbCL88c8\_/view

Appendix B.1 NBER Public Sector Collective Bargaining Law Data Set

The first category of legal measures is contract negotiation provisions (Online Appendix Table 1), which includes collective bargaining rights (Freeman-Valletta numerical coding scheme and Reuben condensed coding scheme) and scope of bargaining. Collective bargaining rights defines the extent to which public sector employers are allowed to negotiate with employee unions. For some groups and states, collective bargaining is outright prohibited, while in most states and for most groups, collective bargaining is allowed and employers have an obligation to negotiate in good faith with union representatives. With the Freeman-Valletta methodology, this measure is finely divided up among six levels. Reuben condenses this scale down to three levels, as detailed in Online Appendix Table 1. The other legal measure regarding contract negotiation provisions is the scope of bargaining. This variable details the extent to which employers and union members are allowed to negotiate on compensation.

The second legal category is union recognition provisions (Online Appendix Table 2), which includes representation and election and term of recognition. Representation and election details how union employees are represented in employment negotiations and how unions are formed. In some states, union leaders are exclusive representatives of employees, while in others this relationship is not exclusive. This variable also captures the extent to which the procedure for forming a public sector union is specified in the laws. Clearly-defined procedures are conducive to union formation. Specified election procedures typically include provisions for the following: initial peti- tion for union certification (percentage necessary for acceptance), posted notices, timing of election, place of election, restrictions on who can vote, employer or employee organization noninterference, and runoff elections procedures. Term of recognition further details union formation by capturing the minimum period of time that a union is guaranteed to represent the employees before another union election can be called.

The third legal category is union security provisions (Online Appendix Table 3), which includes agency shop, union members’ dues checkoff, union shop, and “Right-to-Work” law. The variables in this category capture the amount of power unions have in dues collection, union membership obligations, and employer hiring practices. Agency shop details the extent to which state law allows agreements between unions and employers requiring employees who do not join the union to pay union dues and fees. Union members dues’ checkoff details whether union dues and fees can be regular deductions from paychecks rather than separate payments to the union by employees. Union shop regards agreements between unions and employers allowing employers to hire non-union members, but requiring these new employees to join the union within a certain amount of time. Finally, “Right-to-Work” law measures the presence of a state law prohibiting union shop and agency shop agreements.

The fourth legal category is impasse procedures (Online Appendix Table 4), which includes mediation availability, fact-finding availability, arbitration availability, arbitration scope, and arbitration type. The variables in this category pertain to the procedures in place to resolve negotiation impasses. When collective bargaining negotiations break down, there is a typical route for resolution, but how far down this route the law allows or requires differs by state and occupational group. The first step after an impasse is reached is mediation where a third-party mediator is hired to assist in reaching a compromise. If mediation fails, a third-party fact-finder can be hired to analyze the facts of the impasse and construct a recommendation for a compromise agreement. If fact-finding does not result in a solution, the process may enter arbitration where a third-party agent similar to a fact-finder is hired and makes a recommendation, but this recommendation is binding. Arbitration scope and arbitration type detail the types of recommendations that the arbitrator issues.

The fifth legal category details laws pertaining to public sector employee strikes (Online Appendix Table 5) and includes strike policy (Freeman-Valletta coding scheme and Reuben condensed coding scheme). For most states and groups, laws are in place that prohibit public sector employees from striking; however, the extent of the penalties for strikes varies by state and group. In some instances, public sector employee strikes are permitted.

Online Appendix Table 1 through Online Appendix Table 5 also illustrate the coverage of previous datasets on this information. As we detail further in section 3, we reference two ad- ditional publications to aid in extending the NBER PSCBLD. The first is an extension of three Freeman-Valletta legal variables (collective bargaining rights, “Right-to-Work” law, and strike pol- icy) through 1996 by Kim Reuben. 28 She also generates two new legal measures by condensing the coding scheme for collective bargaining rights and strike policy.

Sanes et al. (2014) provide another resource to aid in our extension by providing a cross-sectional snapshot of the legal environment in 2014. Their report, reviewing legal rights and limitations in the public sector, is easily mapped to the Freeman-Valletta and Reuben categorical coding schemes for all fifty states and the five main public sector occupational groups. The variables covered in their report are collective bargaining rights, scope of bargaining, and strike policy. The exact data availability for each legal measure from previous sources is detailed in the third column of Online Appendix Table 1 through Online Appendix Table 5 along with the source (FV is Freeman-Valletta, R is Reuben, and SS is Sanes-Schmitt).

A table of legal legislation

AI-generated content may be incorrect.

**Vote neg for limits, ground, and precision---prevents opening the floodgates to literally thousands of legal factors that affect bargaining power AND enforces literature-based, rigorous topic constraints.**

**1NC – CP – Countercyclical**

**The United States federal government should:**

* peg strengthening collective bargaining rights for journalism industry workers in relation to Google and Meta to macroecono**mic indicators, increasing their susceptibility to being nullified by antitrust during periods of labor market tightness as determined in good faith by the Federal Open Market Committee.**

#### direct agencies to adopt sector-specific AI assurance standards, apply the NIST Risk Management Framework, and coordinate through an interagency committee.

**Countercyclical strength solves AND avoids overheating the economy.**

Aneil **Kovvali 22**, Harry A. Bigelow Teaching Fellow and Lecturer in Law, University of Chicago Law School, "Countercyclical Corporate Governance," North Carolina Law Review, vol. 101, 12/01/2022, pp. 141, Lexis

Beyond practical implications, the analysis can shed new light on longstanding theoretical debates in corporate governance. Macroeconomic crises break the intuitions that have shaped corporate governance. The traditional view of corporate governance is that directors and officers should focus exclusively on the interests of shareholders.5 While corporations make [\*145] decisions affecting many other constituencies, including workers, creditors, and local communities, those other constituencies are considered protected by contracts and regulations.6 Because shareholders are paid only after these legal obligations to other constituencies are satisfied, shareholders are thought to feel the effects of marginal changes in the firm's value most directly. They are thus believed to have the right incentives to create wealth by maximizing output and minimizing costs like wages.

When the economy is succeeding, this outlook has a rough alignment with the goal of maximizing social wealth. Labor is a scarce social resource, and when a firm uses a worker's time, that time is not available for other valuable activities. When labor markets are functioning properly, the social opportunity cost of deploying that worker's time at the firm instead of elsewhere is reflected in market wages. Suppose that an employee commands wages of $20 an hour at a firm when labor markets are robust. In that scenario, the $20-an-hour wage likely reflects the employee's ability to find another job paying roughly $20 an hour, which in turn indicates that the employee could create more than $20 of value at that other job. If the firm found a way to maintain existing production without using the worker's time, the worker would go to that other job and create that value the $20 an hour saved by the firm would reflect a genuine efficiency gain that permits society to redeploy productive resources and create additional wealth.7 [FOOTNOTE 7 BEGINS] This is not to slight the real pain and disruption that would be experienced by the worker. Even in a robust economy, a layoff that improves efficiency can be personally devastating for the affected workers and their dependents harms that should be mitigated by policy. See Suresh Naidu, Eric A. Posner & Glen Weyl, Antitrust Remedies for Labor Market Power, 132 HARV. L. REV. 536, 587 n.214 (2018) ("Empirical evidence verifies that workers who are laid off suffer significant harms and have trouble finding equally good jobs."); Jonathan S. Masur & Eric A. Posner, Regulation, Unemployment, and Cost-Benefit Analysis, 98 VA. L. REV. 579, 613-18 (2012) [hereinafter Masur & Posner, Unemployment] (documenting harms from layoffs, including increased mortality rates). But in a robust economy and competitive labor market, the harms are reduced because the affected workers are more likely to be able to find alternative employment on comparable terms. Naidu et al., supra, at 587. [FOOTNOTE 7 ENDS]As a result, in ordinary times, the goal of maximizing shareholder profits has a rough correlation with the goal of maximizing social wealth creation.

But in a recession with dysfunctional labor markets and persistently high unemployment, wages may not correspond to the opportunity cost of labor: if an employee is laid off, they may not be able to find another job or create any value. The employee's customary wages would still represent a cost from the shareholder profits perspective but would not reflect a genuine opportunity cost from the social wealth perspective. Maximizing shareholder profits by laying [\*146] off workers could also have destructive effects. A layoff would mean a period of extended unemployment for the worker, meaning that the worker goes from creating some social wealth to none. Other costs of a layoff include loss of income to the worker, a potential loss of productive capacity for the economy if the worker is unemployed for an extended period and loses skills, and a loss of demand as the worker curtails spending. These costs are not borne by the firm's shareholders directly,8 and they are not likely to be part of the calculus of directors and officers who are focused on a narrow conception of shareholders' interests. It would thus be helpful to reform corporate governance to encourage managers to maintain spending and investment, even if some shareholders feel slighted.

Reforming corporate governance in response to these issues could yield substantial benefits because American corporations control substantial resources. Apple Inc. alone reported having almost $200 billion in cash, cash equivalents, and marketable securities as of March 28, 2020,9 about ten percent of the amount that the entire federal government devoted to its unprecedented March 27, 2020, package to address the harms caused by COVID-19.10 If corporations could be induced to use their resources to expand investment and employment in times of economic trouble, they could have an impact comparable to a major government program. And because of their unique capabilities, relationships with employees and other stakeholders, and capacity to act rapidly, their financial firepower may actually understate their usefulness. Therefore, countercyclical corporate governance is worth exploring whether as a complement to government efforts or as a substitute in the wake of an inadequate government response.

These points support a range of policy approaches, with the primary goal of reorienting firms to serve constituencies other than shareholders during a crisis. Although they were not conceptualized as efforts to revise corporate governance, various features of the policy response to COVID-19 suggested a growing recognition that corporations were vehicles to serve constituencies like employees and customers and not simply to generate financial returns for shareholders.11 Shareholders, like index funds, can deepen this trend with thoughtful interventions at portfolio companies, mitigating recessions in a way [\*147] that improves their long-term returns and marketing position.12 Additionally, the government can further support countercyclical corporate governance through appropriate regulations.13 The discussion of policy approaches here is not intended to be exhaustive but should open an important conversation on ways that corporate governance could support an economic recovery.

The Article proceeds as follows. Part I situates the analysis by describing the broader corporate governance debate between advocates of shareholder primacy and stakeholder governance, before showing how the arguments are shaped by macroeconomic context. Part II discusses the use of macroeconomic policy to mitigate the business cycle and shows how existing tools are influenced by and could be supplemented by corporate governance. Part III describes certain responses to the recession prompted by COVID-19, and suggests that they signal an emerging appetite for countercyclical corporate governance. Part IV discusses how a countercyclical corporate governance scheme could be implemented through private measures such as index fund engagement. Part V briefly describes government reforms that could further support countercyclical corporate governance. Finally, Part VI considers limits and objections.

I. SHAREHOLDER PRIMACY AND MACROECONOMIC CONTEXT

This part situates the analysis in the ongoing debate over the proper orientation of corporate governance. Section I.A begins by describing the debate between the shareholder primacy and stakeholder governance schools. Section I.B shows how the debate is affected by macroeconomic context, examining how the normal relationship between shareholder value maximization and social wealth maximization breaks down in recessionary periods.

A. Shareholder Primacy and Stakeholder Governance

The shareholder primacy or shareholder wealth maximization norm posits that a corporation should be managed only to generate profits for its shareholders.14 Under this paradigm, employees, creditors, and other groups [\*148] that are affected by a corporation's decisions must either bargain for specific contractual protections or obtain relief through governmental regulations. Absent some specific formal limitation, corporate directors and officers are to focus solely on shareholder welfare. This norm is supported by the majority of academics and is the conventional account of the law of Delaware, America's most important corporate law jurisdiction.15

The principal argument for shareholder primacy conceptualizes shareholders as the "residual claimants" on the corporation, and suggests that they have the correct incentives to maximize economic value:

Bondholders have fixed claims, and employees generally negotiate compensation schedules in advance of performance. The gains and losses from abnormally good or bad performance are the lot of the shareholders, whose claims stand last in line. . . . The firm should invest in new products, plants, etc., until the gains and costs are identical at the margin. . . . The shareholders receive most of the marginal gains and incur most of the marginal costs. They therefore have the right incentives to exercise discretion.16

The conventional criticism of this argument attacks the claim that shareholders are the residual claimants on the firm. When a firm is doing well, it is likely to reward many constituencies, including employees; when it is doing [\*149] poorly, it is likely to squeeze or even remove them.17 Given that other constituencies also bear risk, it is not clear that shareholders have the right incentives to maximize the value generated by the firm's activities.

The shareholder primacy approach faces increasing competition from stakeholder governance, which suggests that corporations should consider and advance the interests of a broad range of constituencies, including workers, creditors, suppliers, customers, and surrounding communities.18 Influential organizations like the Business Roundtable19 and the World Economic Forum20 have committed to stakeholder governance.

Stakeholder governance has faced serious criticism. First, critics have argued that the stakeholder governance model is indeterminate and fails to provide a clear criterion for corporate decision-makers.21 Because it fails to provide a criterion for corporate decision-makers to apply, it also fails to offer a criterion for others to use in holding decision-makers accountable.22 Second, critics have argued that American corporate law only empowers shareholders.23 Because only shareholders can vote for corporate directors, who in turn select officers, corporate actors lack adequate incentives to consider the interests of other stakeholders.24

[\*150] B. The Relevance of Macroeconomic Context

Macroeconomic context adds an important dimension to these issues. When the economy is producing at capacity and markets are functioning properly, the interests of shareholders correlate with the broader goal of maximizing social wealth. This relationship is broken during recessionary periods when productive resources are idle and markets fail to equilibrate.

Consider a simple firm that pays workers to produce a product, which the firm sells on the market. After workers have been paid their wages, the remaining profits are distributed to shareholders. In a tight labor market with all workers in the economy employed, the shareholders have appropriate incentives to bring the firm's operations toward the social optimum. With all workers fully employed, social wealth could only be increased by moving workers from low-value activities to high-value activities. This suggests a simple social criterion: a worker should be employed at the firm if and only if the worker would generate more value at the firm than they would generate if employed elsewhere. By contrast, shareholders have their own criterion: a worker should be employed at the firm if and only if the worker would generate more value at the firm than their market wage.

With properly functioning labor markets, the social criterion aligns with the shareholder criterion because market wages would correspond to the value that a worker would generate at other firms. If the worker is not generating more value than their market wage, the worker should leave the firm and take on higher value work. While the worker might experience painful disruptions in shifting from one job to another, the pain would be mitigated by the speed with which the worker would get their next job. Focusing on shareholder profits would thus lead a corporation to the correct decision.25

High unemployment and dysfunctional labor markets would break the relationship between the social criterion and shareholders' criterion by damaging the ability of wages to send appropriate signals. Upon being fired, a worker would not necessarily shift into a higher value activity. Instead, the worker might face a prolonged period of unemployment, generating no value at all. Societal wealth would decrease as production decreased, the worker pared back spending, and the worker's community was immiserated. Yet shareholders would have an incentive to undertake layoffs until wages found a new equilibrium.

To illustrate, suppose that Alpha Corporation pays an employee $20 per hour and is happy to continue doing so because the employee generates $21 in value per hour. The eccentric CEO of Beta Corporation then poaches the employee by offering her more than $20 per hour in wages and assigns her to a [\*151] make-work job that generates just $5 per hour. The decision would cost Beta's shareholders the employee's wages are reducing profits by more than $15 an hour. And the decision would cost society the employee was generating $21 of wealth per hour at her job at Alpha and is now generating $5 of wealth.

Now suppose instead that Beta's CEO filled the make-work job by recruiting an unemployed person who previously had no prospect of finding productive work. Of course, Beta's shareholders would still protest, because the employee's wages are reducing profits by more than $15 an hour. But the effect on social wealth would be positive the employee was generating $0 of wealth when unemployed and is now generating $5 at Beta.

A hot economy resembles the former scenario. In the aggregate, hiring would mean pulling a person away from another valuable job, so social wealth is maximized when businesses adopt the shareholders' focus on efficiency. But a slowing economy resembles the latter scenario. In the aggregate, hiring would decrease unemployment, so social wealth can increase when businesses undertake activities that do not directly increase shareholder wealth.

When the economy is producing at capacity and labor markets are functioning properly, it is also reasonable to contend that the shareholders are the residual claimants on the firm. In a tight labor market, workers would have a robust exit option if the firm sought to reduce their wages. As a result, shareholders could not offload risk onto workers and would have to bear the firm's risks. Under harsh macroeconomic conditions, this logic collapses. Shareholders would be free to offload some of the firm's risks onto the workers, because workers would be afraid of termination.26

Importantly, this analysis does not depend on contestable claims that shareholder primacy has contributed to social and macroeconomic ills like income inequality, underinvestment in research and stagnant innovation, and environmental degradation.27 Instead, it simply suggests that the ordinary logic of corporate governance debates breaks down in macroeconomic crises.

These observations could be cast in the familiar language of externalities. Firing a worker when the economy is performing well has limited externalities because the worker would quickly get a new job. Firing a worker when the economy is performing poorly would have extensive externalities, as the worker [\*152] faces prolonged unemployment and cuts back on spending at other businesses.28 Increased externalities during periods of crisis complicate the ordinary logic of corporate governance.29

Of course, a diversified shareholder will absorb some of the consequences of an economy-wide slowdown, and as a result would capture some of the benefits from actions that ameliorate a recession. A shareholder can also have preferences and economic interests outside of their holdings at a given firm; a worker who owns stock may derive greater benefits from a robust labor market than from marginally better stock returns. To the extent these forces lead shareholders in the right direction, countercyclical corporate governance may only require firms to listen to the right shareholders, as opposed to listening to stakeholders.30

The discussion suggests other implications for corporate governance debates. For example, critics of stakeholder governance complain that it fails to offer a criterion for action. This complaint has some force in periods of robust macroeconomic performance. Under those conditions, stakeholder governance must rely on economically indeterminate ideas about fairness or corporate purpose to guide decisions. But in recessionary periods, social wealth maximization becomes a valid criterion to guide corporate action. Indeed, in such periods corporate governance can become a useful tool for policymakers seeking to maximize social wealth.

II. MACROECONOMIC POLICY

This part begins the work of considering corporate governance as a tool of macroeconomic policy. Section II.A briefly discusses recessions and their costs. It then describes traditional policy responses to recessions and the nontraditional policy lever of changing ordinary legal rules and regulations. These tools either substitute for a decline in demand by private actors or encourage private actors to spend or invest. Section II.B shows that corporate governance arrangements affect the way that firms respond to macroeconomic [\*153] policy interventions and thus affect interventions' impact. As a result, policymakers seeking to prevent or mitigate macroeconomic crises must be attentive to corporate governance. Finally, Section II.C considers whether changes to corporate governance might provide a nontraditional economic stimulus. During a recession, prioritizing stakeholder interests could be a useful tool to boost economic activity.

A. Policy Responses to Recessions

In the long run, the economy should naturally move to an equilibrium that reflects its real capacity. If workers are unemployed and the economy is producing below its capacity, real wages and prices should gradually decline. The decline in real prices effectively increases the money supply and lowers interest rates, causing businesses to borrow, invest, and hire. The resulting increase in business activity brings the economy back to its equilibrium.

But as Keynes wrote, "In the long run[,] we are all dead."31 Wages can be "sticky," meaning that they do not adjust immediately to changes in the marketplace. As a result, labor markets may fail to clear for long periods, with wages remaining too high to properly match the demand and supply for labor, leaving large numbers of willing workers unemployed. Delays in reaching full employment are painful for individuals who are unable to find work. A long delay can also damage the economy's productive capacity in the long run as workers lose skills and valuable relationships dissolve.32 And long recessions can damage the legitimacy of governmental institutions, prompting adoption of dangerous political philosophies.33

As the Great Depression unfolded and these threats materialized, governments assumed responsibility for mitigating and shortening recessions.34 To discharge that responsibility, policymakers sought new tools. These tools include the three standard levers of fiscal policy, monetary policy, and automatic stabilizers. Recent research has explored a fourth avenue of regulatory changes. The different tools operate using different mechanisms.

[\*154] 1. Fiscal Policy

Fiscal policy entails government deficit spending. The government responds to a decline in aggregate demand by increasing its own expenditures, reducing taxes to encourage expenditures by private persons, or both. As demand increases, firms respond by hiring to increase their production of goods and services. Newly hired employees spend a large portion of their income, further increasing demand and multiplying the effect of the stimulus. This multiplier effect can be substantial.35

But fiscal policy suffers from serious institutional impediments. Fiscal policy generally requires congressional action: the House, Senate, and President must agree on a bill to have the federal government spend more money or to revise tax policy. Unfortunately, the necessary consensus is often lacking in Washington, and even when it is present, the process often moves slowly.

2. Monetary Policy

Monetary policy offers a different tool for managing recessions. The Federal Reserve is led by expert appointees who are insulated from political pressures and processes.36 As a result, it can quickly take actions that influence the money supply and the cost of borrowing. Chief amongst these are open market operations, in which the Federal Reserve buys or sells financial instruments.37 When the Federal Reserve spends money to buy financial instruments, it increases the supply of money in the economy and makes it easier for economic actors to raise funds by issuing financial instruments. This lowers real prices and makes it easier for firms to raise money to invest in new projects that create jobs.

The institutional set up of the Federal Reserve solves the problems of speed and consensus, as its expert leaders can agree quickly on a course of action and move with dispatch. But these features also contribute to a sense that its actions are undemocratic and illegitimate.38 It is also easier for the Federal Reserve to directly assist large economic actors than to help individuals or small businesses. Governments, financial institutions, and large corporations can [\*155] issue securities in the capital markets, which the Federal Reserve can act on directly. To assist small businesses and individuals, the Federal Reserve must generally act indirectly.

In recent years, near-zero interest rates have also constrained monetary policy. At this "zero lower bound," it is difficult to reduce interest rates further a negative interest rate would mean charging people to lend money, and at some point, they would rather physically store money than loan it out. As a result, it has been difficult to use monetary policy to encourage firms to borrow more and invest in projects.

3. Automatic Stabilizers

Automatic stabilizers are policies that naturally deliver stimulus during recessions. For example, programs that provide funds to unemployed people or people with low incomes will naturally entail higher government expenditures when the economy is ailing. Similarly, a progressive tax system will naturally take a smaller percentage of income out of the economy when incomes decrease. Such policies are often put in place outside of an economic crisis for fairness or humanitarian reasons largely separate from their macroeconomic effect. Moreover, because they do not require additional legislative action, their implementation is not delayed.

The main problem with automatic stabilizers is that there are not enough of them. Although they help reduce suffering and unfairness, they are not sufficient to bring the economy out of a major crisis.

4. Reforming Legal Rules

Like other policy interventions, government mandates can affect price levels and induce businesses to spend and invest. Academics have been increasingly attentive to these effects, suggesting that legal rules might be altered during recessions to improve economic outcomes.39

Perhaps due to the relative infancy of academic study of this set of tools, it seems to have been used in a blunderbuss fashion, if at all. For example, during the economic crisis prompted by COVID-19, the Trump administration ordered that agencies should respond to the "economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery."40 A subsequent order purported to suspend environmental reviews of infrastructure projects.41 The [\*156] orders themselves did not appear to reflect a careful weighing of the costs or benefits of relaxed rules.42

B. Corporate Governance as a Complement to Traditional Macroeconomic Policy Tools

Corporate governance can interact with traditional macroeconomic policy interventions. As a result of these interactions, revisions to corporate governance rules can help preserve the effectiveness of traditional government tools.

Expanding purchases as part of a traditional fiscal policy will likely entail contracting with existing private firms. It may be possible for the government to expand purchases by directly employing workers and coordinating their production of goods and services, as with the New Deal Civilian Conservation Corps.43 But that approach would require the government to build, or to rebuild, the capacity to flexibly scale activities up and down.

Contracts with existing firms implicate corporate governance principles because a firm that seeks to maximize shareholder wealth will attempt to divert a contract's value to its shareholders.44 While funds diverted to shareholders will provide some stimulus, the effect is likely to be less than that of funds flowing to newly employed workers. Unlike a relatively wealthy shareholder seeing a stock price appreciate, a newly employed worker is likely to spend her paycheck at other businesses, multiplying the effect of the stimulus.45 As a result, when a firm bargains hard to maximize shareholder profits on a government contract, it dampens the stimulus from government spending.46

Monetary policy also interacts with corporate governance. Monetary interventions are thought to work by encouraging investment and spending. By lowering the cost of borrowing, the Federal Reserve can cause firms to [\*157] undertake new projects that employ more workers. But the effectiveness of the mechanism depends on firms translating lower borrowing rates into new economic activity.

When firms borrow money from creditors simply to give money to shareholders, they complicate this mechanism. Instead of increasing economic activity and employment by encouraging firms to embark on additional projects, the monetary tool simply sends funds to shareholders.47 This may provide some stimulus, because shareholders may increase their spending as a result. But the effect will be less than if firms translate lower borrowing costs into new business activity.48

Firms that transact in their own shares may have an incentive to go further, and engage in "costly contractions."49 A firm should return capital to shareholders if and only if the shareholders would be able to redeploy the capital in opportunities outside the firm that would have a higher value than activities within the firm. But if the stock price is depressed, firms may be able to generate greater financial returns for their long-term shareholders by forgoing valuable projects and using the extra funds to cash out uncommitted shareholders at the depressed price. This may be more of a threat if stock markets are depressed and volatile.

Of course, shareholders may not appreciate this maneuver, even though it would be designed to maximize the eventual share price.50 The funds returned to them would have to be deployed elsewhere at a time when there are relatively few investment opportunities available.51 Like an employee fired during a recession, a shareholder may struggle to redeploy their capital at a higher value [\*158] activity if it is returned to them at a time when other opportunities are lacking.52 By advancing a narrow conception of its shareholders' interests, the firm would thus fail to maximize the value of its shareholders' full portfolio. More fundamentally, financial engineering to support share buybacks would sap the force of a monetary intervention.

This is more than theoretical. After the Federal Reserve's massive intervention to ensure that credit would continue to flow in the wake of the COVID-19 crisis, companies borrowed extensively and used funds to support stock buybacks.53 A macroeconomic intervention intended to permit companies to undertake new projects that would boost employment was instead partially used to pump up returns to shareholders.

Appropriate corporate governance rules can thus improve the effectiveness of traditional fiscal and monetary stimulus. If firms are oriented toward objectives other than shareholder value maximization, they are more likely to direct the impact of fiscal and monetary interventions toward their intended targets. Even if political institutions like Congress and the Federal Reserve are prepared to respond appropriately to a crisis, corporate governance tools would be a useful complement to their efforts.

C. Corporate Governance as an Independent Macroeconomic Policy Tool

Apart from supporting macroeconomic policy, corporate governance arrangements could also be used independently to deliver a macroeconomic stimulus. In some sense, the point follows directly from the observations above regarding the sensitivity of corporate governance debates to macroeconomic context54 and the macroeconomic impacts of regulations.55 If employment-creating projects or precautions are more justified in a recession, a system of corporate governance that encourages the same steps is similarly justifiable. This section works through potential impacts of a macroeconomic focus.

1. Revising the Profit Maximization Goal

Traditional tools change corporate decisions by changing the external environment in which corporations operate. Policymakers encourage firms to [\*159] hire more workers or make job-creating investments by allowing wages to decline, stimulating demand for products, or lowering interest rates. Policymakers might consider an alternative approach that changes corporate decisions by changing their internal objectives.

Appendix B presents a simple model, but the intuition is straightforward. Given a particular price and wage level, a profit maximizing firm will continue to hire workers and increase production until the marginal productivity of labor equals wages. That is, it will continue to hire until an additional worker would bring in less money in revenue than the worker would cost in wages.

If a policymaker wants the firm to hire more workers in a recession, it can allow wages to decline.56 Lower wages would mean that additional workers cost less, causing a profit maximizing firm to hire more than it would at a higher wage level. But the policymaker could achieve the same level of hiring by changing the firm's internal objective so that it does not maximize profits. A firm that balances profits and worker well-being will hire more at a given wage level than a firm that simply maximizes profits.

Reorienting the firm may be a better approach than allowing wage declines. First, while both mechanisms would induce the firm to make the desired hiring and production decision, they would not be identical in their effects: allowing wages to decline reduces worker earnings, while reorienting the firm away from shareholders reduces shareholder profits.

Because workers are more likely to spend an additional dollar of wages than shareholders are to spend an additional dollar of wealth, reorienting the firm toward workers will do more to stimulate consumption and aggregate demand than lowering wages. Shareholders are disproportionately wealthy and are less likely to need the additional money to fund expenditures.57 Increased profits also may not translate into real net cash flows to shareholders. If the firm simply retains the funds, shareholders can only tap their portion of the funds by selling stock. But while the seller receives cash in a transaction, the purchaser gives up cash, keeping the net effect at zero.58 If the company uses the additional profits to repurchase shares or pay dividends, the effect may still be muted. If index fund investors simply keep the money in the fund as they are likely to do, given that the purpose of an index fund strategy is to hold passively for [\*160] decades instead of actively reallocating capital they have nothing to gain from the inflated prices.

Ordinary people, like typical workers, are also risk averse and derive the bulk of their wealth from their involvement with their employers. By contrast, shareholders of large firms are generally diversified and indifferent to idiosyncratic events at particular firms. As a result, protecting workers will do more to help individuals' wealth and well-being than protecting shareholders' interests.59 This in turn will do more to prop up demand.

Second, reorienting the firm can also be a particularly efficient way to inject funds into the economy because the increase in total worker earnings would be greater than the decrease in shareholder profits: the firm's use of additional labor results in increased production and sale of goods that partially offsets the increase in total wages. The firm is not a zero-sum battleground between worker and shareholder interests.

In a robust economy, the seeming multiplier effect is not real. Any labor that is not employed at the firm and earning a wage of $1 from the firm would have been employed elsewhere, earning a wage of $1 there. Increasing the total wages paid by the firm does not create real value for the economy, but the reduction in shareholder profits represents genuine destruction of value.60 As a result, the shareholders' perspective on the firm aligns with the goal of maximizing societal wealth. But in a weak economy, workers not employed by the firm may not be able to find work at a $1 wage. Some portion of the increase in total wages represents a real increase in the value generated by the firm.

Third, this type of stimulus can be delivered quickly. For example, suppose the firm already has a high labor level. In that case, it can deliver a stimulus immediately by simply holding off on layoffs that would be pursued by a profit-maximizing firm in the more challenging economic environment. By contrast, fiscal policy can require months of congressional deliberation, followed by months of effort to prepare projects. And even if the Federal [\*161] Reserve acts quickly to lower interest rates, it can take months for the rate change to be translated into improved investment activity.61

Transactional frictions can also make the internal approach faster than an external approach. For instance, if "sticky wages" are preventing wages from declining enough to clear the labor market, the firm may still be able to act more quickly to achieve the proper production decision by reweighing its objective function to focus more on workers. Mechanically, it may also be easier for a firm to reorient its approach to major decisions (a strategy that can be handled at the hub of the firm by the officers and directors) than to renegotiate wages with each employee (a strategy that requires reworking every spoke between the firm and each individual).62 Governments sometimes bail out companies instead of individual stakeholders because of the administrative difficulty of reaching each individual.63 The same consideration supports reorienting firms instead of attempting to address every individual's relationship with the firm.

2. Revising Decisions on Risky Investments

Altering firms' approach to risk would also encourage investments that have macroeconomic value. Suppose that a company has assets of $8, debts of $6, and equity of $2. The firm has an opportunity to make an investment of $5 at time t, with a 50% probability of delivering $8 at time t + 1 and a 50% probability of delivering $0 at time t + 1. Risk neutral shareholders would prefer that the investment be made: with the investment there is a 50% chance of equity being worth $5 at t + 1 and a 50% chance of equity being worth $0, for an expected value of $2.50, which is greater than $2 without the investment. Creditors would prefer that the investment not be made: there is a 50% chance of there being $6 to settle the debts and a 50% chance of there being $3 to settle the debts, for an expected value of $4.50, which is less than $6 without the investment.

In ordinary times, society would prefer that the corporation follow the creditors' lead. The project has a negative expected value: there is a 50% chance of delivering a total of $3 (costing $5 of resources at t and delivering $8 at t + 1) and a 50% chance of delivering a total of -$5, for an expected value of -$1. Commentators have described the selection of a "risky project that makes [\*162] creditors worse off by more than it makes shareholders better off" as a form of "misbehavior" referred to as "overinvestment."64

But in stressed macroeconomic conditions, the analysis could be more complicated. The benefit of $5 of stimulus today may be worth the overall cost. If the corporation follows the interests of equity holders, it would effectively be investing as if real interest rates were -20% or lower an extreme trade-off to be sure, but potentially worthwhile temporarily if the economy is being held back because interest rates are unable to reach a below zero equilibrium.65

3. Setting Corporate Priorities

These points suggest an opportunity to operationalize the connection between corporate governance debates and macroeconomic context.66 If policymakers can find ways to reset corporate priorities to encourage regard for workers and openness to risk-taking, they can create value for society during a crisis. The magnitude of these benefits should not be understated. The cost of being laid off to one worker alone could be as high as $260,000.67 Knock-on effects from the resulting decline in the worker's spending are substantial, with estimates of the multiplier effect going as high as 1.5.68 Avoiding layoffs and boosting hiring could have an enormous impact.

To operationalize the approach, it would be necessary to address the concern that stakeholder governance does not offer a clear criterion for weighing competing interests.69 But the analysis above shows that a criterion based on macroeconomic context can suggest priorities for corporate actors. For example, a corporate leader trying to decide between maintaining wages for the current workforce and hiring previously unemployed workers at lower wages might apply macroeconomic reasoning and findings. Raising someone's income from zero is likely to do more to increase demand the previously unemployed person is likely to spend more of the new income suggesting that the latter course would be preferable.70

[\*163] Naturally, there is likely to be debate about the best way for a corporate actor to react to the macroeconomic context. But debates about business strategy are common as well. Business executives disagree and advocate for different strategies, even when their shared goal is to maximize shareholder returns; academics and the press then debate their actions. Indeed, if there were obvious right answers to business problems, there would be little reason for a business judgment rule insulating decisions from judicial review. A criterion based on a blinkered microeconomic efficiency approach is not more determinative than one that accounts for the broader context.

The discussion does raise the question of why policymakers should employ countercyclical corporate governance instead of more traditional means. First, the argument above shows that firms oriented solely to shareholder wealth maximization will make decisions that are suboptimal for society during a period of crisis. Even if the government used traditional means to speed the end of a crisis, countercyclical corporate governance would correct corporate decision-making in the interim. Second, traditional tools are often slow and unavailable during a crisis71 or are inequitable and distortionary.72 Corporate governance tools have the potential to permit rapid action in a less distortionary form. Third, corporations may be able to take advantage of economies of scope in delivering stimulus.73 They have substantial operations that place them in contact with workers, suppliers, customers, shareholders, and creditors; thus, they can modify their operations to benefit those constituencies. Finally, corporations may have access to information that is not available to the government. For example, there is clearly some point at which shareholders will refuse to accept reduced returns at a company to support the goal of bringing the economy out of a crisis. In its capacity as a regulator or contractual counterparty to the corporation, the government may not be able to find that breakpoint with the same precision. Thus, the government may not be able to squeeze shareholders to the same extent.

The discussion also raises the question of whether changes to corporate law would be an effective tool. The analysis in this Article does assume a basically Keynesian framework, in which policymakers manage a decline in aggregate demand by acting to encourage spending and investment.74 The basic [\*164] framework does not seem controversial in the sense that a broad range of policymakers pursue it: Republicans seek to boost savings and investment through tax cuts, and Democrats seek to boost savings and investment through direct expenditures and transfer payments to the needy. All parties seem to recognize the value of boosting business confidence during a recession,75 presumably because they recognize that businesses could help the economy if they decided to increase their activity level.

As noted above, large companies have enormous resources to draw on in a recession, often in the form of cash.76 Apple alone had approximately $200 billion in cash and equivalents at its disposal at the time of the federal government's $2 trillion stimulus package to address the economic crisis caused by COVID-19. Apple also knows how to employ people. The median salary for an Apple employee in 2019 was $57,596.77 By comparison, the federal government's Paycheck Protection Program adopted in the wake of COVID-19 cost between $162,000 and $381,000 per job saved, with a preferred estimate of $224,000.78 As an extremely crude estimate, if Apple used all of its cash reserves to put people to work at the median salary for its employees, Apple could theoretically keep over three million people employed for a year. If the company put all of its net income into employing new people at its median salary, Apple could theoretically employ 700,000 people. If those workers were being employed productively, generating additional income, the numbers would be even greater. This is just one company, and these are not small numbers.

Of course, firms might have the financial firepower to act in ways that have macroeconomic effects, but may lack the operational capacity to productively employ tens of thousands of additional people on short notice. There may also be distributional concerns if relatively wealthy tech firms simply act in ways that benefit their relatively wealthy employees, the approach would be unfair, [\*165] and the stimulus effect would be muted.79 But these concerns also apply to government action. The government might also struggle to find useful work for hundreds of thousands of people, and its chosen measures to respond to crises can have unfair distributional impacts that limit their effectiveness.80

Large firms also have operational moves readily available. They can simply hold off on layoffs, even where layoffs would create profits for shareholders. They can also commission new construction or blue-sky investment projects, including by contracting with other firms. Another Amazon headquarters project or Google fiber optics project would mobilize blue-collar workers.

This effect might be muted if shareholders reduced their spending in response to the diversion of wealth from them to workers. But this is unlikely. In 2020, Apple stock traded at a price to earnings ratio of over thirty to one.81 In other words, only about three percent of the value of an Apple share came from the income Apple generated in 2020. In principle, if Apple committed to devoting all of its earnings to workers for one year (and one year only), Apple shareholders would see the value of their Apple shares reduced by just three percent.82 It is hard to imagine that the size of this effect on the shareholders' spending could be comparable to the size of the effect on new workers' spending.

Multiplier effects amplify the point. A firm that is willing to accept a $1 reduction in shareholder profits can spend more than $1 because some of the additional spending will be offset by additional revenues.83 And $1 of additional wages in the hands of a low-income worker is likely to drive more overall spending than an additional $1 of shareholder wealth.84

Finally, even if countercyclical corporate governance is less effective than traditional policy tools, it may be a useful complement to those measures. It does not need to be the favored tool of policymakers for it to be a worthwhile addition to the toolbox.85 To be useful, countercyclical corporate governance [\*166] only needs to outrun government action86 or show up for the race when the government does not. And even when the government is prepared to act, countercyclical corporate governance can make its interventions more effective. Indeed, as shown below, actual leaders in business and government increasingly recognize countercyclical corporate governance's potential as a complementary tool.

III. EARLY RESPONSES TO THE COVID-19 CRISIS

This part analyzes measures adopted in response to the economic crisis prompted by COVID-19. Proxy advisory firms, the government, and corporations themselves took steps to advance various stakeholder interests. All of these measures could be understood as steps toward revising corporate governance to meet the needs of the moment.

A. Proxy Advisory Services and Shareholders

Proxy advisory services are firms that provide recommendations on how shareholders should cast their votes on corporate decisions.87 Because many passive institutional investors are unwilling to undertake a careful analysis of every decision that is up for a vote, they rely heavily on the recommendations of these services.88 The combination of the voting strength of passive institutional investors and their reliance on advisors' recommendations has placed enormous power in the hands of the two leading providers, Institutional Shareholder Services ("ISS") and Glass Lewis.89 As a result, their positions [\*167] carry enormous weight, and have been analogized to a "civil code" regulating corporations on a broad range of issues.90

Historically, ISS and Glass Lewis have reliably taken positions that enhanced immediate shareholder power over corporate decision-making.91 These positions have included support for a consequential campaign to declassify or de-stagger corporate boards (so that all board members are forced to seek election annually) and heavy skepticism of takeover defenses.92

In a departure from their normal orientation, ISS and Glass Lewis signaled openness to takeover defenses adopted as a result of financial market dislocations that accompanied the coronavirus crisis.93 In a policy guidance document, ISS explained that under its "appropriately flexible" approach, a "severe stock price decline as a result of the COVID-19 pandemic is likely to be considered valid justification in most cases for adopting a pill of less than one year in duration."94 Similarly, Glass Lewis reaffirmed its general opposition to poison pills, but stated that it would consider "companies that are impacted by the coronavirus and the related economic crisis as reasonable context for adopting a poison pill" if they meet certain conditions.95

It is important to acknowledge the limits of this position. ISS and Glass Lewis were not explicitly endorsing stakeholder governance, in which poison pills could be deployed to protect stakeholder interests. And they were not explicitly endorsing a paradigm in which corporations could set a policy favoring stakeholders in a recession as part of an effort to end it.96 Instead, they were simply recognizing that dislocated financial markets would not set an appropriate framework for corporate decisions.97 But the practical import was to create space for corporate decision-makers to set policies that could be opposed by shareholder activists.

[\*168] As these changes occurred, many activist hedge funds backed down on campaigns or struck friendly or constructive settlements.98 With the possible exception of plaintiffs' law firms and a few holdout activist funds,99 even shareholders' fiercest advocates appeared to recognize that they could not and should not dictate the corporate agenda.

Index funds also sought to take a more patient approach. As BlackRock's Investment Stewardship 2020 Annual Report explained:

For many companies, COVID-19 has created near-term existential challenges. . . . In the immediate response period, we were able to be supportive as companies sought flexibility from investors to weather the initial storm.100

These efforts were described to investors as part of a reexamination of corporate purpose that would help generate sustainable corporate value.101 It remains too early to tell whether there will be a lasting shift in the corporate ecosystem. But some analysts suggested that a more sustainable outlook might be the result.102

[\*169] B. Government

Government action in response to the crisis has also been instructive. Throughout the crisis, federal support has been both critical to the survival of businesses and largely premised on a particular vision of the purpose of those businesses in society. Government support was intended to help employees and customers, not shareholders. As former President Donald Trump explained:

I don't want to give a bailout to a company and then have somebody go out and use that money to buy back stock in the company and raise the price and then get a bonus . . . . So I may be Republican, but I don't like that. I want them to use the money for the workers.103

Congress's phase three stimulus package, the Coronavirus Aid, Relief, and Economic Security Act104 ("CARES Act"), thus provided financial support to businesses with the express understanding that the support provided under certain programs should not be channeled to shareholders but rather to other stakeholders.105 For example, the Federal Reserve's Main Street Lending Facility was designed to encourage the flow of credit to medium-sized businesses by committing the Federal Reserve to purchasing qualifying loans.106 By statute, a loan would only qualify for purchase under the facility if the business that received the loan committed to limitations on share repurchases and capital distributions.107 Similarly, the Treasury Department's support to airlines under the CARES Act included provisions requiring the airlines to prioritize support for workers and customers over servicing shareholders.108 [\*170] Such conditions have precedents in prior government responses to macroeconomic crises.109

The CARES Act and Federal Reserve program provisions could be understood as efforts to protect the integrity of the government's macroeconomic interventions and to limit potentially perverse side effects.110 That reading is supported by the federal government's failure to impose similar restrictions on support provided under other programs.111 It is also unclear how effective these efforts have been,112 or whether it would be practical to apply such restrictions to other measures designed to prop up corporate borrowing.113 But the restrictions do suggest a particular understanding of the purpose of the corporation during periods of macroeconomic crisis. At least for the duration of the crisis, corporations became tools for policymakers to channel support and services to stakeholders, not tools for shareholders to generate immediate financial returns for themselves.114

Former Delaware Chief Justice Leo Strine, Jr. a jurist who has written influential pronouncements that shareholder primacy is legally required under Delaware law115 gestured toward this emerging paradigm in an op-ed emphasizing that businesses had an obligation to follow the government's lead [\*171] in addressing the crisis, instead of using the crisis as an opportunity to frustrate government purposes or derive excessive shareholder profits.116

Again, it would be incorrect to take this as an endorsement of a general countercyclical corporate governance regime. The unique challenges of the COVID-19 crisis which threatened lives as well as livelihoods may have supported extraordinary measures, and protecting long-term shareholders by defending the viability of the business fits easily within standard shareholder primacy thinking. But it again suggests a recognition among thought leaders that government action called for a reorientation of corporate priorities.

C. Businesses

Business leaders themselves seemed to appreciate this reality during the early days of the COVID-19 crisis, and properly prioritized the health of their employees, customers, and suppliers.117 Businesses facing liquidity or solvency concerns also worked to resolve those issues with creditors. Businesses also turned to antitakeover devices like the poison pill to defend their strategies against activist attacks.118

Some of this was simple necessity. Equity markets swung wildly based on news events that were largely outside the control of any given business firm. In many cases, the very survival of the business enterprise and thus, all hope for a financial return to equity required leaders to get their approach to stakeholders right. Such measures can thus be justified as efforts to maximize shareholder value.119

But these actions suggested that the crisis context had normalized a revised approach to corporate decision-making, in which businesses sought to prioritize stakeholders apart from shareholders. Prominent companies also sought to emphasize these efforts and present them as part of a thoughtful and [\*172] enlightened strategy; they did not seek to present them as emergency measures that they had been forced into by dire conditions.120

IV. PRIVATE IMPLEMENTATIONS

This part considers shareholder engagement as a mechanism for bringing about corporate governance arrangements that are responsive to macroeconomic crises. Section IV.A identifies institutional voices that might advocate a countercyclical approach. Section IV.B considers what policy they might advocate for a consistent approach in which stakeholders are always considered, or a switching approach in which the degree of stakeholder consideration depends on the business cycle. Section IV.C considers the mechanics of implementation. Finally, Section IV.D identifies ways that the law could support these steps.

A. Potential Shareholder Advocates

Various institutional investors have the means and incentive to advocate for countercyclical corporate governance. Index funds are the most promising potential advocates, though pension funds and bond funds might also play a role.

Index funds establish a portfolio that passively tracks a target index in the marketplace, such as the S&P 500.121 Instead of actively trading trying to identify undervalued or overvalued shares and buying or selling accordingly in an effort to generate outsized returns, these funds simply try to replicate the returns from the index and charge investors a modest fee to do so. These products allow investors to cheaply and easily hold a diversified portfolio that reflects the overall economy's performance.122 As a result, the funds have become increasingly popular. The "Giant Three" index fund providers, BlackRock, State Street, and Vanguard, hold a combined total of approximately twenty percent of the shares of S&P 500 companies and cast approximately [\*173] twenty-five percent of the votes.123 Professor John C. Coates, IV, has suggested that consolidation in the space will soon result in the twelve largest providers controlling a majority of U.S. public companies.124

Admittedly, index funds have real constraints on their engagement with the companies in their portfolio.125 Index funds principally compete on cost: investors rationally seek to buy into funds that charge low fees, so funds prefer not to incur the cost of active stewardship of portfolio companies. Index funds also cannot take a disproportionate stake in a given company and must share any benefits created by their engagement.

Despite these constraints, index fund stakes do appear to affect corporate conduct. For example, there is evidence that firms behave differently when their shareholders also hold stock in their competitors. Company executives are compensated in ways that reflect industry performance instead of performance at their companies, and there have been claims that companies charge their customers higher prices because competition is muted.126

Index funds have a real incentive to use their power to support a countercyclical regime. First, an investor in an index fund would have little to gain and much to lose from an ordinary shareholder primacy approach in a recession. Returning capital to shareholders through dividends or share repurchases does little for investors in a bad economic environment, when few profitable investment opportunities are available.127 And if index fund investors keep dividend or buyback payments in the fund as they are likely to do, given that the purpose of an index fund strategy is to simply hold passively for decades instead of actively allocating capital they have nothing to gain from the inflated prices.128

At the same time, the actual human beings whose capital is deployed through index funds would have much to lose. Most derive a majority of their wealth from salaries instead of financial assets and so would suffer from [\*174] persistent high unemployment.129 An index fund that focused on its investors' needs would prioritize measures to boost employment in a recession over measures to boost share prices at a particular company.

Second, index fund investors also have financial interests apart from their stake in any particular company. Index fund investors are diversified: an investor in a fund that tracks the S&P 500 at least has exposure to the shares of the 500 companies that make up that index. They only have reason to care about systemic risks which affect the performance of the economy as a whole, not idiosyncratic risks at particular companies. Index funds have already taken an interest in systemic issues like climate change and social instability.130 A persistent macroeconomic downturn would have a similarly systemic impact, and index funds have reason to focus on macroeconomic crises to improve their returns.

Finally, index funds could use countercyclical corporate governance to improve their competitive position vis-à-vis other index funds. Index funds have relatively few ways to differentiate themselves, as they all seek to replicate the returns from set indices. At the same time, they are eagerly seeking ways to market themselves to the rising millennial generation of investors, including by engaging in advocacy on social issues131 and climate change. Millennials have been uniquely damaged by recent macroeconomic crises132 and are likely to respond positively to index funds that seek to mitigate them.

Importantly, the marketing motivation for index fund action applies even if it is unclear whether the action will boost overall returns. Index funds like State Street mounted a forceful campaign for gender equity on corporate boards without citing clear-cut evidence that it would impact financial performance133 [\*175] or developing a strategy carefully tailored to maximize financial impact.134 The index funds were motivated to pursue the social value of diversity even where the financial value was unclear.

While index funds have powerful incentives to support countercyclical corporate governance, the incentives are limited by divergences between the wealth of index fund investors and social wealth. The stock market is not the economy. During the COVID-19 crisis, stock indices reached record highs even as unemployment reached historic levels. Index fund performance thus seems insulated from macroeconomic performance. And the harms from a macroeconomic crisis are also not evenly distributed, with the wealthy people who are likely to hold index funds being relatively less affected.

Still, such divergences are unlikely to persist over an extended period, which is the relevant time horizon for a long-term investor pursuing a buy-and-hold strategy supported by index funds. At some point, the economy must grow for investors to reap gains. The divergences also would not make financial chicanery any more attractive to index fund investors, or eliminate index funds' marketing incentive to engage constructively.

But while there are sound theoretical reasons for index funds to support countercyclical corporate governance, the clearest proof of their incentive structure is their support for stakeholder governance and macroeconomic stimulus. Even without a recession, major index funds endorsed a "new paradigm" in which corporations would seek to care for stakeholders other than shareholders and seek to serve social purposes beyond immediate shareholder wealth maximization.135 During the COVID-19 crisis, index funds put this patient approach into practice, recognizing the need for corporate leaders to prioritize nonshareholder constituencies for the duration of the crisis.136 And the leaders of index funds have been attentive to issues of macroeconomic policy, publicly urging stimulus where needed.137

[\*176] Other institutional voices could also use their economic clout to advocate for stakeholder interests, but their views are likely to be more parochial. For example, pension funds might serve as advocates for worker positions.138 While bond funds cannot cast shareholder votes, they could also use their economic clout to advocate for creditor interests. But pension funds' interests may skew toward longstanding employees or retirees instead of capturing the needs of the overall labor market. And in advocating for creditors, bond funds might be unhelpful during a macroeconomic crisis.139

B. Potential Approaches

Institutional voices would ideally seek adoption of a disciplined variant of stakeholder governance, in which corporate leaders deploy resources to various stakeholders in response to macroeconomic crises. This concept could be pursued in two basic ways. Corporations could maintain a consistent stakeholder governance orientation, weighing the needs of stakeholders in good times as well as bad, or they could switch between shareholder and stakeholder-focused regimes based on context.

1. Consistent Approach

Under a consistent or time-invariant approach, disciplined stakeholder governance would be encouraged in both good and bad times. This could entail engaging with companies to select stakeholder-friendly directors and officers; setting long-term compensation criteria based on employee, environmental, social, and governance criteria that are aligned to macroeconomic performance; and encouraging the development of stakeholder-friendly norms.

A consistent approach would avoid debates about whether a triggering macroeconomic crisis has started, and it would avoid delays in implementation. Instead of identifying a crisis, engaging with corporations to shift governance regimes, and waiting to have those changes take effect, index funds could simply count on existing measures. Given that dispatch is one of the benefits of a [\*177] private stimulus as compared to a traditional fiscal stimulus, a consistent approach may do more to capitalize on the strengths of countercyclical corporate governance.140

The counterarguments to this approach are similar to the normal criticisms of stakeholder governance.141 In a good macroeconomic environment, it may contribute to inefficient expenditures. It would also lead to concerns about indeterminacy. Absent a clear goal like delivering useful macroeconomic stimulus in an environment where stimulus would do real good, stakeholder governance may not provide a criterion for corporate decisions. This would create confusion and managerial slack. But even macroeconomic environments that seem like peaks, in which there is no benefit to further stimulus, may actually be susceptible to improvement.142 In addition, an approach that lowers some of the peaks in the business cycle as a cost of raising some of the troughs would be countercyclical. Trading some of the gain from a peak to avoid some of the pain of a trough would be a reasonable approach.

2. Switching Approach

Under a switching approach, a shareholder focus would apply in good times, but disciplined stakeholder governance would be encouraged in bad times. An approach that switched between a shareholder and stakeholder focus based on the macroeconomic environment could be implemented as easily as announcing a supportive approach during a crisis and voting accordingly. Deeper measures might include engagement with companies undertaking layoffs during a recession and with companies that are sitting on capital or returning it to shareholders.

[\*178] A switching approach would allow the economy to reap the benefits of a close focus on efficiency during good economic times and the benefits of a private stimulus during bad economic times. An efficiency focus during periods of strong macroeconomic performance could also help ensure that wasteful or inefficient projects are regularly cleared out, and that workers and consumers expect a return to normalcy during a crisis.143

However, the cleansing effect during periods of strong economic performance could go too far, with firms reducing capital reserves in good periods to ensure that there are no reserves left over in bad periods to direct to other constituencies.

It would also be difficult to implement a switching approach. It would take time to recognize a macroeconomic crisis and react to it. Incentives could also create problems. Part of the reason for an index fund to pursue a countercyclical approach would be a reputational benefit;144 that benefit would be eroded if the fund was perceived as adopting a ruthless shareholder-focused approach during any part of the business cycle. Stakeholder governance also normally relies on norms and understandings within the business community to inculcate a sense of responsibility and cause leaders to internalize their obligations to stakeholders;145 it may not be possible to create strong understandings that can be toggled like a switch. Still, there are potential responses. Macroeconomic policy would have low salience to consumers during the business cycle's peak. And the idea that businesses should do more to protect their communities during a crisis is a natural one that may be adopted by business leaders.

C. Installing the Approach

Advocates might use three broad categories of tools to install a countercyclical approach. First, index funds can announce positions and exhort business leaders to follow them. Major index funds have a bully pulpit within the business community, and are familiar with using that pulpit to urge revisions to corporate governance arrangements. For example, Larry Fink, the leader of BlackRock, has emphasized the need for businesses to have a sense of purpose, and to focus on sustainability in order to be profitable in the long term.146 Even standing alone, statements of this type serve a valuable function in coordinating activities and developing norms. Business leaders can be encouraged to use their discretion to orient themselves toward stakeholders, can [\*179] be pointed toward a common approach that will be more impactful, and can be reassured that they will not be going it alone if they do take action.147

Second, index funds can use their votes. Withholding, or threatening to withhold, votes from directors at companies that fail to adopt a countercyclical approach would send a powerful message. Voting in connection with merger transactions and activist efforts could also be an important lever. Funds could oppose transactions that are based on operational synergies that will reduce employment, either by voting against deals that need to be approved at target companies or by backing management in defending against such offers. While relatively few companies will be involved in such transactions, a few interventions would be sufficient to send a strong and meaningful message.148

Third, index funds could undertake more intensive stewardship activities, actively monitoring and engaging with companies. For example, a fund could select companies with high potential to deliver stimulus and either engage with management proactively or defensively upon announcements of potential job cuts.149

Critics might question the ability of index funds to implement this approach through more intensive stewardship.150 The countercyclical corporate governance approach would also place new demands on their operations by requiring them to form views on macroeconomic issues.

The capacity of index funds to implement the approach will depend in part on the precise approach taken. Index funds probably could not actively engage on a broad array of business issues with every company represented in their portfolio. But issuing a clear statement of their approach and then engaging in targeted and high-profile interventions would send the same message and create similar incentives.

The differences in approach are analogous to the differences between the "police patrol" and "fire alarm" models of political oversight.151 In a police patrol model, the supervisor actively looks for possible infractions, thus expending resources on investigating many situations where there has been no infraction.152 [\*180] In a fire alarm model, the supervisor responds to infractions after they have been identified by key constituencies.153 This requires much less active monitoring, and makes it easier to claim credit with the constituencies that are affected. Index funds plainly have the capacity to respond if the problem is obvious or others sound the alarm, even if they lack the capacity to proactively patrol the corporate landscape for possible issues.

Admittedly, index funds would need to formulate policies based on macroeconomics. But funds should be able to attract and use the necessary expertise. Indeed, the leaders of index fund companies already have fluency in macroeconomic concepts, and are comfortable opining on macroeconomic policies.154 Difficult decisions could also be outsourced to competent bodies like the Federal Reserve. For example, instead of reaching an independent judgment about the state of the economy, index funds could commit to acting when the federal funds rate drops below some threshold near zero percent.155

D. Adjustments to Corporate and Securities Law

As noted above, shareholder primacy is the conventional model for understanding Delaware corporate law. This section urges that shareholder primacy should not be an obstacle to a shareholder implementation of countercyclical corporate governance, and turns to adjustments that would provide further support.

1. Consistency with Current Law

Delaware law would not prevent actual shareholders from implementing a countercyclical approach. Delaware jurists routinely caution that corporate actors are normally required to prioritize the interests of shareholders above all other constituencies.156 But Delaware law does not require corporations to maximize short-term share price, or to submit all corporate decisions to continuous shareholder referenda.157 Between those two clear boundaries is a wide range of possibilities. Shareholder primacy could be understood as a set of mandatory commands designed to advance the narrow financial interests of an [\*181] idealized shareholder, or as an approach that permits private ordering by the shareholders themselves.158

Although some cases provide support for the mandatory view, the broader tendency of Delaware law is toward private ordering by the shareholders.159 For example, Delaware courts have become more deferential in their review of transactions that have been approved by a vote of informed disinterested shareholders.160 Delaware's public benefit corporation statute has similarly been amended to permit a simple majority of shareholders to reframe a corporation's purpose and make it explicitly responsive to stakeholder interests.161

At a more basic level, it is hard to imagine a Delaware court holding anyone liable for pursuing an expansionary business plan during a recession. Resisting layoffs, expanding production or investment, or pursuing a risky project are fairly standard business strategies that are generally subject to highly deferential review under the business judgment rule.162 To the extent any [\*182] shareholders disagree with the strategy set by the directors and officers, they can obtain relief not from legal restrictions but through voting.

2. Removing Uncertainty

Properly understood, Delaware law would not block a countercyclical corporate governance scheme backed by shareholders like index funds. But there are Delaware precedents that are routinely cited in opposition to stakeholder governance, and that may be used by opponents of a countercyclical approach. Contextualizing those cases would remove uncertainty and would make a countercyclical governance scheme more effective.

For a brief period, Delaware courts seemed prepared to allow corporate boards to deploy defensive measures to prevent corporate raiders from harming nonshareholder constituencies.163 But in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,164 the Delaware Supreme Court suggested that there were limits on the extent to which a corporate board could consider such constituencies:

A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. . . . However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.165

As a result, the Revlon board was not permitted to end the auction.166

As others have observed,167Revlon arose in a unique context where a sale and breakup of the corporation had become inevitable. That context had the effect of flattening out the heterogeneous preferences of shareholders there was no competition between investors with short- and long-time horizons, because the company would not exist in the long term and ensuring that no corporate policy benefitting stakeholder interests would endure. Put differently, in Revlon, the only benefit that shareholders could derive from the corporation was the highest possible sales price. As a result, the board was required to have a single-minded focus on that goal. By contrast, shareholders urging a corporation to act in a countercyclical mode would have much to gain from corporate policies that expand employment and promote economic activity, and Revlon would not preclude corporate actors from meeting those needs.

[\*183] The eBay case168 provides a more complex statement on corporate priorities. eBay purchased a stake in craigslist in August 2004; the other two shareholders, Craig Newmark ("Craig") and James Buckmaster ("Jim") together owned a majority of the shares and controlled the board.169 After eBay opened a competing business, Craig and Jim caused craigslist to adopt various measures in 2008, including a poison pill that prevented eBay from ever acquiring more shares.170 Craig and Jim defended the plan as necessary to protect the corporate culture of craigslist, which was based on the website refusing to monetize services.171 The court rejected that explanation, concluding that Craig and Jim had failed to prove the existence of a corporate culture "that sufficiently promotes stockholder value to support the indefinite implementation of a poison pill."172 The board could not justify a poison pill using a corporate policy of refusing to monetize the website, given that the policy "admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders."173 The court also held that the poison pill would be an unreasonable way to pursue the stated purpose, as Craig and Jim could keep the culture in place as long as they held their shares and retained control.174

The eBay case generated substantial critical commentary,175 and there are many contexts in which it is problematic for an entity to be unable to credibly commit to maintaining a noneconomic policy even after its existing shareholders have departed.176 But regardless of eBay's impact on the general project of stakeholder governance, it does not prevent implementation of a countercyclical corporate governance approach in which the current shareholders urge the corporation to enact policies that advance their purely economic interests.

The events surrounding Air Products & Chemicals, Inc. v. Airgas, Inc.,177 are relevant to the overall framework. Beginning in 2009, Air Products sought to acquire Airgas, another supplier of gasses and related goods.178 The approach turned public and hostile, with Air Products launching a tender offer for Airgas [\*184] shares that was conditioned on the Airgas board dismantling its takeover defenses.179 Air Products repeatedly raised its offer price, and even persuaded Airgas shareholders to elect three nominees selected by Air Products to the Airgas board.180 Yet the Airgas board including the three Air Products nominees insisted on maintaining a poison pill takeover defense that prevented the tender offer from going through.181

The Delaware Chancery Court upheld the Airgas board's actions after concluding that it was a reasonable response to the threat that a majority of shareholders might choose to tender into an offer at an inadequate price.182 The court reached the conclusion with apparent reluctance, stating explicitly that Airgas shareholders were fully informed and had taken enough time to consider the Air Products offer.183 But it held that because the board had made the required showings of good faith and a legitimate threat from inadequate price, the board was justified in "blocking the tender offer and forcing the bidder to elect a board majority that supports its bid."184

This result seems to be a decisive refutation of shareholder primacy.185 But if the shareholder-oriented language of Delaware decisions is taken seriously, the case actually presents a challenge for stakeholder governance. It suggests that Delaware law enforces some concept of shareholders' interests that is abstracted away from the actual expressed preferences of the shareholders themselves.186 Even where shareholders seemed to have placed directors on the board to clear the way for a sale,187 the board was permitted to take actions for the specific purpose of preventing shareholders from voluntarily selling their shares. The court seemed to recognize a platonic purpose of the corporation, divorced from shareholders' actual views, which directors were empowered to defend. Such a reading might suggest that countercyclical corporate governance could be barred by courts, even if it is accepted by key shareholders like index funds.

This would be a misreading of the case. The board's power was derived from the fact that it had been elected by shareholders, and would have to be [\*185] reelected by shareholders to maintain the defense.188 Shareholder voting remains largely sacrosanct. Even though Delaware courts permit boards to frustrate hostile tender offers, boards are largely precluded from interfering with shareholder voting.189 The corporation is not a self-perpetuating entity with goals that courts will endlessly defend even against shareholder opposition.190

This difference in treatment between boards interfering with a shareholder's decision to sell her shares and boards interfering with a shareholder's vote also suggests that Delaware law is designed to facilitate enlightened deliberation by shareholders. The difference might be rationalized as pure formalism,191 or as the result of strategic judicial behavior.192

But a more powerful explanation is that Delaware law allows boards to structure the shareholders' decision in the way that best engages their moral and practical faculties.193 As Professors Oliver Hart and Luigi Zingales have explained, a given shareholder's decision is unlikely to make the difference in whether a takeover goes through.194 This fact means that a shareholder has little reason to resist a premium offer to buy her shares, as she will not be morally responsible for any unsavory conduct that results and cannot prevent the damage to her other interests.195 But it also means that a shareholder has no reason to vote for a transaction that she would prefer not to occur, either on moral grounds or out of concern for other practical interests.196 By allowing boards to require that decisions be made through voting instead of sales, Delaware law ensures that corporate control decisions maximize the [\*186] shareholders' welfare as understood by the shareholders themselves, and not simply the financial value of company shares.

Courts and scholars could advance a countercyclical corporate governance scheme by placing the precedents in their proper context, thus eliminating confusion. It could also provide useful support by changing norms. Any system of corporate governance including one based on pure shareholder wealth maximization will ultimately depend on directors and officers internalizing a correct understanding of what values they are supposed to serve.197 Mixed messages from the legal system interfere with internalization of the proper norms.

3. Preventing or Rolling Back Contrary Reforms

Countercyclical corporate governance would depend on authorities refraining from introducing new legal obstacles to institutional investors using their power to vote and engage with corporations.

But various commentators and government actors have sought to prevent certain institutional investors from using their power at a given corporation to advance any goal other than maximizing the value of their investment in that corporation.198 In support of this effort, Trump administration Secretary of Labor Eugene Scalia stressed his view that "[p]rivate employer-sponsored retirement plans are not vehicles for furthering social goals or policy objectives that are not in the financial interest of the plan."199 The Department of Labor published a final rule on November 13, 2020, advancing these principles.200 These regulatory changes were put on hold by the Biden administration. In a March 2021 statement, the Department of Labor stated that it intended to revisit the rules and that it would not enforce the rules in the interim.201

[\*187] Even if they were reinstated, such rules may not prohibit support for countercyclical corporate governance. Casting votes to hasten the end of a recession would be in the pecuniary interest of underlying customers and would secure an economic benefit for them.202 But introducing uncertainty on the issue could diminish the willingness of institutional investors to pursue the approach. Indeed, the Biden administration suggested that in the few months that they had been in force, the rules had "already had a chilling effect on appropriate integration of ESG factors in investment decisions, including in circumstances that the rules can be read to explicitly allow."203

If it did prove to be an obstacle, government regulators should be willing to introduce appropriate exceptions for macroeconomic context. Whether motivated by a general skepticism toward financial institutions exercising power204 or a partisanship-inflected view on issues like climate change and social stability,205 the proposed reforms are not deliberately targeted at countercyclical corporate governance.

4. Facilitative Reforms

The law could do more to facilitate countercyclical efforts by private actors. A supportive reform would encourage institutional investors to better serve the real interests of underlying customers by focusing on issues that impact sustainable growth.206

Expanded disclosure requirements would also help investors hold managers accountable for failing to deliver stimulus. Disclosure on workforce issues would be particularly useful in evaluating whether companies have selected employment levels that are appropriate for a given point in the business cycle. This would not require a substantial departure from ordinary [\*188] considerations, as there has already been investor agitation for expanded disclosures on human capital issues. For example, when adopting updates to Regulation S-K, the Securities and Exchange Commission received extensive comments urging that a variety of employee issues were important to investment decisions.207

V. GOVERNMENT IMPLEMENTATIONS

The government could also directly install a countercyclical approach to corporate decision-making. This part provides a brief and nonexhaustive sketch of potential strategies for reform, with the goal of identifying some promising avenues for future analysis. Section V.A considers changes to the legal regime governing extraordinary corporate events, such as mergers and bankruptcies. Section V.B considers potential changes to ordinary corporate governance, such as changes to fiduciary duties or the introduction of a codetermination scheme. Section V.C considers the potential for governments to act in their capacity as shareholders. Finally, Section V.D considers tax and regulatory reforms.

A. Changing Regulation of Extraordinary Corporate Events

The law's approach to mergers and acquisitions could be revised. Delaware law might empower boards or other groups to resist takeovers if they would cause harm to stakeholders. For example, a corporation might resist a takeover if it would result in mass layoffs. At a minimum, Delaware could expressly revive the approach of Unocal Corp. v. Mesa Petroleum Co.208 and reject the approach of Revlon.209 As a stronger measure, Delaware might empower outside groups to prevent takeovers, or permit boards to empower outside groups.210

There are some good reasons to be skeptical of such measures, unless outside groups are given formal powers or the board is given incentives that align to stakeholders' interests. Some states have adopted "constituency statutes" intended to permit boards to consider stakeholders' interests, but because the statutes did not change incentives or stakeholders' powers, it is not [\*189] clear that they had the desired effect.211 Empowering certain constituencies may also frustrate a countercyclical approach because constituencies like creditors would not want firms to take the steps that would most increase economic activity.212

An alternative would be to revise government and judicial review of proposed transactions. Under current law, operational synergies are generally seen as a positive feature of merger transactions. If a shareholder of the acquired company demands an appraisal that is, to be paid the value of their shares as determined by a court the value of the synergies will be deducted from the appraisal result.213 Similarly, antitrust regulators are more likely to approve a transaction if it creates "efficiencies" by cutting costs.214 If these synergies are to be realized by slashing staff or spending, they may not be helpful during a recession.215 As a result, eliminating the credits under current law may be worthwhile in a recession. Indeed, an almost total inversion of the normal approach for example, granting workers an "appraisal" right based on the value of their eliminated role in the company may be worth considering.216

Reforms might target other extraordinary corporate events. Professor Zachary Liscow has proposed revising bankruptcy practice during periods of high unemployment.217 Under his approach, bankruptcy judges would strive to preserve jobs in reorganizations that occur during a recession, provided that the jobs could be preserved at lower cost within the reorganization than through ordinary fiscal policy.218 The regime would pick up firms outside the reach of [\*190] the index fund mechanism index funds are unlikely to have a meaningful stake in a bankruptcy reorganization. And it would help address concerns about increased risk taking by firms that face potential insolvency,219 by ensuring that a bankruptcy would not necessarily lead to mass layoffs.

B. Changing Ordinary Corporate Governance

The federal government could also revise the fiduciary duties of directors and officers at substantial firms220 or at firms receiving bailout funds.221 Instead of having a duty to maximize the value of a corporation for the benefit of its shareholders, corporate officers and directors would have a duty to serve other groups. Uniform duty rules have drawbacks.222 But they would help limit the need for customized engagement by shareholders, would facilitate a coordinated response by orienting all corporate leaders in the same direction, and would put real teeth behind the concept.

If the reform were pursued, action at the federal level seems appropriate. Delaware is an attractive site for normal corporate law decision-making in part because it is not a major economic power. As a result, it is not normally tempted to manipulate the content of corporate law to advance an industrial policy in the way that larger states might be.223 But that advantage in normal times could be an impediment to a countercyclical corporate governance scheme, which would seek to align corporate law with economic policy.

At the same time, federalizing corporate law would be a major change that would carry substantial costs. For the scheme to work, decisions would also have to be made rapidly; relying on Congress would render the approach as slow as ordinary fiscal policy tools. This problem might be addressed by delegating authority to an expert agency like the Federal Reserve, or an expert bench of commercial judges.

The federal government could also pursue a more fundamental reform, such as implementing a codetermination scheme in which workers are entitled to elect representatives to the boards of important companies. Proposals have [\*191] been floated in Congress,224 and ideas have been debated in the academic literature.225 Such a scheme would almost certainly have to be mandatory and federal to prevent evasion.226

A full evaluation of an American codetermination scheme would be beyond the scope of this Article.227 But codetermination schemes might help limit the duration of a macroeconomic crisis by helping firms to renegotiate relationships with employees instead of engaging in layoffs.228 By empowering workers within the corporate structure, it could also help prevent layoffs that deepen a crisis, even if such layoffs would generate some short-term financial returns for undiversified shareholders.

However, codetermination would be a blunt instrument for implementing a countercyclical approach. By institutionalizing a particular allocation of power, codetermination would reshape corporate decisions even outside of an economic crisis. The changed decisions might entail underinvestment in other forms of capital, or an inefficient deployment of labor across firms.229 A firm with a codetermination governance structure may also provide inefficient [\*192] stimulus. For example, if existing employees have a seat at the table and potential employees do not, a company might choose to pay existing employees more instead of hiring an additional unemployed worker.230 But delivering funds to someone who is unemployed would be likely to prompt more spending a cash-strapped, unemployed worker will be more likely to spend a marginal dollar than an employee who has been drawing a stable salary and thus provide more stimulus.231 Codetermination could also unhelpfully make firms more risk averse by giving partial control to workers, who are unable to diversify their holdings to manage firm-specific risk in the way that shareholders can.232 A broader codetermination scheme that addressed these issues by reserving seats for interest groups other than current workers could prove difficult to install and administer.

Where it is practiced, codetermination is just one of a number of interrelated mechanisms, including some that can help mitigate these tensions.233 For example, strong trade unions would have the means and incentives to attend to the health of the overall labor market, instead of focusing exclusively on the parochial interests of employees at a particular firm. But codetermination in isolation could have different effects, which would make it a problematic tool for a countercyclical approach.

C. Government as Shareholder

Government entities might build up equity stakes and use their voting power to support a countercyclical approach. This would represent more of an evolution than a revolution: sovereign wealth funds are already used to support the macroeconomic policies of various countries,234 and government entities in the United States are increasingly interested in using equity investments to [\*193] support public policy.235 Such an approach could also be used in combination with revised strategies by the Federal Reserve. If the Federal Reserve purchased equity stakes in open market operations, it could use the accompanying control rights to implement a countercyclical approach.

This approach would raise a host of problems. At a mechanical level, the government would have to manage and monitor a large portfolio of equity securities. The government would also have to manage dangerous tensions it might be tempted to protect its portfolio companies by using its regulatory muscle to lean on competitors or counterparties, or to respond to political pressures by forcing portfolio companies to take value-destroying steps.236

Some of these tensions might be reduced by enacting a clear statutory regime,237 or by delegating authority over stewardship decisions to an insulated and relatively apolitical agency. And many of the tensions are in play even without governments taking or using equity stakes, as the government and community can already pressure companies to fulfill an expected social role.238 But they are substantial issues, and may prompt serious opposition to a new scheme of government ownership of equity.

D. Taxes and Regulations

Governments might adopt tax or regulatory schemes that encourage corporations to take countercyclical actions. While these measures would not represent internal reforms to corporate governance in the sense of changing corporate objectives or decision-making, they might induce similar behavior.

One strategy might be to target retained earnings during recessions, with the goal of inducing corporations to spend or invest funds instead of hoarding them in a crisis. For example, an undistributed profits tax designed to prevent corporations from holding on to excess capital was proposed during the New Deal.239 Such a measure could force corporations to spend, invest, or return [\*194] capital to investors. But it could also cause corporations to decrease capital reserves in periods of strong economic performance, making them more vulnerable to shocks.240 And as discussed above, distributing value to shareholders may not be useful during a macroeconomic crisis.

Another strategy would be to target the means by which corporations distribute value to shareholders during recessions. At an extreme, the government could ban stock buybacks during recessions.241 Alternatively, the Securities and Exchange Commission could withdraw the current safe harbor for share repurchases during recessions.242 The government might create similar incentives by removing tax code preferences for capital gains or instituting transactions taxes that would help limit shareholder returns from corporate financial activities that provide a quick boost to share prices without creating long-term value.243 While some recent legislative and regulatory changes are steps in this direction, the reforms might be strengthened and tied more directly to macroeconomic goals.244

A final strategy would be for the government to use regulations to build up centers of "countervailing power" that could deal with corporations at arm's length.245 Empowering external forces like organized labor would shape the environment in which corporations operate, driving them toward outcomes that are similar to those that would be achieved by internal corporate governance reforms like codetermination.246 An exploration of such external reforms would [\*195] be beyond the scope of this Article, but such reforms are a viable path for changing corporate behavior.

**Precedent of automatic regulatory updates enables emerging risk response---extinction.**

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Public policy must address threats that will manifest in the future. Legislation enacted today affects the severity of tomorrow's harms arising from biotechnology, climate change, and artificial intelligence. This Essay focuses on Congress's capacity to confront future threats. It uses a detailed case study of financial crises to show the limits and possibilities of legislation to prevent future catastrophes. By paying insufficient attention to Congress, the existing literature does not recognize the full nature and extent of the institutional challenges in regulating systemic risk. Fully recognizing those challenges reveals important design insights for future-risk legislation.

We first examine Congress as an institution to show that forces are stacked against its ability to enact legislation addressing future harms. Features of Congress's internal organization and procedures, incentives of legislators and industry actors, the evolving complexity of many regulated industries, and the reality that statutes tend to erode in effectiveness over time collectively mean that lawmakers will tend to underproduce legislation aimed at preventing future harms. The stars will occasionally align for landmark legislation, like after the financial crises that generated new regulatory statutes in the 1930s and 2010. But as a general matter, the playing field is tilted against Congress taking action.

This tilted playing field, we argue, points toward a roadmap for how Congress should seek to regulate the risk of major crises when it periodically does have the opportunity to do so. We posit several possible answers to this question, each informed by the institutional features that will generally make it hard for Congress to adjust or strengthen certain future-risk legislation once passed. Congress ought to use automatic triggers so that its legislation updates itself in response to changing conditions; extend expansive authority to agencies with explicit discretion for agencies to address threats that may have been unforeseen at the time of earlier legislation; create strong regulatory minimums that agencies can increase but not decrease, as a safeguard against agency capture or inaction; and encourage enforcement efforts by a diverse range of federal, state, and private actors. Better understanding Congress's institutional limitations, in short, can provide a roadmap for how to enact more effective regulatory legislation in the future.

INTRODUCTION

Public policy must address threats that will manifest in the future. Climate change is undoubtedly reshaping our physical world in the present, but the worst harms of climate change will come in the decades ahead. Biotechnology innovation holds the promise of curing disease, but it also gives rise to risks that are not fully understood. And many warn that artificial intelligence, for all its promise, also holds profound risks. In each of these areas, the need for regulation exists long before harms materialize, and long before the full nature and extent of future harms are certain.

These newer risks share much in common with a centuries-old challenge: the risk of financial crises. For all its benefits, finance has long raised the possibility of systemic meltdowns. Economic history is rife with financial crises that have had immense human, economic, and political costs.1 Regulation aimed at [\*377] preventing financial crises provides a case study of how government performs in the face of a particular type of risk: a likelihood of private sector actors causing large-scale societal harms at some point in the future, but when the timing, character, and magnitude of those harms are at least somewhat unpredictable.

In this Essay, we focus on how one part of government Congress can, does, and should respond to these sorts of risks. We do so through an extended examination of Congress as an institution and the incentives that its members face. This approach reveals several reasons why financial regulatory legislation is difficult to enact. Members of Congress focus on their immediate reelection prospects, while regulating to prevent future harms usually means imposing costs in the present. The private sector interests that bear those costs will often mobilize against reform. The uncertainties that necessarily surround future harms also make it easier to argue against proposed legislation. A study of the intersection of Congress's features with these and other features of financial regulation yields a disquieting conclusion: lawmakers are structurally incentivized to underproduce legislation aimed at preventing financial crises.2

Despite these dynamics, Congress sometimes does legislate to promote a systemically sound financial system, often in the aftermath of a crisis when the dynamics just described can be temporarily overcome.3 The question then becomes how Congress [\*378] should seek to regulate when the opportunity arises. We suggest that Congress ought to use automatic triggers so that its legislation updates itself in response to changing conditions; extend expansive authority to agencies with explicit discretion for the agency to address threats that may have been unforeseen at the time of the legislation's enactment; create strong regulatory minimums that agencies can increase but not decrease, as a safeguard against agency capture; and encourage enforcement by a diverse range of federal, state, and private actors.

Each of these prescriptions follows from our general diagnosis: Congress should legislate under the assumption that future Congresses and regulatory agencies will underproduce in the creation of new legal rules and their enforcement relative to the risks of future harms. This diagnosis should prompt Congress, when it does enact legislation to promote financial stability, to legislate more expansively than it would in a world in which future Congresses could be relied upon to act.4

It may seem counterintuitive to propose that Congress seek to push further than what seems necessary. Overregulating is undesirable. It can stifle economic growth and reduce social welfare. But realism demands weighing the risk and probability of overregulation against the risk and probability of underregulation. We argue that central features of the contemporary Congress make underregulation more likely than overregulation. This should not be taken to minimize the potential harms of excessive or wrongheaded regulatory mandates. It is only to say that Congress's structure makes it more likely that Congress does too little than too much to address future risks.

Before proceeding, a few words are in order about our focus on a particular actor (Congress) and a particular type of policy intervention (legislation aimed at preventing financial crises). Existing legal scholarship on financial regulation often considers the role of administrative agencies,5 but Congress, as the author [\*379] of the statutes that give agencies their authority, is the first mover. Congress writes primary rules and also creates, empowers, structures, and funds federal agencies.6

We focus on regulation aimed at mitigating the risk and severity of financial crises for two reasons. First, and most obvious, is the critical importance of the topic. Financial crises can cause great societal turmoil and cost millions of people their jobs and homes. Financial institutions are ubiquitous, touching every area of economic life, and interconnected, with problems in one part of the system quickly reaching others. These features make the stakes of financial regulation especially high.

Second, financial crises have historically posed a distinctive challenge for Congress. Many areas of regulation address frequently recurring harms such as automobile accidents, air or water pollution, or dangerous consumer products. These recurring harms differ from those, like financial crises, that are always a possibility but only sometimes materialize. The risk of a financial crisis more closely resembles "tail risks" like pandemics, terrorist attacks, or catastrophic harms arising from technological change. Understanding the dynamics of legislation aimed at preventing financial crises can shed light on the dynamics of legislation focused on future risks of other sorts.

Our thesis does not depend on seeing financial regulation as unique. To the contrary, financial regulation holds important lessons for these other domains. But financial regulation is a strong case study of how to legislate in the face of private sector actors that at once provide great social benefits and risk imposing widespread social harms. Financial markets, carbon-emitting activities, and new technologies all pose challenging regulatory questions precisely because they are so central to our lives, and the question for regulators is how to preserve their benefits while protecting society from their risks.

I. CONGRESS: POLITICS, ORGANIZATION, AND INCENTIVES

How does Congress perform in legislating to prevent financial crises? On one account, Congress underproduces legislation that would mitigate systemic risks, and in doing so opens the door [\*380] to future crises.7 On another, Congress overregulates, and in so doing stifles innovation, imposes excessive compliance costs, and restricts the productive flow of capital.8 These dueling accounts raise the question of Congress's performance in legislating to mitigate systemic risk.

The features of Congress as an institution can provide answers. Insights from political science about the structural design of Congress and the incentives of its members allow us to draw lessons for how that body is likely to perform in the domain of financial regulation and other areas involving future risks.

Our conclusion is simple: institutional features of Congress, the motivations and incentives of its members, and the nature of the subject matter all suggest that it is more likely that Congress will underproduce rather than overproduce legislation meant to reduce the likelihood of financial crises and other future risks. This does not suggest that Congress will never legislate in this domain, or even that it will never overlegislate. But it does suggest that, in the aggregate, there is a greater risk that Congress will do too little as compared to too much.

Scholars have recognized that financial regulatory legislation faces hurdles on Capitol Hill.9 But without tying concerns about [\*381] financial regulators to the structure of Congress, there is a danger of underappreciating the extent of the institutional problem and thus of underestimating what legislative changes will be needed moving forward.

A. Concentrated Costs of Regulatory Legislation

A first set of challenges results from the allocation of the costs of legislation aimed at preventing future crises. Put simply, the costs of such policies will fall on financial institutions and, disproportionately, large financial institutions. These are precisely the sorts of institutions well positioned to mobilize to defeat legislation that harms their short-term interests.10

Political economists have long emphasized the difficulty of enacting legislation that imposes concentrated costs on industry, because regulated entities have strong incentives to oppose policy changes and face minimal coordination costs in doing so.11 To see how concentrated costs characterize much of financial regulation, especially regulation focused on systemic risk, consider some of the reforms enacted in the Dodd-Frank Wall Street Reform and Consumer Protection Act.12 Some of Dodd-Frank's key reforms apply only to a relatively small number of firms. A system of enhanced oversight (such as capital buffers and stress) applied only to institutions with over $50 billion in assets.13 The Financial Stability Oversight Council is empowered to designate institutions other than banks, such as large insurance companies, as systemically important and thus requiring regular monitoring.14 [\*382] These and other provisions were targeted at a well-defined group of large firms.15

When proposed legislative provisions would impose costs only on a relatively small number of large firms, public choice theory suggests that those firms are ideally suited to lobby against those provisions.16 In practice, financial firms have often successfully mobilized to block provisions that would have imposed new regulatory requirements.17 Firms also sometimes successfully lobby to roll back existing regulatory mandates. On this score, consider Congress's 2018 partial rollback of Dodd-Frank.18 The rollback loosened federal oversight rules and capital requirements for all but the very largest banks.19 It passed both chambers by wide margins, with some Democrats joining the Republican majority to support the bill.20 This broad support was driven by a major lobbying campaign from midsized banks.21 In one Senator's words: "The lobbyists were everywhere. You couldn't throw an elbow [\*383] without running into one."22 These lobbyists backed up advocacy with campaign contributions, especially targeting vulnerable Democrats facing reelection challenges.23 A banking industry trade group spent $125,000 on advertisements thanking one senator for helping shepherd the bill to passage.24 Major backers of the rollback included Silicon Valley Bank and Signature Bank, both of which would later fail, in part due to a lack of oversight and low capital reserves.25 Dozens of senators received contributions affiliated with the two banks during the bill's consideration.26 Although it is difficult to directly link these efforts to the bill's passage, this flood of lobbying and campaign cash presumably smoothed the way to the rollback's enactment.

Similar advocacy enabled the inclusion of the so-called "Enron loophole" in the Commodity Futures Modernization Act of 200027 (CFMA). The Act is best known for deregulating financial derivatives, and it specifically included a provision deregulating energy derivatives.28 This provision was largely the result of efforts by Senate Banking Committee Chairman Phil Gramm (R-TX), who received campaign contributions from Enron and whose wife served on the company's board.29 Documents released after Enron's collapse showed that the company successfully lobbied Gramm to [\*384] ensure that favorable carve-outs for energy derivatives remained in the final version of the CFMA.30

Asymmetric advocacy is somewhat unavoidable, but it is exacerbated by contingent policy choices. The culprits here are familiar lax regulation of campaign finance, lobbying, and the revolving door of personnel between government and industry and other scholars have documented in detail how those features of federal law and legislative politics have allowed for financial industry influence on Capitol Hill.31

In sum, financial institutions have the incentive and ability to resist congressional legislation that would seek to make the financial system more systemically sound while imposing concentrated costs on industry. This is the first major dynamic that makes it challenging for Congress to regulate to mitigate the risk of financial crises. The obvious counterweight to the dynamics just discussed would be political or institutional forces pushing for stricter regulatory legislation. But those countervailing forces are often weak, for reasons we turn to next.

B. Benefits of Regulatory Legislation: Diffuse, Long Term, and Hard to Trace

Interest group dynamics look very different when we turn to the benefits of legislation aimed at promoting financial stability. Three features of those regulatory benefits make congressional action challenging: the diffuse character of regulatory beneficiaries, the timing of regulatory benefits, and the difficulty of tracing positive changes in the world to particular regulatory interventions.

First, the diffusion of regulatory beneficiaries makes collective action difficult. The benefits of fewer financial crises are widely shared. It might seem that this common interest would promote [\*385] effective policy, but interest group theory suggests that diffuse benefits can disincentivize mobilization. Each individual's stake in a well-functioning financial system is small enough that it provides little incentive to organize in favor of stricter regulation.32

Second, a timing issue also poses a challenge to legislation that promotes a sound financial system. The costs of financial regulation are realized in the present, when firms must pay compliance costs and forgo the profits they would have made from prohibited conduct. But the benefits of avoiding financial crises are realized in the future: today's regulation might prevent (or ameliorate) a crisis years or decades down the road. This timing problem has implications for both regulatory beneficiaries and for legislators. For beneficiaries, it compounds the difficulty of mobilizing: the absence of present benefits of financial-soundness legislation makes organizing difficult. This contrasts with many other sorts of regulatory legislation legislation to promote clean water, ensure safe consumer products, or bar discrimination that can have more immediate benefits. For members of Congress, the fact that regulatory benefits accrue in the future can make financial soundness a lower priority than those issues for which regulation has a short-term impact.33

Third, it can be hard to trace the impacts of financial stability legislation. In some other contexts, the effect of a regulatory intervention is easily traceable: a ban on lead paint and pipes causes the phasing out of those products and, ultimately, better health outcomes. By contrast, it is virtually impossible to trace the precise impact of Dodd-Frank's providing for increased supervision of big banks or the creation of the Financial Stability Oversight Council (FSOC). Proponents have credibly claimed that those reforms made the financial system sounder, but it is hard to prove that [\*386] definitively.34 The presence and severity of any financial crisis will always be multicausal. Legislative interventions can reduce the risk or magnitude of a crisis, but it will almost always be contestable precisely what impact those interventions had.

This traceability problem poses a particular challenge for legislators. Reelection-seeking members of Congress aim to claim credit for tangible accomplishments that benefit their constituents.35 It is much harder to claim this sort of tangible benefit for financial regulatory legislation. This hurdle can be overcome when, in Professor Douglas Arnold's words, "an issue is salient or potentially salient" to the public and "there are talented leaders in Congress who will champion the interests of inattentive citizens" in the legislative process.36 These conditions, especially public salience, will typically not hold for financial regulatory legislation, except perhaps in the aftermath of crises.

\* \* \*

All of this amounts to a lopsided interest group environment when it comes to legislation aimed at preventing or mitigating the severity of financial crises. The costs of such legislation are incurred by financial institutions that have the means, motive, and opportunity to oppose them, while the benefits of such legislation can be diffuse, long-term, and hard to trace all of which dampens advocacy in their favor.

C. Congressional Organization and Procedure

Congressional organization and procedure could, hypothetically, be a force that eases the enactment of legislation to promote a stable financial system and guard against other sorts of future risks. In practice, however, the organization of Congress makes financial regulatory legislation difficult to enact. The culprits [\*387] here are many, including committee size,37 the seniority system,38 and even bicameralism itself.39 Reforms to any of these could make the legislative process more friendly to legislation addressing future threats, including financial crises.

Perhaps the most important institutional feature of Congress that impedes regulatory legislation is the Senate filibuster. A defining feature of the contemporary Congress is that the Senate can proceed to a final vote on most legislation only with the support of a three-fifths supermajority.40 It has been extremely rare in the modern Senate for either party to control sixty seats.41 As a result, the supermajority requirement allows a unified minority party in the Senate to block legislation, even if that legislation is favored by the President, the House, and a majority of the Senate. The filibuster thereby makes it difficult to enact regulatory legislation of many sorts, including financial regulatory legislation.

Consider, in this regard, the fate of Dodd-Frank. The final Senate vote tally on the legislation was 60-39.42 This is a wide margin in numerical terms, but the narrowest possible margin given Senate rules. The legislation was possible only because of large Democratic majorities elected on the heels of the Global Financial Crisis. The bill was supported by fifty-seven Democrats and Democrat-aligned Independents43 a significantly larger majority than either party typically controls in the contemporary Senate. Dodd-Frank won the support of only three Senate Republicans, all hailing from blue states.44 This vote tally shows that, even in the [\*388] wake of a financial crisis and with an unusually wide Democratic majority, Senate rules would have doomed Dodd-Frank if even one Senator had voted differently. It is no surprise that in more ordinary times, the filibuster renders most financial regulatory legislation a nonstarter.

Intraparty dynamics also make financial regulatory legislation difficult. Majority-party leadership in both the House and Senate play key roles in setting Congress's agenda and determining which bills come to the floor.45 Party leaders often seek to avoid bringing forth issues that divide their caucuses. In Professors James Curry and Frances Lee's words, by "encouraging their members to hold the party line . . . , congressional parties help clarify the lines of political conflict for the public."46 Raising issues that divide party caucuses can jeopardize the leadership position of a House Speaker or Senate Majority Leader or create electoral risk for caucus members.47

Party leaders' general aversion to pursuing agendas that divide their caucuses helps explain why financial regulatory legislation is often a low priority. Today, Democrats are the far more likely party to pursue financial regulatory legislation.48 But the issue divides Democrats: progressives largely favor greater regulation of the financial sector, while moderates often resist and have sometimes supported regulatory rollbacks.49 In the late 2010s, one journalist described Democratic members of Congress as "hopelessly divided over which direction to head" on the issue, noting Democrats' hesitancy around calling for votes that would [\*389] "forc[e] their own finance-friendly members onto the record."50 In 2023, two bank failures prompted debate about whether Congress had been right to repeal key provisions of Dodd-Frank five years earlier, highlighting "internal divisions among Democratic senators, who usually pride themselves on policy unity."51

In the face of such divisions, it is no surprise that Democratic leaders prefer to focus on issues that unite the party. The early Biden Administration, for example, featured successful legislative efforts on climate, infrastructure, and social safety net policy.52 Each of these initiatives largely unified the Democratic coalition. For topics about which that is not the case including certain aspects of financial regulation party leaders will have less incentive to raise the issue, since doing so risks exposing divisions in the caucus and falling short on votes if a bill were to come to the floor.

D. Policy Complexity and Congressional Capacity

Another key challenge for regulatory legislation designed to prevent financial crises is that the complexity of the topic can outstrip Congress's capacity and expertise. The problem of congressional capacity is a general one, but it is especially acute for many future threats. These difficulties make it challenging for Congress to craft regulatory legislation to prevent financial crises.

The core problem is Congress's lack of policy expertise. Members devote much of their time to nonlegislative activities, such as fundraising and campaigning.53 Even when legislating, members are nearly all generalists who lack deep expertise.54 The search for expertise then shifts to congressional staff. But "[s]ince 1980, Congress as an institution has been steadily divesting itself of its own resources" through reduced staffing levels, increased turnover and shorter tenures, and less time in session.55 At any [\*390] given time, many young congressional staffers will not have professional experience responding to a financial crisis and some will not even have any memory of the last crisis. Some staff members (especially committee staff) have deep backgrounds in technical subject matter, but committees are less important to the legislative process than they once were.56 Internal expertise shortfalls often prompt Congress to rely on the expertise of regulated industries and their representatives, which can provide Congress with valuable information that can aid in policy formulation. But that information comes at a cost, since firms have incentives to present information in ways that further their own interests.

These general dynamics can be particularly pronounced with respect to future threats. Such threats present uncertainty along at least four dimensions. First, there is uncertainty about the probability of a given harm coming to pass. (What is the likelihood of a crisis within a given time horizon?) Second, there is uncertainty about the magnitude of harm if it does come to pass. (How bad would the crisis be?) Third, there is uncertainty about whether a proposed policy intervention would reduce the probability and magnitude of harm and, if so, by how much. (What difference would the policy intervention make?) And fourth, there is uncertainty about whether an effort to reduce risk in one domain might accidentally create spillover risk in another. (Would such spillover exist, and how bad would it be?) Each of these types of uncertainty characterizes financial stability legislation. Similar uncertainties exist for other sorts of future harms like natural disasters, acts of terrorism, or harms arising from artificial intelligence. These uncertainties either do not exist or exist to a much lesser degree when the subject matter at issue is a present harm.

Moreover, several features of the financial sector make Congress's information problem particularly acute, even relative to other future harms. Scholars have identified complexity as a defining feature of modern finance.57 Alongside this complexity is [\*391] dynamism: constant innovation in the financial system. As Professors Daniel Awrey and Kathryn Judge have noted, financial innovation includes "theoretical insights (like the Black-Scholes option pricing model), technological developments (like massive increases in computing power), and the emergence of new financial markets, institutions, and instruments (like derivatives and structured finance)."58 The emergence and rapid spread of fintech provides further dynamism and complexity to the world of finance.59

In sum, the complexity and dynamism of contemporary finance, whatever its other advantages and disadvantages, makes it especially challenging for Congress to hold a deep understanding of risks to financial stability and possible policy responses to mitigate those risks. One response to these challenges is for Congress to take steps to increase its capacity. Congress can improve staffing in general, build greater internal expertise, and take more particular steps to better predict future threats and understand how to prevent them.60 Unless those steps are taken, however, Congress will continue to face a structural shortfall.

E. (Lack of) Substitutable Spending

Across domains, the difficulty of enacting regulatory legislation often prompts Congress to turn to spending as a substitute. But spending is limited in its ability to prevent financial crises before they occur. Spending can help stabilize the system during or after a crisis, but regulatory mandates to ensure the soundness of the financial system mandates that so often seem beyond Congress's reach are necessary to fend off crises in the first instance.

[\*392] Several forces can push Congress toward preferring spending money to regulatory mandates.61 We have already seen the political economy story on why enacting regulatory legislation is often difficult concentrated harms, diffuse beneficiaries but a parallel story is that spending is often more politically feasible because it typically creates concentrated beneficiaries (fund recipients) while diffusing costs (among taxpayers as a whole). Further, Congress operates under a bifurcated system of legislative procedure that allows some spending measures to bypass the filibuster and be enacted by a simple majority vote.62

A playing field tilted toward spending and against regulatory legislation impedes financial regulatory legislation. The private nature of U.S. banking means that regulatory interventions first by Congress, and then typically via additional action by administrative agencies must be a central part of safeguarding against future crises.63 Indeed, most financial regulatory legislation aimed at promoting stability imposes binding obligations on banks and other financial institutions. The fact that Congress's institutional rules and public choice dynamics encourage Congress to make policy through spending tilts the playing field against financial regulatory legislation, making it difficult (though not impossible) to legislate on issues of financial stability.

To be sure, Congress spends massive amounts of money to respond to financial crises, but response is different from prevention. Perhaps most famously, Congress in 2008 created the $700 billion Troubled Asset Relief Program (TARP), which stabilized the financial system in the midst of a crisis but created a moral hazard problem moving forward.64 One could imagine a range of [\*393] other government responses to crisis that rely on spending: bailouts, stimulus, buying debt, or even buying banks. Each of these, however, is a possible response to crisis, not a means of averting crisis in the first instance.65

In this sense, promoting financial stability poses an especially hard problem for Congress. For some types of risks, spending can at least partially substitute for regulation: massive green energy investments can help tackle climate change,66 and spending can promote pandemic preparedness.67 In the financial stability context, by contrast, spending can less easily substitute for regulation. When the policy objective is the need to prevent financial crises before they happen, the fact that spending is not an effective substitute for regulation provides another reason why it is challenging for Congress to act.

F. Postenactment Erosion

The institutional factors just described account for why Congress might fail to legislate to address the risk of financial crises. But even when Congress does enact such legislation, its output is not the last word. Legislation is often rendered less effective by subsequent action by later Congresses, agencies, and the courts.68

First, Congress might roll back its earlier efforts. We have already discussed how only eight years after enacting Dodd-Frank, as memory of the last crisis faded, Congress repealed some of the statute's key provisions relating to bank soundness.69 Similarly, only ten years after enacting the Sarbanes-Oxley Act of 2002,70 Congress enacted new legislation that exempted certain [\*394] companies from some of the law's requirements with respect to internal controls.71 While on a longer time horizon, Congress in 1999 repealed parts of the Banking (Glass-Steagall) Act of 193372 requiring the separation of commercial and investment banking.73 Interest groups lobbied hard for these rollbacks, each of which Congress enacted on a bipartisan basis.74 These rollbacks show that outside of the immediate aftermath of a crisis, Congress may undo regulatory legislation that it previously imposed.

Second, agency action (or inaction) can render regulatory legislation less effective. Agency inaction is a major challenge in financial regulation, as in other regulatory spheres.75 Scholars have documented in detail the distinct features of the financial sector, and the agencies regulating that sector, that can give rise to industry capture. These features include revolving doors of personnel between agencies and regulated entities, agency reliance on regulated entities for nonpublic information, some agencies' dependence on regulated entities for fees to fund agency operations, competition between regulators in certain contexts that can lead to laxity, the need for financial regulators (unlike regulators in many other fields) to worry about the possible failure of regulated entities, and the prevalence of supervision and "soft law" rather than more formal notice-and-comment rulemaking in many financial regulatory contexts.76 The exact causes and character of regulatory capture are beyond our scope here. But from Congress's standpoint, one plausible lesson from the capture scholarship is that agency action will at times render financial regulatory statutes less effective than those statutes' designers would have hoped.

[\*395] Third, opponents of regulatory statutes or agency regulations implementing those statutes can turn to the courts. Empirical evidence shows that financial institutions sue their regulators less often as compared to firms in other industries.77 But courts have the potential to trim the sails of financial regulators. Doctrinal developments including the demise of Chevron deference,78 the rise of the major questions doctrine,79 and restrictions on agency adjudication80 each make it harder, at the margins, for financial regulatory agencies to act.

Finally, even without subsequent action, what political scientists have called policy drift or decay tends to make regulatory statutes less effective over time. On this view, "policies designed for today's world are unlikely to provide a perfect fit tomorrow," and in fact, over time, "the fit of policy to the world around it worsens."81 Even when regulatory provisions remain on the books, financial innovation may reduce their effectiveness. The rise of shadow banking, a system that some scholars have argued "specifically evolved to evade regulatory restrictions on banking,"82 provides one example. Even if the formal scope of banking laws was to be held constant, the increasing importance of nonbank financial institutions would have the effect of reducing the share of overall financial activity that those laws cover. Technological [\*396] changes, in banking and more broadly, can likewise create regulatory gaps.83

The bottom line from all of this is that it is challenging for a regulation-minded Congress to have the last word. The full contours of the law will be shaped by policy drift and future action by a combination of later Congresses, agencies, and the courts. Those forces will typically push policy in the direction of less strict, rather than more strict, regulation. The result is that existing legislation addressing future harms will often weaken over time.

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This Part has shown that legislating to address risks of future harms is difficult, as illustrated by the case of financial regulation to address systemic risk. In the face of these hurdles, how should Congress approach financial regulation? What, if anything, can it do to mitigate the dynamics just described? We turn to these questions next.

II. FUTURE-ORIENTED LAWMAKING

The preceding discussion showed the difficulty of Congress legislating to address future harms, with financial crises as the paradigm case. We turn next to how Congress should proceed when it does legislate.84 Our overarching answer is that, during such moments, Congress should act with self-awareness of the high likelihood of its own future inaction.

In concrete terms, this points toward four approaches to legislating for the future. First, Congress can pass legislation with provisions that automatically go into effect when certain conditions are met, obviating the need for frequent congressional action. Second, rather than trusting agencies to act, Congress can impose mandates on agencies or pass provisions with strong default rules. Third, Congress can better empower agencies to address emergent or fast-moving harms, so that agencies that have [\*397] the will to act also have the ability to do so effectively. Finally, Congress can empower other actors backup federal agencies, state agencies, and private litigants in case the primary federal agency declines to act.

This analysis is both descriptive and prescriptive. In a descriptive register, it helps explain why parts of financial regulatory law take the forms that they do. In a prescriptive register, we suggest various means of legislating that are sensitive to the limitations described in Part I. The following proposals would all help allow Congress to enable effective regulation in the face of its structural limitations. Some suggestions are also more precisely tailored to address the threat of future congressional inaction.

We aim to offer a menu of legislative design tools, rather than a specific proposal. Our focus is not on particular policies, but on the many types of tools in Congress's toolbox. We are under no illusion that Congress will soon pass new comprehensive regulatory legislation seeking to address financial crises or any other future risk. But our hope is that this Part shows ways that Congress can (and sometimes does) act that reflect an awareness of the realities and constraints described in the previous Part.85

A. Automatic-Updating Mechanisms

To account for possible inaction by a future Congress or agency, legislative provisions can update automatically in the future. Such provisions become operational only if certain specified conditions are met, which allows them to go into effect, adjust their content, or cease operating altogether without further government action.

One version of such legislation involves triggers keyed to economic or other events in the world. A long-standing challenge of financial regulation is that when the economy is booming, regulators tend to relax restrictions, thereby feeding the economic boom.86 Yet in such moments, precisely the opposite is often what is needed.87 [FOOTNOTE 87 BEGINS] For scholarly discussions of "countercyclical" financial regulation, see generally Jonathan S. Masur & Eric A. Posner, Should Regulation Be Countercyclical?, 34 YALE J. ON REGUL. 857 (2017); and Patricia A. McCoy, Countercyclical Regulation and Its Challenges, 47 ARIZ. ST. L.J. 1181 (2016). [FOOTNOTE 87 ENDS] This challenge was evident in the early 2000s, when [\*398] regulators facilitated financial innovation in mortgage lending that contributed to a housing bubble.88 When that bubble burst, regulators exacerbated the ensuing financial crisis by implementing policies that discouraged banks from lending at a moment when the economy needed more credit.89 In other words, financial regulation encouraged risky behavior, and then when the economy began to plummet, regulators exercised authority in ways that worsened the recession.

Dodd-Frank responded by directing regulators to establish rules requiring that banks hold a level of capital that "increases in times of economic expansion and decreases in times of economic contraction."90 The resulting rules were not sufficiently directive to ensure automatic adjustments,91 as Dodd-Frank provided that regulators "shall seek to make such requirements countercyclical."92 A stronger approach sensitive to the dynamics of regulatory policymaking would have mandated adjustment of capital as an automatic mathematical function of one or more objective indicators of economic well-being, rather than assuming a future Congress or agency will proactively adjust the rule.

Automated legislation can help to bypass lawmakers' disagreements about what is likely to happen in the future and thereby build consensus in the present. For instance, members of Congress might disagree about the likely effects of artificial intelligence say, on employment rates or personal finance. But if lawmakers agree on what should happen under specific conditions, they may authorize additional regulatory provisions (whether statutory mandates on private parties or delegations to administrative agencies) to kick in only when certain conditions are met, such as when the unemployment rate rises above a given threshold or when a certain percentage of consumers rely on digital advisers to automatically manage their savings.

The main advantage of using automatic-adjustment mechanisms is that such mechanisms can, in Professor David Kamin's words, "respond quickly and predictably to new information often, more quickly and more predictably than relying on the later [\*399] discretion of some combination of Congress, agencies, or courts."93 Because the enacting Congress knows that its successors or other governmental actors might be unable or unwilling to act later, a legislative provision that kicks in when specified conditions obtain is an effective way of overcoming inertia. To be sure, imperfectly designed triggers might lead to either an excessive or insufficient government response to future conditions. But neither problem should count as much of a strike against triggers. With respect to the possibility of insufficient regulatory strictness, that possibility always exists and is more likely to come to pass without triggers than with. Conversely, the problem of an excessive response is mitigated by the fact that Congress is structurally well situated to weaken or repeal overly stringent regulation, for the reasons set forth in Part I.

Another category of triggers is based not on conditions but instead on time. Most prominently, scholars concerned about overregulation have proposed sunset clauses (expiration dates) in some contexts such as securities regulation.94 Sunsets make sense if Congress is prone to overlegislating the opposite of the problem that we have identified for financial regulation and other future risks. When the problem is instead a bias toward congressional inaction, the solution could be the opposite approach: "sunrise" provisions that do not go into effect until some amount of time has elapsed.95 By way of example: it has become standard for state regulations banning the sale of new gasoline cars to go into effect years into the future so that firms and consumers have ample time to adjust to the new regulatory environment.96

Sunrise laws offer a promising application in the context of innovative industries. Sunrises could provide a grace period to allow time for an industry in its infancy to develop. Sunrises might [\*400] even be more politically palatable because the costs to industry will arrive later. For emergent industries, the lag may allow firms to become better established and better able to afford compliance costs in the future. For all industries, the time lag may reduce the incentive to organize against regulatory legislation.

B. Mandating Agency Action

Although automated legislation can reduce the need to rely on agencies, delegation to agencies will often still be necessary and desirable. Agencies often fail to exercise the power that Congress has given them, however, even when doing so would be in the public interest.97 To address this problem, Congress can seek to force agency action. One way of doing so is to legislatively mandate minimums, or floors, such as requiring at least one annual inspection for each regulated entity. Another way is to legislatively impose a strict backup rule if an agency fails to act.

On the enforcement side, Congress sometimes mandates minimum action levels for agencies. Historically, after beginning by simply authorizing agencies to monitor firms, Congress has often realized that it needed to impose minimums on how often agencies monitor.98 For instance, in the late 1900s, following disastrous oil spills, deadly food poisoning outbreaks, and fatal mine shaft collapses, Congress ordered regulators to inspect offshore oil platforms, risky food manufacturing facilities, and underground mines at least once every year or on some other minimum timeline.99 Decades prior, Congress authorized bank regulators to conduct examinations, and within a year it realized that it needed to require two annual examinations of each bank and amended the statute accordingly.100

Congress should set floors when empowering agencies to engage in monitoring. In the wake of the 2008 financial crisis, Congress seems to have come to this conclusion. It authorized a [\*401] new regulatory tool: stress testing the largest banks, which provides information on which banks might be at risk of failing.101 However, Congress did not simply authorize such tests. Instead, it required the biggest banks to conduct such a test at least once every two years under Federal Reserve supervision.102 Whatever the limitations of stress tests as a policy tool, Congress rightly recognized that the only way to guarantee that they were used was to make them mandatory.

Enforcement minimums are not limited to gathering information. Following years of savings and loan fraud that threatened the stability of the banking system, Congress in 1991 passed a statute that would automatically punish financial institutions that became undercapitalized, through heightened oversight including a limitation on growth absent regulatory approval.103 This sort of rule does not give the agency the discretion to decide when it takes control, which denies the possibility of harmful agency inaction.

Congress can also use automatic mechanisms to incentivize timely agency rulemaking. Even when ordered to write rules by a specific date, agencies often delay for years beyond the deadline.104 Congress can prevent these delays by providing for strong statutory default rules. A default rule could become law if the agency fails to write a different rule by a certain date, or if the agency's rule becomes inoperable (such as if it is vacated by a court).

Dodd-Frank shows the power of this approach. With respect to mortgage consumer-protection provisions, the law would have imposed new requirements on financial institutions if the Consumer Financial Protection Bureau (CFPB) failed to write rules by a specific date.105 This contrasts with other issues on which Dodd-Frank gave agencies more discretion, which led to long delays.106 [\*402] Congress could have instead imposed a default rule, automatically effectuated after a short period, perhaps two years, unless the relevant agency wrote an alternative rule before then.

Environmental law provides models of how Congress can use default rules to spur agency action. After the EPA failed to meet rulemaking deadlines for the Resource Conservation and Recovery Act,107 Congress passed amendments to spur action.108 The amendments provided that if the EPA failed to meet a rulemaking deadline, a tough default rule would go into effect (the "soft hammer").109 If the EPA missed a later final deadline, an even stricter rule would go into effect (the "hard hammer").110

An advantage of this approach is that it can flip industry motivations. In the EPA case, Congress was aware that the agency had missed deadlines partly because industry had slowed the agency down through lawsuits.111 After the amendments, however, slowing the EPA down meant harsher default rules. Unsurprisingly, following the amendments, the EPA faced fewer lawsuits and met its deadlines.112

Although the agency could theoretically water down such rules later, the starting point of strong regulation would anchor the agency's subsequent actions. To weaken the rule, the agency would need to dedicate scarce time and staff resources, produce a plausible cost-benefit analysis, and go through notice-and-comment rulemaking.113 It would also have to produce an alternative proposal that could survive arbitrary and capricious review, since courts' general posture of deference toward agency inaction does not extend to rulemakings that weaken or repeal existing regulatory requirements.114

[\*403] These examples show how Congress can do far more than just delegate to agencies. Congress can compel certain types of agency action or impose regulatory mandates that remain in force absent agency action to the contrary. Either of these approaches provides a means of overcoming the inertia by both agencies and future Congresses that can prevent effective regulatory action.

C. Empowering Agencies

Empowered agencies are not sufficient for an effective regulatory regime, since there is no guarantee that agencies will in fact use the power that they hold. But empowered agencies are necessary. There are several ways in which Congress can shape agency effectiveness, including effectiveness in addressing future risks such as financial crises. Agencies must have sufficient resources and capacity to accomplish their goals, sufficient information access to monitor and respond to emerging risks, and the flexibility to pursue both rulemakings and enforcement actions. We take up each of these in turn.115

1. Funding and capacity.

Agency effectiveness depends on capacity. Agencies need funding and personnel to be effective, including in addressing future risks.116 Congress holds significant sway over agency capacity. Congress determines whether an agency can hire and retain more officials, pay salaries to attract and retain talent in competitive labor markets, and otherwise have the resources to do their jobs effectively.117 Yet regulators' budgets often stagnate [\*404] over time, even as the industries they oversee expand considerably.118 The result is that agencies often lack the ability to engage in the rulemakings, monitoring, and enforcement actions to adequately guard against future risks.

For Congress, the obvious response to these challenges is to provide agencies with greater resources. Most simply, this means appropriating adequate funds to support agency operations. But the annual nature of the appropriations process means that Congress must decide, each year, to adequately fund a given type of enforcement. The interest group dynamics described in Part I can make this challenging. The question emerges, then, what sorts of more creative funding mechanisms may be available that do not require Congress to continuously reaffirm its commitment to financial regulation.

Congress has devised a powerful solution to this problem: it allows many financial regulatory agencies to collect funds through fees, rather than through the annual appropriations process, which in turn makes funding more stable over time. The Federal Reserve, for example, is self-funded outside the appropriations process, through both its own market activities and fees assessed on banks.119 Congress likewise provided the CFPB with an independent source of funding by allowing it to draw on the Federal Reserve's budget.120 However, Congress imposed caps on the CFPB's future annual budget121 that neglect the fact that greater resources might be needed depending on future financial innovations.122

Congress could also design funding streams to be more adaptive. For instance, lawmakers might link funding and agency personnel levels for activities like inspections or monitoring to the [\*405] size of the regulated industry as a default ideally outside of the appropriations process on the logic that more or larger firms require more resources for effective oversight. Another, albeit less powerful, approach would be requiring regulated entities to bridge the funding gap if Congress does not allocate funding proportional to the size of the industry. This arrangement would put financial institutions in the distinctive position of needing to use their influence in Congress to advocate for more funding for regulatory agencies if they want to avoid having to foot the bill.

Further creative funding arrangements that might also incorporate concerns about regulatory inaction are worth considering. One possibility would be linking an agency's funding to the number of examinations undertaken, so that an agency could increase its budget as the reasonable need for examinations grows. In such an arrangement, there is a risk of creating counterproductive incentives to overexamine. Linking funding to examinations thus makes sense only under the assumption that the risks of underexamining are greater than the risks of overexamining. That may be a safe assumption not only in light of agency incentives, but also because insufficient use of bank regulatory monitoring has historically been a problem in financial regulation.123

The broader takeaway is that a Congress wishing to promote agency capacity has tools for doing so. Congress can seek to secure funding on a long-term basis, outside of the annual appropriations process, and ensure funding commensurate with the scale of the agency's work. All of these are tasks for the legislative branch and areas in which a Congress wishing to enhance agency capacity is able to do so.124

2. Information access.

A second pillar of agency capacity is information. Without access to relevant information, agencies cannot act effectively. This holds across all regulatory domains, but it is perhaps especially [\*406] true for agencies tasked with addressing future harms. Financial regulation shows the importance of information provision for regulatory agencies and the risks that attend to underinformed agencies.

Financial regulatory agencies have fairly expansive access to business information. Congress authorized regulatory monitoring of banks in 1863.125 This authority has long been unusually extensive, with bank examiners able to look at any document.126 As one former examiner depicted it in 1904, after an examiner "inserted an official-looking card between the bars of the cashier's window[,] . . . [f]ive minutes later the bank force was dancing at the beck and call of a national bank examiner."127 Today, bank examiners still can access most any information they need, even without suspicion of wrongdoing by the bank.128 At the largest banks, regulators have examiners onsite year-round.129

This information access does not mean that regulators always identify issues, of course. Prior to the 2008 financial crisis, prudential regulators had little visibility into the rise of mortgage-backed securities and credit default swaps.130 Although it is impossible to know the counterfactual, financial regulators' blindness to the accruing risks is consistent with them being too focused on banks' traditional measures of safety and soundness, and not focused enough on credit rating agencies, financial innovation, and predatory consumer lending.131

Despite these failings, however, agencies' expansive access to bank information can help prevent bank failures or even fullblown financial crises. Moreover, even when regulators fail to prevent an adverse event, the information they have on hand can still prove valuable in containing its scope. Regulators failed to [\*407] prevent the failure of Silicon Valley Bank in 2023.132 But regulators' knowledge of depositors at Silicon Valley Bank and elsewhere informed their decisions both about which deposits to treat as insured and whether to shut down another bank, Signature Bank and may have helped prevent a broader crisis.133

The challenge that financial regulators have faced historically, and still face to some extent, is that those agencies monitoring for systemic risk such as the Federal Reserve and the Office of the Comptroller of the Currency (OCC) lack the authority to monitor nonbanks. This was a significant problem that contributed to the 2008 crisis.134 Today, similar blind spots arguably exist for fintech firms that are increasingly providing automated advice, alternative credit, and other digital services to consumers.135 One way for Congress to promote regulatory effectiveness in the face of future risks is to incentivize broad information gathering by agencies, so agencies can better identify (and address) risks before they materialize.

3. Expansive remedies and rulemaking authority.

Congress has given financial regulators significant authority.136 Regulators can revoke a bank's license out of concerns about the financial system's soundness, amounting to a death sentence for a business.137 They can cap growth, a severe penalty in a corporate world that prioritizes growth as a core value.138 They can [\*408] impose fines for wrongdoing.139 Alongside these more formal remedies, regulators can also ramp up examinations, which are costly for financial institutions and risk exposing additional violations.140 All of these tools give regulators considerable leverage in negotiations with the institutions that they regulate.

Though Congress has already given financial regulatory agencies considerable power, the need for legally empowered agencies bears emphasis for two reasons. First, agencies addressing other sorts of risks do not always have at least expressly the expansive authority that Congress has given the financial regulatory agencies. A full survey is beyond our scope here, but agencies almost certainly lack the power necessary to adequately address other future threats, from climate change to biotechnology innovation to artificial intelligence.

Further, even if statutes give financial regulators expansive authority, limits on that authority have at times prevented government from addressing important risks. An important cause of the 2008 financial crisis, for example, was conduct by nonbanks that were beyond the regulatory reach of prudential regulators like the Federal Reserve.141 This fact led Congress, in creating the CFPB, to give it authority to police consumer financial products even if offered by nonfinancial businesses.142 Similarly, concerns that existing regulatory frameworks did not adequately address the possibility of institutions that were "too big to fail" led Congress to create FSOC and vest it with the authority to designate institutions (such as hedge funds or insurance companies) as "systemically important."143 This designation makes the institution subject to heightened supervision by the Federal Reserve, which would otherwise lack authority.144 The successes [\*409] and failures of FSOC are beyond our scope, but the key point for present purposes is that Congress felt the need to create FSOC because of gaps in existing regulatory statutes.145

Finally, the contemporary Supreme Court's jurisprudence should prompt Congress, when it enacts new delegations to administrative agencies to engage in rulemakings, to do so with specificity. In an ideal world, Congress could give agencies openended delegations, recognizing that the complex and dynamic nature of finance demands agencies that can issue new rules to serve the public interest in financial stability. But given changes in the Court's jurisprudence,146 broad delegations run the risk of being narrowly construed (at best) or struck down altogether (at worst). A Congress wishing to prevent such outcomes should delegate rulemaking power in as precise a manner as possible, perhaps with express instructions that any ambiguities be construed in favor of agency authority.147

D. Encouraging Pluralistic Action

A central challenge associated with regulating future risks is that even when Congress acts, future Congresses or regulatory agencies might chip away at those actions. Congress can hedge against this risk by diffusing power. The theory behind this diffusion, from Congress's standpoint, is simple: if there is a worry that one institution will fail to act, empowering another actor can serve as a valuable backstop. We here focus on three sorts of actors: state governments, "backup" administrative agencies, and private litigants. None are perfect substitutes for effective federal regulation by Congress and the main regulatory agencies, but each shows how other actors can at times step in to partially (if imperfectly) fill regulatory gaps.

[\*410]

1. State governments.

One choice that Congress faces in regulating risks is how to view state governments. Are the states potential partners in regulation, or potential impediments to effective national-level regulation? For a Congress worried about insufficient regulatory action on the federal level, strategic empowerment of state governments can be an important policy tool.

In the financial regulation context, lawmakers faced this issue in drafting Dodd-Frank. When Congress sought to address the consumer protection weaknesses that led to the mortgage crisis and by extension, the financial crisis lawmakers needed to decide to what degree to preempt state laws. Dodd-Frank sought to maximize both state and federal abilities to intervene in consumer financial protection by establishing federal legislation as the floor above which states could add additional protections.148 That model allows for states to fill gaps that future Congresses do not. Additionally, under Dodd-Frank, a majority of states can force the CFPB to undertake rulemakings to either establish or modify a CFPB regulation.149 This model of allowing state regulation and even allowing states to force federal action is responsive to the structural limitations of Congress outlined in Part I.

The main downside of this model is the costs of firms complying with multiple states' regulatory regimes. Those costs sometimes make preemption appropriate, either entirely or with regard to certain types of entities (say, small firms that would have greater difficulty bearing the costs of regulation). In other instances, it might lead Congress to create a default rule of preemption but allow states to obtain exceptions upon offering evidence of a harm against which federal rules do not protect.150 Yet another approach would be to use certain statutory triggers, such as providing that when a given number of states have implemented a requirement, a federal requirement goes into automatic effect.151

Another intervention is for Congress to empower state entities to enforce federal laws related to systemic risk. Dodd-Frank authorized states to enforce some federal consumer protection [\*411] laws, but that is not the case for laws related to systemic risk.152 The possibility of uncoordinated or even conflicting suits filed by federal and state officials provides a reason to hesitate before empowering state enforcement of federal law. Additionally, states are less well situated to view the entire financial system's risk than is the federal government. But even private individuals have at times identified systemic risk concerns that federal regulators missed.153 The risk of underenforcement by the federal government might at times lead the benefits of state-level enforcement to exceed the costs.

2. Overlapping agency jurisdiction.

Overlapping agency authority provides another option for increasing the number of entities that might fill the gap created by Congress's structural limitations. Congress often delegates related or overlapping authorities to multiple agencies.154 This sort of overlap is especially common in financial regulation. For instance, the Federal Reserve, Federal Deposit Insurance Corporation (FDIC), and OCC all have some overlapping authority to ensure that Citigroup is not engaging in risky behavior the Federal Reserve because Citigroup is a bank holding company, the OCC because one of its subsidiaries is a national bank, and the FDIC because some of Citigroup's deposits are insured.155

Overlapping agency authority offers several benefits. First is the simple numerical increase in the number of entities that might act when Congress fails to do so. Second, it is more difficult for industry to capture multiple agencies than solely one.156 Third, overlapping agencies might influence one another in valuable ways, either through competition or through lobbying.157 Indeed, a system in which agencies with overlapping authority "compete against each other can bring policy closer to the preferences of [\*412] Congress than would delegation to a single agent."158 Though overlapping agency jurisdiction comes with downsides like coordination costs and the potential for wasted resources,159 these downsides will sometimes be outweighed by the benefits of overlap as a safeguard against agency inaction.

Congress has several ways of empowering multiple agencies. One approach is simply giving overlapping authority. This already partly happens in financial regulation, such as when the Federal Reserve and the OCC at times examine the same large bank for safety and soundness.160 A more purposeful model would task the Federal Reserve or OCC with occasionally independently conducting the same examination and then comparing the results afterwards. Both agencies would have access to the results of the two examinations to see how they differ. This sort of overlap implicates a trade-off between minimizing errors and conserving resources. Duplicate work will not always be worthwhile, but if the cost of errors is high enough which will often be the case if the downside risk is a bank failure or worse then Congress may be wise to task agencies with duplicating work.

Another approach would be for Congress to enable agencies to audit each other's work. Congress could require one agency to share relevant data and other documents with another, so the second can review materials and ensure that the appropriate action is being taken. Congress can mitigate the risk of harmful agency inaction by tasking the second agency with assessing whether the initial agency made the right decision in light of the data. This structure can check agency inaction: if one agency decides not to pursue an inspection, impose a fine, or commence an enforcement action, another agency can second guess that decision. This sort of auditing role might also have ex ante effects on agency action: if inaction is likely to be called out, agencies might be more active in the first instance. (A more ambitious version of this proposal would be to allow the second agency to compel action by the first.161 )

[\*413] Congress can also seek to promote coordination through mechanisms that bring multiple agencies together. As noted above, Congress in 2010 created FSOC, a council comprised of the leaders of the CFPB, the Securities and Exchange Commission (SEC), the prudential regulators, and representatives from state regulatory agencies.162 FSOC's primary job is to monitor for systemic risk through a broader lens than any individual prudential regulator might.163 It is tasked with producing an annual report to Congress on emerging and unaddressed systemic risks.164 The council also is tasked with collecting data and providing nonbinding recommendations to its members.165 Beyond FSOC's current role, one could imagine additional roles that a convening agency or meta-agency might play, whether through monitoring the work of existing regulatory agencies or through facilitating interagency coordination, joint rulemakings, or joint enforcement efforts. A rational Congress, knowing of the limitations of individual agencies, might reasonably conclude that encouraging agencies to serve as checks on each other in some circumstances and to coordinate in others could further the public welfare.

3. Harnessing private parties.

While the discussion to this point has focused on how Congress can empower (or compel) other governmental actors, Congress can also enlist private parties. Different sorts of policies will make sense in different circumstances, but private parties can play a key role in operationalizing federal regulatory schemes.

First, Congress can enable private enforcement. As Professor Sean Farhang has observed, Congress may be motivated to create private enforcement regimes because such regimes "provide a form of auto-pilot enforcement, via market incentives, that will be difficult for future legislative majorities, or errant bureaucrats pursuing their own goals, to subvert."166 Citizen suits have become [\*414] central to environmental law,167 and private enforcement of various sorts exists in the civil rights, securities regulation, antitrust, and government procurement contexts.168 Private rights of action play a more limited role, however, in much of financial regulation. Individual consumers cannot bring systemic risk lawsuits.169 Nor can consumer advocacy nonprofits or other citizen groups bring private attorney general lawsuits against financial institutions.170 There are several possible justifications for this absence; most notably, private parties will often lack the expertise and motivation to weigh the broader societal interests at stake in any suit implicating systemic risk (and the courts might be similarly illequipped). When available, however, these citizen suits have filled regulatory gaps when agencies were hesitant to act.171

Second, Congress can encourage third-party monitoring to augment regulatory capacity. For instance, regulators require banks to monitor third parties for systemic risk and consumer protection. Banks must, for instance, make sure that any independent call centers, mortgage brokers, or IT service providers do not act in ways that introduce systemic risk.172 Prudential regulators like the Federal Reserve have thereby managed to exert influence against entities outside their direct jurisdictions.173 This approach has the advantage of leveraging the expertise of sophisticated and well-resourced private parties (big banks) to help oversee a larger universe of private actors whose business models may be unfamiliar to regulators.174 Similar arrangements could be imagined for artificial intelligence, for instance, if large platforms (such as Microsoft and Google) were required to play a role [\*415] in monitoring third-party small businesses that use their artificial intelligence technologies.

Third, Congress can legislate to encourage actors within regulated entities to come forth with valuable information. Most importantly, Congress can provide bounties to encourage whistleblowing and protections for the whistleblowers who might otherwise face employer retaliation. Bounties for whistleblowers who bring to light issues relating to financial stability are not as generous as bounties in other areas. For securities regulation, for instance, whistleblowers earn substantial bounties for sharing information that leads to successful lawsuits, with the average payout amounting to $6.2 million.175 And securities regulation also forces various disclosures of information, partly with the goal of allowing markets to police problematic conduct.176 Similarly strong whistleblower protections and incentives could encourage more people to expose conduct that risks financial instability, a role played by past whistleblowers such as Eileen Foster, a former high-ranking bank official who exposed conduct at Countrywide Financial that helped give rise to the financial crisis.177

CONCLUSION

We have argued that the playing field is tilted against federal legislation that effectively promotes financial stability. The incentives of legislators and industry, features of Congress's internal [\*416] organization and procedures, the complexity of many regulated industries, and the reality that existing statutes tend to erode in effectiveness over time all make it difficult to enact and sustain sufficient regulation of the financial sector to prevent crises. Our diagnosis of Congress's limitations has led to a set of prescriptions for how Congress, when it does act, can ensure that its interventions are effective. By enacting statutes with automatic-updating mechanisms, empowering agencies and at times mandating agency action, and diffusing power among varied actors, Congress can effectively legislate with knowledge of its own limitations.

This framework matters in its own right, given the importance of financial regulation in preventing crises with catastrophic economic, social, and political impacts. But it also provides a way of thinking about how Congress should legislate to address other sorts of future harms. What Congress does in the present will affect the future devastation from climate change, the next pandemic, or the growth of artificial intelligence. Each of these threats is of course different they implicate different existing statutory frameworks, different private sector actors with different incentives, and different substantive trade-offs. But each involves harms that will materialize either entirely or primarily in the future, which makes each at least partially analogous to the financial stability context that has been our focus. In each instance, the core question is how to get Congress to focus, when times are good (or relatively good), on the threats that lie ahead.

#### Solves AI safety and leadership.

**MITRE 24**, The Center for Data-Driven Policy, bolstered by the extensive expertise of MITRE's approximately 10,000 employees, provides impartial, evidence-based, and nonpartisan insights to inform government policy decisions, "Assuring AI Security and Safety Through AI Regulation," MITRE, 07/01/2024, https://www.mitre.org/sites/default/files/2024-07/PR-23-02057-31-Assuring-AI-Security-Safety-Through-AI-Regulation.pdf

By establishing a comprehensive and effective regulatory framework for AI security and safety, the incoming administration can ensure a balanced approach to technological progression, ethical considerations, and public trust. Doing so will not only reinforce the United States’ international leadership in AI but also unlock its transformative potential to address a wide range of critical challenges.

The Case for Action

Over the past decade, the field of artificial intelligence (AI) has experienced remarkable advancements, ushering in a new era of technological innovation. These advancements have equipped us with a transformative technology in AI, which can be leveraged to address critical challenges in diverse fields, from healthcare to national security.

With each new presidential term comes the opportunity to reassess and enhance our approach to rapidly advancing technologies. In the realm of AI, it will be essential for the administration to stay informed about the current state of AI, its potential impacts, and the importance of advancing a sensible regulatory framework for AI assurance. While current policy and legislative activities have begun to address the need for AI regulation, more progress is needed to ensure the proper application and use of this technology, balancing security, ethical considerations, and public trust.

Key Challenges and Opportunities

AI regulation presents unique challenges due to the rapid pace of AI advancement and its diverse applications. Bridging the gap between policymakers at the Executive Office of the President (EOP) and agency implementation is a significant hurdle. Ensuring that policies formulated at the executive level are effectively translated into action at the agency level, taking into account the unique needs and contexts of each agency, is crucial.

Developing sector-specific AI assurance requirements that consider use cases and operationalizing the National Institute of Standards and Technology’s (NIST’s) AI Risk Management Framework (RMF) across sectors present significant challenges. These steps are necessary to ensure AI applications, within their specific contexts, meet safety and performance standards and effectively manage risks.

[FIGURE OMITTED]

Establishing system auditability and increasing transparency in AI applications are essential for tracking misuse of AI and ensuring accountability within organizations. However, these measures pose challenges due to the complexity of AI systems and the current gap in technical expertise needed to effectively implement and manage these processes.

Despite these challenges, there are significant opportunities. Rethinking regulatory and legal frameworks can guide federal funding decisions, advance AI research, and promote responsible AI use while deterring misuse. Strengthening critical infrastructure plans and promoting continuous regulatory analysis can help secure our critical infrastructure against exploitation by humans, AI-augmented humans, or malicious AI agents.

Moreover, the diverse needs and requirements of agencies based on their size, organization, budget, mission, and internal AI talent present an opportunity to promote flexibility and adaptability in AI governance. An effective approach to AI regulation should allow for a tailored and effective implementation of AI strategies and policies across agencies.

Data-Driven Recommendations

1. BRIDGE THE GAP BETWEEN POLICYMAKERS AND AGENCY IMPLEMENTATION

Enhance communication and collaboration between policymakers and those implementing AI strategies by ensuring policies formulated at the executive level are effectively translated into action at the agency level, taking into account the unique needs and contexts of each agency. This can be achieved by evaluating existing EOP-interagency committees, expanding their mandates, adjusting their composition, or enhancing their resources, and if necessary, establishing a new dedicated committee that includes representatives from the EOP, various agencies, and industry. This group would help ensure effective communication and collaboration, involving regular meetings, shared resources, and a common platform for exchanging ideas and best practices.

2. DEVELOP SECTOR-SPECIFIC ASSURANCE REQUIREMENTS AND AI ASSURANCE PLANS

Collaborate with stakeholders in a repeatable AI assurance process to ensure that the use of AI within their specific contexts meets necessary safety and performance standards and manages risks associated with AI. Adoption of safe and secure AI can be achieved through requiring a structured AI assurance process that involves four steps: Discovering Assurance Needs, Characterizing and Prioritizing Risks, Evaluating Risks, and Managing Risks. This risk management process should incorporate the NIST AI RMF, be iterative, and be executed throughout the AI system’s life cycle. A required output of this process is an AI Assurance Plan. This living document outlines the management and technical activities necessary to achieve and maintain assurance of the AI system over its operational lifetime and will require updating as new issues or risks are discovered.

3. SUPPORT AND ENHANCE THE OPERATIONS OF THE AI INFORMATION SHARING AND ANALYSIS CENTER (AI-ISAC)

Promote the recently established AI-ISAC to accelerate the sharing of real-world assurance incidents. This is essential to hasten understanding of threats, vulnerabilities, and risks to AI technology adoption for consequential use. The AI-ISAC should work in tandem with a national incident database like the Adversarial Threat Landscape for AI Systems (ATLASTM) to promote safe and anonymous sharing of real-world incidents. AI vulnerabilities and risks arise not only from malicious action but also because of the nature of the algorithms themselves and their susceptibility to misinterpretation, bias, performance drift, and other assurance factors. The AI-ISAC promotes analysis of incidents to identify root causes, and identification and development of mitigations, which can be derived from and/or contributed to the NIST AI RMF.

4. UNDERSTAND ADVERSARY USE OF AI ADVANCEMENTS

Support an at-scale AI Science and Technology Intelligence (AI S&TI) apparatus to monitor adversarial AI tradecraft from open sources such as research literature and publications, while providing continuous red-teaming of U.S. public and commercial AI infrastructure and operations. Doing so is crucial to understanding how our adversaries are using AI to gain advantage globally and to characterizing the reach of adversary capabilities into the United States, as well as the threat such reach poses to national security.

5. ESTABLISH SYSTEM AUDITABILITY AND INCREASE TRANSPARENCY IN AI APPLICATIONS

Issue an executive order that mandates system auditability, developing standards for audit trails, and advocating for policies that increase transparency in AI applications. This would include requiring AI developers to disclose what data was used to train their systems as well as the foundation models on which their systems were built. System auditability is vital for tracking misuse of AI and holding individuals accountable, as well as maintaining public trust in AI technologies.

6. PROMOTE PRACTICES FOR AI PRINCIPLES ALIGNMENT AND REFINE REGULATORY AND LEGAL FRAMEWORKS FOR AI SYSTEMS WITH INCREASING AGENCY

Take the following key actions to ensure the safe and responsible development and use of AI.

• Recognize that purpose (an understanding of objectives or goals) is an inherently human quality, and AI systems with agency (having the ability to act independently) will either directly receive purpose from a human (as instruction) or infer purpose through learning from human behaviors and artifacts.

• For AI principles alignment, create common vocabulary and research frameworks for guiding AI alignment in systems as scientific and engineering advances are made (rather than limiting or regulating advancements toward artificial general intelligence) to mitigate the risk of either humans tasking AI to carry out dangerous actions or AI systems exhibiting dangerous emergent behavior. Resulting guidelines would be similar to those established for research involving human subjects. Such advancements in AI alignment practices will serve to limit emergent, undesirable AI behavior, but research activities will still need safe environments with regulated guidelines like bioresearch and biosafety levels.

• Refine regulatory and legal frameworks to differentiate between appropriate research (with risk mitigations) and bad actors using AI for malintent, establish guidelines that address misuse of AI, and hold all appropriately accountable for harms.

7. STRENGTHEN CRITICAL INFRASTRUCTURE PLANS AND PROMOTE CONTINUOUS REGULATORY ANALYSIS

Direct federal agencies to review and strengthen government-critical infrastructure plans, focusing on safety-critical cyber-physical systems vulnerable to increased threats due to the scale and speed AI enables, and establish a dedicated executive task force to propose regulatory updates as needed. Such actions are necessary to ensure that our critical infrastructure is secure against exploitation by humans, AI-augmented humans, or malicious AI agents.

8. PROMOTE FLEXIBILITY AND ADAPTABILITY IN AI GOVERNANCE

Develop guidelines that allow for flexibility in AI governance implementation across different agencies, considering their unique needs and contexts (e.g., size, organization, budget, mission, AI workforce competencies). This involves enabling each agency to set an AI strategy that aligns with its needs and specific level of AI maturity. The guidelines should provide a range of options for AI governance structures, processes, and practices, and allow agencies to choose the ones that best fit their specific circumstances while ensuring minimum standards for consistency and effectiveness. As AI technologies rapidly evolve, these guidelines should also be flexible to accommodate ongoing innovation and shifting expectations about what is possible.

9. BRING IT ALL TOGETHER

Create a National AI Center of Excellence (NAICE) that promotes and coordinates these priorities, drawing on threat and risk assessment from the AI-ISAC and AI S&TI. The NAICE should not only cross-pollinate lessons learned by sector-specific regulatory authorities and build on and advance AI assurance frameworks and best practices, but also lead in conducting cutting-edge applied research and development in AI. This includes developing new AI technologies, methodologies, and tools that can be adopted across different sectors. The Center would facilitate collaboration among industry, government, and academia, thereby accelerating the transition and adoption of cutting-edge AI capabilities that are safe and secure.

### 1NC – DA – Realignment

#### Trump’s built a temporary coalition through token support for workers---it’ll crumble now because Trump won’t follow through on genuine pro-labor policy.

Philip Wegmann 25, White House Correspondent at Real Clear Politics, Former Writer at The Washington Examiner, Investigative Reporter, "'The Realignment': GOP Sen. Hawley to introduce pro-union legislation," Magnolia Tribune, 02/17/2025, https://magnoliatribune.com/2025/02/17/the-realignment-gop-sen-hawley-to-introduce-pro-union-legislation/

He was the first president to walk a picket line. And he crowed regularly about being the “most pro-union” president ever. But after four years as president, Joe Biden could not stop a growing working-class coalition, one that increasingly includes rank-and-file union members, from flocking to Donald Trump.

Reflecting on election night about the coalition that returned him to the White House, Trump called it “a historic realignment.” John McLaughlin wondered if it would endure.

While Republicans celebrated in the weeks after the election, Trump’s longtime pollster looked to the future.

“Right now, these Trump voters – the GOP is just renting them,” McLaughlin told RealClearPolitics. Speaking of the coalition Trump cobbled together consisting of disaffected Democrats and traditionally liberal constituencies, he added that Republicans “need to make a decision if they’re going to make them permanent.”

Enter Sen. Josh Hawley, the Missouri Republican emerging as the right-of-center pro-labor leader.

“Look at what Donald Trump achieved. He achieved victory based on this coalition, and he deserves tremendous credit for making it possible, and he knows it,” Hawley said in an interview before picking up where Trump’s pollster left off. Hawley is asking his Republican colleagues whether they want their new-found working-class support “to begin and end with Donald Trump.”

His framework for pro-union legislation amounts to something of a downpayment. It is a set of proposals to reform the way businesses interact with organized labor, from requiring worker rights to be displayed on a job site to prohibiting “unsafe work speed quotas.” And soon Hawley will introduce legislation mandating accelerated negotiations between unions and employers.

A 2022 Bloomberg Law analysis found that the average time between workers voting to unionize and reaching their first contract with employers was 465 days. The Hawley bill would mandate that once workers vote to form a union, the employer and employees must begin the negotiations process within 10 days. It is a significant reform, which unions have wanted for years. Two Democrats have already promised to co-sponsor: Sens. Cory Booker of New Jersey and Gary Peters of Michigan. But its author is unusual in that Hawley comes from a party traditionally more favorable to corporations than workers.

Hawley has embraced the heterodoxy. Last year he abandoned his support for right-to-work laws, policies which bar unions from requiring workers to pay dues as a condition of employment. Before that, Hawley introduced legislation that could have easily come from the desk of socialist firebrand Bernie Sanders. One was a bill to cap credit card interest rates; another sought to overturn the Supreme Court’s campaign finance decision, Citizens United.

Neither was well-received in traditional conservative precincts. The latter earned Hawley a rebuke from the business-friendly Wall Street Journal editorial page. But Hawley represents a vanguard of a New Right, and while his bill mandating accelerated negotiations between labor and business faces an uphill battle in the Senate, skepticism of corporate power is increasingly in vogue among the GOP because of Trump’s ascendancy.

“As conservatives, who are now benefiting from the support of working people, it’s time we deliver for them and bring into actuality this Trump realignment, this working-class realignment of the Republican Party,” Hawley said of his efforts. “This is my project.”

In this, the president is sympathetic. Trump delights in bragging about how he peeled union votes away from Democrats. He invited Teamsters president Sean O’Brien to address the Republican Convention in Milwaukee without any preconditions about what the union boss could or couldn’t say on stage. Later when the Teamsters declined to endorse him or former Vice President Kamala Harris, Trump portrayed the non-endorsement as a tacit repudiation of Democrats.

Trump and Hawley have spoken in the days since the inauguration. A source familiar with those calls reports that the president is generally supportive of Hawley’s pro-labor legislation. A senior White House official did not dispute that characterization, telling RCP that “the president will never turn his back on union voters.”

The administration made their commitment explicit on the campaign trail where Vice President J.D. Vance often bemoaned the “tragedy” of declining union membership in the private sector.

“I think what we see as our job in national policy is to protect as many workers’ jobs as possible, to promote tax and spending and tariff policies that promote large scale economic growth and actually give workers more their take on pay and more jobs to begin with,” Vance told RCP last September before adding that the incoming administration would work to make the job of unions “easier, not harder.”

This was a winning political argument. Now those voters are likely to expect results. Hawley says Republicans must embrace working class voters or, he warns, “we will never be a majority party.”

“The Republican Party right now is defined largely by one very specific personality who’s been quite successful,” said Abigail Ball, executive director of the conservative think tank American Compass. “If we’re going to see this be a long-lasting realignment,” she continued, “where working class voters take seriously that conservatives want to deliver, we have to do real long-term policy work.”

If Trump exits the Oval Office in four years without overseeing any such “policy work,” Hawley fears that the GOP is at risk of “reverting to the days where we are a wholly owned subsidiary of these mega corporations.” That comes with its own familiar result: a return to what Hawley calls “the political wilderness.” There is no majority coalition there, he said, warning his party, “We know this because we’ve lived it for 30 years.”

An early test comes in the person of Trump’s nominee for labor secretary, Lori Chavez-DeRemer. She is a former member of Congress, a Democrat from Oregon with well-defined, pro-union views. Her support of the PRO Act, which would pre-empt state right-to-work laws, makes her anathema to pro-business Republicans. Kentucky Sen. Rand Paul promised to oppose her and predicted she could lose as many as 15 GOP votes. Democrats like Massachusetts Sen. Elizabeth Warren, meanwhile, seemed pleasantly surprised and signaled a willingness to back her. “I think she’d be terrific,” Hawley said.

If there is indeed a realignment, it is incomplete. Republicans are not as comfortable as Hawley on a picket line. They are more inclined to side with industry. And while Trump seems eager to keep union voters in the GOP fold, during his first time in office he sided with business. His judicial nominees, as well as his nominees to sit on the National Labor Relations Board, were undoubtedly labor skeptics. Trump even praised Elon Musk’s perceived penchant for firing Tesla workers interested in starting a union.

“You’re the greatest cutter,” Trump told Musk during a live conversation on X. “I look at what you do. You walk in and say, ‘You want to quit?’ I won’t mention the name of the company, but they go on strike, and you say, ‘that’s OK. You’re all gone.’”

The richest man in the world, Musk is now not just a supporter but a key member of the Trump administration. The second and third richest men in the world, Mark Zuckerberg of Facebook/Meta and Jeff Bezos of Amazon, attended Trump’s second inaugural. All three have, at one time or another, been caught up in lawsuits over their treatment of employees looking to unionize.

The proximity of that much capital to the president does not worry Hawley. “There’s only one person who runs the Trump administration, and as many who think otherwise, sadly, learn, that one person is Donald J. Trump,” he replied when asked about the new coziness between Silicon Valley elite and the populist president. “So I have no doubt that Jeff Bezos would love to be in the president’s inner circle,” he added. “Do I think that the president is going to ultimately listen to him? No.”

The Missouri senator would prefer if the president listened to him and helped get his latest pro-labor legislation into law. So would the Teamsters who support the new bill.

“Legislation gets put forward, oftentimes, as a political chess piece and part of the game, but the ultimate result is that it doesn’t see the light of day,” said Teamsters spokeswoman Kara Deniz. Unions have watched that dynamic play out over and over again across administrations, she said. Led by O’Brien, though, the Teamsters are increasingly open to working across the partisan divide. “The priority is to wherever we can, whether it’s Democrat, Republican, or independent, to work together with any political leader that is going to support workers,” Deniz told RCP.

#### Dems will take advantage of the opportunity now by pivoting to post-neoliberalism---but the plan means Republicans beat them to the punch, which locks in a generation of GOP dominance.

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Is This How Democrats Win Back the Working Class?

Embracing populism could help the party build a lasting political coalition—if the Republicans don’t do it first.

A week after Donald Trump won the presidency again, I sat across from Chris Murphy in his minimalist but well-appointed D.C. office. The Connecticut senator sounded like a man who had done a speedrun through all five stages of grief and was ready to talk about what comes next: how his party could learn from its loss and win over—or win back—voters in 2026 and 2028. “I have thought for a long time that there’s a race between the Republican Party and the Democratic Party,” Murphy told me. “And the question is: Does the Republican Party become more economically populist in a genuine way before the Democratic Party opens itself up to people who don’t agree with us on 100 percent of our social and cultural issues?”

Murphy is onto something. The politics of the average American are not well represented by either party right now. On economic issues, large majorities of the electorate support progressive positions: They say that making sure everyone has health-care coverage is the government’s responsibility (62 percent), support raising the minimum wage to $15 an hour (62 percent), strongly or somewhat support free public college (63 percent), and are in favor of federal investment in paid family and medical leave (73 percent). They also support more government regulation of a variety of industries including banking (53 percent), social media (60 percent), pharmaceuticals (68 percent), and artificial intelligence (72 percent). Yet large majorities of this same American public also take conservative positions on social issues: They think the Supreme Court was right to overturn affirmative action (68 percent), agree that trans athletes should compete only on teams that match their gender assigned at birth (69 percent), believe that third-trimester abortions should be illegal in most circumstances (70 percent), and are at least somewhat concerned about the number of undocumented immigrants entering the country (79 percent).

These facts are not especially convenient for either Democrats or Republicans, which is no doubt why both sides have failed to put forward platforms that represent these views. But lately, more political insiders from both parties have been willing to acknowledge the problem and admit that it’s time to move on from neoliberalism, the political ideology that champions market solutions, deregulation, the privatization of public services, and a general laissez-faire approach to the economy.

Substantial obstacles confront populists on both the left and right. Democrats must contend with a college-educated base and party establishment that embraces maximalist positions on social issues, while Republicans must contend with substantial libertarian cliques. But whichever party figures out how to advance a meaningful post-neoliberal platform could unlock a winning and durable political coalition.

Murphy is doing his best to make sure that his side of the aisle beats the Republicans, but he seems far from certain that it will. In an MSNBC interview after the election, the senator sketched out something of a road map for Democrats: “We should return to the party we were in the ’70s and ’80s, when we had economics as the tent pole and then we let in people who thought differently than us on other social and cultural issues.” Murphy was quick to add that this reinvention—or rather, reversion—will be challenging to pull off. “That’s a difficult thing for the Democratic Party to do, because we’ve applied a lot of litmus tests over the years,” he observed. “Those litmus tests have added up to a party that is pretty exclusionary and is shrinking, not growing.”

In the days and weeks after the election, I spoke with post-neoliberal economists, academics, and leaders of major political nonprofits on the left and the right. Almost all of those I interviewed shared Murphy’s view that America’s political parties are in an arms race to capture what the senator called, in a 2022 essay for The New Republic, the “silent majority of Americans who want more economic control, more social connection, and more moral markets.”

It is a race that some worry the Republicans are winning. Although few on the populist right view Trump as the genuine article—they tend to politely describe the president-elect as a “transitional figure”—he has nominated post-neoliberal and populist sympathizers to major positions in his second administration: Senator Marco Rubio, an industrial-policy aficionado, for secretary of state; the pro-union Representative Lori Chavez-DeRemer for labor secretary; the Big Tech skeptic Gail Slater to lead the Justice Department’s antitrust division; and, of course, J. D. Vance, whose rise to vice president–elect was greeted with trepidation by Wall Street despite his tech-venture-capital background. Still, most of those I interviewed shared the view that Trump will likely squander his populist goodwill with tax cuts for billionaires and other anti-populist agenda items during his term.

This should produce an opening for the populist left, but there remains a deeper and perhaps more intractable problem: The GOP appears to be locking into place a multiracial coalition of the non-college-educated. These are voters who may prove easier for liberals to lose than to win back. If the Democrats have any hope of once again being the party of the working class, Murphy and others believe, they need to recognize that Americans are desperate for meaning and community.

The language Murphy used in his New Republic essay—invoking morality, self-worth, and social connection—is omnipresent in post-neoliberal discourse. The movement’s chief exponents believe that neoliberalism has not only created an economic disaster, but its emphasis on ruthless individualism has also created a crisis of political and social meaning. In the view of Murphy and others, any post-neoliberal politics must cultivate a new social ethic rooted in dignified and fairly remunerated labor. Many of these prominent post-neoliberals, some of them affiliated with the same think tanks and nonprofits that once helped establish the neoliberal consensus, seem convinced that there’s a massive voting bloc waiting to be activated: Americans who are moderate or even small-c conservative on social issues, but who also favor a more aggressive, rabble-rousing attack on the country’s existing economic system.

“We have not convinced voters in this country that we are serious about redistributing power from people who have it to people who don’t have it,” Murphy lamented to me. “The solutions we’ve proposed are largely small-ball, largely adjustments to the existing market. We don’t talk about power in the way that Republicans talk about power.” Others agreed.

Although many observed that Joe Biden has been arguably the most pro-labor president in decades and has often broken with neoliberal orthodoxy in areas such as industrial policy, they also felt that he never quite captured the narrative or claimed credit for his substantial accomplishments. In other words: There was a widespread sense among the people I spoke with that Biden had working-class policies without working-class politics. “The Democratic Party didn’t show that it was really backing the concerns of ordinary people strongly enough, and wasn’t identifying well enough with how they saw the world,” Joseph Stiglitz, a Nobel Prize–winning economist and longtime critic of neoliberalism, told me.

For many (though not all) post-neoliberals, the heart of their economic vision is “pre-distribution,” a concept popularized by the political scientist Jacob Hacker. Whereas center-left neoliberals tend to favor redistributive tax-and-transfer policies—allowing an unchained market to generate robust growth, and then blunting resulting economic disparities by taking some of the gains from the system’s winners and redistributing them to the system’s working-class “losers,” reducing inequality after the fact—post-neoliberals generally believe that it is better to avoid generating such inequalities in the first place. “The moral of this story,” Hacker explains in a 2011 paper, “is that progressive reformers need to focus on market reforms that encourage a more equal distribution of economic power and rewards even before government collects taxes or pays out benefits.”

As Hacker (perhaps accidentally) implies with his invocation of the story’s “moral,” pre-distribution advocates often justify this strategy in ethical or even spiritual terms: Empowering workers to secure better pay and working conditions—say, through unions and sectoral bargaining—is about restoring dignity and revitalizing labor-based forms of community.

“Most people don’t want a handout,” Chris Murphy recently posted on social media. “They want the rules unrigged so they can succeed on their own.” Although some on the left (not unreasonably) disliked the way the senator described certain redistributionist policies as “handouts,” these vocabulary complaints distract from Murphy’s deeper point. Honest labor is a source of pride, and populists should want an economy where most Americans are paid fairly for work they feel good about rather than suffering poverty wages and waiting for cash floats that keep them above water.

“Most people need opportunities for meaningful work and social recognition in order to feel that their goals in life are worthwhile,” the philosopher Daniel Chandler observed in his recent book Free and Equal, which received coverage in both mainstream liberal and left-wing media. “By focusing on increasing market incomes, especially from employment, predistribution helps to maintain the healthy connection between contribution and reward that might be lost if we relied too heavily on redistribution. At the same time, it takes seriously the importance of work for people’s sense of self-respect.” As Chandler and others see it, many Democrats’ inability to grasp the fact that it matters to people not only that they have financial resources but how they acquire them has left the party unable to understand why voters don’t reward them for their largesse. Larry Kramer, a former president of the Hewlett Foundation and the current president of the London School of Economics, echoed this view. He insisted to me that reaching the working class is about more than just material conditions: “It’s not economic. It’s political economy.” In his telling, liberals get so wrapped up debating how the economy should be organized that we forget to ask what moral and political ends—that is, what vision of the good life and what kinds of values—markets are supposed to secure in the first place.

Many Democratic insiders believe that post-neoliberal economic policies alone are not sufficient to win back American workers. Social issues will also need to be reconsidered. Stiglitz pointed to immigration as one place where Democrats may need to compromise, a view he shares with others in his post-neoliberal cohort. Murphy helped write a defeated bipartisan border-security bill that would have added Border Patrol officers and made asylum standards more stringent; some critics characterized it as “hard-right.” Last year, a hotly discussed book by the socialist journalist John B. Judis and the liberal political scientist Ruy Teixeira likewise packaged a withering critique of neoliberalism with a call to embrace more conservative positions on immigration. Chandler’s Free and Equal also quietly endorsed claims that increased immigration depresses wages for low earners and strains public resources. As Chandler argues, “High levels of immigration can make it more difficult to create a stable sense of political community and national identity.”

Gun control is another area where flexibility may be prudent in order to be competitive in certain parts of the country. Democrats will have to accommodate people like Dan Osborn, the independent who, though he lost his bid to represent Nebraska in the Senate, outperformed Kamala Harris while combining a vocal defense of the Second Amendment with proudly pro-union politics.

Teixeira and Judis flagged a third topic, gender identity, where Democrats ought to respond to the public’s concerns. That begins by making room for conversations that don’t involve accusations of bigotry, or insisting that the very act of asking questions about terms such as people with the capacity for pregnancy is tantamount to challenging the right of trans Americans to exist or exposing them to harm. For Judis and Teixeira, that requires making more granular distinctions between culture-war battles such as fairness in sports—where good-faith disagreement is possible—and important efforts to provide trans Americans the kind of universalist safeguards won in earlier civil-rights movements. LGBTQ groups’ effort to “protect transgender people from discrimination in housing, employment, and school admission falls well within America’s democratic tradition,” they write. But they also warn that activist demands outside this scope are “attempt[s] to impose a new social conformity based on a dubious notion of gender.”

More than anything, liberals need to understand that many Americans—especially those in the working class—feel unheard. Their trust will be won back not through quick fixes, but by treating those without a college education or with more conservative social views as equal participants in our national dialogue.

“The debate is still alive inside our party. But the post-neoliberals are clearly ascendant,” Murphy told me. He argued that his fellow Democrats need to be more open to dissenting viewpoints, and that expanding the tent will involve a fight: “I am not making an argument that the core Democratic Party do a left turn and reorient our position on choice, climate, or guns. I am arguing that we allow people into the tent … so that we have a little bit more robust conversation, and potentially a little bit more diversity on those issues inside the coalition.”

The soul-searching that is before the Democrats will require liberals to engage with views they find discomfiting, and to reckon with the fact that their social values are out of keeping with the working-class majorities they profess to represent. Democrats must figure out where there is room to compromise. And where compromise is not possible—or truly unjust—they must begin the slow-grinding work of persuasion.

“We cannot successfully engage with people whose inner lives we do not even try to understand,” a recent report from the stalwartly liberal think tank the Roosevelt Institute concludes. Whether left-wing liberals are open to doing this remains to be seen.

“It’s not clear that if we blow it in two or four years time that there’s another shot at this apple for Dems,” Jennifer Harris, a Hewlett Foundation director and former Biden-administration official, suggested, speaking in a personal capacity, when describing the Democratic Party’s need for a post-neoliberal makeover. In her view, the prize for such a transformation may prove to be not just a near-term political victory, but a Franklin D. Roosevelt–style stranglehold on the electorate: “There is potentially a lot of political spoils.”

Spoils indeed. Many on the left and right agree that the stakes are high, the reward prodigious, and the path forward obvious: Whichever party can credibly combine economic populism with moderate social positions will win elections. There is no mystery here. The problem is not the absence of a political solution but a deficit in political willpower. And the next election, and the elections to come, may well hinge on which party can muster the resolve to finally deliver real populism to the people.

#### GOP realignment causes extinction.

Miles Taylor 24, National Security Expert, Chief of Staff at U.S. Department of Homeland Security, Marshall Scholar, Truman Scholar, M.Phil. in International Relations from Oxford University, B.A. from Indiana University, "Blowback: A Warning to Save Democracy from Trump's Revenge," Atria Books, 04/09/2024, 368 pages, ISBN13: 9781668015995, pp 13–266

In the realm of national security, we have a term to describe unintended consequences, the failure to anticipate the repercussions when we make a choice: blowback.

This is a cautionary tale about how neglecting our guardrails —individually and as a democracy—can lead to self-destruction.

More specically, it is a political forecast about how a deeply divided nation is setting the stage for the resurgence of Trumpism. In this book, you will glimpse the not-too-distant future of the blowback we will experience if we choose the wrong path. It’s also a story about personal mistakes and why a failure of introspection can be fatal.

In the pages to follow, I will paint a vivid portrait of another term under a vindictive, twice-impeached, unconstrained commander in chief, or more likely under the rule of a savvier successor who will take his place—collectively referred to as “the Next Trump.” Each section will assess a particular guardrail of democracy, toggling between how it was tested in the rst Trump administration and how it could be dismantled next time. From remorselessly gutting the American judicial system to deploying U.S. combat troops in neighboring countries, you will see what “mega MAGA” really looks like and how it could endanger our lives, our livelihoods, and our way of life.

If we want to save democracy from the Next Trump, we need to fully understand the threat he or she will pose. Predictions must not be founded in fear but instead rooted in truth. In forming these projections, I have relied on rst-person interviews with the people who know the MAGA movement’s plans, never-beforetold stories from the inside, and penetrating insights from the country’s leading democracy doctors, who understand how dire the situation has become. Together, they provide a matter-of-fact prognosis for what to expect if we install another corrupt leader in the White House.

This isn’t just about the next presidential election or a shortterm hazard. Autocratic personalities will come and go, but the antidemocratic trend lines in our system pose lasting, generational peril. Trumpism is a political philosophy that seeks to achieve far-right, populist goals by defying democratic institutions and misusing government power for partisan purposes. It has spread like a disease, infecting a rising generation of copycats.

I know how ugly it can get. I sat in the Oval Oce as Donald Trump fantasized about replicating North Korea’s demilitarized zone on the U.S. southern border, replete with land mines, barbed wire, electric fences, and armed guards. Trump described in graphic detail the sharp, esh-piercing spikes he wanted installed on the border wall, designed to maim climbers so bloodily that other migrants would be scared to follow suit. He mused about U.S. soldiers ring on civilians, knowing that if they blew the legs out from underneath pregnant mothers, it would keep them from reaching the border.

I listened aboard Air Force One as Trump lavished praise on America’s adversaries and foreign dictators, waxing poetic about Vladimir Putin and Xi Jinping. Those men could do whatever they wanted, unconstrained by congresses and judges. He wanted the same power, ordering subordinates to send draft laws to Congress to eliminate appellate courts that overruled him and to write executive orders to invoke the Insurrection Act, allowing him to impose a version of martial law.

I heard gag-inducing comments about women, as Trump nitpicked their looks and television performances, including, most grotesquely, sexual references to his own daughter. Perversion aside, it was the ex-president’s inclination toward illegality that led me to quit. I witnessed Trump tell border patrol agents to ignore the law and to send arriving migrants right back into the hot-sun desert where they could die despite their legal right to claim asylum, oering to pardon anyone who got arrested for carrying out his directive. That was the last straw. I reported the incident to government lawyers and resigned shortly thereafter, making sure news of the episode became public.

If another like-minded MAGA gure is given a shot at the presidency, these will not be anecdotes of near misses. They will be ocial U.S. government policy. I don’t expect you to take my word for it. Many people who were close to Trump have shared with me—almost unanimously—their belief that the return of Trumpism will be more volatile than its initial rise, which is why we must act without delay. (Some Republicans I spoke with are so worried about retribution from gures inside the movement that they requested their names be withheld in these pages and/or that identifying details about them be modied, in part because of threats of physical violence from Trump’s followers.)

Regardless of whether the ex-president has a shot at returning to the White House, his torchbearers intend to carry on his legacy by bringing the ame back into government. They won’t allow political prudence to hold them back from weaponizing the very same democratic institutions that should serve as guardrails. As I write this, MAGA operatives are working in Washington to transform their hostile takeover of the Republican Party into sustained, multi-decade control over the levers of government.

These are not the national security dangers I expected to be worried about in the twenty-rst century. I entered government service in the wake of September 11, 2001. Since that dark day, I have spent my career focused on protecting the country against foreign threats, from terrorists and transnational criminal organizations, to nation-states such as Russia and China. After witnessing Donald Trump’s rise, presidency, and fall up close, I now believe that the greatest threat to American democracy in this century will come from within.

A widening cabal of antidemocratic leaders here at home have exploited our polarized political climate and are already mimicking Donald Trump. I have met them on the campaign trail as they run for local, state, and federal oce. They are winning more elections than you think. The inuence of Trump’s example has created an opening for his apprentices to engage in abuses of power by using America’s public oces to promote their own self-interest and to silence objectors.

We can halt the spread of political extremism, but it will be a once-in-a-generation challenge.

We didn’t snu out Trumpism. Rather, we looked the other way as its cinders lit the dry underbrush of our fraying society and spread like wildfire. Right now, the winds favor the fanatics, from a historically divided electorate to grim public attitudes about political violence. Recent surveys have found one in ten Americans —more than 30 million people—now support violence against the government. Such a combustible political climate is what MAGAaligned gures need in order to burn down the system.

Democrats, reform-minded Republicans, and Independents can come together to create a symbolic “rebreak” to prevent the blaze’s spread by taking three actions.

First, we must open our eyes. A victim mentality has overcome voters since the Trump presidency, with Americans lamenting the brokenness of our politics, as if the unwelcome situation were a faultless mishap. We must be candid with ourselves. This isn’t happening to us; this is happening because of us. Our city streets are now the front lines in the war for the soul of our political system, and it won’t end without a great civic awakening.

Second, we must proactively protect our institutions. The United States needs an insurance policy against political disaster, which means identifying the risks posed by antidemocracy gures and crafting mitigation strategies to safeguard the laws and traditions that made America the exceptional nation it is. I have identied some of the most crucial areas where we would expect the Next Trump to do damage, and I oer suggestions for how we can fortify our institutions against a would-be despot.

Third, we must not hide from a deeper menace. The stories you will read here—of illegal acts, long-lasting lies, misused presidential powers, conspiracies, assassination plots, and suicide attempts—are the consequences of a poorly understood bystander phenomenon, which I believe is the “hidden threat” to democracy.

For now, I will say I have arrived at an unexpected conclusion, given my background: anonymity is a gift to authoritarians. They thrive on fear and the suppression of dissent. My journey to the truth was painful—mentally, emotionally, and physically—and forced me to unlearn what I’d been taught in Washington.

In the end, I discovered that in politics, the real struggle is not us-versus-them.

It is us-versus-us.

[PARAGRAPH INTEGRITY PAUSES]

Chapter 1 THE FACTION The process of election affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. —ALEXANDER HAMILTON, FEDERALIST NO. 68, 1788 PART I There is a front row to American democracy, and it can only seat four. In the U.S. House of Representatives, two nondescript desks positioned at the back wall oer the most revealing view of the magisterial chamber. Most Americans will never see these hidden perches. One is tucked away on the right corner, the Republican side of the chamber; the other on the left, the Democratic side. Young staers assigned to these wooden tables mark opposite ends of a chaotic thoroughfare away from the cameras, where members of Congress mingle, laugh, argue, and cut deals to keep the country running. At fteen years old, I was plucked from farmland obscurity in La Porte, Indiana, and dropped into one of these four seats. That is where I rst learned about politics. “Welcome to your new office.” I was lured to public service both as an escape and as a calling. As a boy, my obsession with superheroes imbued me with a simple good-against-evil worldview. I wanted to be one of the good guys. With a distant gaze at adulthood, government seemed thrilling compared to the drudgery of small-town life, especially after my parents divorced and home became a place of low-level turbulence. Washington was where actual superheroes lived, men and women elected with the noble purpose of rectifying the world’s wrongs and confronting the real bad guys—criminals, polluters, dictators. Sitting in the nurse’s oce one day at school, I listened through the curtain as a fellow student recounted his parents’ struggle to aord food, while he and his siblings survived on trick-or-treat candy they had collected on Halloween. Trick-or-treat candy. That seemingly little moment changed my perspective. Suddenly, my own situation at home didn’t look so bad, and I felt the faintest inklings of a calling. I devoured books about extreme poverty. An idealistic middle-schooler, I checked out tomes on history, economics, and the Millennium Development Goals. Then terrorists struck. I was in the Twin Towers weeks before September 11, 2001, on a trip to New York City with my mom and aunt. At fourteen years old, I gaped down from the highest oor of the North Tower with a wide-eyed view of Lower Manhattan. The short passage of time between that moment and the implosion of the buildings made me feel a cosmic connection to the tragedy. Alone in my room, I sobbed looking at still photos of Americans leaping from the buildings’ upper oors to escape ames ignited by men who had turned airplanes into missiles. “Never again,” Americans vowed. I meant it, desperate to lend a hand in protecting the country against foreign enemies, while I compartmented clinical anxiety, which I couldn’t name or understand until much later. But what does a kid from a two-star town have to oer fourstar military generals who are hunting down the bad guys? That was my dilemma. My family didn’t have a lot of money or major political connections. Without those, I couldn’t see a fast path into government for a high-school student and part-time restaurant dishwasher with scalded hands and a restless mind. When I heard about a minimum-wage job as a cub reporter at the local radio station, I submitted an application. I got the gig. Luckily, listeners couldn’t tell I was a teenager unless my voice cracked on air, something I carefully avoided by practicing a deep octave. “And a pleasant good morning,” I bellowed into the foamcovered microphone hanging from the studio ceiling. “This is Miles Taylor here at the broadcast center, with a look at your neewwwws at this hour.” I elbowed past colleagues to land assignments covering visits from political leaders. “A word to the wise,” the salty news director warned. “Don’t meet your heroes. They’ll let you down.” As I brushed shoulders with Bush administration ocials who were visiting the Midwest and national media gures like MSNBC’s Chris Matthews, I was pretty sure my boss was wrong. These were the giants of public policy, and I wanted to join their ranks. My interview subjects weren’t fooled, though. No matter how grown-up I tried to act, I was still a kid wearing big-people clothes. Literally. Dad’s oversize Navy blue blazer gave me away with sleeves that were only centimeters away from my ngers, and without a driver’s license, I was forced to rely on my mom to drop me o and pick me up from news events. But what felt like intolerable indignities ended up leading to an opening. “Son, how old are you?” U.S. senator Evan Bayh asked skeptically one night on the sidelines of a town hall he was hosting in our community. “Fifteen,” I admitted reluctantly. He abruptly ended the interview and asked me to kill my handheld tape recorder. I was discouraged. But then he whispered to an aide and told me about something called the Congressional Page Program. “You want to see politics in action?” Bayh asked. His aide handed me a fancy business card. I rubbed my thumb reverently over the gold-embossed eagle and probably emailed the staer that same night. Several months later, I found myself on the ten-hour drive from Northwest Indiana to Washington, D.C., to join several dozen students for a job in the United States Capitol. For two hundred years, young people have assisted with administrative proceedings in the nation’s legislative body as congressional pages, or as we were sometimes called, “democracy’s messengers.” The errands ranged from mundane to momentous. We spent early mornings running packages around the Capitol complex and late nights putting bills and resolutions in the hands of hundreds of representatives, each of whom had a urry of comments, edits, amendments, and rewrites to make to the people’s paperwork. You rarely see congressional pages. We were trained to operate in the background, quietly supporting the country’s leaders, except for every four years when pages are photographed delivering the Electoral College ballot boxes to the House to certify the results of the presidential election. On my rst day, I met a personal hero. U.S. senator John McCain greeted us in passing as he made his way to the other side of the Capitol. His handshake felt like a professional christening, and I watched the vaunted combat veteran and “maverick” presidential candidate disappear down a stately hallway. We were ushered onto the oor of the House of Representatives. The cavernous chamber was ornamented with Americana—busts, quotes, and frescoes of the country’s Founders—and it struck me with the veneration that you’d reserve for a holy site. “Welcome to your new oce,” Peggy Sampson, the businesslike page boss, told us as she pointed out the two desks in the back corners that would become our rotating perches. The class was split between Republican and Democratic pages, a reminder of Washington’s built-in divide. I was fortunate to be a Republican page. The GOP was in the majority, and soon I was selected to serve as the Speaker’s page—the personal messenger for the most powerful gure in Congress: Speaker of the House Dennis Hastert. Washington was enveloped in a sober urgency in those post9/11 years, which became clear by the weighty atmosphere. Access to the Speaker’s oce was strictly controlled, and distractions weren’t tolerated in his quiet sanctum. One day an aide found me using the oce phone for a personal call to a girlfriend back in Indiana, and as punishment, I was sent back to the page desk on the House oor to run errands for junior members of Congress. (To me, getting sent back into the middle of the action wasn’t exactly punishment.) We trained as apprentices to wartime legislators who were grappling with an existential threat. You can’t overstate the palpable fear vibrating through Washington at the time, from worries about biological weapons to whispers of nuclear dirty bombs. A gas mask was hidden under every seat in the U.S. House. But fear gave way to cooperation, as members of Congress crossed the aisle to compromise on sweeping legislation. The master class in bipartisanship culminated, for me, in President George W. Bush’s 2005 State of the Union Address. Despite having just come o of a contentious presidential campaign, he entered the chamber’s arched doorway to applause and handshakes from Republicans and Democrats. “We have known times of sorrow and hours of uncertainty and days of victory,” he declared, as I stood by the page desk in the back. “In all this history, even when we have disagreed, we have seen threads of purpose that unite us.” The room applauded in agreement. I had found my tribe. Roaming the musty marble passageways of Congress, I grew surer of my views as a Republican. I was a “compassionate conservative,” the kind George W. Bush spoke about when he called for a government that used the free market to eliminate poverty, that openly welcomed immigrants who sought to join our country, and that championed freedom and human dignity around the globe. Joining the GOP tribe also seemed like the best way to defend the country; Republicans, after all, portrayed themselves as the party that was ready to stand up against enemies to our democracy. What was meant to be a year turned into a whirlwind decade. I could hardly stay in school, although I was obsessed with good grades. From elementary to graduate school, I was a straightA psychopath (except for a lonely B+ on my seventh-grade report card). Valedictorian. Indiana State Debate Champion. Full ride at Indiana University as an undergrad. Full ride at Oxford University as a grad student. But I was bored. I dropped out of school multiple times to take jobs in Washington because I was more interested in sitting in secure brieng rooms, digging into intelligence gathered overseas by U.S. spies, than sitting in classrooms. I trained my strengths—and anxieties—toward supporting national leaders, from preparing research memos at the White House and Pentagon to brieng CIA directors and Homeland Security secretaries. The stainless boy from a Midwest yover state was awestruck at having a top-secret security clearance. I grew up fast and learned to stay in the background safeguarding information, knowing that lives were in the balance and that I was responsible for protecting the “sources and methods” of our spy agencies. Just as the kid inside me had yearned, I was working alongside the good guys to ght the bad ones, or so I thought. Washington changed in the years after 9/11. After spending time in the executive branch, the private sector, and grad school, I returned to Capitol Hill in my late twenties and found a very dierent place. Some of the people I looked up to had turned out to be not-so-good guys (including House Speaker Dennis Hastert, who’d been arrested, charged, and later convicted in a hush-money scheme related to sexual misconduct with minors). The spirit of unity had also worn o, giving way to fermenting animosity. The Republican Party was focused on undermining Democratic President Barack Obama, while a confrontational Tea Party movement sought to take over the GOP by launching an insurgency. I tried to ignore the partisan rancor that followed me up the career ladder. As the national security advisor on the House Homeland Security Committee, I told people I was focused on policy, not politics. Then Donald Trump emerged. “I want a Trump inoculation plan.” In early 2016, a small group of Republican congressmen and aides, myself included, huddled around a conference table inside the U.S. Capitol. Afternoon sunshine illuminated untouched cookies and sodas in front of us. The faces around the table hung low. “I want a Trump inoculation plan,” House Speaker Paul Ryan demanded, making eye contact with each of us. Paul Ryan had been elected Speaker only months earlier and was eager to move the GOP toward a big tent, hopeful, ideasdriven party. I was a fan for this reason. We millennials prided ourselves on being scally conservative and socially liberal, and Ryan was going to be our gurehead. Trump was putting it all at risk in his unexpected quest for the GOP presidential nomination. “We can’t let him trash the GOP,” Ryan fumed, noting that Donald Trump was not representative of the policies or the people in the Republican Party. House majority leader Kevin McCarthy nodded in agreement. When it was his turn, McCarthy joked that Trump had switched parties so many times he couldn’t tell a donkey from an elephant. Party leaders had failed to knock out Trump early, so now they were trying to coalesce around someone who could stop him. In the meantime, Paul Ryan wanted House Republicans to distance themselves from the New York businessman, who they all expected would lose anyway. It wasn’t just that Trump was hostile to GOP orthodoxy; he was breathtakingly ignorant about the rule of law, the Constitution, and the democratic system. The select group of lawmakers and sta were tasked with developing a platform that was the antidote to Trumpism. Rarely does anyone other than the Republican nominee release a party strategy during an election year. Speaker Ryan’s “Better Way Agenda” was billed as a right-leaning response to eight years of a Democratic administration. In practice, though, we were drafting an alternative to the ideas Trump was spewing on the campaign trail, where he was badly hurting the GOP brand. We talked about what the document should say. It should repudiate the TV personality’s vitriolic rhetoric, isolationist tendencies, protectionist economic ideas, disparaging comments about our allies, anity for America’s adversaries, and divisive anti-Muslim views, among other appalling comments. More broadly, it should reect a party that was focused on the future and not relitigating the culture wars around guns, abortion, sexual orientation, and gender identity. I went to work, charged with co-drafting the national security portion of Ryan’s plan. For me, Donald Trump was number seventeen out of seventeen of the major candidates in the GOP primary race, a foulmouthed imbecile who was doomed to fail. I was happy to do anything to separate us from him. He wasn’t a part of our tribe; he was just trying to create a small faction to inltrate the Republican Party for personal gain. I’d already seen the Tea Party movement do the same, and so far, we’d kept them at bay. In fact, I didn’t know any legislator on the GOP side who seriously supported Trump. Senator Ted Cruz called the man an “utterly amoral… narcissist.” Texas governor Rick Perry said the businessman was a “cancer on conservatism,” dening Trumpism as “a toxic mix of demagoguery, mean-spiritedness, and nonsense.” Senator Lindsey Graham equated the man to an “evil force,” and openly referred to him as a “jackass” and a “kook.” Representative Mick Mulvaney had an even simpler summation: Trump was “a terrible human being.” Then the unthinkable happened. Donald Trump surged forward in the primaries and eectively clinched the nomination. A schism erupted within the party. While most establishment conservatives begrudgingly decided to coalesce behind the nominee (who still seemed destined to lose in the general election), a “Never Trump” wing formed to sink him using any means necessary. Former mentors and colleagues from the Bush administration signed letters disavowing Trump, but because I was a GOP ocial, I rationalized that it would be inappropriate to add my name to a public list. Paul Ryan’s policy project took on greater urgency. He advised us not to openly attack Trump—and risk pushing him away from the GOP mainstream—but to quietly point him in the right direction by giving him a plan that sounded Republican, not reckless. We foolishly thought we could guide Trump. We weren’t writing the “Better Way Agenda” anymore; it was the “Make Trump Better Plan.” In May 2016, I traveled with a group of GOP senators and congressmen to the Middle East. One evening in Bahrain, I went to dinner with Kansas representative Mike Pompeo. Over lamb shank and hummus, we talked about the dilemma, and I reiterated what was quickly becoming conventional wisdom: in the months ahead during the presidential race, Trump would set the GOP back years with his sensationalistic comments. “What if—in a uke—he actually wins?” I wondered aloud. Maybe we should do more than we were doing. “Miles, he’s a coward and a bully,” Pompeo responded bluntly. “The American people will see through it, and when this is all over, he’ll be a fucking afterthought.” He was so sure Trump couldn’t win that we spent most of our dinner talking about what we could do from Capitol Hill to x U.S. foreign policy during a Hillary Clinton presidency. Obama had backed away from America’s allies, we lamented, and was bowing down to its adversaries. Pompeo was considering a run for chair of the House Intelligence Committee, where he could have more inuence on U.S. foreign policy. I oered to help him angle for the job once the election was over. Still, in every country we visited, foreign leaders expressed grave concerns about what a hypothetical Trump presidency might mean for the world, especially given the man’s anti-Muslim commentary. “There’s no reason to fret,” Texas senator John Cornyn told a group of diplomats in the region. “Trump was loud and unpredictable to win the primaries, but his tone will start changing for the general election. He’ll calm down. You’ll see.” The cowboy boots poking out from under the senator’s khakis spoke louder than his words, as if to say, Trust me, I’m from the land of rodeos. This is all part of the show. But was he reassuring them, or himself? None of us actually knew whether Trump would moderate his tone. In late May, former New York City mayor Rudy Giuliani reached out for help with exactly that topic. He was having conversations with Trump and wanted the presumptive nominee to adopt more traditional GOP policy positions before the general election race, starting with reversing his crude comments about Islam. Giuliani asked my boss—House Homeland Security Committee chairman Michael McCaul—and me to assist. Early in the campaign, Trump had shocked the world by calling for a “Muslim ban” on travel into the United States, falsely equating billions of everyday Muslims with the small population of terrorists who perverted the religion to justify violence. As a counterterrorism professional, I feared Trump’s words would be exploited by militants to convince others that we were at war with Islam. As an American, I found his words disgusting. Most worshippers of Islam were just like Christians, Jews, or Hindus— people of faith who practiced their religion peacefully. Giuliani convened an ad hoc group (including former U.S. attorney general Michael Mukasey, Chairman McCaul, and former prosecutor Andy McCarthy) to draft a memo to get Trump to stop saying “Muslim ban” and to talk about reasonable counterterrorism policies. While I didn’t agree with everything in the document, the nal draft condemned Trump’s comments and rightfully made clear that a Muslim ban would “run afoul of our constitutional principle against religion-based discrimination,” emphasizing to the candidate that most Muslims who came here were “patriotic and productive Americans… precisely the kind of immigrants our policy should encourage to come to the United States.” In place of a ridiculous “ban,” the memo proposed “intensied vetting” of U.S.-bound travelers to weed out the real terrorism suspects. Giuliani briefed Trump. To our surprise, it worked. Donald Trump never said the words “Muslim ban” again on the campaign trail, although apparently the word “intensied” wasn’t enough for him. He began to talk about “extreme vetting” and how he would implement harsh measures to keep terrorists out of the United States. While I wasn’t sure he really understood what we wrote, I was buoyed to see he was shifting back toward the mainstream. Maybe Trump could be guided after all. The relief was eeting. When Paul Ryan released his forwardlooking GOP agenda in June, Donald Trump accepted it like a buzzsaw accepts timber. He had no interest in policy nuance, crafting an optimistic Republican Party, or restraining his antagonistic tendencies. Within days, Trump attacked a federal judge who ruled against him in a fraud case as “biased” because of his “Mexican heritage.” Ryan rebuked the GOP nominee’s words as the “textbook denition of a racist comment,” and after that, any hope that Trump would listen to Speaker Ryan faded. Our Make Trump Better plan was dead. “Maybe there is no hacking!” My consolation that year was the feeling of certainty that Donald Trump would never, ever be president of the United States. It was October 9, 2016, the night of the second presidential debate, and I watched it with my girlfriend Anabel in our row house on Capitol Hill. Anabel wasn’t in politics—she was a Southwestern transplant to D.C. who worked in banking—and her tolerance for sleazy politicians was even lower than mine. With a re roaring in our exposed-brick replace, we mocked the GOP candidate’s meandering performance. There was good reason to think Trump’s campaign was nished. As he roamed the town hall stage that night like a caged animal, he gave us another. During the debate, Donald Trump angrily denied Moscow was behind ongoing interference in the 2016 election, and that the interference was even happening in the rst place. Trump was lying to the American people. I knew it because I’d helped brief him on the threat days earlier. Russia’s plot consumed me throughout the election. In mid2016, an urgent bulletin sent to Capitol Hill from a U.S. security agency agged a disturbing development: foreign actors might be launching digital attacks on the 2016 election, including cyber intrusions targeting U.S. political gures and institutions. The alert didn’t identify the culprit, but within days, I arranged briengs for members of Congress to get the details. The DNC announced weeks later that it had been hacked by Russia. My worry grew, in part because Moscow was breaking into a U.S. political party but also because one of the two major candidates in the election was seemingly ambivalent about it. Trump accused the DNC of making it up and then publicly goaded the Russians to hack the emails of his opponent, Hillary Clinton. A fellow GOP aide on Capitol Hill, Evan McMullin, found Trump’s behavior so oensive that it inspired him to quit his job and actually challenge Trump. The forty-something foreign policy advisor announced he was running for president as an independent, a quixotic last-ditch attempt to block the Republican nominee. Evan and I had come up in the GOP around the same time. We entered government service after 9/11 and both were convinced someone in our party would emerge to counter Trump. When no one did, Evan told me he had no choice but to do it himself, even if the odds were impossible. The “Never Trump” movement had gone from the majority of the party to a small, faltering faction led by a no-name congressional staer. Evan asked if I wanted to join his campaign. I gave him the reexive excuse that I could be more eective from inside the party than outside of it. In truth, by then I’d concluded that Hillary Clinton was the only way to end Trump’s candidacy for good. Then in the summer and fall, Russia leaked emails and released disinformation to undermine Clinton. Both Trump and Clinton were briefed on the very sensitive intelligence about Moscow’s ongoing operation. Yet Trump continued to dismiss it. A handful of congressmen asserted themselves in Trump’s orbit to get him to wake up, including my boss, House Homeland Security chairman McCaul. He agreed to prepare the nominee for the presidential debates in September and October 2016. Beforehand, I pulled together in-depth brieng materials for McCaul to take with him—background, charts, maps, talking points, the works. Our singular goal was to get Trump to admit that America was under attack and to warn Russia that they would face our wrath. At the debate prep, McCaul walked through the details. He assured Trump that the information about Russia was valid, that we’d been briefed on it for months, and that it was critical for Trump to publicly acknowledge the situation and vow that— regardless of who the Russians were trying to support—the United States would punish them. My dial-in connection was unsteady, so I phoned McCaul afterward to see how it went. “Not good.” The chairman recounted Trump’s visceral reaction. “He didn’t want to hear it.” The candidate interrupted McCaul repeatedly. “It’s all bullshit,” Trump allegedly retorted, waving his hands dismissively. “Totally politicized bullshit, right Mike?” Trump turned to another Michael in the room, Lieutenant General Michael Flynn, the former head of the Defense Intelligence Agency, who’d been forced out of his job for alleged misconduct and was now a Trump campaign advisor. “You’re right, sir,” Flynn armed. “It’s politicized, intelligence community BS.” McCaul tried again, but Trump ended the conversation. Days later, the candidate lied in the presidential debate about what he knew. “I don’t think anybody knows it was Russia that broke into the DNC,” he said. “[Clinton is] saying Russia, Russia, Russia… but it could also be China. It could also be lots of other people. It also could be somebody sitting on their bed that weighs four hundred pounds, okay?” He went further in the second debate, suggesting that the cyber breach might not have happened at all. “Maybe there is no hacking!” The falsehood was sickening. Trump knew the truth, so why was he covering for one of America’s adversaries, Vladimir Putin? Another controversy erupted at the same time. An old video recording surfaced of him making denigrating comments about women, sending his campaign into free fall. It was time to stop “managing” Trump within the party and start maligning him. This was the opening I’d been waiting for. While on a road trip through the New Mexico desert a few days after the debate, I called and texted GOP members of Congress to encourage them to turn against the nominee. Now was the time to distance themselves from Trump’s campaign or, better, to unendorse the candidate altogether. Of course he wouldn’t win the presidency, and if we didn’t isolate him, we’d be associated with his lies and toxic politics for years to come. “There’s an awful lot of reasons to rescind your support,” I texted one legislator, trying to convince him to ditch Trump. “Politically the scandals are destroying his chances and folks are going to use this as a litmus test in the future, i.e. ‘what did Representative XX do when he had the opportunity to rescind his endorsement?’ But the most compelling one is that it’s probably the right thing to do.” The congressman said nothing. The next day, he sent a meme of three faces and three quotes: former president Franklin Delano Roosevelt (“The only thing we have to fear is fear itself”), John F. Kennedy (“Ask not what your country can do for you but what you can do for your country”), and Trump (“Grab them by the pussy”). To him, it was funny. While some Republicans denounced the nominee’s comments, most quietly stood behind Donald Trump in the end. I couldn’t understand why. Until he won. “Sure, he’s a dick, but now he’s our dick.” Everyone remembers election night 2016 and the shock of Trump’s comeback victory. But what I remember is the gloating, specically from one GOP representative. A Southern legislator leaned against a gold railing on the House oor several days later, trying to convince me Trump wouldn’t be so bad. The party would benet from his brash antics, the congressman reasoned. Trump would keep the pressure on “the libs.” “Sure, he’s a dick, but now he’s our dick,” he quipped, ebulliently. The vodka-soaked frat culture of Capitol Hill was already making me feel disillusioned, but the state of denial in the party was worse. The same people who had equated Trump to an “evil force” were now giddy about the prospect of a drain-the-swamp disruptor in the White House. After sneaking away to celebratory happy hours, congressmen would return to the House oor smelling like booze. During votes, they passed out their ID cards so someone else could register the “yeas” and “nays” for them. They were too busy to vote, placing bets on which of them would end up in the new president’s cabinet. Then came the pilgrimages to Trump Tower. To be fair, some sober-minded Republicans hoped to convince the incoming president to recruit serious leaders and statesmen and -women to replace the island of mist advisors he’d assembled. But far too many alighted from the tower’s golden escalator to pitch themselves for top spots. One of them, Congressman Mike Pompeo, had just been picked to be CIA director and reported back condently that Trump wasn’t looking for “yes men.” I hoped he was right. More so, I hoped people like Pompeo—who’d been blunt about his disdain for Trump—would serve as a check on the man. I ew up to New York with a delegation of GOP gures a week later, in late November 2016. Kellyanne Conway greeted us like a carnival barker welcoming circus-goers into a tent, as a gaggle of current and former ocials came and went; Steve Bannon glad-handed donors in a corner, grinning ear to ear; General Flynn quietly escorted foreign visitors out, oering hushed farewells and promising to be in touch; and Ivanka and Jared made a brief appearance with an air that said, The family is in charge. I squeezed onto a couch next to former vice president Dan Quayle, who brought ideas to help the untested president-elect think about governing. The atmosphere was too surreal to ignore. “Did your transition look like this?” I asked. He scoed and whispered from the side of his mouth: “No. This place is a fucking circus.” Exactly what I was thinking. If it were a circus, Vice-President-Elect Mike Pence was the ticket boy, dutifully shuttling back and forth to the waiting area to tell another newcomer it was his or her turn to enter the lion’s den. We were next. Clutching policy papers on national security, Chairman McCaul and I were ushered into a meeting room. Donald J. Trump—Secret Service codename “MOGUL”—was in full form. The braggart chief executive had just closed the biggest real estate deal of all time: the acquisition of the White House. An oversized suit jacket and wrinkled pants hung over his large frame, accented by a red necktie that dangled too far below his belt line. “Look at that! Isn’t it beautiful? Just. Beautiful.” He waved his hand at a map of all the counties he had won across America, as if the congressman and I hadn’t seen the results. A sea of red with occasional pockets of blue. The conversation never got to counterterrorism or cybersecurity; Trump wanted to talk about how much of a winner he was and how he was going to bring other winners into the new administration. An aide escorted me out to meet with a staer on the transition team. I introduced myself and started to talk about the national security issues the incoming president would need to start thinking about. He cut me o. We weren’t there to talk about policy. He wanted names. Which prominent gures from Capitol Hill would be loyal lieutenants to the incoming president? “Loyal,” he repeated. I had brought a list with me, but it wasn’t a list of congresspeople. The legislators I knew weren’t showing backbone, so I handed over a spreadsheet of leaders who I thought actually had character. The staer crossed out most of the names. “Bushie,” he said. Another. “Never Trumper.” “John Kelly?” he asked, stopping at a name on the list. “You think he’s experienced enough to be defense secretary?” “He’s a four-star Marine general,” I replied. Kelly had met with Trump recently, and I had been oored that serious people were being considered at all. “We’ll see,” the aide responded. We were interrupted. McCaul’s meeting was over, and Pence was ready to walk us out. On the elevator ride down, the vicepresident-elect gave us a knowing look. He’d seen others leave with the same worried faces, the type that commuters make when passing a ery roadside crash. “It’s going to be all right,” he oered. “Here’s my personal information if you need anything.” Pence handed me a scrap of paper with a mobile number and an obscure Gmail address scrawled on it. “It’s not as bad as it looks. It’s a hell of a lot worse.” These aren’t the words you want to hear from your soon-to-be boss. Yet John Kelly stated them matter-of-factly. It was March 2017. He’d been serving for two months as Trump’s Homeland Security secretary. The job I’d hoped he’d take—running the Pentagon—had gone to another man I regarded as a rare living legend, General Jim Mattis. Kelly dealt with a urry of crises after taking oce, including Trump’s surprise executive order blocking millions of people from Muslim-majority countries from coming into the United States. The shock order certainly looked like the “Muslim ban” we thought we’d talked Trump out of. Worse still, Trump didn’t consult John Kelly or other agency heads before releasing it. The results were disastrous. At the time, I was still on Capitol Hill and asked Chairman McCaul to condemn the policy. It was highly unusual for a top Republican to criticize a new president from his own party, only days into the administration, no less. But McCaul agreed. He called on the Trump White House to roll back the executive order, using my words to admonish them: “Don’t undermine our nation’s credibility while trying to restore it.” I was wary of any job in the administration and turned down a White House post during the transition period. However, I admired Kelly. The plainspoken, no-nonsense operator wasn’t interested in partisan politics. He was one of the leading military gures of his generation and the highest-ranking ocer to lose a child in the wars in Iraq or Afghanistan. He continued to serve despite the family’s loss. If anyone could be a check on Trump, I hoped, it was hardened soldiers who tended to be immune to politics and wary of unlawful orders. Word got out that Kelly needed more people to bring order to the chaos at DHS. I was open to working for one of the “adults in the room,” though a breakaway part of my conscience argued otherwise. Anyone could see this wasn’t going to end well. I buried the internal dissent under layers of careful reasoning about how “good people” were going inside to do what was right. By March, I’d come around. I accepted a position as Kelly’s counterthreats and intelligence advisor. I was just entering my thirties and would be the youngest counselor on his team. Days before I was slated to take the post, another crisis hit. A man jumped the fence at the White House and evaded Secret Service agents for seventeen minutes before he was caught. Trump was furious at the breach, and so were members of Congress from both parties. Kelly was called up to brief the House Homeland Security Committee, and I waited to catch him in the hallway before he went in to see the representatives. “Leatherneck inbound,” an agent whispered into his sleeve. The Secret Service codename—an old slang term for U.S. Marines —captured Kelly’s aesthetic perfectly. As he rounded the corner, he had the imposing presence of a general, and his face was carved with weathered battle lines that spoke as loudly as his record. We were in a secure facility several stories underneath Congress. No cameras, no reporters. While I was still technically working for the room of angry congresspeople, I would soon be one of Kelly’s deputies, and I felt an obligation to brief the man who would be my boss about what he was walking into. “Mr. Secretary, they’re frustrated—not just about the White House intruder,” I warned him. “Democrats are probably going to grill you about the president’s missteps on everything else.” “That’s okay. It’s not as bad as it looks,” Kelly responded. “It’s a hell of a lot worse.” I laughed. “I’m not sure I’d frame it that way in the room, sir.” Kelly wasn’t joking. He patted me on the shoulder. “I’ve got this, Miles. Hang back for a minute afterwards, okay?” The brieng went as expected. The secretary played security camera footage of the intruder scaling multiple fences, dodging sensors, and taking advantage of a comedy of errors as Secret Service agents tried to locate him before he nearly made it inside the president’s residence. Kelly announced that he was boosting protection at the White House complex until long-term corrective action was taken, starting with a request for Congress to give him more money for a bigger fence. The representatives were unied in their concern over how easily the guy had entered one of the most high-security facilities in the world. If he’d detonated a bomb, God forbid, he could have destabilized the entire federal government. Representative Bennie Thompson pressed Kelly: “How could this happen?” (Incidentally, Thompson would be asking the same question years later while investigating a far bigger breach of the U.S. Capitol.) Before long, attendees were o-topic and the meeting devolved into partisan bickering. Kelly was the rst Trump lieutenant to brief the group, and Democrats in particular were still coming to terms with a whiplash White House. Trump’s preposterous travel ban; his denial of Russian election interference; an obsession with a hulking concrete “border wall”; already frosty relations with Congress; and his apparent disregard for his own cabinet. Republicans jumped in to defend the president, though most barely knew the man. Kelly calmly told the representatives that everything was copacetic. There was an adjustment period in every new administration, and President Trump was taking the advice of his team. The general understood the importance of this assurance. Skeptics of Trump were only comforted by the hope that the businessman would somehow assemble a credible cabinet, a group of grown-ups who would provide stability in the executive branch. Then another topic came up. Days earlier the administration had made a cryptic announcement that carry-on laptops would be banned on certain ights to the United States from several Middle Eastern countries. What was happening? Members of Congress demanded to know, reminding John Kelly that we were sitting in a secure environment and could discuss sensitive issues. For the rst time, Kelly looked uncomfortable. He demurred, oering up only the fact that the decision was based on “evaluated intelligence” that he hoped to share at the appropriate time. A buzzer screeched from behind the members of Congress and lights ashed on a wall clock. It was time for votes on the House oor. The meeting was over. As the room cleared, I waited for Kelly. I told him that he had handled the back-and-forth well. “You still on board?” he asked with a grin. “Yes, sir. But you spooked me on the way in,” I joked. “About that…” The secretary’s smile faded. He lowered his voice. “I want you to know something. I swore an oath to protect this country against enemies foreign and domestic. Foreign and domestic, Miles. You’ll be doing the same by joining my team. Take it as seriously as a heart attack, okay?” “Yes, sir, of course,” I armed. Kelly waited a beat before his face lit up again. He reminded me that I had one day of freedom left. “Don’t fuck it up.” The secretary disappeared down the hall followed by sta, agents with earpieces, and a military aide carrying a black briefcase, leaving only silence in his wake. I closed up the brieng room by punching in a code, sealing the vault-like door, and spinning the lock. The hallways were empty. The House was a vacuum that hoovered up bodies from around the Capitol when it was time to vote. I headed that direction, returning aboveground through a maze of passageways, staircases, and elevators, thinking about what the general had said. Foreign and domestic. PART II The American system was designed to prevent a tyrant (or, more specically, a would-be king) from becoming president. With the heavy-handed British monarchy fresh in their minds, the Founders wrapped a protective layer around the U.S. executive branch. They placed strict legislative and judicial checks on the presidency, curtailed the president’s powers, and put a four-year term limit on the oce. Most importantly, they designed a presidential selection process that was meant to block bad leaders from winning. The emergence of fringe politicians was inevitable. “The latent causes of faction are thus sown in the nature of man,” James Madison wrote, and have “divided mankind into parties, inamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good.” Rather than try to x this ugly side of human nature, Madison proposed using it to help protect democracy. Put another way, warring factions could be pitted against each other as a check. In small societies, political movements tended to merge and trample the rights of the minority, Madison wrote. However, in a country as vast as the United States, various parties and factions would have trouble combining forces, and instead they’d compete with one another, preventing any one group from becoming too powerful. America’s most famous anonymous author sought to reassure the people. The Founding Fathers wrote a series of unsigned essays to sell the public on supporting a new constitution, using the alias “Publius.” Under the pen name, Alexander Hamilton declared that “talents for low intrigue and the little arts of popularity” were not enough to get someone elected president. To capture the top job, a person would need to appeal to the country’s broad swath of political groups. As a result, “it will not be too strong to say, that there will be a constant probability of seeing the [presidency] lled by characters pre-eminent for ability and virtue,” he wrote. In 2016, Hamilton was proven wrong. THE LONG-TERM CONDITIONS ARE HIGHLY FAVORABLE FOR A VOLATILE POPULIST FIGURE—THE NEXT TRUMP—TO RECAPTURE THE WHITE HOUSE. Our system of government allowed an observably unqualied man to win the U.S. presidency. Democracy’s electoral guardrails were tested, and they failed. I witnessed the futile eorts of Donald Trump’s early opponents as they tried to stop him and his breakaway MAGA faction, the naivete of a Republican Party apparatus that attempted to guide him, and the GOP advisors— like me—who hoped we could manage Trump on his way to inevitable defeat. That is not what happened. Trump won and held the White House for four chaotic years. Afterward, many continued to think Trumpism was an aberration. When Joe Biden defeated the one-term president in 2020, it was supposed to mark the death of MAGA. Since that time, however, Trump-inspired candidates have popped up across the country, assumed party leadership positions, and taken control of an entire ecosystem of groups that shape the GOP’s direction. What began as a small faction within the party now commands the entirety of it. The MAGA movement—or Trumpism, which I use interchangeably—remains the fastest-growing political coalition in America, regardless of how damaged its namesake is. The coalition has been able to unify disparate groups of Republicans—Tea Party, libertarian, small business, establishment, Evangelical, and beyond. Various factions within the GOP no longer compete and balance each other out. They’ve been subordinated to Trumpism. The prospect of a MAGA comeback in the White House goes far beyond the next presidential election. The electoral guardrails that were supposed to stop someone like Donald Trump from getting elected have not been hardened to prevent a repeat. They have been corroded. Far-right gures like Representatives Marjorie Taylor Greene and Lauren Boebert are now in the mainstream of the Republican Party, and they are using intimidation to silence remaining opposition, while persuading the masses to believe conspiracy theories that are tilling the fertile soil for a new crop of antidemocratic populists. We have seen this story before in history, and it doesn’t end well. First, MAGA forces are purging internal opposition with striking eciency. One of the best checks against the emergence of a dangerous gure in a free society is the ambition of his or her opponents. Almost every senator, congressperson, or cabinet secretary I know in Washington has fantasized about becoming something more, namely the president of the United States. Most coyly deny it, but the glint in their eyes when they cross the threshold into the Oval Oce betrays their true desires. The fact that scores of politicians are always considering presidential bids is good for our political system; their ambition makes the presidential contest more competitive and weeds out defective candidates. This is how Trump should have been stopped. He faced a wide array of competitors more qualied to hold the nation’s highest oce, most of whom repudiated the New York tycoon. Nearly all observers expected the combined ambition of Trump’s opponents to smother his candidacy. As we know, that didn’t happen. Today, we should have little condence that the ambitions of moderate politicians will prevent MAGA acolytes from seeking and eventually winning the presidency again. Few dissenters remain in the party. Pro-Trump forces are silencing dissent and eliminating internal opposition using a three-pronged approach: threaten, defeat, and destroy. For hundreds of moderate Republican ocials around the country who have been driven out of oce or even into hiding, this has become a grim reality. It starts with a warning. Former GOP congressman Denver Riggleman, who was elected from Virginia in 2018, recalled that it felt like a hostage situation on the House oor. He was expected to support the MAGA movement, or else. “As soon as I won, I realized what I’d gotten myself into,” he shared with me. “I found that votes had nothing to do with policy but with complete loyalty to the president. I just found it amazing that [other representatives] were so subservient,” while they privately mocked Trump as “probably high on meth,” he said. At rst, Riggleman toed the party line. He campaigned as a Trump supporter and was a good soldier, following the guidance of party leaders. But one day, he decided to vote against a Trump bill that would throw the government into chaos by shutting it down. Riggleman was admonished by Republican leaders. “I was told I would have a primary opponent,” he said. The congressman shrugged o the threat and voted his conscience anyway. Representative Mark Meadows, who eventually became Donald Trump’s fourth White House chief of sta, aggressively confronted Riggleman on the House oor afterward with a foreboding message: “You’re done.” Meadows was right. The next year, Riggleman lost the support of GOP leaders in his primary race—the same race he had won overwhelmingly two years earlier—and was defeated by a vocal Trump supporter who derided COVID-19 as a “phony” pandemic. Why did he lose? I asked Riggleman. “I refused to kneel at the altar of Trump,” he responded plainly. “That is really what it comes down to.” The threat of political alienation is not enough for MAGA forces to keep the coalition in line. They are trying other tactics to intimidate opponents of Trumpism and discourage other dissenters from joining the rebel ranks. The ten House Republicans who did vote to impeach Donald Trump experienced this viscerally. Several months before she was defeated in the Wyoming Republican primary, Liz Cheney told me that the fear of physical harm was working. Flanked by armed guards at a fundraiser, she said that Republican colleagues rejected Trumpism but were afraid to come forward after witnessing her experience. She was no stranger to Secret Service protection, given that her father had been vice president of the United States, but this was dierent. A security detail was not a mark of status for the Cheneys anymore; it was reective of the fact that people were making violent threats against her family back in Wyoming, where she couldn’t go out in public the way she used to. Her fellow dissenters felt the same. “You know, it puts you at risk,” said Michigan congressman Fred Upton, who decided to walk away from a thirty-year career in Congress after his impeachment vote, “particularly when they threaten not only you—and I like to think I’m pretty fast—but when they threaten your spouse or your kids or whatever, that’s what really makes it frightening.” Ohio congressman Anthony Gonzalez decided to quit, too, confessing to receiving threats and fearing for the safety of his wife and children. In February 2022, I reached out to hundreds of former GOP ocials to join a public statement condemning party eorts to silence dissent. More than 140 Republican leaders signed on. Many more than that declined. A former U.S. congressman apologized that he couldn’t add his name to the list, citing the fervor of MAGA supporters in his area. “I can’t do that,” he lamented. “These people are fucking crazy.” Second, the takeover of the GOP apparatus is largely complete. The people who opposed Donald Trump in 2016 are either gone or converted. The Paul Ryans of the Republican Party have been sidelined or have made their way to the exits, along with their illusions about breaking a populist wave with oceanic words about a big-tent party. The Trump inoculation plan failed. Today, the GOP that tried unsuccessfully to stop the man has been overtaken by his staunchest allies, all the way down to the precinct level. “Trumpism has taken over the party machine almost entirely,” one retired Republican congressman told me. “You have party chairs who cannot advance in their positions unless they pledge themselves to Trumpism.” The former elected ocial had helped lead a libertarian insurgency in the GOP in the 2010s and regretted that the movement had been commandeered by the expresident. The evidence of a MAGA takeover of the Republican Party could ll several volumes. For example, GOP state legislatures are fervently advancing Trump-like agendas, passing extremist laws on everything from elections to abortion that were inconceivable only a few years ago. Previously mild-mannered policy wonks such as Representative Elise Stefanik now speak in a combative Trumpian tone. Even the adjacent Libertarian Party has been seized by MAGA-friendly operatives who scorn moderation and compromise. Arizona is an illustrative case. Donald Trump won the state by a few percentage points in 2016, but that didn’t make it a MAGA safe haven. Home to longtime Trump critic and Republican U.S. senator John McCain, the Southwestern state is known for its political nonconformity. Arizona boasts as many independent voters as Democrats or Republicans. Trump lost the state in 2020, and when pro-Trump forces tried to overturn the election results, they were thwarted by election ocials within their own party. Bill Gates was one of them. The Republican (not to be confused with the Microsoft billionaire of the same name) was serving as supervisor for Maricopa County, the fourth most populous county in America. At fty years, Gates still had the eyes of a kid who sported a “Reagan-Bush ’88” shirt before he had car keys and who joined the college Republicans rather than thinking about pledging a fraternity. His folksy demeanor struck me as the mark of a man who took his local position seriously. No kid dreams of becoming county supervisor. Gates was surprised to nd himself at the center of a restorm in November 2020. “The system held after the election,” he explained. In his position, he was charged with overseeing Maricopa County’s election procedures. Despite several days of uncertainty, public outcry, and a changing vote tally that kept the nation on edge, “the results got certied,” Gates said. “And Joe Biden won.” Gates respected the results. Others didn’t. “Trump’s allies started trying to get their hands on the ballots and the voting machines [after the certication],” he recalled, “and it took a very ugly turn.” Three phone calls changed his career forever. The night of November 12, Gates was picking up food when a colleague rang to warn that his personal information—and that of the other county supervisors—had been released online, doxxed by Trump voters angered by the election results. Gates tried to lie low, but the hate mail arrived anyway. It got worse in the weeks that followed, as Trump claimed the election was stolen. Gates knew the allegation was false, at least in Arizona, where he’d personally overseen the voting procedures. He hoped the anger would dissipate, but Arizona’s GOP lawmakers were riled up by the outgoing president, including Congressional representatives Paul Gosar and Andy Biggs. They demanded an audit of the vote. State legislators agreed and wanted to get their hands on the raw materials themselves. The GOPdominated assembly requested Maricopa County give up its voting machines, administrative passwords, and all ballots that had been cast in the November election as part of a “forensic investigation.” Gates didn’t believe he was allowed to hand over 2.1 million private ballots. If he did, surely there was a serious risk of tampering or manipulation. The issue came to a head when Arizona Senate Republicans subpoenaed the Maricopa County Board of Supervisors, demanding that the request be fullled. The supervisors went to court to challenge the subpoena. Gates was cautiously optimistic that a judge would settle the issue denitively in the county’s favor, leaving the votes alone while the political winds died down. He got another call on January 6, 2021. This time, a friend in the business community phoned to report that armed protesters had constructed a full guillotine—a wooden structure for beheading criminals—on the grounds of the Arizona state capitol. The device was meant to send a menacing signal to those who were upholding Biden’s victory. “You gotta get out of your house,” the friend told him. Gates rented an Airbnb in Scottsdale. “I moved my whole family. We took the dogs,” he recalled. “They wanted us killed.” That night Gates, his wife, and his daughters watched the television coverage of what happened in Washington, D.C. as rioters stormed the United States Congress. The violence was real. Republican ocials were being targeted by their own base for defying Trump’s eort to remain in oce. The Gates family remained cautious until Joe Biden was sworn in as president. On Super Bowl Sunday 2021, they were back at their home. The beleaguered county supervisor planned to take a muchneeded break from the smoldering controversy, which had put him at odds with longtime friends in the party. Then one of his daughters called him. “Dad, are you going to jail?” she asked after seeing a post on Twitter. In a bid to pressure the Maricopa County Board of Supervisors, state Republicans had drafted a resolution that would give the legislature power to arrest anyone who deed their subpoenas. What’s more, the measure had the sixteen cosponsors it needed to pass. If Gates and his colleagues didn’t hand over the 2020 ballots, they now faced the prospect of jail time. Gates sprang into action to stop the bill before it was too late. After a urry of behind-the-scenes calls and the release of an emergency public message to condemn the measures (“We shot a video here in my oce,” Gates noted, “and it was like a prison video”), they caught a break. One lawmaker decided to pull his name o the bill, eectively killing it. “The State Senate came within one vote of jailing us,” Gates mused. “We were thrilled we were not being detained, but we had real concerns that MAGA people would come to the house.… We were worried they’d come take us into custody on their own.” So that night two sheri’s deputies were dispatched to guard his home. Arizona Republicans were eectively at war with one another. A judge ultimately ordered the Board of Supervisors to turn over the voting machines and the ballots. A person familiar with the case believes the judge privately agreed with Maricopa County —and didn’t think there were legal grounds for an audit—but approved it anyway under pressure and fear that his family might also be targeted by the MAGA crowd if he didn’t order the county to hand over the ballots. Gates became a vocal critic of the review, earning him national attention—and scorn. He appeared before a U.S. congressional committee to speak out against the partisan audit: “This is without a doubt the biggest threat to our democracy in my lifetime.” The contractors hired to comb through the election results, known as the “Cyber Ninjas,” were inexperienced. Yet right-wing social media viciously trolled Gates and others who tried to point out the review’s failings. The nal report released in fall 2021 was lled with unsubstantiated claims but no real evidence of widespread fraud. The election was free, fair, and accurate. Joe Biden had clearly won the state, and it was time to move on. A year later, Bill Gates still didn’t feel vindicated. Sitting behind his desk in Phoenix—the same place he recorded the “prison video” to protest the legislature’s power grab—Gates reected anxiously on the future of the Republican Party. In recent primaries, MAGA types had defeated GOP moderates up and down the Arizona ballot. Normally the state GOP apparatus stayed out of hotly contested primaries, letting voters decide the party’s direction. That wasn’t the case anymore, Gates said. “Now the party is putting its thumb on the scales,” he explained at the time, noting that the Arizona Republican Party was openly favoring pro-Trump gures over centrist alternatives. “Even the people who aren’t endorsed by Trump… are still falling all over themselves to be MAGA. The movement is permeating the entire party.” Is the intimidation working? I asked. He thought for a beat and looked out the window, as if expecting someone to show up when I said it. “Anyone who would dare speak the truth to these people is in danger.” Third, much of the GOP base is now radicalized. The state-by-state MAGA takeover of the Republican Party machinery will make it easier for the Next Trump to emerge. But the transformation of the GOP base is what will actually propel such a volatile gure into the White House. The increasingly reactionary views of grassroots Republicans virtually guarantee that the movement will maintain its dominant inuence on the party for the foreseeable future. A yard sign I saw in rural Pennsylvania tells the story. Driving through the Midwest during the 2020 presidential campaign, I saw planted in front of a house a homemade poster with the words RONALD REAGAN IS A LOSER written on it in bold. Former President Reagan’s face was crossed out with an X, with Donald Trump’s smiling face next to it. Presumably this was a Trump supporter, but why attack Reagan? The fortieth president was beloved by Republicans, not on the ballot, long dead, and certainly not a threat to Trump. The last assumption is where I was wrong. Trump xated on his predecessors and so did his supporters. “You go around Pennsylvania and you see Trump signs everywhere,” he once tweeted, proceeding to quote a supporter. “The Donald Trump situation is bigger than the Reagan Revolution. Donald Trump has inspired us.” The same year: “94% Approval Rating in the Republican Party, an all time high. Ronald Reagan was 87%. Thank you!” And again: “Wow, highest Poll Numbers in the history of the Republican Party. That includes Honest Abe Lincoln and Ronald Reagan. There must be something wrong, please recheck that poll!” To be seen as powerful enough to restore the country to what it was—to Make America Great Again—his identity requires that others see him as equal to, or greater than, those who came before him. I used to think such comparisons were a farcical insecurity Now I believe Donald Trump was understating the comparison. In truth, there is no comparison. He created a cult unlike any of his predecessors, inspiring throngs of supporters to create deeply personal—sometimes spiritual—connections with his movement. Tribalism is as strong as it’s ever been within the Republican Party. Whether or not Trump remains the tribal leader, the power of group loyalty has radicalized the base. Tens of millions of people now believe conspiracy theories that are provably false, a reality that will shape the American political system in unknowable ways for many years to come. In summer 2022, former Republican congressman Reid Ribble did a test. He was a founder of the Tea Party movement, though he was disillusioned by Trump. Speaking to a group of several hundred churchgoers in Wisconsin, he decided to poll the congregation. “How many of you believe the 2020 election was stolen from Donald Trump?” Ribble asked. A sea of hands went up. It was almost the entire room. Ribble disguised his shock by shifting to a second question, which he hoped would cause most of the hands to go down. “And how many of you believe Donald Trump is still the rightful president of the United States?” Some hands dropped, but roughly half the room kept their arms in the air. It was worse than he had realized.

[PARAGRAPH INTEGRITY RESUMES]

“Populism—in almost all of its historical iterations—tends toward authoritarianism,” he told me. The test he did with the congregation reminded him of another dark period in history: preNazi Germany

In the 1920s, Adolf Hitler rose to power on a Big Lie. He alleged that Germany had been on the path to victory in World War I, but its leaders surrendered prematurely. Victory was seized from Germans by corrupt politicians, Hitler said. The people had been “stabbed in the back.” In reality, the German military had been defeated and the country had no hope of winning the war; nevertheless, millions believed Hitler’s lie amid the harsh conditions of postwar life, from political gridlock to ination. Anxious Germans welcomed the rise of a disruptor who could upend the institutions they believed had failed them, which paved the way for Nazism.

“He created a whole class of victims,” Congressman Ribble explained, “and then he told them he would vanquish the villain.” Similarly, Ribble worries Trump’s lies have created an opening for another dangerous leader. The untruths have created an angry and restless electorate.

In poll after poll, a majority of U.S. Republican voters say that Joe Biden was not the winner of the 2020 election—that it was stolen from Donald Trump. As one of the ocials appointed by the Trump White House to oversee election security during his administration, I can conrm (once again) that this is entirely false. The 2020 election was the most secure in modern history. Yet such attestations have failed. In the aftermath of the Trump presidency, GOP-dominated legislatures in more than thirty states have put forward or passed measures to make it easier to interfere in the vote in the GOP’s favor—teeing up the possibility of legal civil war in future elections.

This isn’t the only falsehood reshaping the system.

The MAGA movement has promoted the QAnon conspiracy theory of an evil deep state running the government. An Economist/YouGov survey found that half of American Republicans now believe in core QAnon concepts, such as the assertion that a single group of people “secretly… rule the world” and that “top Democrats are involved in elite child sex-tracking rings.” In 2016 a man shot up a Washington, D.C., pizza parlor that he believed was used as a Democratic sex-abuse lair. GOP leaders have fanned the ames of these theories. The number three House Republican referred to Democrats as “pedo grifters” in 2022, and the party backed candidates who were open QAnon believers.

Likewise, millions of Republicans subscribe to the Trumpfueled “Great Replacement Theory.” The conspiracy alleges that the Democratic Party is attempting to “replace the current electorate” of white Americans with “Third World” voters, as Fox News host Tucker Carlson claimed. A gunman cited this racebaiting theory in a manifesto before murdering nearly a dozen black Americans in a New York supermarket in 2022, not to mention the mass shooter who killed two dozen people in an El Paso Walmart in 2019, echoing Trump’s words about an “invasion” at the U.S. southern border. An AP poll found nearly half of Republicans believed in the theory, while a University of Chicago poll found that tens of millions of MAGA supporters agreed with the statement that “African American people or Hispanic people in our country will eventually have more rights than whites.”

It would be willful delusion to think these conspiracy theories won’t have lasting repercussions. These highly motivated voters are hungry for MAGA candidates who share their views. And such views will not change overnight. The Next Trump will be a product of this beast because he or she will have to feed it to win, which means keeping the base radicalized on a steady diet of conspiracy theories about existential threats to their way of life.

“There’s a soft totalitarianism coming into play,” Michael Steele professed. He spent two years leading the GOP as chairman of the Republican National Committee. “Modern-day conservatism meant lower taxes, less government, free markets. What we are witnessing now is a deconstruction of that.… I think the rational side is losing, if not having already lost.

“For a party that’s all sensitive about the Left canceling them, they do a pretty good job of canceling their own,” he added. “That’s why the hammer came down so hard on Liz Cheney—to send a message of fear. No one wants to be targeted the way she’s been targeted, which makes this period we are in perhaps the most dangerous.”

Observing what has happened to the party of Lincoln, we can make one conclusion with condence: we’ve only seen the beginning of Trumpism. The rational faction of the GOP has been put down by the radical one and is no longer a check on the system. The conditions are right for the Next Trump to emerge. Worse still for our democracy, when he or she enters the White House, the rest of the guardrails will be weaker than ever.

[PARAGRAPH INTEGRITY PAUSES]

Chapter 2 THE DEPUTY Once an efficient national government is established, the best men in the country will not only consent to serve, but also will generally be appointed to manage it. —JOHN JAY, FEDERALIST NO. 3, 1787 56 PART I Today the Department of Homeland Security sits on a hill just outside of the nation’s capital, a behemoth visible from the Potomac River. But the original Homeland Security headquarters was nestled in the sleepy D.C. neighborhood of Tenleytown, largely unnoticed by pedestrians. The network of interconnected brick o􀐓ce buildings had previously been a secret National Security Agency hub and, later, a naval research facility. After 9/11, it became the home of DHS and almost blended in with nearby American University, were it not for two layers of barbedwire fence and a 􀐜eet of armored SUVs that regularly transited the premises, 􀐜ashing red and blue lights. I was awed to work there during the Bush administration, proudly swiping my badge each day to enter the compound. HQ was responsible for overseeing the department’s nearly 250,000 employees—helping them do their jobs and protecting the American people by responding to everything from natural disasters to cyberattacks. When I returned years later during the Trump administration, little had changed at the compound, except that now the government’s third-largest department was more worried about one person than the many thousands in its ranks. DHS was in a constant battle with the president of the United States. I soon found out why. “The ‘adults’ are winning.” The DHS Visitor Center was backed up when a group of anxious bureaucrats arrived on March 22, 2017. They cut to the front of the line at the magnetometers—shu􀐖ing past framed photos on the wall of President Donald Trump and the newly con􀐙rmed DHS secretary, John Kelly—and discreetly 􀐜ashed blue badges at 57 the guards. In my mind, the matching tote bags gave these spy community employees away. CIA, maybe NSA. They were clutching otherwise unremarkable nylon pouches with thick zippers and pick-proof locks, the kind used to deliver classi􀐙ed material to decision-makers. Was it good news or bad news in the bags? The visitors’ impatience suggested the latter. They vanished into the facility almost as suddenly as they’d arrived. Before long, I’d be on the receiving end of such deliveries every day. Hours earlier, I had been sworn in to be John Kelly’s top intelligence and counter-threats advisor, overseeing the vast e􀐐orts under way at DHS to catch violent extremists, root out foreign spies, and detect weapons of mass destruction (WMD). For now though, I was trapped in a mundane waiting area, watching a silent parade of public servants remove their belts and empty their pockets at the metal detectors. My own paperwork had gotten lost. “We don’t have a Miles Taylor in the system,” the security guard had explained. “Please call your supervisor for guidance.” My boss’s photo was hanging on the wall behind the guards. I imagined how they’d react if the secretary of Homeland Security himself came to get me. Instead I rang the personnel o􀐓ce to 􀐙gure out what happened, and an hour went by before I got a call back. I was told it would be a while longer. If I wanted to bail on the job, this was probably my last chance. An old mentor had reached out earlier in the week to ask me if I was sure I was making the right choice. Jim Kolbe had served as a congressman for more than twenty years in the House (until 2007) and was one of the rare Republican leaders to oppose Trump in the general election. To him, it looked as if only bootlickers were going into the administration, and I should keep my guard up. At a minimum, Jim told me I should carry a draft resignation letter at all times. 58 “Don’t stay too long,” the ex-lawmaker advised. I assured him I was joining a team that understood the situation. Secretary Kelly was the right leader for DHS and would shield the department from Trump’s never-ending political controversies. No draft resignation letter was needed. I scrolled through Twitter while I waited in the Visitor Center, catching breaking news in my feed. A driver on the Westminster Bridge in London had just mowed down dozens of pedestrians before crashing into the gates outside the UK Parliament. Twitter users reported a nearby knife attack on police. Details were murky, but it looked like a terrorist attack in progress. I got a call. “Where are you?” Kirstjen Nielsen, the DHS chief of sta􀐐, was looking for me to brief the secretary on the attack. She was 􀐜ustered when I told her I was stuck at security, and promptly hung up. Minutes later an assistant from the secretary’s o􀐓ce arrived on a golf cart and told the guards to let me through. They obliged. I was whisked into the complex, toward one of the many red-brick buildings, through several checkpoints, past a skeptical Secret Service agent, and beyond frosted-glass double doors. I was in. The secretary’s suite hummed with activity. A group of sta􀐐ers huddled on phones and military aides moved purposefully between o􀐓ces. Kirstjen emerged from their midst. Shoulderlength blond hair and not an inch taller than 􀐙ve-four, she wasn’t exactly intimidating, unless you knew how seriously she took her job. I did. We had worked together brie􀐜y during the Bush years, and she had no tolerance for wasted time. She waved me impatiently into John Kelly’s o􀐓ce, without a “How are you?” or “Welcome to DHS!” “Hey Miles.” Kelly greeted me from behind a large brown desk. “Whatta we got?” He and Kirstjen wanted the latest on the London attack. 59 I explained that I’d just arrived and only knew what I’d seen on Twitter—not from any intelligence reports, calls with law enforcement, or any o􀐓cial sources whatsoever. Anything was better than nothing, Kelly said. He was expecting Trump’s call any moment since this was the 􀐙rst terrorist attack in the West during his presidency. Kelly was worried Trump might pin the blame on Syrian immigrants, post about his Muslim ban, or criticize UK police for failing to stop the attack—none of which would be helpful and would probably cause a diplomatic rift in the middle of a crisis. So I gave Kelly the latest information and my best advice: the suspects were most likely ISIS-inspired locals. Not operatives deployed from the Middle East (but we should talk to our UK counterparts before saying so). The president should call Prime Minister Theresa May and o􀐐er condolences and assistance. Not immigration critiques. And DHS should take the lead away from the White House so this looked operational, not political. We’d review the intel and reassure the public that we didn’t see any imminent threat to America—if, indeed, that was true. “Mr. Secretary,” a military aide interrupted through the doorway, “the president is on the line.” I stood up to leave, but Kelly motioned for me to stay. “Yes, Mr. President,” the secretary answered. I could hear the irritation in Trump’s voice on the other end. He was clearly itching to comment on the news. Trump didn’t like waiting or being managed by sta􀐐 when something was making headlines. But he responded di􀐐erently to John Kelly. The president was awed by military generals and listened quietly as Kelly briefed him on the situation, urged Trump to o􀐐er assistance to the British, and said the White House should let DHS take it from here. The president agreed. After some back-and-forth, the call ended. 60 “Now go make it happen,” the secretary told me. This is what I was hired for. As the door closed behind me, I thought I should have asked where my desk was. I was greeted by a smile that seemed to anticipate the question. Elizabeth Neumann, the deputy chief of sta􀐐, gave me a warm hug. “Heeeyyyy! Welcome. We’re so excited you’re here!” She o􀐐ered an impromptu orientation around the o􀐓ce. The blond Texan was the type you see in the movies who proudly says, “I serve at the pleasure of the president.” Only in Elizabeth’s case, she had known what she was walking into, understood that the president was unsteady at best, and had spent weeks since the inauguration expertly putting out 􀐙res. Nonetheless, she remained optimistic that these were just the growing pains of a new administration and that Trump could be tamed, eventually. Six of us were appointed to help the secretary lead DHS: the chief of sta􀐐 (Kirstjen Nielsen), two deputy chiefs of sta􀐐 (Elizabeth Neumann and, soon, Chad Wolf), and three senior counselors—one for border and immigration (Gene Hamilton), one for cybersecurity (Chris Krebs), and one for threats and intelligence (me). We shared important similarities. All of us were former Bush o􀐓cials (a rarity in Trump’s world, since the president hated “Bushies”), and we all acknowledged that our biggest challenge wouldn’t be tornados or terrorist attacks, but Trump himself. He was more 􀐙xated on DHS than any other department in the federal government, because of his immigration priorities. Dealing with his impulsiveness in the coming months would forge us into a close-knit family, for a time anyway. Elizabeth took me to the “bullpen” to meet my fellow counselors. Gene Hamilton, the border advisor, greeted me while on mute during a conference call. 61 “Howdy, my friend,” he o􀐐ered in a genial Georgia drawl. The tall, mid-thirties lawyer had previously worked for Senator Je􀐐 Sessions on Capitol Hill, and his reputation as a bureaucracybusting immigration hardliner stood in contrast to his upbeat attitude and Southern charm. Chris Krebs, the cyber advisor, had a di􀐐erent energy. Fresh out of Microsoft, his surfer-swoop hair was closer to Silicon Valley than Washington, D.C., while his zero-to-sixty attitude about everything had earned him the nickname “Catastrophe Krebs.” Until our o􀐓ces were ready, he and I shared a tiny workspace. He could tell by my face that I didn’t think we could both 􀐙t inside the matchbox of a cubicle. “How’s your 􀐙rst day?” Chris asked. I told him what had just happened with Trump and the frenetic terrorism brie􀐙ng based solely on what I’d read on Twitter. He looked at me knowingly, like he’d seen it a thousand times. “Ride the wave, man,” Chris advised. “Ride the wave.” Back in Elizabeth’s o􀐓ce, she 􀐙lled me in on the dynamics between DHS and the White House. Yes, it was more erratic on the inside than it looked. But General Kelly was taking charge. For instance, Trump’s right-wing strategist, Steve Bannon, had recently been appointed to the National Security Council (NSC) —the body that advises U.S. presidents on matters of war and peace. The NSC was no place for political hacks. Kelly had teamed up with General Mattis at the Pentagon to reverse the decision, Elizabeth explained, and it would soon be announced that Bannon was being kicked o􀐐 the NSC. Even on immigration, the secretary was having a positive impact. Kelly told the president that it was impractical to build his wall “from sea to shining sea,” and a few weeks ago, the General had traveled to Mexico with Secretary of State Rex Tillerson to make sure Trump’s bluster didn’t blow up relations with our neighbor. The president had been teasing “mass deportations” and 62 unspeci􀐙ed “military operations” at the border. Much to the relief of Mexican o􀐓cials, Kelly and Tillerson denied that any such actions were planned. Of course there was the ongoing Russia investigation. Trump’s behavior toward Vladimir Putin vexed everyone, including Kelly, who worried we didn’t fully know whether the Trump campaign had colluded with Moscow or not. A lot of us were acquainted with FBI director James Comey and trusted him to run an impartial investigation. A briefer with a courier tote knocked on Elizabeth’s door. I noted his impatient expression (bad news in the bag). “What is it?” she asked. The man seemed unsure if he should say. He mumbled two words reticently in my presence. Her face fell. “I have to kick you out for this. Codeword clearance only.” She could tell I was put o􀐐. I was supposed to be the intelligence advisor, after all. “Don’t worry. You’ll be ‘read in’ soon, and you’ll wish you hadn’t been.” I spent the rest of the afternoon handling the response to the UK terrorist attack. There were no o􀐐-the-wall presidential tweets about the crisis, and to my surprise, the White House followed our cues, just as Kelly had requested. After I spoke to my British counterpart on the phone and reviewed a threat assessment, we put out a statement that DHS didn’t see any reason to change America’s security posture. We would help with the investigation and remain vigilant. That evening we gathered in the secretary’s o􀐓ce. Me, Gene, Chris, Elizabeth, Kirstjen, and Secretary Kelly. In honor of my arrival, they opened a bottle of mescal, given to Kelly by Mexican o􀐓cials weeks earlier. 63 He raised a glass of the smokey spirit and toasted—to me and “to another day of dodging bullets.” Not long after starting, I caught up with a reporter friend. We sat outside drinking cocktails not far from the White House, enjoying unseasonably warm April weather. I con􀐙dently told her there was an “Axis of Adults” emerging inside the Trump administration— comprised of Kelly, Mattis, Tillerson, and others—who were keeping it on track. She pushed back gently. “They know what they’re up against?” she asked. “They realize this is a tumultuous White House,” I explained, “and they are serving as a leveling in􀐜uence over fractious personalities… protecting the country from enemies both foreign and domestic.” The reporter ran a story in the Daily Beast—“New Power Center in Trumpland: The Axis of Adults”—and asked to use the quote. I agreed, hoping others would take comfort in knowing it wasn’t all chaos in Trumpland. In hindsight, I was probably sending the message to a few particular people—like the mentor who’d reached out to warn me against going into the administration. And maybe, I was still trying to convince myself. Steve Bannon’s recent removal from the NSC, the reporter wrote, should be “seen as a sign the ‘adults’ are winning.” The job was all-consuming. I returned home most nights after my girlfriend Anabel was already asleep, and left before she awoke, so I took to staying in the guest bedroom. DHS personnel transformed it into a miniature secure facility, complete with a special phone to reach me during emergencies. I fell asleep easily in those early days knowing I’d made the right decision. The Trump administration was starting to function, thanks to capable deputies who knew how to run the government. Like most bedtime stories, this turned out to be 􀐙ction. 64 “Watch your backs.” The helicopter banked left—hard—pushing me against the window. I gripped the armrests. We were low, so low that the downdraft spun up an arti􀐙cial sandstorm in the Jordanian desert while we buzzed the ground. Another sharp turn, right. The seat belt revolted against my chest and waist, as inertia tried to yank my body out of the seat. Distress 􀐜ares erupted from the side of the aircraft. I could see the dazzling red 􀐙reballs out the window as they raced away from the helo, leaving behind thin smoke trails. What had begun as a sightseeing trip was now one of the most turbulent 􀐜ights of my life, and I’d volunteered for it. “Wooohooo!” one of the copilots cheered in my headset after setting o􀐐 another 􀐜are. We were on a joyride, courtesy of King Abdullah II. Secretary Kelly and I were in Jordan for sensitive discussions with the Middle Eastern monarch. At lunch I’d made a joke about taking a spin in the leader’s rotorcraft. He was a pilot, and I knew he had state-of-the-art helos. The king 􀐜ashed a mischievous grin. Thirty minutes later, two limousines pulled up outside the palace to take us to a helipad. Kirstjen shot me a sternly disapproving look, Kelly gave me a thumbs-up, and o􀐐 we went. A lot had happened in the two months since I swore my oath. But the most pressing issue on my plate had brought us halfway around the world to the desert. After I started, I got “read in” on some of the issues Elizabeth had warned me about, especially the panoply of terrorist threats. It was worse than I had imagined. A few hours away from Jordan, in neighboring Syria, ISIS militants were plotting sophisticated global attacks. For instance, terror masterminds were designing bombs that could pass through security undetected and had already shipped packages with hidden explosives around the world to test the system, as a West Point 65 counterterrorism report and law enforcement authorities revealed after several plotters were arrested. Before our trip, I traveled to a secret facility outside of Washington to get up to speed. A veteran spook—we’ll call him Rob—boasted a lengthy career of putting bad guys in the ground, or “warheads on foreheads,” as he put it. We sat in a room with a dozen television screens. Each carried a feed from somewhere abroad. Behind some of those cameras, I guessed, were warheads. “Guys like you and I get asked, ‘What keeps you up at night?’ ” Rob remarked. “For me, it’s this,” he motioned to the screens. Rob shared details of plots that intelligence agencies were tracking. The schemes under way could rival 9/11, and that’s just what we knew about. The reach of ISIS was far greater than al Qaeda, and we were in a real-life race against time to stop attacks that could hypothetically involve anything from chemical weapons and homemade drones to carry-on luggage bombs and vehicleramming attacks. The full magnitude of the danger covered me like an oversized gravity blanket. The military was playing o􀐐ense. DHS was expected to play defense. I remember calling the acting TSA administrator afterward to say, I get it now. In the months that followed, I convened DHS leaders to wrestle with one particular plot that spanned multiple cells, multiple countries, and multiple attack vectors. We had only pieces of the puzzle, and I understood why John Kelly was hesitant to tell Congress or European allies too much. If the details got out, terrorists might speed up their plans before we uncovered the full conspiracy. We were also cautious about telling the president too much. The Oval O􀐓ce wasn’t the highly controlled environment I remembered from the Bush years. It was a crowded New York 66 bagel shop. Donald Trump stood behind the counter chattering with disheveled patrons who ducked in and out, rushing between meetings and showing little reverence for the president’s schedule or the regal decor lining the rounded walls. The president’s notorious reputation as a gossip made us nervous to talk about classi􀐙ed information. Still, he was the commander in chief. Stopping a complex international terrorist plot would require presidential powers, so we shared information and impressed upon Trump the sensitivity of it. Thankfully the president avoided the topic in the press, but we chafed at the White House’s private micromanagement. We logged hours and hours inside the Situation Room with Trump aides, debating what to do. DHS wanted to take swift action to elevate global aviation security across the board to prevent an attack, while White House sta􀐐ers were worried about upsetting the airline industry. In Kelly’s words, it was “time to stop admiring the problem” and do something—fast. The secretary and I 􀐜ew to the Middle East to meet with allies who understood the seriousness of the danger, including the Jordanians and the Saudis. They’d implemented their own heightened counterterrorism protocols in recent years. We sought their help with the spiderweb of lethal threats. Inside the helicopter over the Jordanian desert, the copilot came back on the radio. “Are you ready to head back?” he asked. For the past twenty minutes, my answer had been yes, but the Jordanians were obviously proud to show o􀐐 the aircraft. Back on the ground, the king gave me a high 􀐙ve, smiling behind aviator sunglasses. “Thank you, Your Majesty,” I o􀐐ered. 67 “No, thank you!” He laughed. These weren’t Jordanian helicopters. They were American ones, funded by U.S. support to the kingdom. The relationship was hardly one-sided. As I learned in future meetings with King Abdullah, the Jords were willing to take enormous risks for us and had lost lives gathering the kind of information used to protect Americans from groups like ISIS. They had our backs. Former soldiers known for their integrity, Kelly and the king wordlessly understood the somber bond. We left the royal compound as the sun melted into blood-orange sand dunes, and I saw a handshake between the two men that was more valuable than any press conference or economic deal or helicopter. You couldn’t put a price on trust. After a stopover in Saudi Arabia to meet with the country’s leaders, we returned home with a skeleton of a strategy to deal with the danger we were facing. Tom Bossert, the president’s lanky homeland security advisor, met us in Riyadh. He rode back with us on our modi􀐙ed air force 757, normally reserved for the vice president. Tom was known for lengthy philosophical conversations, and we got hours-deep into one, workshopping a counterterrorism plan for the White House. Aside from the pilots, he and I were the only people awake for the overnight 􀐜ight. I walked Tom through a proposal for how to deal with the threat, based in part on conversations with Middle Eastern allies. I referred to it as the Global Aviation Security Plan, or “GASP.” The melodramatic acronym was 􀐙tting because it would be the biggest increase in airport security in years. Airlines and passengers wouldn’t love it, but it would make it far more di􀐓cult for terrorists to advance their attack plots. Would the president stand behind it? 68 Tom was typically circumspect in his commentary about Trump. He rarely criticized the president. But at thirty thousand feet, with everyone around us passed out, Tom was candid. “Miles, the details don’t matter to him,” he admitted. “He is the most distracted person in the world. He has no fucking clue what we’re talking about.” The president wouldn’t read anything, Tom said, which is why we needed to take our jobs extra seriously. The next steps were up to us. The homeland security advisor admitted that he almost hadn’t joined us overseas; Tom was worried about leaving Trump unsupervised. Something was going down back home, but he wasn’t sure what. We landed at Andrews Air Force Base, and the secretary’s motorcade pulled up next to the plane. Kelly could tell I hadn’t slept and told me to take the day o􀐐. I accepted the order. Rather than nap, I spent the afternoon of May 9 with Anabel, taking advantage of a rare chance to decompress. We went to a lunch spot on Capitol Hill. On top of my slow-burn exhaustion, a glass of wine felt like three. My work phone vibrated on the table. It was the secretary. “Yes, sir,” I answered. Kelly had bad news. The president had just 􀐙red FBI Director Comey in an apparent attempt to obstruct the Russia investigation. The secretary had called Comey to express his disgust and, so far, was the only person in the cabinet to reach out to the director. Conditions inside the executive branch were worsening. The wood-paneled room was tense while we waited for the secretary the next morning. A half dozen of us huddled with him 69 at the start of each new day. When he 􀐙nally entered the room, his face bore quiet anger and resolve. John Kelly made his views clear. He thought the president’s 􀐙ring of Comey was undigni􀐙ed; he was deeply disturbed by how the White House was operating, and he warned us: “watch your backs.” He didn’t know where this administration was headed, but he wouldn’t allow political meddling inside his department. Going forward, we should be cautious about any White House intrusions into DHS business, he said. “I’m the only person here who was con􀐙rmed by the U.S. Senate to run this department,” he instructed, “and if someone at the White House tells you to do something, you tell them to have the president of the United States call me. He’s the only person I report to. I’m the only person you report to. Is that understood?” We all agreed. Comey’s 􀐙ring loomed large over the month of May. The only person who seemed undisturbed was Trump, who tweeted gleefully. “Comey lost the con􀐙dence of almost everyone in Washington, Republican and Democrat alike,” he wrote. “When things calm down, they will be thanking me!” Perhaps not coincidentally, Trump was slated to meet the morning after the FBI director’s removal with Russia’s foreign minister, Sergey Lavrov, and the country’s ambassador to the United States, Sergey Kislyak. Firing Comey and embracing the Kremlin in the same week felt eerie, if not sinister. A few days later, I went to an event with a mix of national security o􀐓cials. The outdoor bar near the White House was the same one where I’d persuaded a reporter the month before that there was an “Axis of Adults” inside the Trump administration. Incidentally, one of those Adults—Tom Bossert—rang my phone while I was sipping a cocktail. The homeland security advisor wanted to give me a heads-up. When President Trump met with the Russians in the Oval O􀐓ce 70 days earlier, he apparently had chatted them up about the “great intelligence” he was getting and shared sensitive details with them about an ISIS terror plot. The news was about to be in the headlines everywhere, Tom warned. Before I could tell the secretary, The Washington Post broke the story. The president had given “code-word information” to the Russians, a top o􀐓cial familiar with the episode told the paper. Trump “revealed more information to the Russian ambassador than we have shared with our own allies.” In one meeting, the president had broken the trust of our international partners, possibly tipped o􀐐 our adversaries, and put U.S. lives in danger. I needed to get back to the o􀐓ce. “I may last a day…” With the arrival of summer, whatever cautious optimism there had been inside the Trump administration burned o􀐐 like water on hot asphalt. Every few days, John Kelly and I descended into a secure room in the basement of DHS headquarters for virtual meetings. We spent a lot of time in these “SCIFs” (secure compartmented information facilities), on the phone with Secretary of Defense Jim Mattis, CIA Director Mike Pompeo, Secretary of State Rex Tillerson, and others, notionally to talk about threats to the country. By midyear, I had begun to dread the meetings. We spent less time talking about international developments and more time 􀐙guring out how to 􀐙x crises of President Trump’s own making. One day, he might insist that America pull out of the North Atlantic Treaty Organization (NATO), the defense alliance that is the backbone of U.S. security. Another day, it might be an errant demand to cancel a free trade agreement with a top ally Trump was mad at for a perceived slight, regardless of whether it might hurt the economy or create diplomatic upheaval. 71 After his 􀐙rst meeting with Russian president Vladimir Putin, for instance, Trump tweeted that he had made a deal with the Kremlin leader to jointly form an “impenetrable cyber unit” to protect elections. Let me clarify: Trump wanted to cooperate on anti-hacking with the very same man who’d just hacked the 2016 vote in the United States. It was like agreeing to host an anger management class with a serial murderer. I showed Kelly the tweet. The Secretary fumed. “I don’t know what the hell he’s talking about,” he said. Our cybersecurity chief, Chris Krebs, was beside himself. Secretary Kelly’s mood began to change. I watched him at Trump’s 􀐙rst cabinet meeting in June. One by one, the president went around the room to his deputies for an update, basking in their words of praise. Vice President Pence said it was the “greatest privilege” of his life to serve Donald Trump. White House Chief of Sta􀐐 Reince Priebus waxed poetic about how the president’s agenda was “a blessing.” UN Ambassador Nikki Haley gushed about the New York tycoon’s “strong voice” on the international stage. The two generals at the table, John Kelly and Jim Mattis, kept straight faces, declining to fawn over the president before, during, or after the meeting. When Trump turned to them expecting tribute, they said little about the man. Mattis praised “the men and women of the Department of Defense,” while Kelly noted the honor of representing a “quarter of a million men and women that serve the country in DHS.” Afterward, I told Kelly that two spectators would notice his choice of words: a grateful DHS workforce and a seething Donald Trump. He smiled. Privately, deputies to the president were questioning more than just Trump’s thirst for adulation. They worried about the 72 commander in chief’s mental state. Trump was becoming more irascible in meetings, lashing out at sta􀐐, frequently repeating himself, and displaying a maddening inability to focus. On June 23, Kirstjen and I went with General Kelly to the White House for a series of meetings. Kelly, Mattis, and Tillerson planned to confront Trump about the creeping state of chaos inside the West Wing, and the scene that morning appeared to prove the point. Unable to get the conversation on track as aides darted in and out of the Oval O􀐓ce, Secretary Kelly raised his voice, demanding that anyone who wasn’t con􀐙rmed by the U.S. Senate needed to leave to room. Sta􀐐ers shu􀐖ed out into the hallway where I was waiting, until the only people left in the Oval were the cabinet members. The president bristled at criticisms of how the West Wing was run, Kelly later recounted. “If it’s so screwed up,” Trump shot back at the general, “come 􀐙x it yourself.” It was at least the second time Trump had suggested that John Kelly become his chief of sta􀐐 at the White House. The secretary declined, in addition to turning down Trump’s request that Kelly take Comey’s place as FBI director. Kelly reassured us he was closer to resigning than accepting a role at Trump’s side, but someone needed to take command soon, or the ship would sink. Trump’s shortcomings stood out particularly during emergencies. I remember brie􀐙ng the president in the Oval O􀐓ce on the projected storm track of an Atlantic hurricane. At 􀐙rst, he seemed to grasp the devastating magnitude of the Category 4 superstorm, until he opened his mouth. “Is that the direction they always spin?” the president asked me. “I’m sorry sir,” I responded, “I don’t understand.” 73 “Hurricanes. Do they always spin like that?” He made a swirl in the air with his 􀐙nger. “Counterclockwise?” I asked. He nodded. “Yes, Mr. President. It’s called the Coriolis e􀐐ect. It’s the same reason toilet water spins the other direction in the Southern Hemisphere.” “Incredible,” Trump replied, squinting his eyes to look at the foam board presentation. We needed him to urge residents to evacuate from the Carolinas, where it looked like the storm would make landfall, but the president mused about another potential response. “You know, I was watching TV, and they interviewed a guy in a parking lot,” Trump leaned back and recounted. “He was wearing a red hat, a MAGA hat, and he said he was going to ‘ride it out.’ Isn’t that something? That’s what Trump supporters do. They’re tough. They ride it out. I think that’s what I’ll tell them to do.” Sometimes his irreverence could be funny, even charming. That day it wasn’t. Worried looks 􀐙lled the room. A clever communications aide piped up. “Mr. President, I wouldn’t take that chance. This is going to be a pretty bad storm, and you don’t want to lose supporters in the Carolinas before the 2020 election.” The president thought about it for a moment. “That’s such a good point. We should urge the evacuations.” You couldn’t write such a stupid scene in a movie, but it always got a little worse. The president told John Kelly that he wanted to take the Marine One helicopters down to the Carolinas to view the expected wreckage. The visual of him 􀐜ying over leveled houses in a helicopter would be much cooler than him viewing the damage from a motorcade, he said. “Mr. President,” Kelly interjected. “We can’t travel down that far on Marine One for this.” 74 “No, no, no,” Trump protested. “When I was in New York, I would take helicopters much, much further. I would take them everywhere. That’s what we should do—we’re taking the Marine One helicopters.” Kelly stated the obvious. “Sir, the helicopter can’t carry your whole team. We don’t travel that light.” Marine One held a handful of people. In contrast, when the president’s motorcade was assembled in a new location, it included forty to 􀐙fty vehicles packed with sta􀐐, armed agents, and medical personnel in the event of an emergency. The image of squeezing all of that into a couple of helicopters was beyond cartoonish. As Trump looked at the faces in front of him, he seemed to know the idea wasn’t going anywhere. He couldn’t pilot the choppers himself. Suddenly, he changed his tune. “Actually, you know what, it’s probably not a good idea to take them. Helicopters always break down. Do you know why?” The president paused and looked around the room for guesses. I shook my head. “Because there are too many parts!” he exclaimed. “That’s right. It’s true. Helicopters have too many parts, so they’re always breaking down—it’s this part, then it’s that part, then it’s another little tiny part. So we won’t do it.” I felt secondhand embarrassment for the briefer in circumstances like this. He or she would stand there awkwardly waiting to get back on topic, while witnessing in person—often for the 􀐙rst time—how genuinely incompetent our president was. It was one of many reasons General Kelly was circumspect about who had access to Trump. Word came down from the White House in mid-2017 to stop providing the president with lengthy documents. If there was a staple in it, the brie􀐙ng paper was probably too long and needed to be cut. Fifteen-page updates on complex issues were chopped down to one. Bold fonts. Simple words. BIG pictures. Know your 75 audience, they say, and the “audience of one” (as we called the president) had the temperament of a child, albeit a child with a 􀐙nger lingering over the nuclear button. We were forced to dumb down life-and-death decisions. Nowhere was this more relevant than on Afghanistan and Syria, two places Trump knew nothing about. The president was dismissive of his national security team’s advice. He wanted out of foreign countries altogether, was eager to please the people who had applauded him on the campaign trail for saying so, and balked at the idea that he needed to give the concept of a massive U.S. military withdrawal any thoughtful deliberation. Military leaders reminded Trump that he liked boasting about how hard we were 􀐙ghting terrorists. Well, Afghanistan and Syria just so happened to be the places where we were 􀐙ghting terrorists, they told him. If we pulled out too fast, extremist operatives would be able to carry out their plots with impunity, and Trump would get blamed for it by the public. The national security rami􀐙cations didn’t matter to the president, but the political implications mattered to him a great deal. I could tell that Trump’s careless handling of military decisions weighed on General Kelly. Amid the internal debates, he made a speech in New York City about honoring U.S. service members. As Kelly spoke, I was sitting close to the stage, reviewing his written remarks, when I realized he was going o􀐐 script. He brought up the death of his son Robert, who had been killed several years earlier by a land mine in Afghanistan. The room went quiet. When a parent loses a son or daughter in combat, Kelly explained, they are visited in person by a U.S. military casualty o􀐓cer who delivers the news. In November 2010, there was a knock on John Kelly’s door from his close friend, Joseph Dunford, who was then the number two of the Marine Corps. That morning General Dunford had volunteered to personally 76 break the terrible news to Kelly and his wife Karen. As soon as they saw their friend’s face at the door, they knew that it meant their lives would be forever changed. “It’s a kind of grief that is unbearable to the mind and antagonizing to the heart,” Kelly recounted. He had been on the other side of the doorway many times in the past, comforting families. In those moments, grieving mothers and fathers asked him whether the sacri􀐙ce was worth it—“worth the life of someone they brought into the world, raised and nurtured, and looked forward to seeing grow up… meeting husbands and wives… having kids of their own,” he said. Kelly had felt ill-equipped to answer such a heartbreaking question without having experienced it himself. “I learned I was right,” he said. Until he received the knock on the door himself, he had no idea how deep the grief could go. The day Kelly buried his own son at Arlington National Cemetery, he described the feeling of emptiness in his heart. He arrived at an answer to the question other parents asked themselves in mourning. Was it worth it? “Robert volunteered to risk everything—including himself—to serve our country,” Kelly explained. “So was it worth his life? That wasn’t up to me. My son answered the question for me.” When it came time to deliver options on Afghanistan, Kelly was worried that Trump was unprepared. The thick brie􀐙ng memo that had landed on the president’s desk was beyond the man’s comprehension or reading ability, truly. I was asked to boil the 􀐙fty- or sixty-page document down to a page or two—in the president’s voice. So overnight in my o􀐓ce, I stayed awake writing a Wikipedia-style 101 about why America was in Afghanistan and what was at stake, all in the Trumpian vernacular. The title of the unclassi􀐙ed version felt like a parody: “Afghanistan: How to Put America First—And Win!” If we pulled out of the country too fast, I wrote, we would be mocked as 77 “losers” by terrorists. If we wanted to be “winners,” we needed to 􀐙ght smarter and harder, then cut a “great deal” to hand over security to the Afghans. A career DHS expert helped me workshop the absurd document so that it sounded like Trump but also made sense from a national security standpoint, strident rhetoric notwithstanding. The memo went to Camp David with the president for decision day. After hours of waiting, we got word. Trump reluctantly agreed with our recommendation to keep U.S. forces in place. He wanted to be “a winner.” Left unsaid in the memo was the solemn promise the U.S. government had made to the families of the fallen, like the Kellys. America had pledged to memorialize their service and sacri􀐙ce by ending the con􀐜ict, in due course, in the same spirit that their loved ones had fought and died: honorably. I couldn’t 􀐙gure out how to put that in Trump’s words. In July, Kelly told the president we were moving forward with the aviation security plan in response to the spiderweb of terrorist plots we were tracking. The White House was worried about the massive scope of the “GASP” proposal, spanning nearly three hundred airports in more than one hundred countries; I was more worried about going too slow, fearing that Trump’s alleged comments to the Russians in the Oval O􀐓ce might cause terrorists to accelerate their attack plotting. Kelly didn’t exactly ask for permission and announced the far-reaching measures in a speech from a hotel in downtown D.C., televised live on the major networks. Weeks later, the secretary’s decision was validated. Authorities in Australia disrupted an ISIS plot to bomb an international 􀐜ight with explosives hidden inside a meat grinder and to develop chemical weapons to kill civilians. Police revealed that the Sydneybased plotters were in touch with operatives in Syria. Our enemies 78 were on the move, and we had to take decisive action to protect Americans. With the GASP announcement out of the way, I felt like it was almost time to depart the administration. I told Anabel the job might kill me. After nearly six months of late nights and fullworkday weekends, I was more exhausted than I’d ever been. The only way I could sleep was with a glass of whiskey (or two) before bed, and I was immediately saddled with an unshakable anxiety every morning when I woke up. What would each day bring? I had push-alerts on my phone for all of the president’s tweets. At any moment the posts could throw the day into turmoil, let alone the threats we read about in our daily intelligence brie􀐙ngs. John Kelly seemed to have adapted to managing Trump while also managing DHS. As long as I could 􀐙nd a suitable replacement, I decided I’d leave in the fall. Yes, it would be an early departure, but this place wasn’t for me. “This administration is a fucking nightmare,” then deputy chief of sta􀐐 Chad Wolf lamented late one evening. Neither of us had taken a proper day o􀐐 since we started. In normal times, Chad appeared more like a TV actor than a DHS bureaucrat—highand- tight haircut, 􀐙ve-o’clock shadow, and designer clothes. But we spent far more time in the o􀐓ce than at home, and it was starting to show. He looked gaunt. At the end of July, Secretary Kelly told everyone to take a week o􀐐. I gladly complied, 􀐜ying to a friend’s wedding in Texas. That’s where I got the phone call that changed everything. I was standing in my swimsuit at a water park outside of San Antonio embracing the warm sunlight when Kirstjen rang. She said Kelly had just gotten o􀐐 the phone with the president. Once again, Trump had appealed to him to come run the White House as chief of sta􀐐, an o􀐐er the secretary had rebu􀐐ed twice already. The secretary had decided to 􀐜y back early from the West Coast, where he’d been spending time with his family. 79 In the past, Kelly had told me there was “zero chance” he’d take the White House job. But, given how unstable the White House had become, Kelly wasn’t dismissing the possibility this time. I had a bad feeling in the pit of my stomach. For thirty minutes, our core front-o􀐓ce team was on a conference call to talk about it. Kelly tried to calm everyone down. He hadn’t committed to the job, was 􀐙fty-􀐙fty about the idea, and had convinced the president to discuss it 􀐙rst, man to man, in the coming days. Kelly would see if Trump was willing to do what was needed to restore order in the White House. I couldn’t imagine Trump showing the discipline a four-star general would demand. Then the president tweeted while we were on the call. We paused to read it. “I am pleased to inform you that I have just named General/Secretary John F Kelly as White House Chief of Sta􀐐. He is a Great American… and a Great Leader. John has also done a spectacular job at Homeland Security. He has been a true star of my Administration.” In a subsequent tweet, Trump 􀐙red his existing chief of sta􀐐, Reince Priebus. A moment of stunned silence was broken by the realization that someone—Kelly, Nielsen, anyone—needed to call the White House immediately to 􀐙gure out where the breakdown had occurred. Kelly hadn’t formally accepted the job. If we acted fast enough, we might be able to put the announcement back in the box, which turned out to be another foolish miscalculation. The president had appointed (ordered, really) his homeland security secretary to become his chief of sta􀐐, and the manner in which he’d done it was a forewarning of how John Kelly’s tenure would play out. The next day I was on a plane back to Washington. 80 I was crestfallen that the secretary was leaving DHS, but there was no time to complain or use in protesting it. I sent along ideas for what needed to happen in Week One at the White House, from personnel changes to suggestions for resetting bipartisan cooperation on Capitol Hill. I also wrote the secretary a parting note about the “turbulent moment” in which he was taking the job and how much we were counting on him. I shared a Thomas Paine quote: “An army of principles can penetrate where an army of soldiers cannot.” The president didn’t need a general. He needed a conscience, and I told the secretary I hoped he’d be one for Trump. “I may last a day or 􀐙ve years in this job,” he wrote back, “but no matter [what], every day I will work hard to live up to your words.” Back in Washington, Kelly literally had only a handful of belongings to pack up to take to the White House. His sparse o􀐓ce symbolized the impermanence with which he viewed his role. I sat on the black leather couch in front of his desk watching him place a few items in a single cardboard box. He threw me a parting “gift”—a pair of wacky socks that had been given to him by some visitor. John Kelly didn’t wear wacky socks. The black stockings were emblazoned with white pineapples, a symbol of friendship. “When it’s time to do the right thing, don’t get cold feet,” he joked. Three days after the tweet, our team drove to General Kelly’s swearing-in ceremony, entering the White House gates in a somber procession of government vehicles. The atmosphere inside was subdued as we made our way to the Oval O􀐓ce. White House sta􀐐 who joined us—Steve Bannon, Sean Spicer, Kellyanne Conway, Anthony Scaramucci, and others—weren’t enthusiastic either, worried how a new regime would a􀐐ect their stature. Jared Kushner glared at the Kelly team from across the room. 81 Trump was the only buoyant person in the Oval. Proud of his latest acquisition and eager to show him o􀐐, the grinning president motioned for the general to say a few words. In a few moments, Kelly would no longer challenge him from outside the White House walls. He would loyally serve him right here, in Trump’s mind, as a compliant deputy. I saw it di􀐐erently. A good man was jumping on a grenade thrown by a bad one. Kelly chose his words carefully. He reminded everyone in the room about the importance of swearing an oath to the Constitution instead of to a person. If we swore allegiance to a particular man or woman, he said, we’d be living in a despotism. Not a democracy. With that, a black-robed judge in front of the Resolute desk asked the general to raise his right hand and led him through a civic ritual that felt like last rites. Everyone who came with Kelly to the ceremony shared his view of the oath of o􀐓ce. He’d hired us for that reason. Kirstjen Nielsen, Elizabeth Neumann, Chad Wolf, Gene Hamilton, Chris Krebs, and me. We stood together feet from Donald Trump, united against the turbulence he was creating in the executive branch. The unity wouldn’t last. In the years to come, our group would fracture, as the commander in chief tested whether we were loyal to the Constitution—or to him. 82 PART II The Founders intended for executive branch employees to be an internal guardrail for democracy. Although the chief executive was empowered to personally nominate the “assistants or deputies” to run agencies, the Senate would con􀐙rm them to ensure responsible leaders were picked. In addition, the Founders envisioned “the steady administration of the laws” by a workforce of duty-minded public servants who would faithfully operate the daily functions of government, regardless of who was president. “The true test of a good government,” Hamilton wrote under the pen name Publius, “is its aptitude and tendency to produce a good administration.” Donald Trump thoroughly dismantled this guardrail. He systematically sidelined or eliminated anyone who objected to his agenda or sought to restrain his impulses. By the end of four years, only the sycophants remained. It will be worse the next time around. In my interviews and conversations with former Trump o􀐓cials, the most oft-repeated view was that a future MAGA administration would not be led by “the best men in the country,” as Publius hoped, but by the worst. THE NEXT TRUMP WILL INSTALL ONLY DEVOUT LOYALISTS IN TOP POSITIONS, WHILE PURGING DISSENTERS FROM THE EXECUTIVE BRANCH. The MAGA movement learned a hard lesson in Donald Trump’s 􀐙rst term: people are policy. The president appointed a vast array of public 􀐙gures to key government posts, most of whom didn’t know the mercurial businessman. And they certainly weren’t willing to carry out policies that were plainly irresponsible, immoral, or illegal. In some cases, the internal resistance set Trump back years in carrying out his true intentions. 83 John Bolton saw himself as one of those people. The former ambassador agreed to serve as White House national security advisor partway through Trump’s term. For a time, Bolton thought he was shielding agencies from Trump’s disruptive mood swings and sudden changes in policy direction. But the more the ambassador objected to the president’s bad ideas, the more he got left out of the conversation. “There would be secret meetings at Mar-a-Lago on national security issues,” a former aide to Bolton told me, “and [John] would call me and say, ‘What the fuck is going on? Why am I not in this meeting?’ ” Afghanistan was the tipping point. Trump was angry about the modest Afghan War plan we’d persuaded him to adopt in 2017 and returned to demanding a sudden pullout. He wanted to host Taliban leaders—the same people who’d harbored the al Qaeda terrorists responsible for 9/11—on U.S. soil at Camp David for talks just days before the anniversary of the tragedy. Bolton objected strenuously. Trump cut him out of the decision-making process, tweeted the summit into existence, and 􀐙red his national security advisor soon after. Then Trump put in motion a hasty framework for exiting Afghanistan. What was the point, I wondered, of the months, the meetings, and the misery we had endured trying to get Trump to do the right thing, only to have him reverse the decision? I put the question to Tom Warrick, the DHS civil servant who had helped me put together the infamous memo, “Afghanistan: How to Put America First—And Win!” Tom was less defeatist. “We bought an extra two years of the United States staying [in Afghanistan] and killing terrorists and protecting the country,” he said. John Bolton agreed that moments like this—when sta􀐐 persuaded President Trump to take the prudent course, even if 84 only temporarily—bought just enough time to protect the country from the worst possible outcomes. “The damage Trump did in the 􀐙rst term is reparable,” Bolton told me. But a second MAGA administration “would do damage that is not reparable, especially in a White House surrounded by 􀐙fth-raters,” he predicted. Nearly every Trump appointee I spoke with made a similar prediction. Another MAGA president won’t hire a stable of experienced public servants. From the start, he or she will populate the administration with a “D Team” of political operatives who pledge allegiance to a cult of personality, not the Constitution. “[Trumpism] is like a progressive disease,” Bolton explained. “It might remit for a while, but it never gets better.” Or as a Pentagon leader under Trump told me: “In Round Two, you won’t see Jim Mattis and John Kelly. It will be the fucking enablers.” A future MAGA cabinet will be led by unapologetically uncon

[PARAGRAPH INTEGRITY RESUMES]

When he was still White House chief of sta, John Kelly rebuked the president one day in the Oval Oce when Trump was having another t about how the drug cartels in Latin America were making him look bad. The president rattled o a list of impossible demands.

“Mr. President, you don’t have dictatorial powers to secure the border,” Kelly retorted. “Or, if you want, you can just declare war on Mexico, invade, and slaughter everyone.”

Kelly was making a graphic but powerful point. Short of exercising his war powers, Trump had to work with Congress to bring the situation under control, through legal changes, funding, and more. That wasn’t Trump’s takeaway. After Kelly was booted from the White House, the president irted with the concept of using military force across the border.

Former defense secretary Mark Esper revealed that the president suggested ring missiles into Mexico to annihilate the criminal groups. The proposal sent the military chain of command into a tizzy. A missile strike on the territory of America’s neighbor—although it was against cartel operatives— could provoke an armed conict with the government of Mexico.

In his nal year, the president’s team asked for plans to deploy 250,000 U.S. troops to the border. The massive mobilization would have rivaled the U.S. operations in Iraq and Afghanistan. Trump was prepared to send soldiers into Mexico to “wage war” against the cartels. Conveniently, the move would have also enabled him to create the buer zone he fantasized so much about —a militarized, Korea-like DMZ.

If missile launches didn’t start a war, invading U.S. troops certainly would have. The Pentagon talked Trump out of military action. But given the rhetoric of the far-right GOP, the next MAGA president might not accept an appeal to reason. He or she might instead raise the sword and take up arms against an ally, indierent to the consequences.

THE NEXT TRUMP WILL DISRUPT DIPLOMATIC RELATIONS WITH THE WORLD AND WIELD MILITARY FORCE CLOSE TO HOME.

The architects of the American system sought to split the foreign policy powers of the government between two branches. In the Federalist essays, they detailed the necessity of dividing it between the president and Congress: “The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most t agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the oce of making them.”

Yet when it came to military power, they defaulted to the executive branch. The draft Constitution named the president the sole commander in chief. “The propriety of this provision is so evident in itself,” they wrote, “… that little need be said to explain or enforce it.” A blade cannot be swung by multiple people at once. “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”

Practically speaking, both sets of powers have ended up largely in the president’s hands. The White House drives the vast majority of all diplomatic and military activities, while the legislative branch occasionally intervenes—usually when it comes to funding. Withholding or supplying money is the main means of control. But presidents of both parties have found ways to shirk Congress’s attempts to limit White House control.

The defense community was nervous about Donald Trump well before he was elected. I spoke with one of the ocials responsible for planning intelligence briengs for the 2016 presidential candidates. He reported that the briefers conducted drills to prepare for the possibility that the GOP candidate might do something foolish with the defense information he was given.

“We war-gamed potential scenarios about what could happen,” the ocial shared. They considered nixing the briengs, which are traditionally given to both presidential nominees. “What if he started tweeting what he heard? We ran a whole series of machinations up to [the oce of the director of national intelligence], including whether to do it or not.”

Rather than scrapping the intelligence updates, they ended up scrubbing them.

“The briengs to him and Clinton were fundamentally dierent,” the ocial explained. “With him, it was like elementary school.” More specically, the briefers presented the information to Trump in such a way that—if he leaked it—the damage to U.S. operations around the world would be minimized.

The fears later proved to be justied. Over the course of four years, Trump recklessly compromised U.S. secrets. He gave sensitive defense information to journalists, shared it with foreign adversaries, and absconded with it to his private residence in Florida after leaving the White House.

On the surface, Trump’s mishandling of classied information doesn’t seem like something you can ascribe to his movement. That was a personal defect, after all. Every Trump shortcoming isn’t imprinted on the wider MAGA coalition, and not all of his characteristics will be shared by the Next Trump.

He has, however, made the GOP downright wrathful toward national security agencies. The distrust runs deep. And Republican leaders have shown newfound scorn toward once venerated American institutions.

“It’s time to end the U.S. intelligence operations against America,” MAGA congresswoman Marjorie Taylor Greene tweeted one day in 2022. Far-right outlets cheered.

“Her instincts are very much in line with the liberty conservatives in Middle America who have grown hostile towards the managerial state and DC altogether,” a popular right-wing website declared, adding that conservatives should gut untrustworthy defense agencies.

In his nal weeks in oce, Trump sought radical change. He considered placing political gures in charge of the CIA and sent loyalists into the Pentagon and the intelligence community. A former NSC staer told me his colleagues were worried that MAGA aides were being dispatched to rummage around in classied programs, to expose “Deep State” conspiracies that didn’t exist, and to betray the agency’s most closely guarded secrets. He also knew they were setting in motion plans to pull American personnel back from overseas. Indeed, Trump drew up orders to withdraw U.S. troops from various places in Central Asia and Africa.

Anthony Scaramucci summed up why MAGA leaders resent the defense and foreign policy establishment: “They want to take America back to 1890, a walled-o society.” As he explained it, the America First approach to international aairs views the past hundred years of U.S. policy—from free trade to democracy promotion—as having harmed Americans, not helped them. The movement’s leading gures would “shut down world trade” if they could, Scaramucci explained, and ensure “everything is made in America.”

“If the cup costs a penny to make in China, let’s make it for twenty-four dollars in America,” he quipped. “That’s what America First is aiming at, total isolationism, guratively and literally.”

Long-standing U.S. alliances will be diminished or destroyed.

While the White House managed to achieve a number of positive foreign policy victories during the Trump administration with other countries, most successes were owed to the Axis of Adults who pointed the president in the right direction. A savvier successor to Trump will try to dissolve the postwar international system and the Western democratic alliance. Put another way, the next MAGA president will pull the plug on American leadership. This isn’t errant speculation. In his rst term, Trump’s foreign policy goal was retrenchment. He badly wanted to reduce America’s overseas footprint, a desire that inuenced his conversations with world leaders.

On a regular basis, Trump demanded an end to U.S. commitments abroad. He called for scrapping defense pacts with Japan and South Korea. He called for pulling out of NATO. He called for canceling free trade agreements with an array of friendly governments. He called for yanking U.S. troops out of places they were stationed—Afghanistan, Syria, Somalia, Germany, and beyond. Arguments with his cabinet over these demands slowed Trump down, but his successor won’t be cowed.

Whoever assumes the mantle of the MAGA movement will pursue an isolationist foreign policy. The result could be calamitous. Like it or not, U.S. inuence and military strength have been the backbone of global stability since the two world wars. Withdrawing from international aairs would make the world less safe for Americans.

Worryingly, isolationist views have infected the wider Republican Party. In the lead-up to Russia’s 2022 invasion of Ukraine, for instance, the vast majority of Republicans supported the statement that “we should pay less attention to problems overseas and concentrate on problems here at home,” according to an Echelon Insights poll. A mere 30 percent of GOP voters agreed with the statement that “it is best for the future of our country to be active in world aairs.”

“My biggest concern would be withdrawing troops from key places abroad, withdrawing from NATO, and abandoning alliances,” Donald Trump’s former defense secretary Mark Esper told me. “I see growing isolationism because of the MAGA movement.” Esper expects another Trump would pull U.S. troops out of strategic positions in Europe, Asia, and Africa entirely.

Chris Harnisch, a top counterterrorism ocial in Trump’s State Department, drew a direct connection to domestic security. He predicted that a populist successor would “bring our troops back from almost everywhere,” adding, “You can’t ght terrorism this way. You can’t pull America back and keep the threat at bay with just drone strikes. So we will pay the price.”

It won’t stop there. MAGA leaders are not content with America embracing a new isolationism; they want other Western countries to do the same. If there is a pattern in international relations, it’s that countries want other nations to look like and act like them. Democracies ally with democracies. Dictators form pacts with other dictators. And all of them hope to see the world remade in their image. Accordingly, Donald Trump and his lieutenants cheered on right-wing nationalist movements in the hope that the MAGA approach to strongman populism would spread worldwide.

“I think strong countries and strong nationalist movements in countries make strong neighbors,” Steve Bannon told a European audience before Trump was elected. “That is really the building blocks that built Western Europe and the United States, and I think it’s what can see us forward.”

If you listen to the intellectual architects of the MAGA movement, openness is the enemy. The postwar focus on free trade, open travel, and political integration have created “the forgotten man.” Globalization has left working-class people behind and made Western nations soft. Manufacturing jobs have vanished, stolen away by developing nations. Immigrants have ooded democracies, undoing a white Judeo-Christian culture, and institutions like the European Union have weakened the West.

The myth conveniently ignores crucial facts. In the same period, the West saw an explosion in economic prosperity (GDP per capita soared year over year), unprecedented levels of security (armed conict among democracies declined), and a surge in political freedom (democracies went from a minority of the world to the majority of nations). Regardless, pro-Trump forces want to turn back the clock. They are urging U.S. allies to embrace antiimmigrant policies and economic protectionism, from Britain and France to Hungary and Italy.

A select group of foreign leaders are eager to see this happen. They want the United States and its allies to retreat, put up their walls, and look inward. Those observers are not our friends.

The world’s autocrats will benefit from an isolationist America.

[PARAGRAPH INTEGRITY PAUSES]

In October 2018, U.S.-based journalist Jamal Khashoggi went into the Saudi Arabian consulate in Istanbul and never came out. According to reports, he was killed and dismembered inside by Saudi operatives at the behest of the country’s leader, Mohammed bin Salman, who wanted the dissident silenced. Following the incident, Donald Trump welcomed reporters into the Oval Oce for a conversation. He was under pressure to condemn the brutal killing and sever ties with Saudi Arabia. Down the hall, I was meeting with National Security Advisor John Bolton about an unrelated issue, when there was a knock on the door. It was White House Press Secretary Sarah Sanders. “Ambassador,” she said to Bolton, “I think you should know something.” He ushered her in. Sanders recapped Trump’s forty-ve-minute interview, during which he begrudgingly acknowledged that Khashoggi had been killed. Then, she said, the president picked up classied documents on his desk and showed them to the reporters, remarking, “See? Many countries have given us intelligence on this.” There was an audible gasp from Bolton. “Oh, God,” he said under his breath. “Yeah,” Sarah replied, “but he didn’t say it was from a specic country on record, just o. You could see pictures but not read any text from where they were sitting.” “Was that part on record?” Bolton asked. “No,” she said. Bolton asked if there were cameras in the room. “No,” Sarah replied. The national security advisor breathed a sigh of relief. We were all disturbed by the lapse in protocol and poor protection of classied information. Equally as disturbing was that Trump couldn’t quite bring himself to condemn the Saudis. “It’s not a positive, not a positive,” he told the reporters about the killing, but then he proceeded to defend the regime. “They’ve been a very good ally, and they’ve bought massive amounts of various things and investments in this country, which I appreciate.” In a meeting with the president in the Oval Oce months later, Trump expressed his opinion to us in blunter terms. “I am not going to talk about this anymore,” he fumed. “Oil is at fty dollars a barrel. Do you know how stupid it would be to pick this ght? Oil would go up to one hundred fty dollars a barrel. Jesus. How fucking stupid would I be?” He thought the Saudis would retaliate and that higher gas prices would hurt him politically. Trump eectively proposed giving the regime a free pass. He later admitted as much to the press.

[PARAGRAPH INTEGRITY RESUMES]

Donald Trump’s look-the-other-way foreign policy emboldened the world’s dictators. By paying less attention to human rights and democracy, Trump broadcast a willingness to tolerate repressive behavior from China, Iran, North Korea, Russia, and other dictatorships.

The attitude will be shared by whoever takes his place.

“The populist MAGA movement has created confusion about who our allies are and who our adversaries are, and that puts America in grave danger,” explained Fiona Hill, one of Trump’s top former NSC aides. The moral equivalence has “made us weaker in the contest with Russia and with China.”

“We had to push through actions sort of by stealth to counter the Russians,” Hill explained of her time in the White House under Trump. “Putin had him wrapped around his nger the entire time.… He was always kissing Putin’s ass. He wanted Putin’s adulation.”

I asked her what motivated the aection for dictators.

“One of the reasons Trump didn’t want to clamp down on autocrats is because he wanted to do the same things as them,” she explained. In Hill’s view, this reected broader MAGA ideology. The movement itself is quasi-authoritarian. She pointed to proTrump members of Congress who have continued to call for the United States to pull back from supporting Ukraine, a move that would be a permission slip for Putin to pursue his ambitions in Eastern Europe.

Eugene Vindman (brother of Alexander Vindman), served as a top NSC lawyer under Trump. He predicted another MAGA president would allow Russia to absorb neighboring countries, including Belarus and Moldova.

“A country of 140 million becomes a country of over 200 million,” he explained, “and a resurgent Russian empire. We’d be in a position where Europe would be far more subject to Russian pressure.”

China will also feel empowered to spread its inuence. Vindman says Trump or a MAGA successor likely wouldn’t protect Taiwan against a Chinese invasion, despite a multi-decade U.S. commitment to defend the island.

Not everyone agrees on this point. A number of Trump’s foreign policy aides argue that—despite the MAGA crowd’s anity for autocrats—many of them support a tougher stance against China. However, the fact that there is stark divergence within the movement on this question suggests that Beijing might be able to divide-and-paralyze any U.S. response to Chinese aggression under the administration of the Next Trump.

And what if the sword is turned on America itself?

The U.S. military is one of democracy’s last lines of defense, meant to repel foreign aggression. If it’s turned inward, it can go from a guardrail of democracy to an existential threat. Just as a future MAGA president is likely to commandeer the domestic security apparatus for political purposes, he or she may also deploy the military to assert control inside U.S. territory.

Until the Trump administration, the proposition had sounded like the plot of a bad ction novel. But Donald Trump was a few sentences away from making it happen. I was there.

In the run-up to his February 2019 State of the Union Address, Trump saw news about another migrant caravan headed toward the southern border. White House aides informed me the president wanted to invoke the Insurrection Act so he could deploy the U.S. military to forcibly expel the migrants, as if they were a foreign army invading the United States.

Of all the emergency powers a president possesses, this one is best known to the public—and was very much on Trump’s mind. It was part of the “magical authorities” he often referenced. The Insurrection Act permits a president to deploy the military inside the United States in order to suppress a rebellion or repel a foreign invasion. If it’s invoked, the president can call forth the military to enforce U.S. laws. The statute is the closest thing to “martial law” in our system.

After I got the call on February 4, Kirstjen Nielsen and I rushed to the White House and intercepted Trump in the Map Room.

“This is fucking insane,” he protested. “We can’t let them in. You have my permission to close the ports—and you need to send them back.” He told us to use the military, which I interpreted as a nod to the Insurrection Act that aides had warned me about.

We spent hours trying to get White House sta and the counsel’s oce to weigh in against Trump’s request. If he invoked the Insurrection Act, it would set a dangerous precedent. There was no telling where Trump might use it next.

We went back to the president to assure him that we were working with Mexican authorities to contain the situation. There was no need for extraordinary measures. We bought just enough time to throw him o the idea, while the speech was nalized without any reference to the Insurrection Act.

The issue roared back to life the following year amid racial justice protests in U.S. cities. Trump was tempted to use the military to suppress the demonstrations, prompting an unusual reproach from his former defense secretary Jim Mattis in The Atlantic. I was heartened to see Mattis nally speak up.

His words captured the gravity of the situation:

I swore an oath to support and defend the Constitution. Never did I dream that troops taking that same oath would be ordered under any circumstance to violate the Constitutional rights of their fellow citizens.… We must reject any thinking of our cities as a “battlespace” that our uniformed military is called upon to “dominate.”… It erodes the moral ground that ensures a trusted bond between men and women in uniform and the society they are sworn to protect.

The Next Trump will have options for how to make the military subservient to his or her whims. One method would be to outsource it. In other words, the Next Trump might hire blackops personnel as mercenaries.

A former NSC staer recounted how Trump was transxed by the prospect of outsourcing warfare to private contractors. Former Blackwater founder Erik Prince reportedly pushed a plan to have contractors take over for U.S. troops overseas, from a vethousand-man team to help overthrow the Communist regime in Venezuela to privatizing U.S. operations in Afghanistan. Trump was intrigued, and a line of communication was opened to Prince through third parties.

Top NSC advisor Lisa Curtis was alerted to the discussions. She asked one of her deputies to write a memo to the president, explaining why it was a terrible idea to enlist outsiders to do the military’s job. The aide scrambled to put together the legal, operational, and moral case for not outsourcing core military functions. Fortunately, the proposal died.

“Next time we won’t be so lucky,” a person familiar with the discussions told me, envisioning a Trump-like future president. “We’ll have a military run by mercenaries.”

A privatized force. Weaponized for political purposes. Policing U.S. city streets. If that’s how the shield and the sword of government are recast, then Tom Warrick’s caricature of the Next Trump commanding his own forces doesn’t seem so hyperbolic. “A junior gestapo,” as he put it, is exactly what it would be.

When I reect on the nightmare scenario—of an American president hijacking the military for nefarious ends—I like to believe there are safety valves. That’s the type of moment when the Twenty-Fifth Amendment gets invoked, isn’t it? Surely the president’s cabinet would save the day by ejecting him from oce if he tried to turn the armed forces against the American people.

But I know better. The Next Trump’s cabinet will be stacked with loyalists. If they think about ipping, they’ll be watched. Top ocials are routinely tracked so they can be whisked away in the event of a crisis. A paranoid president would use those same security measures as a trip wire to determine whether his cabinet was convening—and conspiring—against him.

We can protect our institutions up to a point with obvious remedies. Congress can curtail the two-hundred-year-old law that allows a president to deploy the military on U.S. soil, and legislators should make it harder for the White House to misuse the armed forces. As far as guarding against isolationism, Congress should craft a new Marshall Plan to advance U.S. inuence abroad, to protect global trade routes, to defend the territorial integrity of democratic allies, to resist the spread of autocracy, and to prevent meddling in our republic, especially if we want this to be another American century.

Up to this point, I’ve outlined the many plausible ways the Next Trump might dismantle the guardrails of our democracy. He or she will almost certainly do much of the damage piecemeal, a form of low-level democratic vandalism. Other possibilities (such as turning the American military against the citizenry) would catalyze a more drastic civic implosion.

## Advantage 1

### Circumvention – 1NC

Aff gets overpowered by Google and Meta. They have billions and revenue and union-busting initiatives.

#### Circumvention. Employers and courts nullify enforcement.

Harold Meyerson 25, editor at large of The American Prospect, "A Federal Appellate Court Finds the NLRB to Be Unconstitutional," American Prospect, 8/25/25, https://prospect.org/justice/2025-08-25-federal-appellate-court-finds-nlrb-unconstitutional/

Today, the NLRA hovers somewhere between de facto and de jure nullification. It’s been slowly eroding for at least half a century, as employer resistance to it has heightened, and as the penalties to employers for violating its terms have weakened. Currently, the fact that the five-member National Labor Relations Board is down to just two members—not enough to constitute a quorum—means the Board can make no rulings. This enables employers who’ve been found to have violated workers’ rights by lower NLRB administrative courts to appeal those findings and penalties to the Board, which cannot rule on anything—essentially, giving those employers leeway to keep on doing what they’re doing, however illegal it may be.

The Board is only down to two members because President Trump fired Biden-appointed and congressionally confirmed Board chair Gwynne Wilcox in the middle of her term, which, as for all Board members, was set by the NLRA to run for five years. Under the law, presidents had the power to remove members before their terms expire only in the event of “neglect of duty or malfeasance in office,” which Trump didn’t even allege when he fired Wilcox.

In May, the Republican majority on the Supreme Court upheld Trump’s power to fire Board members at will, under the still-novel theory of the unitary executive, which holds that the federal agencies that Congress established and presidents signed into law to be independent of presidential power, save only the power to appoint their leaders, are now in violation of the newly discovered right of presidents to completely control these agencies. The Republican justices are expected to soon reverse the Court’s 1935 ruling in a case called Humphrey’s Executor, which limited the president’s power over independent regulatory agencies. By upholding Trump’s firing of Wilcox and other heads of regulatory agencies, those justices have positioned themselves to rule that such limitations violate the Constitution’s vesting of executive power in the president.

Last week, the Fifth Circuit circumscribed the NLRB’s power even more. Before the court was a suit that Elon Musk’s SpaceX had filed against the Board, concerning a pending investigation from one of the Board’s regional attorneys into claims that SpaceX had violated its workers’ rights by firing eight of them for going online to opine that Musk’s online verbal outbursts and abuses actually hurt the company’s standing. SpaceX had sought an immediate injunction overturning the Board’s right to investigate those charges, saying that it inflicted “irreparable harm” on the company, even though it was the fired workers who suffered harm and even though the only entity inflicting irreparable harm on Musk’s companies has been Musk himself, through the very outbursts and bigoted behavior that his employees had warned against. (See, e.g., Musk’s effect on Tesla sales.)

Today, the National Labor Relations Act hovers somewhere between de facto and de jure nullification.

In seeking SpaceX’s injunction to stop any investigation the Board might order, its attorneys, from the union-busting firm of Morgan Lewis, based their claim on the argument that the Board itself was unconstitutional, since it had been established, and had been operating for the past 90 years, as an agency that the president couldn’t completely control. The two Trump-appointed judges and the one George H.W. Bush–appointed judge who heard the case found for SpaceX, in a ruling that will now extend to any and every case brought against the NLRB or against employers or unions that the NLRB would adjudicate in the Fifth Circuit, which encompasses Louisiana, Mississippi, and Texas. And in this era of judge shopping, mega-companies that may have one part-time employee or a single post office box in one of those states “may now flood the Fifth Circuit” to avoid any enforcement of decisions upholding workers’ rights, former NLRB general counsel Jennifer Abruzzo told me in the wake of the court’s ruling.

The neutering or repeal of the NLRA has been in the works for several years. Both Musk and his fellow world’s-richest-human competitor, Jeff Bezos, had initiated suits last year claiming that the act—the only act that gives workers the power to bargain with their employers and seek remedies when those employers violate labor laws—was unconstitutional. Even before then, Musk had publicly proclaimed that he was “opposed to the idea of unions.” And just as Musk’s SpaceX had contested an NLRB finding by seeking an injunction against it premised on the act’s unconstitutionality, so Bezos’s Amazon had filed a similar suit seeking a similar injunction on similar grounds. In the Amazon case, the company was opposed not only by the NLRB but by the union of the affected workers, the Teamsters. (That case is still in the works.) The SpaceX workers neither had a union affiliation nor were seeking one, so the only parties to the case were the company and the agency.

But the agency is now inert at the top, and has an acting general counsel put there by Trump. Trump’s nominee for permanent general counsel, Crystal Carey—a former partner at Morgan Lewis, the firm representing SpaceX in this case—was asked by Bernie Sanders in her Senate confirmation hearing last month whether she believed the NLRB was constitutional. That, she answered, was up to the courts, declining to say whether she herself believed it was, and raising the possibility, verging on probability, that she wouldn’t have the agency oppose the argument that SpaceX was making. As of now, Carey remains unconfirmed, as her over-the-top support for employer rule over workers alienated at least one Republican member of the Senate committee.

The Fifth Circuit could have ruled that it was the act’s language forbidding presidents to make at-will firings that was unconstitutional. But by going beyond that to flatly declare that the Board itself was unconstitutional, it completely blocked workers from any attempts to have the act’s protection of their rights upheld by, or even heard by, federal courts in those three states. By granting that immediate injunction, it nullified Board attorneys’ power to simply investigate allegations. (In a concurring opinion, one of the three justices said he’d tried and failed to find any of the irreparable harm to SpaceX presumably posed by an NLRB attorney’s investigation, but he let the ruling stand nonetheless. In the Trump judiciary’s war on workers, empirical concerns appear only as the faintest of whispers.)

Abruzzo, whose service as NLRB general counsel during Biden’s presidency ranks as the most brilliantly pro-worker tenure of any federal official since Sen. Robert Wagner, the NLRA’s author, has some ideas about what can be done if the NLRB remains deactivated or is abolished altogether. “States have to step in,” she told me, “if the NLRB is no longer functioning.” Already, some states have enacted laws banning employers from compelling their employees to listen to anti-union propaganda. Many have extended bargaining rights to workers excluded from the protections of the NLRA. But if the NLRB is no longer functioning and, for instance, can no longer hold union affiliation elections for a company’s workers, then states should consider holding such elections, she suggested. And even if the NLRA is struck down in toto, she noted, workers would still retain their fundamental right to recourse. The years immediately preceding its 1935 enactment, she recalled, were filled with boycotts, strikes, and even general strikes that closed cities down. Workers will “still have the power to withhold their labor,” she said.

For now, it’s important to remember that the federal assault on workers’ rights isn’t all Trump’s doing, or Musk’s, or Bezos’s. Republican officials and American CEOs and mega-investors have been opposed to workers’ rights and power for a very long time, just as many Democrats—not a lot, but enough to make a difference—have been lax in defending them. Today, the bough has been bent to the point that it’s almost broken. A catastrophic snap may come soon.

### Solvency – AT: Union Power – 1NC

#### Can’t solve union density. NLRB is incapable of registering even a 1% uptick.

Benjamin Y. Fong 25, associate director of the Center for Work and Democracy at Arizona State University. He has a Substack focusing on labor and logistics called On the Seams, "A Labor Movement Beyond the NLRA?," Jacobin, 02/13/2025, https://jacobin.com/2025/02/a-labor-movement-beyond-the-nlra

If Elon Musk and the nebulous Department of Government Efficiency have anything to say about it, the labor relations regime that has been in place for ninety years could come to an abrupt end with the inauguration of President Donald Trump.

Passed in 1935, the National Labor Relations Act (NLRA) codified union representation and collective bargaining rights for workers. Union membership boomed in the 1930s and 1940s, and it continued to grow even after the 1947 Taft-Hartley Act, which amended the NLRA to make it harder for unions to organize new members.

In the postwar period, unions became complacent, partly as a result of new legal restrictions and partly out of an acceptance of managerial capitalism. They were thus unprepared for the assault of the business class and the Republican Party during the Ronald Reagan years, which was generally met by the Democratic Party with indifference. Union density has been in decline for decades, and it has continued to drop even among a recent surge in new interest in and approval for unions.

Under President Joe Biden, the National Labor Relations Board (NLRB), the administrative body tasked with carrying out the NLRA, took many actions favorable to unions. It created new rules for the swift processing of union elections and stricter penalties for employer misconduct. It ruled that Amazon was a “joint employer” of its subcontracted delivery drivers. And most recently it banned so-called “captive audience” meetings, where employers use work time to bring employees together and let them know their opinions on unions.

These were all beneficial rule changes for organized labor, and in all likelihood, they will all be reversed by a Trump-appointed board. But we should not be lulled into thinking that all of labor’s problems have an R next to their name.

We should not be lulled into thinking that all of labor’s problems have an R next to their name.

Every year for the last four years, union density has declined — and under the current labor law regime, even in the best of administrative circumstances, it’s difficult to imagine a reversal in this trend. A mere 1 percent uptick in density would require adding more than a million workers to organized labor’s ranks. With the growth in the labor market and regular union losses elsewhere through plant closures or decertifications, actually achieving 1 percent growth would probably mean organizing more like two million workers.

In 2023, in what was called a “banner year” for the labor movement, 99,116 workers were organized in NLRB representation elections, and 115,551 voted in elections. That’s a great win/loss proportion, but the numbers are a mere fraction of what would be required even to keep up with labor market growth. Even were unions willing and able to resource an effort ten times this size (again, the bare minimum required for a possible 1 percent increase in union density), the legal constraints on new organizing efforts would limit the fruits of such expenditures. In addition, the perpetually underfunded NLRB would not be in a place to process all of those elections, even under a friendly Democratic administration. Organized labor’s problems are thus structural, extending far beyond the incoming Trump administration.

#### Fissured economy makes worker power impossible.

Whitney 16 — Bigelow Teaching Fellow and Lecturer in Law, University of Chicago Law School. J.D. from Harvard Law School. Former clerk for Chief Judge of the Seventh Circuit. Heather M. Whitney, “Rethinking the Ban on Employer-Labor Organization Cooperation,” 37 Cardozo Law Review 1455 (2016), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=12438&context=journal\_articles

Whether one supports unionization or not, the NLRA was originally intended to protect “full freedom of association [and] selforganization” for workers.43 As Benjamin Sachs, Professor of Labor and Industry at Harvard Law School, has pointed out, most scholars believe it has failed to do this for one of two reasons: the statute is too weak, and thus unable to do the necessary protecting, or the statute is too rigid, unable to keep pace with changes in the composition and nature of work.44 An examination of modern company-worker relations speaks to the latter reason.

NLRA-style unionization is premised on the notion of a single company that acts as a stable employer of long-term, full-time employees.45 But a number of transformations to the nature of work have rendered anachronistic this conception, and with it the possibility of 1935-era unionization, increasingly impracticable.

Perhaps most significantly, the modern workplace is fissured.46 “Employment is no longer the clear relationship between a well-defined employer and a worker. The basic terms of employment—hiring, evaluation, pay, supervision, training, and coordination—are now the result of multiple organizations.”47

Supply chains and outsourcing more generally provide one example of this. A basic question a company must answer is whether a particular activity it needs done (be it manufacturing, marketing, or inventing) occurs within the corporation itself.48 This choice may be influenced by a variety of considerations, but for corporations with the exclusive goal of maximizing shareholder value, the answer will be straightforward: which is cheaper? In the past, the direct costs of producing a cell phone in China or a lower-cost area in the United States might be far lower than those associated with producing it in house at the company’s headquarters in Silicon Valley; other transaction costs, like those associated with transportation and monitoring, were sufficiently high that cheaper labor did not always translate to cheaper production, all things considered.49 Today, however, those transaction costs are going down. Flying to China to check on manufacturers is cheap and email and surveillance technologies make monitoring farflung factories cheaper.50 Additionally, by contracting out a particular project or job, companies can take advantage of the downward pressure facing smaller companies that compete to win bids for those jobs.51 If a hotel is looking to outsource its room-keeping, it can create a bidding war between vendors, who in turn cut worker wages or risk losing the contract.

Supply chains makes traditional unionization ineffective, if possible at all. With outsourcing, even if the workers are able to successfully unionize the supplier, the supplier itself is intensely competing for bids against other, non-unionized competitors, in low-margin markets.52 The result will often be that the unionized workforce simply does not win contracts for work at all. And in cases where suppliers win and workers subsequently unionize, there is simply not enough money to go around, and the lead company is always free to choose a cheaper (typically nonunionized) supplier during the next round of bidding.53 Thus, unionization of a single low-level supplier is not an effective strategy for workers looking to better their position Franchises are another method of fissuring.54 As one way to lower costs while increasing profits, companies focus on creating and developing a brand while outsourcing day-to-day business operations to franchisees.55 Companies like McDonald’s use this strategy; they create strong brand identities and then sign franchise agreements whereby franchisees agree to abide by strict quality standards.56 In exchange, the franchisee gains access to a consumer-trusted brand while starting their business.

The franchise arrangement used by companies like McDonald’s render traditional unionization difficult and ineffective. First, the nature of franchisee-franchisor relation often puts downward pressure on wages, which results in low-wage and part-time work, as a means to avoid triggering additional benefits.57 This combination, in turn, leads to high turnover and workers juggling multiple jobs, both of which leave them with little time and motivation to unionize a bad but ultimately short-term workplace.58

Moreover, franchisee workers can typically only unionize on a franchisee-by-franchisee basis, since the franchisee of each in particular location traditionally stands as the sole employer of the workers in its particular establishment. This is a problem for workers who want to use collective action as a way to negotiate for improved conditions, since the inaccessible franchisor can maintain significant control over rules about employee scheduling and human resource activities and yet are not at the bargaining table.59 Thus, even if unionization efforts are successful, the franchisor’s control means franchisees have little room to meaningfully negotiate on issues like wages and working conditions.60 While the answer here may be that the franchisors that exert substantial control over the terms and conditions of work most salient to workers should be held a joint employer, the litigation required to achieve that outcome is time-consuming and costly.61

As a result of globalization and new technological developments, companies have also moved further away from long-term employment promises.62 In the June 2013 issue of the Harvard Business Review, Reid Hoffman, co-founder of LinkedIn, and co-authors argued that globalization and the Information Age had eroded stability, put adaptability and entrepreneurship front and center, and “demolished the traditional employer-employee compact and its accompanying career escalator in the U.S. private sector.”63 In this world, they recommended workers think of themselves as “free agents” and the development of a new employer-employee compact based on “tours of duty,” where employees are hired for a specified number-of-year “tours,” typically two to four, with specific and tangible goals.64 While commentators often assume this shift to a “gig economy” is a bad thing, not all workers are opposed. Younger workers especially embrace the role of freelancer in the knowledge economy.65 But regardless of one’s views on long-term versus short-term employment, the less time workers expect to spend at a particular company, the less likely they will be willing to organize to improve the terms and conditions of working there.66

#### Employer stalling kills union power. The bargaining process is unworkable.

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Employer opposition to unions does not stop once workers win their election. After workers vote in favor of a union, they still need to negotiate with their employer for a first contract. The NLRA requires employers and unions to bargain in good faith but does not require them to reach agreement. Unfortunately, there is no governmental source that tracks data for the time it takes for a union to be recognized and sign their first contract. Studies conducted to answer this question consistently show that reaching a first contract can be a lengthy process (McNicholas, Poydock, and Schmitt 2023). According to analysis by Bloomberg Law, the average time it takes for a union to reach a first contract is 465 days—well over a year (Combs 2022). Employers often drag their feet when negotiating a first contract as a tactic to diminish solidarity and morale within the union. Once a year has passed after an NLRB-certified union election, workers may request to decertify their union. Many employers see first contract negotiations as a second chance to defeat the union. This kind of aggressive employer opposition is a key driver for the decline in unionization.

The U.S. labor market is dynamic and sees a large amount of natural churn each month. For example, if the labor market adds 200,000 jobs in a given month, that would typically be comprised of around 2.5 million job gains at new and expanding businesses and 2.3 million job separations at closing and shrinking businesses—both union and nonunion. Under current labor law—which presents enormous obstacles to organizing—workers are unable to organize new union members fast enough to keep pace with the natural “churning out” of unionized jobs (Shierholz et al. 2024).

**War---1NC**

**Democratic peace is statistically disproven---it’s conflict driving**

Dr. Daina **Chiba 21**, Associate Professor of Political Science in the Department of Government and Public Administration at the University of Macau, Ph.D. in Political Science from Rice University, LL.M in Jurisprudence and International Relations from Hitotsubashi University, and Dr. Erik Gartzke, Professor of Political Science at the University of California, San Diego, PhD in Political Science from the University of Iowa, “Make Two Democracies and Call Me in the Morning: Endogenous Regime Type and the Democratic Peace”, 2/19/2021, https://dainachiba.github.io/research/make2dem/Make2Dem.pdf

The democratic peace—the observation that democracies are less likely to fight each other than are other pairings of states—is one of the most widely acknowledged empirical regularities in international relations. Prominent scholars have even characterized the relationship as an empirical law (Levy 1988; Gleditsch 1992). The discovery of a special peace in liberal dyads stimulated enormous scholarly debate and led to, or reinforced, a number of policy initiatives by various governments and international organizations. Although a broad consensus has emerged among researchers regarding the empirical correlation between joint democracy and peace, disagreement remains as to its logical foundations. Numerous theories have been proposed to account for how democracy produces peace, if only dyadically (e.g., Russett 1993; Rummel 1996; Doyle 1997; Schultz 2001).

At the same time, peace appears likely to foster or maintain democracy (Thompson 1996; James, Solberg, andWolfson 1999). A vast swath of research in political science and economics proposes explanations for the origins of liberal government involving variables such as economic development (Lipset 1959; Burkhart and Lewis-Beck 1994; Przeworski et al. 2000; Acemoglu and Robinson 2006; Epstein et al. 2006) and inequality (Boix 2003), political interests (Downs 1957; Bueno de Mesquita et al. 2003), power hierarchies (Moore 1966; Lake 2009), third party inducements (Pevehouse 2005) or impositions (Peceny 1995; Meernik 1996), geography (Gleditsch 2002b), and natural resource endowments (Ross 2001), to list just a few examples. Each of these putative causes of democracy is also associated with various explanations for international conflict. Indeed, some as yet poorly defined set of canonical factors may contribute both to democracy and to peace, making it look as if the two variables are directly related, even if possibly they are not.

We seek to contribute to this literature, not by proposing yet another theory to explain how democracy vanquishes war, but by estimating the causal effect of joint democracy on the probability of militarized disputes using a quasi-experimental research design. We begin by noting that some of the common causes of democracy and peace may be unobservable, generating an endogenous relationship between the two. Theories of democracy and explanations for peace are at a formative state; it is not possible to utilize detailed, validated and widely accepted models of each of these processes to assess their interaction. Indeed, to a remarkable degree democracy and peace each remain poorly understood and weakly accounted for empirically, despite their central roles in international politics. We address the risk of spurious correlation by applying an instrumental variables approach. Having taken into account possible endogeneity between democracy and peace, we find that joint democracy does not have an independent pacifying effect on interstate conflict. Instead, our findings show that democratic countries are more likely to attack other democracies than are non-democracies. Our results call into question the large body of theory that has been proposed to account for the apparent pacifism of democratic dyads.

**1NC**

**Existential warming is inevitable AND causes a collapse into extreme authoritarianism---only transitioning from democracy solves**

Dr. Chien-Yi **Lu 21**, PhD and MA in Government from the University of Texas, Austin, Visiting Scholar at Harvard University, Associate Research Fellow at the Institute of European and American Studies of Academia Sinica, Surviving Democracy: Mitigating Climate Change in a Neoliberalized World, Paperback Edition, 12/13/2021, p. 1-2

The fact that the scientific knowledge on the human contribution to climate change entered human society through the most advanced democratic societies should have been a cause for celebration. Given the congruence of climate mitigation and public interests, the problem of climate change should have been considered solved decades ago. Several decades of inaction later, however, arguments are proliferating that democracy is exactly the reason for inaction.

In The Collapse of Western Civilization, historians Naomi Oreskes and Erik Conway travel to the future to look back and offer a forensic analysis on the climate-induced Great Collapse of Western Civilization of 2074 (2014: 63). The future historians’ forensic report states that “[a]s the devastating effects of the Great Collapse began to appear, the nation-states with democratic governments… were at first unwilling and then unable” to deal with the crisis. These democratic governments realized that they had no “infrastructure and organizational ability to quarantine and relocate people” as “food shortages and disease outbreaks spread and sea level[s] rose.” In China, where there was centralized government, the crisis was handled much more adequately, leading to survival rates exceeding 80%, a development that “vindicated the necessity of centralized government” (2014: 51–2). The gist of The Collapse of Western Civilization is not about critiquing democracy per se but a warning against the stubborn inaction mandated by market fundamentalism that has hijacked Western democracies.1 In their previous book, Merchants of Doubt, Oreskes and Conway documented the way that climate deniers sowed the seeds of doubt about climate change and successfully staved off implementations of mitigation measures. For the authors, the anticommunist ideology that had kept actors vigilant about government encroachment in the marketplace occupied a central place in climate denial (2014: 69). Ironically, this sort of ideology-informed calculation meant that preventative action was blocked, increasing the risk that disruptive climate disasters would eventually necessitate the suspension of democracy and legitimating the sort of heavy-handed authoritarian interventions that the conservatives most abhorred (2014: 52; 69).

An appeal to suspend democracy for the sake of survival can be found in The Climate Change Challenge and the Failure of Democracy, where Shearman and Smith argue that liberal democracy is incompatible with the urgent necessity to prevent catastrophic climate change. The vested interests of politicians, corporations, and media lie in continuing with business as usual and in keeping the public ignorant. Instead of bottom-up reforms to improve democracy and bring about sensible climate policies, Shearman and Smith see a transformation into authoritarian regimes as the only responsible way forward when faced with the extreme ecological stress of climate change. They point out that, as Plato foresaw, those in power in a democracy are seldom able to resist the demands of the populace for long, but as a mass, the populace is seldom able to focus on complex problems and to perceive threats that lie over the horizon. Hence, those able to see further—scientists, experts, and the knowledgeable— should be entrusted with steering the course while there is still time to avoid disaster. It is only under a benign authoritarian rule of the knowledgeable that a saner, fairer, and more rational means of weighing social goods against evils can be introduced (Shearman and Smith, 2007).

### Democracy Defense---Resilient---1NC

#### American democracy is resilient---institutional buffers ensure continuity.

Matthew Kroenig 20, Professor in the Department of Government and the Edmund A. Walsh School of Foreign Service at Georgetown University, The Return of Great Power Rivalry: Democracy versus Autocracy from the Ancient World to the U.S. and China, pg. 198-199, Oxford University Press

American Democracy

The United States is the world’s oldest constitutional democracy. Fleeing persecution by European monarchs, the American founding fathers set up a system to check and balance the chief executive. The authors of the U.S. constitution were also very much inspired by the mixed system of government that proved so successful for the ancient Roman Republic. Individuals are selected for political positions through competitive elections. Freedom of the press, assembly, and many other liberties help to ensure that citizens have the opportunity for meaningful political participation. According to Polity, the United States has been rated as a democracy for over two centuries.3

Contemporary warnings of a possible decline in American democracy should be taken seriously, but, on inspection, they are often overblown. To be sure, American democracy is imperfect, but democracy does not require perfection. It requires free and fair elections and the broad range of civil and political rights that allow for meaningful political participation. There is no doubt that the United States meets this standard.

Worries about a U.S. president’s putative autocratic tendencies are not new; they are baked into the system. America’s founders were revolting against overbearing British monarchs and they wanted to be sure to prevent an overwhelming concentration of power in the executive branch. George Washington was criticized for his presumed monarchic ambitions. More recently, commentators criticized George W. Bush for supposedly consolidating power and creating an “imperial presidency.”4 What is truly most notable about the U.S. system, however, is not executive overreach, but the degree to which Congress and the courts, and the executive branch itself, continually step in to check the chief executive.5 This continues to remain true, even in the current era.

In sharp contrast to Russia, journalists do not have to worry that they will be shot in the back for criticizing the president. And, in distinction to China, the United States does not keep millions of Muslims locked up in re-education camps. It is perverse to draw a moral equivalence between democratic politicking in the United States and the gross evils perpetrated in Russia and China.

American democracy is strong enough to survive contemporary controversies and political scandals. There is little reason to believe that today’s headlines will be more damaging than the Teapot Dome Scandal, Watergate, Iran-Contra, or the Monica Lewinsky affair.

Indeed, contrary to the prevailing narrative, intense domestic political fights and polarization are not evidence that American democracy has failed; rather, they are proof that the system is working. Yes, democracy can be messy, but that is what makes the system great. These disagreements are not even permitted in autocratic states. Serious political conflicts of interest in autocracies often result in dead bodies. Our democratic political system gives us the ability to work out our differences through a mutually accepted and peaceful, institutionalized process. Legislative gridlock is not necessarily a problem. If half of the country strongly disagrees with a proposal, then it is not obviously a good idea, and probably should not become national law. The purpose of the U.S. government is not to enact legislation for its own sake but to ensure “life, liberty, and the pursuit of happiness.” By those measures the country is doing pretty well.

As Machiavelli argued five hundred years ago, discord within a republican system of government is not always pretty, but the results are more than worth it. Nations that desire expanded freedom at home and influence abroad should not rebuke domestic political struggles within a democracy, but celebrate them.

Indeed, the institutionalized tumult and discord in the United States will likely continue to be the primary engine for its continued international power and influence abroad.

### Democracy Defense---No DPT Democratic Peace---1NC

#### DPT is inaccurate. Hawkish beliefs, not regime type, influence war.

Femke E. Bakker 20, assistant professor at the Institute of Political Science Leiden University, Leiden, Netherlands, “The microfoundations of normative democratic peace theory. Experiments in the US, Russia and China,” Political Research Exchange , Vol 2, Issue 1, 2020, https://www.tandfonline.com/doi/full/10.1080/2474736X.2020.1753084

Introduction

Why do leaders of democracies don't fight with other democracies while they do fight with non-democracies? A substantial body of literature within the field of international relations (IR) argues that liberal norms are the cause of the so-called ‘democratic peace’, an empirical pattern that indicates an absence of war between democracies. In attempt to create a democratic peace theory, they posit the following mechanism: Democracies supposedly socialize their leaders and citizens with liberal norms. These liberal norms are expected to decrease war-proneness among these individuals, in particular towards societies that share these norms: other democracies (Doyle 1997, 282; Maoz and Russett 1993, 625). Autocracies, on the other hand, supposedly socialize their leaders and citizens with other, more violent and zero-sum, political norms. These norms are expected to increase the tendency of war-proneness among these individuals (Maoz and Russett 1993, 625). The socialization process purportedly nurtures peace between democracies, and thus war can only happen when the opposing state is non-democratic. Following the logic of this ‘normative explanation’, liberal democracies are ‘forced’ to fight with non-democracies because of the lack of liberal norms of the latter. Liberal democracies will, therefore, have to adapt to the more violent norms of the non-democratic states (Kahl 1998, 125–129; Maoz and Russett 1993, 625; Rousseau 2005, 27–28; Russett 1993, 32–33).

A considerable volume of research has explored the empirical validity of this ‘normative explanation’ for the democratic peace (Bakker 2017; Bell and Quek 2018; Danilovic and Clare 2007; Dixon 1994; Dixon and Senese 2002, 549; Geva, DeRouen, and Mintz 1993; Geva and Hanson 1999; Jakobsen, Jakobsen, and Ekevold 2016; Johns and Davies 2012; Kahl 1998; Maoz and Russett 1993, 625; Mintz and Geva 1993; Mousseau 1997; Owen 1994; Rawls 1999; Ray 1995; Risse-Kappen 1995; Rousseau 2005, 27–28; Rummel 1983; Tomz and Weeks 2013; Van Belle 1997; Weart 1998, 75–93), or what I will call ‘democratic peace theory’ from here on. Only few of them have used experiments to study the logic of this theory, because its microfoundations rest on a particular set of assumptions about how individuals differ cross-regimes (Bakker 2017; Bell and Quek 2018; Geva, DeRouen, and Mintz 1993; Geva and Hanson 1999; Johns and Davies 2012; Mintz and Geva 1993; Rousseau 2005; Tomz and Weeks 2013). These experimental studies have told us, overall, that individuals within democracies are reluctant to use force towards other democracies, when compared with their willingness to use force towards autocracies. However, these studies have missed out on three crucial elements of the mechanism: they never tested (1) the actual presence respective absence of liberal norms in different regime-types, (2) the expected effect of liberal norms on the willingness to use force, and (3) they conducted their experiments in democracies only.

In regard to the latter point, there are two studies that do consider autocratic samples and explore the willingness to attack democracies among non-democratic citizens (Bakker 2017; Bell and Quek 2018). Both studies show, in contrast to the assumptions of democratic peace theory, that also individuals in autocracies are less willing to go to war with democracies. Bell and Quek (2018) replicated Tomz and Weeks’ (2013) experiment on a China sample. Their intriguing finding that also Chinese participants are reluctant to attack democracies made them call for new investigations within autocratic settings. However, Bell and Quek (2018) did not measure whether liberal norms were indeed absent, nor did they control for the possible effect of those norms. Although their results offer important new insights, as argued above, when we study autocratic audiences, we need to investigate the assumptions about the absence and possible effect if liberal norms as an empirical question. And that is something I did in a previous study (Bakker 2017). In this study, experiments were conducted in China and in the Netherlands to test for the microfoundations of democratic peace theory. Moreover, in that study liberal norms among Dutch and Chinese participants were actually measured. The results showed that liberal norms are also present among non-democratic individuals, but that these are not of influence on the willingness to attack. Even more, the comparison of autocratic individuals with democratic individuals reveals a new insight: the democrats are not so much more peaceful than autocratic individuals, they are rather more war-prone towards autocracies (Bakker 2017, 538). The conclusion was that we ‘should be prudent with assuming a priori that liberal norms could not exist among individuals living in other regime-types’ (Bakker 2017, 539) to explain the democratic peace and suggests, moreover, to include multiple explanatory factors into our experimental designs, such as hawkish beliefs, and the perception of threat.

In this paper this call is answered. It shows that the current state of the art on democratic peace theory is insufficient to claim that liberal norms cause peace between democracies. My argument builds my previous study (Bakker 2017, 524–527) in which I argue, based on the state of the art, that if we want to know if liberal norms are indeed present in democracies and absent in autocracies, we need to conceptualize and measure them, and study their influence on decision-making processes in both democracies and other regimes types. This paper extends the earlier studies, and in particular my previous study (Bakker 2017). It (1) Offers a stronger conceptualization and measurement of liberal norms, and (2) Uses an experiment on American, Russian and Chinese samples to test the microfoundations of democratic peace theory. These states have different regime-types but are fairly similar in respect to position on the world stage. The paper then (3) compares the results of the student samples with samples representative of their respective populations, to seek external validity. And lastly (4), following Bakker (2017), the paper also improves the experimental design of previous studies by controlling for the perception of threat, and other explanatory individually based factors that might influence decision-making as posited by other political psychologists (Kertzer and Brutger 2016; Rathbun et al. 2016; Yarhi-Milo, Kertzer, and Renshon 2016).

The results of this paper support my earlier findings (Bakker 2017, 539) about liberal norms and regime-types, and moreover offer new insights into the microfoundations of democratic peace theory. A comparison between representative and student samples of the US, Russia and China show that liberal norms are universal values rather than norms imbued by the super structure of a regime-type. Moreover, nor regime-type, nor liberal norms show to be of influence on the decision to attack the enemy. The evidence of the experiments shows that hawkish beliefs rather than structural factors determine whether leaders choose to go to war. This paper makes the case that structural theories about the causes of war and peace, such as the democratic peace theory, need to be revised. The democratic peace thesis might be correct in its description of an empirical regularity, but the dominant explanation of why democracies do not fight each other is built on empirically shaky foundations.

### Democracy Defense---No US Model---1NC

#### Democracy is inevitable, even without the US.

Ngaire Woods 25, Professor of Global Economic Governance and Dean of the Blavatnik School of Government at the University of Oxford, "Order Without America," Foreign Affairs, https://www.foreignaffairs.com/united-states/donald-trump-order-without-america-ngaire-woods

As the political scientist Robert Keohane pointed out in the 1980s, however, hegemonic stability theory looks only at the “supply side”: the willingness of a powerful country to supply the conditions for cooperation. But the demand side matters, too. Many countries, including the vast majority that lack dominant power, support various forms of multilateral cooperation to secure their own interests. That demand exists because in a world rife with competition, uncertainty, and conflicts, most countries recognize that ad hoc deal-by-deal diplomacy is unlikely to succeed. Such deals will tend to favor strong powers and thus lead to the kind of coercive behavior Trump has already used against weaker countries such as Canada and Mexico. As a result, even in the absence of a hegemon, countries may seek collective institutions to pool their power, build a bulwark against instability, and capture the mutual gains that occur when a modicum of cooperation is achieved. This insight suggests new possibilities for order without the United States.

In fact, multilateralism without a hegemon has a long history in Europe. At the Congress of Vienna in 1814–15, the European powers convened to create a rudimentary order. What emerged was the Concert of Europe, a group that would come to include Austria, France, Prussia, Russia, and the United Kingdom. Although the United Kingdom had great naval and economic strength at the time, it did not have hegemonic power over the continent. Rather, a combination of diplomatic cooperation and a balance of power kept order until the Crimean War and the unifications of Germany and Italy disrupted it. A yet older example of such cooperation is the Hanseatic League, the confederation established by northern European cities in the thirteenth century to protect and promote their trading interests. Highly successful, it flourished for hundreds of years.

Since World War II, although Washington has occupied a hegemonic role in the overall order, there have been several prominent examples of demand-driven cooperation among groups of countries that do not include the United States. Take the European Union. Even in the face of U.S. apprehensions about protectionism, European countries successfully organized their economies as one large, powerful bloc. As a result, Europe has strong and durable institutions, including collective financial resources, such as the European Central Bank and the European Investment Bank, which now have major influence in international affairs. And as European countries scale up public investment to respond to the world’s overlapping crises amid volatile changes in American foreign and trade policy, the euro could provide an attractive alternative to the U.S. dollar as a global reserve currency.

Another prominent example of interstate cooperation without a hegemon is the Organization of the Petroleum Exporting Countries, a group that includes the major oil producers of Africa and the Middle East, as well as Venezuela. Since its establishment in 1960, OPEC has suffered defections, internal price wars, and regular cheating on its quota limits, but it has nonetheless empowered a group of resource-rich countries without strong armies or diversified economies to sway global affairs and generate leverage in capitals around the world. Since Russia’s invasion of Ukraine in 2022, the group has successfully coordinated production quotas among its own members and the ten other countries that form OPEC+ to stabilize and sustain high oil prices, furnishing its members more than a trillion dollars in gross revenue.

A looser form of demand-driven multilateral organization is the BRICS+ group of countries. Founded in 2009 by Brazil, Russia, India, and China, BRIC (as it was known then) has since grown to ten members. Although some have dismissed it as an ineffectual attempt to provide an alternative to Western-dominated international financial institutions, the group is held together by a shared interest in reducing risks. For example, many BRICS+ members worry that their reliance on the U.S. dollar and U.S.-led international institutions makes them vulnerable to coercion and sanctions. They have created institutions that they hope will make them more resilient, including the New Development Bank, which by the end of 2022 had approved more than $32.8 billion in loans for 96 projects in BRICS+ countries and other emerging economies.

Each of these cases illustrates that countries that have common interests or a need to protect themselves against shared risks can make effective arrangements on their own. If the Trump administration decides to withdraw from international institutions, renege on U.S. commitments, and ignore established norms of diplomacy, that does not mean that other countries cannot create and sustain frameworks for negotiation and agreement. Indeed, there are several pathways by which the world could transition from U.S.-led institutions, treaties, and alliances to ones shaped by other countries.

#### US has zero democratic credibility.

Emma Ashford 21, Senior fellow in the New American Engagement Initiative at the Atlantic Council’s Scowcroft Center for Strategy and Security, "America Can’t Promote Democracy Abroad. It Can’t Even Protect It at Home." Foreign Policy, 01/07/2021, https://foreignpolicy.com/2021/01/07/america-cant-promote-protect-democracy-abroad/.

“What if journalists wrote about U.S. politics the way they wrote about other countries?” asked a dozen tongue-in-cheek articles since 2016. Twitter users joked about the embattled president of a former British colony, huddling in his palace, refusing to concede the election. But all of that ended Wednesday afternoon, when a violent mob rushed past U.S. Capitol Police and invaded Congress, forcing the evacuation of lawmakers and ending with tear gas, gunfire, and at least four deaths. The pictures called to mind Boris Yeltsin on top of a tank, the Arab Spring, or the streets of Venezuela. For those watching around the world, the United States had become what American leaders so often decried: a weak democracy unable to prevent violence and bloodshed from marring the transition of power from one leader to the next.

It’s a sign of how broken U.S. foreign-policy debates are that the primary reaction from many commentators was to worry about America’s moral authority and global leadership. There were comments about how happy China’s Xi Jinping must be and worries that this would undermine U.S. democracy promotion abroad. Michael McFaul, a former Obama-era ambassador to Moscow, tweeted that “Trump today delivered his latest, but hopefully his last gift to Putin.” Meanwhile, a group of NGOs, including the National Endowment for Democracy, issued a statement reaffirming its “commitment to stand in solidarity with all those around the world who share democratic values.” In short: in the middle of a literal coup attempt aimed at halting the certification of a democratic election, with insurrectionists storming the Capitol, many foreign-policy hands were fretting about whether the United States could continue to spread democracy and human rights abroad and whether it might impact America’s ability to engage in great-power competition with China.

To call these reactions out of touch would be an understatement. At this point, the United States has bigger problems than an inability to promote democracy around the world or worrying about an ambitious global competition with China. U.S. domestic politics are staggering under the weight of decades of partisan abuse, and while most institutions have so far proved resilient, there is no guarantee they’ll stand up to the next autocratic wannabe. Almost the only institution that retains the trust of the American people is the military, a distinction that carries its own worrying implications.

Wednesday’s violence will certainly impact the United States’ global image, although the last four years under Donald Trump have done plenty of damage already. And while it is certainly true that the political turmoil that has engulfed the country since November will make it harder for the United States to build an international coalition against China, it’s hard to see why U.S. policymakers are prioritizing rallying an ambitious and poorly defined “alliance of democracies” to push back against China, rather than trying to stop the bleeding at home.

To be clear, this is not a call for America to retreat from the world; the United States benefits hugely from global engagement. But Wednesday’s crisis lays bare a central flaw with U.S. foreign policy today: Ambitious foreign-policy goals are completely out of step with the realities of the country’s domestic political and economic dysfunction.

How can anyone expect—as Joe Biden’s campaign promised—to “restore responsible American leadership on the world stage” if Americans cannot even govern themselves at home? How can the United States spread democracy or act as an example for others if it barely has a functioning democracy at home? Washington’s foreign-policy elites remain committed to the preservation of a three-decade foreign policy aimed at reshaping the world in America’s image. They are far too blasé about what that image has become in 2020.

Even the projects that have been undertaken since 2016 focusing on the intersection between domestic and foreign politics—such as this recent Carnegie Endowment project—have mostly focused on ways to either sell the country’s existing foreign policy to the American people or fix trade and investment policies so that the middle class benefits more. In reality, what is needed is a wholesale rethinking of foreign policy, a more modest and humble approach to the world, and an attempt to address the real problems created by domestic dysfunction.

Wednesday’s insurrection worsens two concrete foreign-policy problems for the United States. First, it will increase the likelihood that other governments will be wary of any binding commitments or in-depth cooperation with the United States. Four years of Trump have already convinced countries in Europe and Asia that U.S. commitments may not be worth the paper they are written on, particularly in an increasingly partisan environment. The Iran nuclear deal, the Trans-Pacific Partnership, and the Paris climate accords were all victims of a shift to a more partisan, seesaw form of foreign policy. This week’s violence in Washington and the broader political turmoil since the November election have added to those concerns that future U.S. elections may not even be free and fair.

### Extremism Defense---No Impact---1NC

#### There’s no impact to extremism---xenophobic nationalism is the problem, but the AFF can’t solve that.

Tjitske Akkerman 17, researcher at the department of Political Science at the University of Amsterdam, “Don’t Panic About Populism: Greater Threats Abound,” Green European Journal, https://www.greeneuropeanjournal.eu/dont-panic-about-populism-greater-threats-abound/

The recent rise of ‘populism’ across Europe has been the subject of increasing concern in the past few years. However the idea that it’s ‘populism’ itself is a problem fails to take into account its key characteristics and how it’s the xenophobic and nationalist ideology of the forces that are gaining tract every year on the right of the political spectrum that makes them a threat to democracy.

Out

In 2016 there was widespread panic about populism. Brexit, the election of Trump, and the electoral prospects of populist radical right parties like the French National Front (FN), the Dutch Party for Freedom (PVV), the Alternative for Germany (AfD), and the Austrian Freedom Party (FPŐ) exacerbated this panic. The consternation has somewhat declined now that these elections have been held without bringing the feared landslides. Yet, populism is still regarded as the main threat to liberal democracies in Western and Eastern Europe. I will argue that the impact of populism is overrated. That is not to say that I hold liberal democracies to be safe. Liberal democratic achievements like freedom of the press, the trias politica (the separation of powers), and a pluralist civil society are under siege in Hungary and Poland. In Western Europe liberal democratic institutions may have acquired stronger foundations due to their longer existence, but they should not be considered invincible. There are threats, but these threats are stemming from xenophobic nationalism rather than from populism.

Panic about populism

Populism is the great danger of our times according to world leaders in the West. Obama, on his last trip to Europe as president, warned against populist movements on the Left and the Right in Europe. Pope Francis said that “populism is evil and ends badly as the past century showed,” in an interview with a German newspaper. Juncker, the head of the European Commission said in his annual State of the Union address in 2016 that the EU was facing a “galloping populism” and “we need to be aware of that and protect ourselves against it”. The term ‘populism’ is loosely used by politicians and pundits and ranges from left-wing opponents such as Hugo Chavez, Jeremy Corbyn, Bernie Sanders, Syriza, and Podemos to right-wing ones like Donald Trump, Marine Le Pen, and Geert Wilders amongst others. Populism is not only branded as evil or dangerous in public discourses, however, academic scholars also tend to see it as an ideology that inspires political parties or politicians to make undemocratic claims. The most well-known critic is Jan Werner Müller. He follows Cas Mudde’s definition of populism as an ideology that separates society in two antagonistic and homogeneous groups – the good people versus the bad elite – and that claims that politics should be an expression of the general will of the people. For populists the general will of the people is more important than the rule of law. Various scholars have argued that this ideal of democracy as being based on an unfettered popular will makes populism into a potential enemy of liberal democracy. Jan Werner Müller goes one step further by asserting that democracy as such is under threat.

Left-wing populists are not anti-democratic

The crux of this definition of populism is that the people are seen as homogeneous. Populists are perceived as anti-democratic because they are anti-pluralist; they do not acknowledge that voters have diverse values and interests. This anti-pluralism is the core idea that makes populism so dangerous, according to Jan-Werner Müller. However, Müller overrates the danger of populism. First, populism is only a secondary ideology that is not the main driver of anti-liberal policies nowadays in Europe. If populism is an ideology, it is a thin ideology that tends to be additional to more substantial core ideologies of parties or movements. It can be added to socialism, for instance, in the case of radical left-wing parties or to nationalism in the case of radical right-wing parties. Second, populism is a feature of both right-wing and left-wing parties and politicians. Yet, populist left-wing parties in Western Europe do not tend to be anti-liberal. Populist left-wing politicians like Corbyn in Britain and parties like Podemos in Spain, Syriza in Greece, GreenLeft and the Socialist Party in the Netherlands, or Die Linke in Germany are called populist because they often refer to the people as being oppressed by elites. This rhetoric does not imply a homogeneous idea of the people. These parties may display a populist discourse, for instance by criticising greedy elites like bankers and endorsing empowerment of the people, but they are not anti-pluralist.[2] Moreover, this does not only hold for left-wing populist parties but also for their voters. As surveys show, voters of left-wing populist parties are not inclined to anti-pluralist attitudes.[3] Only radical right-wing parties and their voters have an idea of the people as a homogeneous group. Parties like National Front, Party for Freedom, Flemish Interest, Lega Nord, Austrian Freedom Party, Swiss People’s Party, the Finns, Danish People’s Party, and various others refer to a culturally homogeneous people. In other words, populism is not necessarily or always based on the idea of a homogeneous people. Of course, one could argue that this is a matter of definition, but a definition that goes against common use is far from helpful. Moreover, the idea of a homogeneous people that one finds in radical right discourse is not primarily a populist idea, but it is founded in xenophobic nationalism. That is the core ideology of these parties. These parties also tend to be authoritarian in the sense that security overrules fundamental freedoms. Nationalism and authoritarianism are closely linked, because radical right-wing parties tend to link immigration to terrorism and criminality.

Immigration and security are the issues that count

The programmes, policies, and motivations of voters of populist radical right-wing parties all demonstrate that exclusive nationalism is their lifeblood. In Western Europe these parties have focused on anti-immigration and anti-Islam policies. In Eastern Europe, exclusive nationalism used to be directed at ethnic minorities, Roma, or Jews, but parties like Fidesz in Hungary and the Party of Law and Justice (Pis) in Poland have also focused on immigration more recently. There is overwhelming evidence that anti-immigration views are also the main motive for voters in Western Europe to vote for these parties.[4] Populist cynicism and distrust of political elites does play a role as well, but protesting against established parties is a far more marginal motivation than opposition to immigration. The refugee crisis of 2015/2016 in particular boosted the support for populist radical right-wing parties, far more so than the financial and economic crisis that broke out in 2008.

Viktor Orbán, the Hungarian prime minister and leader of the populist party Fidesz, has openly propagated an ideal of illiberal democracy. He defied liberal democracy and praised ‘illiberal democracy’ when he was re-elected in 2014. In Western Europe, however, populist radical right parties tend to refrain from openly promoting an alternative, illiberal model of democracy. Nevertheless, their policy proposals and legislative initiatives in opposition or in government betray that they have little respect for fundamental freedoms and rights of ‘non-native’ groups. When they promote policy proposals or legislative acts that collide with fundamental human rights, these proposals are mainly about immigration or security.[5] When in government, the Austrian Freedom Party proposed to take fingerprints of all foreigners, the Lega Nord proposed a ‘security package’ that included proposals that were thrown out by the European Court of Justice as fundamentally conflicting with fundamental human rights, the Swiss People’ s Party used popular initiatives to restrict religious freedoms such as the building of minarets that breached the European Convention of Human Rights. Success in implementing these policy proposals has been limited so far in Western Europe. National or European courts, political opposition and civil societies have in most cases prevented that such proposals came into law. Moreover, when populist radical right-wing parties in Western Europe have gained executive power they most often did so as junior partners of coalition governments. Finally, fundamental freedoms also tend to be firmly embedded in national constitutions in most countries in Western Europe. Constitutional reforms usually require political majorities that are difficult or impossible to acquire by one party due to proportionate electoral systems and increasing political fragmentation in most countries in Western Europe.

Reasons to worry

This is not to say that worries about the corrosion of liberal democracies in Europe are misplaced. Populist radical right parties do not show much willingness to tone down. On the contrary, they tend to radicalise over time. Mainstream parties, in particular centre-right parties, take over highly restrictive positions on immigration and xenophobic rhetoric in order to compete electorally with their rivals at the far-right flank. Most worrying is that mainstream parties also increasingly skim the boundaries of the rule of law or go beyond them when fighting against terrorism or preventing another refugee crisis. This broader corrosion of fundamental freedoms that is taking place in order to protect national security and national identities is nowadays the main threat to liberal democracies. The term populism obscures rather than identifies this threat. That is not to say that the term populism should be discarded altogether. It is a distinguishing rhetorical feature of radical politics at the left- as well as the right-wing flanks of the political spectrum. Yet, it should be clear that populism is not by definition anti-pluralist. Xenophobic nationalism should be the target when identifying the main threat to liberal democracies in Europe.

## Neg – Models

**Artificial Intelligence AI AGI Superintelligence Defense---Not Real---AT: Neural Networks**

**The deep neural network architecture cannot create AGI.**

Jérémie **Sublime 24**, ISEP – School of Digital Engineers, LISITE Laboratory, DaSSIP Team, “The AI Race: Why Current Neural Network-Based Architectures Are a Poor Basis for Artificial General Intelligence,” Journal of Artificial Intelligence Research, vol. 79, 01/10/2024, pp. 41–67

Due to several recent algorithms edging closer to one or several of the previously de-scribed properties, both the claim that we are getting closer to AGI (Bubeck et al., 2023)and the fear of what may happen are rising again.

In this paper, we will review several of these recent and impressive AI algorithms, how they have evolved through time, and their architecture. In particular, we will focus on 3 categories of AIs: AIs developed to play games (checkers, go, Chess and Starcraft II), generative AIs (for artistic or deep fake applications), and personal assistant AIs built with large language models to chat with humans. Since they are all based on deep neural network technology, we will assess what this implies in terms of capacities but also limitations that such algorithms will have in the future. In particular, we will focus on reminding how these methods work and interface with the real world. By doing so, we will defend the argument that current deep learning based methods (that is, all current trendy AI methods) are poor candidates for developing AGI due to the inherent nature and many bottlenecks of this technology when it comes to learning or intelligence in general.

Our argument, will be a direct complement to the recent Microsoft paper on GPT-4 showing sparks of AGI (Bubeck et al., 2023), but not limited to the scope of LLMs model and with an additional architecture oriented perspective to the limits of current AI systems. We will finally develop on the idea that while they are not likely to become AGI, it does not mean that these algorithms or their future versions are harmless should their development be left unchecked in the current AI race.

Our paper is organized as follows: First, we will discuss some of the state-of-the-art AI that were introduced to the public in different fields, what they use in terms of deep learning techniques, and where they lie in terms of intelligence. We will follow with a section discussing the core architecture, principles and the limits of neural network-based models with examples from the two previous sections. Finally, we conclude our paper with the actual questions and dangers of neural network based AI systems and a discussion summarizing the different elements presented in this work.

2. AI has evolved fast and far: An Overview of the Current most Impressive AI Systems

In this section, we will present some of the most impressive AI systems to date in their respective fields and how they have evolved. We have sorted them in 3 categories:

 AIs for games,

 Generative AIs used for deep fakes or artistic purposes,

 Personal assistant AIs based on large language models.

Please note that these categories are arbitrary and were chosen for readability purposes and to better show their evolution in different domains of application. However, as we can see from Figure 1, they all come from the same family tree of methods and are overlapping in terms of technologies: For instance, the generative models (Goodfellow et al., 2014), which are the core of deep fakes and artistic AI, are also used by large language models which power the latest personal assistant AIs, and the adversarial learning process (Szegedy et al., 2014; Goodfellow et al., 2015) used by these methods is also used by the latest AIs for games. Finally, the vast majority of recent methods from all 3 categories all use deep neural network architectures.

[FIGURE 1 OMITTED]

2.1 AIs for Games

AIs for games are the ones that speak the most for a broad non-scientific audience, and they also have been around for the longest, which is why we chose to start with them. Regardless of whether they were developed for traditional board games or for videos games, more or less advanced programs have been around since the 1950s to enable people to play alone, or rather against a machine: Christopher Strachey and Dietrich Prinz wrote computer programs able to play checkers and Chess respectively as early as 1951 at the University of Manchester. It is then Arthur Samuel’s checkers program, developed in the early 60s that was the first to be good enough to challenge an amateur player (Schaeffer, 2014). As for one player video games against adversaries, they started to appear with single player games in the late 1960s and truly took off starting with 1978 “space invaders”. However, the first occurrence of a computer program being better than human champions (without cheating) occurred with IBM Deep Blue Chess playing computer (IBM, 2008) who beat Garry Kasparov in 1997.

While Deep Blue appears to be the first great AI of our era, it is actually not a proper artificial intelligence program: It was an expert system that uses rules and logic, and had the capability of evaluating 200 million positions per second to search for the best next possible move. Deep Blue was trained using 700000 grand master games and by storing most of the possible Chess ending with 6 pieces, and all of them with 5 pieces or less. Using this huge database as a starting point, Deep Blue relied on alpha-beta pruning (Pearl, 1982) -an algorithm to make tree exploration more efficient- and its paralleled computation power to browse at high speed through the tree of possible moves to find the best one. In other words, Deep Blue was not really an artificial intelligence, but rather a brute force algorithm assisted by an efficient alpha-beta pruning method and huge hardware capabilities for its time. Still, Deep Blue has been a solid inspiration for later Chess playing AI such as Stockfish (Maharaj et al., 2022), which was also based on a pruning algorithm before being hybridized with neural networks, before this type of model culminated for Chess with engines such as Leela Chess Zero (a Chess adapted version of AlphaGO Zero that we will discuss in the next paragraph) (Silver et al., 2018). In Figure 1, all these models belong to the “old school” gaming AI branch that descends from symbolic AI and rule-based learning. This type of model has the huge advantage that it is explainable, and therefore we can understand why the algorithm chooses certain moves over others.

As we show in Table 1, with an average of only 20 to 40 moves per game and a maximum tree depth of possible moves estimated around 120, for the game of Chess alpha-beta pruning through the tree of possibilities and memorizing a large number of game to cover most possibilities remained a valid option. This is not the case however for the game of Go with its 19 × 19 board, 150 to 350 moves per game, and a tree depth as well as number of possible positions which are intractable. For this reason, the game of Go was long considered impossible to Master by traditional AIs that would simply try to brute-force through an intractable tree of possible moves. For the first time, a really smart computer program was needed, one that could plan its next move based not only on the branch most likely to lead to victory (which is impossible to assess given the depth of a Go game tree) but also based on the current situation and how to make the best of it.

To answer these new challenges, DeepMind technologies (a subdivision of Google) developed AlphaGo, the first AI able to play Go at high level and defeat world champions by combining neural networks and tree search (Silver et al., 2016). In its 2016 version that first beat World champion Lee Sedol, AlphaGo relied on this hybridization principles between a deep neural network and Monte Carlo Tree search. The main prowess resulted in training the neural network to help predict which branches of the tree (and consequently which moves) where the most interesting, without being able to browse to the full depth of said tree. AlphaGo and its successor can do so efficiently all the while being able to guess their likelihood of ultimately winning the game after each move. For its training, AlphaGo required a human database of 30 million of Go moves from 160000 games to attain a decent level, and was then further trained using reinforcement learning by playing against itself to further increase its skills. Unlike all previous AI for board games, AlphaGo did not use any database of moves to play once the learning phase was over.

AlphaGo’s successor by the same team, AlphaGo Zero, was an even more impressive case of artificial intelligence as it was trained without using any human games as reference, and only played against itself to figure out the best opening and moves (Silver et al., 2017). The development team reported that it took it approximately 15 million games against itself in a total of 3 days to reach a decent level, and 40 days and approximately further 200 million games against itself to be uncontested by both humans and earlier AI programs playing Go. It is because of its “self-training” abilities over such an enormous space of possibilities that AlphaGo Zero was seen as a major break through in AI. Furthermore, while the original AlphaGo was considered conservative in the way it played, this was not the case for AlphaGo Zero: it is also this “self-training” ability which led it to try moves and innovate during Go games in ways that humans would have never considered before. It was therefore able to surprise even the best humans champions due to the never seen before nature of some of its moves. Obviously, very much like Deep Blue in its time, all iterations of AlphaGo were supported by huge hardware capabilities, especially for the training phase of the neural network. In a way, we could say that while in the case of Deep Blue hardware was used to brute force a tree exploring algorithm, for AlphaGo Zero and its successor, the raw computation power was used to play a number of games so huge that the algorithm would self-train efficiently. Still, this shift in the use of computing power for modern AI proved useful as the technique used to train AlphaGo Zero was successfully reapplied to adapt it to the game of Chess and shogi (Silver et al., 2016), but also for protein folding problems (Heaven, 2020).

Moving to a new challenge, after AlphaGo Zero, the same DeepMind team turned to Starcraft II, an online real time strategy game by Blizzard Entertainement, as their new challenge to tackle with artificial Intelligence. Compared with Chess and Go, as can be seen in Table 1 the game of Starcraft II constitute a major challenge step up in the following ways:

 If we consider Starcraft II as a board game (which it is not), all games are played over maps that are more than 128 × 128 in size, which is way bigger than the 8 × 8 of Chess, or the 19 × 19 of Go.

 If you consider the number of mouse or keyboard actions as reference, an average Starcraft II game requires 700 to 3600 actions, which is a ten fold increase compared with Go.

 As a consequence of both the map size and number of actions, the number of possibilities and depth of a Starcraft II decision tree are considered to be infinite, which is also a step up compared with Go.

 While Chess and Go have time limitations, Starcraft II is not turn-by-turn and is played in real time.

 Starcraft II is way more complex than Chess or Go in the sense that a game requires you to do the following in parallel: develop your economy and gather resources, build units that will counter your opponent units (think rock-paper-scissor, but a lot more complicated), control and send your units out to see what your opponent is doing, destroy his economy as well as his units.

 Battles between units go beyond which units are effective or not against another as unit micro-management is required in real time: for instance using units skills and spells at the right moments and places, but also moving and keeping damaged or fragile units in the back of your army whilst keeping tanky ones at the front.

 Starcraft II has fog of war, which means that unlike Chess and Go, you can’t see what your opponent is doing unless you send troops out to see what is going on.

From this description it is easy to see that to be good at this game without cheating (no fog of war, more powerful units, increased resources, etc.) an AI would need to have many skills that resemble what would be needed for an AGI: planning capabilities, memory of what happened a few moments ago, real time response abilities, and creativity.

Due to the large exploration space for a game like Starcraft II, a full self-training was not possible, and AlphaStar was pre-trained using a database of 65000 games to learn the very basic moves and some basic strategies. It is only then that it used the same self-training ability by playing against itself to refine its strategies. This reinforcement learning phase also included a phase against so-called exploiter agents whose purpose was to tackle the main agent on its own weaknesses so that it could improve.

[TABLE 1 OMITTED]

Very much like for AlphaGo, world top Starcraft II players that faced AlphaStar were surprised to see the algorithm using strategies that had never before been seen in human games. Also like for the game of Go, the AI quickly proved to be able to defeat any human player. Furthermore, due to the fact that it was initially unlimited in the number of actions per second it could make, it was nearly impossible for a human to beat AlphaStar’s unit micro-management, as humans are limited by their physical abilities as well as their use of mouse and keyboard, and can’t sustain a very high number of actions per minutes for long (typically 60 to 120 actions per minute at best). For this reason, AlphaStar was capped in terms of number of actions per minutes it could make, but still proved better than human players. However, it is worth mentioning that unlike for the game of Go, there were several instances where AlphaStar showed its limits by being unable to assess a situation it had probably never seen before or had an erratic play style that made no sense at all: For instance, Starcraft II uses a wide array of maps (boards) that are all different and 3 different races. AlphaStar was initially able to play a single race and was limited to the sets of maps it knew, and was unable to adapt to others. While switching race can prove challenging for beginner humans players, it does not result in “nothing happening”. As for map changing, it presents no problem at all for humans (even at very low level) and shows that humans have an adaptability that it does not have. Finally, in some matches, AlphaStar proved unable to properly assess whether it was losing or winning, which resulted in erratic behavior very similar to what could often be seen from an “old school” AI going out of its decision tree.

It is worth mentioning that while attempts have been made at reproducing AlphaStarlike performances with smaller networks and less hardware (Liu et al., 2022), such feats are so far limited to companies with huge research departments and computation power.

2.2 Generative or “Artistic” AIs

In this paper, we call artistic AI the different algorithms that have been released with the ability to create artistic or realistic images of videos on different subjects. This type of AI first appeared with the neural network called Inception (Szegedy et al., 2015) whose original goal was to detect objects in images, but was later used as a reference to understand how convolutional neural networks worked, and in particular their different convolution layers. Using the Inception network, a team from Google proposed the DeepDream software, a program generating psychedelic and dream like images. While still used to detect elements of interest in images (mostly faces), DeepDream uses a reverse process compared with normal detection network and will twist and adjust the image to look like something else by giving an output neuron more importance than it should have (a cat face instead of a human face for exemple) and will then proceed to alter the original image via gradient descent so that it matches with the purposefully wrongly activated neurons. This results in very strange images reminiscent of what can be experienced by LSD users, which led some scientist to believe that convolutional neural network share common architecture with the visual cortex of humans (Schartner & Timmermann, 2020).

While DeepDream was the first neural network to generate false images, it is later networks based on generative adversarial networks that really became known to the public audience for their ability to generate the so called deep fakes: images or videos artificially generated and for which it is very difficult to say whether it is a real picture, or something generated by an AI.

These deep fake networks use both the autoencoder principle (Hinton & Zemel, 1993; Kingma & Welling, 2014), (See next section and Figure 3 for details): the encoder finds a lower space representation of a person or thing to modify. Once this is done, key features can easily be changed in the reduced feature space, and the decoder will proceed with the reconstruction of the modified (fake) image. Coupled with a generative adversarial network (Goodfellow et al., 2014) after the decoder, this technology has proven to be very powerful. The main principle of generative adversarial network is to have 2 networks following an optimization process against one another:

 The first network (the discriminator) is trained to detect real images or videos from artificially generated ones.

 The other network (called the generator) tries to generate images or videos that won’t be detected as fake by the first network. It is optimized to make fakes that are more and more difficult to detect.

These deep fakes can be used in all sorts of ways: adding, replacing or removing something or someone from an image, changing small or major details, generating a video of someone saying a speech that never happened, building a full composition image of things that never happened (for example in image of the pope partying in Coachella), etc. Because of the adversarial training process, very realistic generators can be trained, and their generated images are impossible to tell from real ones.

While not a proof of general intelligence per se, these deep fake algorithms can generate from scratch very realistic images on demand by simply having a user describing what he or she wants. It can mimic any style of photo, painting or art, and there is also the possibility of using random parameters to generate images or videos. In any case, with the best of these generative algorithms, the output will be very realistic and unique, which can be interpreted as a form of creativity.

2.3 Personal Assistant AIs

We will now move on to the last category of AI discussed in this paper, the so-called “assistant AI ”. This category regroups all AIs models that were developed to interact with humans with the goal of helping them: Personal home assistant such as Amazon’s Alexa, Google Home, Microsoft’s Cortana, and Apple’s Siri, the many chatbots developed for support services, and obviously conversational AIs such as ChatGPT.

Conversation has always been considered a difficult task as it requires to both understand a question, and producing an answer that is accurate and understandable. AIs targeted at this type of task therefore have to master language data, which have some very specific challenges:

 Words are more than simple data that can be hard encoded into binary vectors. An efficient AI algorithm would have to learn (or at least use) a word embedding system in which closely related and semantically similar words are similar enough in the embedding space. This is what Word2vec (Mikolov et al., 2013) does for instance.

 Understanding language requires more than knowing a list of words and their semantic relationships: it also entails a basic understanding of grammar in order to properly understand a question, a prompt or a text: the tense of a verb, the presence of negations, and the grammatical role of some groups of words can completely change the meaning of a sentence.

 Most languages contain at least 80000 to 300000 words, which is a lot to learn, especially if you add the semantic. Grammar also varies from one language to another, although there are some common basis.

 Specific idioms and second degree humor can make a sentence all the more difficult to understand.

All the reasons mentioned above have made assistant AI particularly difficult to develop, and it is only recently that the first effective assistant AIs have appeared. Indeed, before the generalization of neural networks to learn large corpuses and semantic relationships, most assistant AIs simply relied on the detection of a limited number of keywords and expressions, and proposed pre-set answers accordingly. Most early chatbot fall under this category and -very much like early gaming AIs- belong to the family of Symbolic AI shown in Figure 1. Assistants such as Google Home or Alexa use neural networks to process the sounds they hear into instructions with words given to their algorithm. But the “reasoning part” to interpret the instructions is similar the early chatbots and also belongs to the symbolic AI branch to decide what to do or to answer.

As one can see, the main difficulty in natural language processing is not so much the decision making or the generative process, it is to properly model the language to both understand and answer questions. Once again, it is deep neural networks that brought the main advances in the field of natural language processing. Word2vec (Mikolov et al., 2013) is one of the first proposed word embedding system that accounts for word semantic in text data representation. It was more recently followed by BERT (Devlin et al., 2019), another embedding system relying on neural networks. The main difference between the 2 technologies are the following: BERT allows several vector representation for the same word, while Word2vec only has a 1-to-1 mapping. BERT can handle words that are outside the original vocabulary it was originally trained with, while on the other hand Word2vec cannot do so. From Word2vec and BERT, the next main advance was large language models (LLMs) whose principle is to take as input a list of tokenized words using embedding (the question or prompt) and to output a probability distribution over the vocabulary known by the system and which will be used to build an the answer. These systems are called “large” because they use billion of parameters and are trained over very large bases of vocabulary. With 340 million parameters and a corpus of 3.3 million words, BERT is considered to be the first large language model, and is somewhat small compared to GPT-3 (175 billion parameters and 300 billion tokens), LLaMa (MetaAI, 2023) (65 billion parameters and 1.4 trillion words) or GPT-4 (OpenAI, 2023) with more than a trillion parameters.

AI systems belonging to the LLM family have shown rapid and impressive progresses:

 With each new iteration or version, they act more and more human in the way they interact with people and can do casual conversation and have the apparent ability to solve logic problems just as well as humans do.

 They are fluent in a large number of human languages and can translate easily from one language to another.

 In addition to natural languages, many of these AIs now have programming ability.

In terms of technology, these systems cover two main tasks:

 Learning and embedding the large set of words or tokens that constitute their vocabulary. We have already discussed this difficulty and this is done by pre-training them on very large textual databases such as Wikipedia or GitHub.

 Training the neural network to actually produce good quality answers based on an almost infinite possible number of prompts. This is done using a mix of self-supervised learning and reinforcement learning from both human and other AI instances. This is very similar to what we have seen for AlphaGoZero and AlphaStar, but applied to language.

These systems have recently surprised the World with the ability of some of them to successfully pass the Turing test (and successfully pretend to be human), the large panel of tasks they can do with efficiency, but also some very specific abilities that appear to have spontaneously emerged in some of them without being explicitly programmed.

Most recent LLMs also appear to have shown some reasoning abilities. However, these reasoning abilities seem to be highly dependent on breaking-down or splitting the problem into simpler sub-problems with intermediate prompts to increase the likelihood of a good understanding by the neural network (Wei et al., 2022b; Zhou et al., 2023). Furthermore, it is very difficult to tell the difference between reasoning abilities and just having learned on a database large enough to find the answer without any reasoning, and some researchers even doubt that it can reason at all due to its lack of world model (Borji, 2023).

Indeed, it is worth mentioning that they have also shown limits, such as the so-called hallucinations in which these systems proposed with great certainty an answer to a given query which is not correct and sometimes has no real basis. A good example of such hallucinations is ChatGPT proposing references of scientific papers that do not exist: the journal exists, the authors have realistic names, the title seems to match the question asked to the algorithm and would be relevant for the journal, but the paper does not exist. This is due to the way these algorithms are programmed to find the most likely distribution in their known vocabulary to propose an answer: with most questions, it just takes putting these words or tokens in a certain order to form a fine sentence and a correct answer. Doing so with pieces of a scientific paper and a matching journal will however most likely result in something that does not exist. The same kind of strange behavior can happen when asking GPT-4 for the names of the feodal lords of some lesser-known villages, which it will answer by making up realistic names that are out of touch with the reality. There is another famous example where GPT-3.5 was asked to remind the places of a series of past conferences, and it only returned the ones for odd years. When asked why he did not return the places for even years, it answered that the conference did not take place on even years (which was false). Likewise algorithms such as LaMDA (Thoppilan et al., 2022) have been confused by user prompts asking if Yuri Gagarin went to the Moon (which the algorithm successfully answered no), before affirming that he brought back moon rocks that he got from the Moon.

These four examples show the limits of these systems which mimic intelligence but are actually mostly trying to give you the most likely answer, which is different from the truth.

Finally, we can also mention that some “spontaneous” behaviors of such AI may sometime be very inappropriate: Microsoft Bing AI has had a few bad experiences with chatbots going horribly wrong: The Tay chatbot in 2016 was a first example of an AI that went nazi very quickly because it was fed with the wrong data by malicious users. And more recently some of their latest LLM AI also acted very creepy with some of their users by either faking sentiments for them, or displaying downright hostility.

3. State of the Art AI Systems and their Deep Learning Limitations to Evolving AGI

In this section, we discuss the building blocks, architecture, and training methods of the neural networks that are at the heart of most modern AI systems nowadays. In particular, we explain how these common blocks used in all modern neural networks are defining the capabilities and limitations of modern AI systems.

It is worth mentioning that the Deep Learning paradigm is very likely to remain the dominant AI technology for the decades to come, and that as such everything presented in this section is valid for current AI systems and for most systems to come. Indeed, as shown in Figure 1, all breaking ground new AIs systems come from the same family descending from Machine Learning, deep neural networks, adversarial networks, and more recently generative networks.

The main implication of all these algorithms coming from the same families of methods is that they have many things in common as they inherit the strengths, weaknesses and core principles of the same methods.

3.1 Core Principles and Main Components of Deep Neural Networks

Artificial neural networks are a family of machine learning methods remotely inspired from the neurons in the brain, and whose earliest apparition in computer science was in the 1960s with the first perceptron (Minsky & Papert, 1969) and the conceptualization of backpropagation for optimization purposes (Amari, 1967). The field then stagnated until the late 1980s with the first conceptualization of neural networks able to learn phonemes (Waibel et al., 1989), and the idea of convolutional neural networks inspired by the human visual cortex for image analysis and interpretation using artificial intelligence (LeCun et al., 1989; Rumelhart et al., 1986). The field then rose to popularity and emerged for the general public in the early 2010s when GPU-based computation power became available and cheap enough to allow for larger and more sophisticated networks to emerge and be trained faster.

In Figure 2 we show the basic components of all neural networks. First, we have neural units which basically process a set of inputs which are multiplied by weights to be learned. Each unit also contains an internal activation function which will determine the output based on the weighted sum of the neural unit inputs. A neural network itself is made of several layers containing such neural units. We distinguish between different types of layers:

 Input layers which handle either raw input data, or outputs coming from earlier blocks of the networks, and transform them into something usable by the rest of the

[FIGURE 2 OMITTED]

network. For instance, text data needs to be transformed into numerical vectors, and convolutional layers are typically used with images to extract features at different scales.

 Neural layers between the input and the output. A typical neural network may count dozen or even thousands (hence the name deep neural network) of these layers. They are used to find and disentangle complex representations of the input data.

 Output layers which basically produce the answer of the network. This answer can be in the form of a numerical vector, in which case these input layers are not very different from typical neural units. However, in the case of a classification problem, it is typically expected that only one neuron from the output layer activates to decide which class is picked. This required specific activation functions and layer properties.

Neural networks are trained by means of gradient descent and back-propagation: The networks (or blocks of the networks) are fed with multiple data which are going to run through the different layers and produce an output. This output is then compared with what was desired for the data that were fed, and the difference between the produced result and the expected one is then back-propagated over the different layers of the network(s) so that the weights of the different units are adjusted to better match the expected result. It is worth mentioning that it is typical to use the root mean squared error, and not the raw difference, but that many different functions can be used depending on the task and problem.

The goal of any neural network training is therefore to optimize an objective function so that the network output becomes satisfying enough. A neural network such as the one shown in Figure 2 is very basic, but more complex neural networks follow the same basic architecture with more layers, layers containing more units, and complex structures containing several sub-networks filling different functions.

3.2 Interfacing to the Real World and Extracting Features: A First Bottleneck

As we have seen with Figure 2, no matter their complexity or depth, all modern AI systems interface with the real world using an input and an output layer: Gaming AIs take the current state of the game (or what they can see of it) as input, and output their next move. Personal assistant AIs take a written or oral prompt as input, and will output text or spoken answer accordingly. Artistic AIs will take a set of parameters as input (type and size of image, a theme, or even a written description) and will output an image. Etc.

In most fiction works where an AI becomes aware and escapes, it starts to connect to systems it was not supposed to connect to, and to do things it was not meant to. This is absolutely impossible due to the fixed and static nature of the input and output interfaces of neural networks: The way neural networks are trained, which we have already briefly mentioned, and will detail more in the next sub-section, implies that the structure of the input and output layers of any neural network is fixed. If it changes or is modified, the training must basically be done all over again from scratch.

Beyond simple interfacing limitations restricting the type of input and output, we can also mention task specific interfacing limitations:

 For instance, we have seen with text analysis tasks that there were different ways to feed text data to an AI using Word2vec, BERT or large language models. In any case, words or languages unknown to the algorithm would be difficult to understand for any AI system as they would not be included in their original embedding system.

 In image processing, where convolution layers are key to analyse an image, it does not take the same architecture to make a classification method to tell cats from dogs, and to analyse medical images: The convolution layers needed to search for specific elements at different scales would simply not be the same. It means in this case, that even if an AI can interface to the 2 types of images, it may not have the right first layers to properly extract the relevant features.

Indeed, while we have simplified things by only discussing the first input layer as the only interface with the external world for an AI, in truth while the first layers limit the format of what can be accepted or not, there is a large number of the first layers which is used to create the features that will later be processed by follow-up layers in a process known as feature extraction. This means that it is not only the format of the input layer, but also the format of the follow-up layers for feature extraction (e.g.: number and type of convolutions) which will determine what an AI efficiently interfaces to or not, even before it has been trained. And once the training has been done for these feature extracting layers, it will narrow-down the possibilities even more.

[FIGURE 3 OMITTED]

In Figure 3, we show a typical autoencoder (AE) architecture (Hinton & Zemel, 1993), an unsupervised model used for feature extraction and whose principle is to train a network to rebuild its input with a certain number of compression layers in between. The first part before the narrowest bottleneck layer is called the encoder, and the one from the bottleneck to the reconstructed output is the decoder. Once trained, the decoder part is discarded, and the encoder can be kept and integrated into a larger neural network to transform original input data into better quality features. Yet, these “better quality features” would also be fixed by the encoder architecture and training, and would be just as much a limitation as the input layer. Once again, modifying them on the fly by adding or removing layers or neurons is usually not an option. Variational autoencoders (VAEs) (Kingma & Welling, 2014) are an evolved form of autoencoders that maps the data into a latent space and inject white gaussian noise between the latent space and the decoder to achieve more robust features. AEs and VAEs otherwise fit the same role of an unsupervised and self-supervised learning of the features.

To sum up these first sections on the limitations of current neural network based AI, we have seen that the input and output layers, as well as feature extraction mechanisms which enables these AIs to connect and interact with the outside worlds are limited and rigid. Furthermore, while we have simplified the problem to simple networks, in large AI systems which are made of very large deep and multi-component sub-networks, these structures are everywhere in the network, which further limits its adaptability to efficiently interface with anything else than what it was designed for. Finally, while they are simpler, the output possibilities of such networks are perhaps even more limited in their format.

3.3 Limits of Objective Functions and Gradient-based Learning

Let us now discuss objective function based learning and gradient descent which are the two core processes of Deep Learning algorithms. We will see how and why this type of learning is not compatible with the idea of AGI because of the way they restrict the types of tasks that can be handled and are also currently incompatible with symbolic learning (they don’t belong to the same AI branch as shown in Figure 1), a key feature of human-like learning.

The first obvious limit of objective based-learning is that some problems are not easy or convenient to model with an objective function: While it is somewhat simple to have a quality-based objective function for classification problems, or a reconstruction error to minimize for regression methods or autoencoders, it is more difficult for complex tasks. For instance, we mentioned earlier systems for games or personal assistants. In this case rating a game move or a proposed answer and turning it into an objective function when the“best” move or answer are not known can be very challenging: Can we define such function when the best answers are not known ? And will it be possible to differentiate it and run a gradient descent ?

This leads us to our second argument on the limitations of objective-based and gradient based learning: it implies that the objective function must be differentiable. Indeed, the backpropagation system used by deep learning methods requires that a derivative can be found in all layers, including the output one with the objective function. Furthermore, in the case of a non-convex system (which is very often the case), convergence towards a local minimum rather than the optimal one is very likely with gradient-based learning, which is another limitation.

Lastly, in its current form, both gradient-based learning, objective-function based learning and the limited input interfaces are incompatible with symbolic-based learning which encompasses structured data and is very useful to insert human-made rules into an AI system, but also to understand the decisions made by an AI. There is no place in gradientbased learning for hard rules (only for targeted examples to guide a system), and even less for complex structured data.

To sum up this subsection, objective function and gradient-based learning are limiting in two ways:

 First, they cannot handled symbolic learning and structured data.

 Finding the right and differentiable objective function can be challenging and is far from ideal: Even if one can be found, it will necessarily limit the type of tasks that an AI can process or not, and the risk of convergence towards a local optimum is always a risk.

3.4 Learning Processes: More Bottlenecks

Let us now focus on the learning abilities of the current AI model. Our goal in this subsection will be to show that current AI models cannot lead to an explosion of generalized intelligence able to answer or to know everything. To do so, we will use geometry to illustrate the problem. Let us represent the space of problems an AI should be able to answer in its specific domain as a line in space:

 If the problem is simple and finite, the line is also finite.

 For complex problems such as generalized AI, the line is most likely infinite.

The way most current AI methods based on deep learning work is that they are fed with examples belonging to the space of possible problems (LeCun, 2018): If the examples are provided with correct answers, then we are dealing with supervised learning. If the algorithm is provided with just examples, left to explore and rewarded or penalized depending on its answer, then it is reinforcement learning. If the algorithm is only fed unlabeled examples and left on its own to provide answers in an unsupervised way, then we are dealing with unsupervised learning. The type of learning does not really matter for our analysis:

 Before its training, the algorithm will have been provided with examples covering some of the considered problem space.

 Once it is trained, the algorithm should be able to properly answer a certain amount of problems from the same space.

[FIGURE 4 OMITTED]

There are 3 possibles outcomes to training an AI: In the first scenario, the AI underfits and is only able to handle a much narrower number of cases (sometimes 0) than what was fed to it during its training. This usually means, that the AI structure and models are not complex enough to properly grasp the problem, or when the number of examples is too small compared with the algorithm complexity. In the second scenario, the AI overfits during the learning process and will only be good at processing examples it has already seen, but bad with anything else. This can be caused by all sorts of sampling issues with the training examples, but also by an algorithm structure too complex compared with the problem complexity. In the last scenario -which is the prefered one-, once it has been trained the AI algorithm can be effective at handling problems from a space larger than the set of examples it was fed. As hinted by the two previous scenarios, this can be achieved only with the right complexity for the AI algorithm relative to the problem, a sufficient number of examples also relative to the complexity, and also a good enough sampling.

These 3 scenarios are visually shown in Figure 4, where the bottom and top lines of each rectangle are the problem space and the learning process from bottom to top is shown in green. In this representation, and based on the previous explanations, we see that the learning capability of an algorithm can be modeled as a function L(CX, SX, CA, SA) which produces a result which will reflect on whether or not the algorithms will be able to tackle data beyond what it was fed:

 This result will be negative if the algorithm turns out being unable to produce good quality results even on the data it was trained from. This is known as underfiting.

 The result will be 0 in case of an overfiting. That is, after training the algorithm is efficient on the data it was trained with, but ineffective with anything else.

 A positive result greater than 0 if the algorithm shows generalization capabilities after its training and can efficiently process data it had never seen previously. Obviously, the greater the number, the larger the generalization capability.

In a way, this function would define an “angle of some sort” which is illustrated in Figure 4 by the problem space where the algorithm is efficient being narrower, the same, or larger, after training.

This function would have many parameters including CX the overall complexity of the problem, SX the size and representativity of the set of training examples relative to the problem complexity, CA the complexity of the AI model, SA the size of the set of training examples relative to the complexity of the AI model. There are very few known properties for such function:

(1)

Based on this first idea, let us now add the interfacing constraints that we have discussed previously: Deep learning algorithms have fixed input layers which restricts what they can and cannot efficiently process. In our geometric representation, this gives hard limits such as the ones shown in Figure 5(a) where no matter the quality of the algorithm, the learning is restricted by the narrow interfacing possibilities.

[FIGURE 5 OMITTED]

If we keep looking at Figure 5, we see a couple of other useful examples to understand the strengths and limits of AI methods. In this Figure, we show in blue the boundaries of reasonable human efficiency over the same application domain than the algorithm. Please note that the algorithm being outside of the reasonable human efficiency zone does not necessary mean that it is smarter. Indeed, many of the examples outside of this zone may well be non-sensical, and there is no benefit in having the algorithm able to process them.

The goal of many Machine learning algorithms and AI is to be as effective or more effective than humans, and to do so with minimal training efforts. This would mean having a narrow number of examples compared with the global human efficiency area to train the algorithm, and an equal or larger efficiency of the AI after the training. This ideal scenario is shown in Figure 5(c) where the green area is narrower than the blue one at the bottom of the rectangle, but larger at the top. This also implies L(CX, SX, CA, SA) > 0 as a necessary, but not sufficient condition. Indeed, Figure 5(b) shows the very common example where despite having good learning properties, the AI remains less versatile and efficient than a human on a given domain after its training. Figures 5(d) and 5(e) show two other likely scenarios: In the first one the AI exceeds human capabilities for some part of the domain problem, but remains inferior in others. In the second one (which is even more common), we have the same phenomenon with an additional area of human efficiency which will never be reached by the AI because of its interface limitations.

Likewise, we have seen with large language models, that they require humongous amounts of data crawled from the internet and that they do not even guarantee good results. Both families of algorithms tackle this issue by having AI agents training with or against one another to further improve their performance in a process called adversarial learning that we have presented already. This process makes it possible to have, not one, but several rounds of stacked training with the same AI architecture. If such AI is good enough at the early stage (it has a positive learning angle), it will lead to proficiency in a potentially larger number of training examples after each iteration of the training, which can be used to further improve the AI performances. We have seen how strong this process of stacked reinforcement learning and adversarial learning can be for gaming AI and large language models. It is part of what has misled some into thinking that such process may lead to an explosion of intelligence and ultimately to AGI.

In Figure 6, we show why this idea is false with 3 scenarios that take their explanations from the properties of Equation (1):

1. In the first scenario from Figure 6(a), we see how the first pre-training starts with a narrow set of examples and a narrow yet positive angle which results in a much better learning angle with more examples at the second step of learning. Then because of properties (4) and (5), we know that for a fixed architecture and problem the learning angle is bound to go towards zero as the number of training examples increases. This means, that regardless of the number of incremental learning iterations, improvement will decrease and stop at some point.

2. Scenario 6(b) shows that we can’t even be sure that there will be an increase in learning rate at all between the different learning steps. It is just as likely to get an ever decreasing angle towards 0.

3. Finally, Figure 6(c) shows a last scenario where, regardless of the learning angle, it is the interface limitations of the algorithms which will stop the progress of the AI before it reaches its sample size limits.

[FIGURE 6 OMITTED]

While it is tempting to say that all it takes to remove these limits is to change the algorithm architecture or input layers between training phases, we remind our reader that this is not that easy:

 Even though knowledge acquired during the training process with an earlier architecture could be re-used, any architecture modification will result in a new network that has to be re-trained from scratch. In other words: back to the first phase of training.

 Modifying the input interfaces will result not only in having to retrain the AI from scratch, but also in having to redefine training samples entirely.

4. Conclusion

4.1 Limitations

In this paper, we have studied several aspects that AI would need to achieve to become what an AGI, and how current state of the art systems are both coming close to some of them, but also falling short for many of these aspects: The idea of being general and able to tackle a wide variety of problems by contrast to a narrow range of problems, the notions of adaptability and creativity, common-sense and basic reasoning abilities, and finally long term memory.

Through 3 different types of AIs (AIs for games, generative artistic AIs and personal assistant), we have seen how each family has modern AI that seems to check several of the previously mentioned criteria: Gaming AIs have creative and reasoning abilities as well as long term memory abilities that far surpass these of humans. Generative AIs are also able to display creative abilities that result in new and unique pieces of art. And finally, personal assistant AIs based on large language models have shown long term memory, adaptability, creativity, common sense and basic reasoning abilities, as well as being quite versatile in how they can assist humans.

However, we have also discussed the limits of these systems, and how what appears to look like intelligence is sometimes an illusion made possible by the vast amounts of data ingested by these systems:

 First, none of these systems is nowhere near being generic. While they are somewhat more versatile than their predecessors, they remain limited to a narrow range of tasks: the fact that we have 3 categories of AIs discussed in this paper is proof enough of the lack of general purpose.

 While assistant AIs appear to have reasoning and common sense abilities, they fail on a very regular basis to solve very simple problems, which shows that this illusion of reasoning and common sense is mainly due to brute force learning. The same could be said of gaming AIs that play moves that are difficult to explain for a humans, but sometimes fail to see that the game is over and they have lost in situations where it would be impossible to miss for a human.

 The idea of creativity is very subjective and difficult to evaluate, even for humans. We could argue that most of what appears to be creative with these systems is merely the statistical result of very long adversarial learning sessions with a bit of randomness here and there. And what to say about the hallucinations that LLMs systems have when they make up things because they have to answer something ? Is it creativity, or a proof of stupidity ?

 Finally, we have seen that the adaptability and genericity of these systems is severely hindered by the neural network architectures that power them: They are limited in terms of how they can interface with the world, and their ability to evolve is constrained by an architecture that needs to be retrained if it is modified.

 We have also shown that this same architecture currently prevents the explosion of intelligence, the singularity that some scientists from fields outside of artificial intelligence appear to fear.

Some scientists even go as far as saying that any illusion of emergent abilities in the latest versions of these systems (that is LLMs) can easily be debunked with the right statistical tools and enough time (Schaeffer, Miranda, & Koyejo, 2023).

In short, we can say that despite undeniable and very impressive progresses, current AIs systems are very far from achieving AGI. We could even argue that they are not really in the right direction because of the limitations imposed by neural network based architectures in terms of volumes of data required to train them, interfacing constraints, lack of symbolic learning abilities and how these models are trained.

**General intelligence is a fundamentally different kind of problem than neural networks.**

François **Chollet 18**, Software engineer and AI researcher, currently a Senior Staff Software Engineer at Google, formerly Machine Learning Architect at Thunder, formerly Software Engineer at FreshPlanet, “Conclusions,” Deep Learning with Python, Manning Publications Co, 2018, pp. 314–339

9.2 The limitations of deep learning

The space of applications that can be implemented with deep learning is nearly infinite. And yet, many applications are completely out of reach for current deeplearning techniques—even given vast amounts of human-annotated data. Say, for instance, that you could assemble a dataset of hundreds of thousands—even millions—of English-language descriptions of the features of a software product, written by a product manager, as well as the corresponding source code developed by a team of engineers to meet these requirements. Even with this data, you could not train a deep-learning model to read a product description and generate the appropriate codebase. That’s just one example among many. In general, anything that requires reasoning—like programming or applying the scientific method—long-term planning, and algorithmic data manipulation is out of reach for deep-learning models, no matter how much data you throw at them. Even learning a sorting algorithm with a deep neural network is tremendously difficult.

This is because a deep-learning model is just a chain of simple, continuous geometric transformations mapping one vector space into another. All it can do is map one data manifold X into another manifold Y, assuming the existence of a learnable continuous transform from X to Y. A deep-learning model can be interpreted as a kind of program; but, inversely, most programs can’t be expressed as deep-learning models—for most tasks, either there exists no corresponding deep-neural network that solves the task or, even if one exists, it may not be learnable: the corresponding geometric transform may be far too complex, or there may not be appropriate data available to learn it.

Scaling up current deep-learning techniques by stacking more layers and using more training data can only superficially palliate some of these issues. It won’t solve the more fundamental problems that deep-learning models are limited in what they can represent and that most of the programs you may wish to learn can’t be expressed as a continuous geometric morphing of a data manifold.

9.2.1 The risk of anthropomorphizing machine-learning models

One real risk with contemporary AI is misinterpreting what deep-learning models do and overestimating their abilities. A fundamental feature of humans is our theory of mind: our tendency to project intentions, beliefs, and knowledge on the things around us. Drawing a smiley face on a rock suddenly makes it “happy”—in our minds. Applied to deep learning, this means that, for instance, when we’re able to somewhat successfully train a model to generate captions to describe pictures, we’re led to believe that the model “understands” the contents of the pictures and the captions it generates. Then we’re surprised when any slight departure from the sort of images present in the training data causes the model to generate completely absurd captions (see figure 9.1).

[FIGURE 9.1 OMITTED]

In particular, this is highlighted by adversarial examples, which are samples fed to a deep-learning network that are designed to trick the model into misclassifying them. You’re already aware that, for instance, it’s possible to do gradient ascent in input space to generate inputs that maximize the activation of some convnet filter—this is the basis of the filter-visualization technique introduced in chapter 5, as well as the DeepDream algorithm in chapter 8. Similarly, through gradient ascent, you can slightly modify an image in order to maximize the class prediction for a given class. By taking a picture of a panda and adding to it a gibbon gradient, we can get a neural network to classify the panda as a gibbon (see figure 9.2). This evidences both the brittleness of these models and the deep difference between their input-to-output mapping and our human perception.

[FIGURE 9.2 OMITTED]

In short, deep-learning models don’t have any understanding of their input—at least, not in a human sense. Our own understanding of images, sounds, and language is grounded in our sensorimotor experience as humans. Machine-learning models have no access to such experiences and thus can’t understand their inputs in a human-relatable way. By annotating large numbers of training examples to feed into our models, we get them to learn a geometric transform that maps data to human concepts on a specific set of examples, but this mapping is a simplistic sketch of the original model in our minds—the one developed from our experience as embodied agents. It’s like a dim image in a mirror (see figure 9.3).

[FIGURE 9.3 OMITTED]

As a machine-learning practitioner, always be mindful of this, and never fall into the trap of believing that neural networks understand the task they perform—they don’t, at least not in a way that would make sense to us. They were trained on a different, far narrower task than the one we wanted to teach them: that of mapping training inputs to training targets, point by point. Show them anything that deviates from their training data, and they will break in absurd ways.

9.2.2 Local generalization vs. extreme generalization

There are fundamental differences between the straightforward geometric morphing from input to output that deep-learning models do, and the way humans think and learn. It isn’t only the fact that humans learn by themselves from embodied experience instead of being presented with explicit training examples. In addition to the different learning processes, there’s a basic difference in the nature of the underlying representations.

Humans are capable of far more than mapping immediate stimuli to immediate responses, as a deep network, or maybe an insect, would. We maintain complex, abstract models of our current situation, of ourselves, and of other people, and can use these models to anticipate different possible futures and perform long-term planning. We can merge together known concepts to represent something we’ve never experienced before—like picturing a horse wearing jeans, for instance, or imagining what we’d do if we won the lottery. This ability to handle hypotheticals, to expand our mental model space far beyond what we can experience directly—to perform abstraction and reasoning—is arguably the defining characteristic of human cognition. I call it extreme generalization: an ability to adapt to novel, never-before-experienced situations using little data or even no new data at all.

This stands in sharp contrast with what deep nets do, which I call local generalization (see figure 9.4). The mapping from inputs to outputs performed by a deep net quickly stops making sense if new inputs differ even slightly from what the net saw at training time. Consider, for instance, the problem of learning the appropriate launch parameters to get a rocket to land on the moon. If you used a deep net for this task and trained it using supervised learning or reinforcement learning, you’d have to feed it thousands or even millions of launch trials: you’d need to expose it to a dense sampling of the input space, in order for it to learn a reliable mapping from input space to output space. In contrast, as humans we can use our power of abstraction to come up with physical models—rocket science—and derive an exact solution that will land the rocket on the moon in one or a few trials. Similarly, if you developed a deep net controlling a human body, and you wanted it to learn to safely navigate a city without getting hit by cars, the net would have to die many thousands of times in various situations until it could infer that cars are dangerous, and develop appropriate avoidance behaviors. Dropped into a new city, the net would have to relearn most of what it knows. On the other hand, humans are able to learn safe behaviors without having to die even once—again, thanks to our power of abstract modeling of hypothetical situations.

[FIGURE 9.4 OMITTED]

In short, despite our progress on machine perception, we’re still far from human-level AI. Our models can only perform local generalization, adapting to new situations that must be similar to past data, whereas human cognition is capable of extreme generalization, quickly adapting to radically novel situations and planning for long-term future situations.

9.2.3 Wrapping up

Here’s what you should remember: the only real success of deep learning so far has been the ability to map space X to space Y using a continuous geometric transform, given large amounts of human-annotated data. Doing this well is a game-changer for essentially every industry, but it’s still a long way from human-level AI.

To lift some of the limitations we have discussed and create AI that can compete with human brains, we need to move away from straightforward input-to-output mappings and on to reasoning and abstraction. A likely appropriate substrate for abstract modeling of various situations and concepts is that of computer programs. We said previously that machine-learning models can be defined as learnable programs; currently we can only learn programs that belong to a narrow and specific subset of all possible programs. But what if we could learn any program, in a modular and reusable way? Let’s see in the next section what the road ahead may look like.

9.3 The future of deep learning

This is a more speculative section aimed at opening horizons for people who want to join a research program or begin doing independent research. Given what we know of how deep nets work, their limitations, and the current state of the research landscape, can we predict where things are headed in the medium term? Following are some purely personal thoughts. Note that I don’t have a crystal ball, so a lot of what I anticipate may fail to become reality. I’m sharing these predictions not because I expect them to be proven completely right in the future, but because they’re interesting and actionable in the present.

At a high level, these are the main directions in which I see promise:

 Models closer to general-purpose computer programs, built on top of far richer primitives than the current differentiable layers. This is how we’ll get to reasoning and abstraction, the lack of which is the fundamental weakness of current models.

 New forms of learning that make the previous point possible, allowing models to move away from differentiable transforms.

 Models that require less involvement from human engineers. It shouldn’t be your job to tune knobs endlessly.

 Greater, systematic reuse of previously learned features and architectures, such as metalearning systems using reusable and modular program subroutines.

Additionally, note that these considerations aren’t specific to the sort of supervised learning that has been the bread and butter of deep learning so far—rather, they’re applicable to any form of machine learning, including unsupervised, self-supervised, and reinforcement learning. It isn’t fundamentally important where your labels come from or what your training loop looks like; these different branches of machine learning are different facets of the same construct. Let’s dive in.

9.3.1 Models as programs

As noted in the previous section, a necessary transformational development that we can expect in the field of machine learning is a move away from models that perform purely pattern recognition and can only achieve local generalization, toward models capable of abstraction and reasoning that can achieve extreme generalization. Current AI programs that are capable of basic forms of reasoning are all hardcoded by human programmers: for instance, software that relies on search algorithms, graph manipulation, and formal logic. In DeepMind’s AlphaGo, for example, most of the intelligence on display is designed and hardcoded by expert programmers (such as Monte Carlo Tree Search); learning from data happens only in specialized submodules (value networks and policy networks). But in the future, such AI systems may be fully learned, with no human involvement.

What path could make this happen? Consider a well-known type of network: RNNs. It’s important to note that RNNs have slightly fewer limitations than feedforward networks. That’s because RNNs are a bit more than mere geometric transformations: they’re geometric transformations repeatedly applied inside a for loop. The temporal for loop is itself hardcoded by human developers: it’s a built-in assumption of the network. Naturally, RNNs are still extremely limited in what they can represent, primarily because each step they perform is a differentiable geometric transformation, and they carry information from step to step via points in a continuous geometric space (state vectors). Now imagine a neural network that’s augmented in a similar way with programming primitives—but instead of a single hardcoded for loop with hardcoded geometric memory, the network includes a large set of programming primitives that the model is free to manipulate to expand its processing function, such as if branches, while statements, variable creation, disk storage for long-term memory, sorting operators, advanced data structures (such as lists, graphs, and hash tables), and many more. The space of programs that such a network could represent would be far broader than what can be represented with current deep-learning models, and some of these programs could achieve superior generalization power.

We’ll move away from having, on one hand, hardcoded algorithmic intelligence (handcrafted software) and, on the other hand, learned geometric intelligence (deep learning). Instead, we’ll have a blend of formal algorithmic modules that provide reasoning and abstraction capabilities, and geometric modules that provide informal intuition and pattern-recognition capabilities. The entire system will be learned with little or no human involvement.

A related subfield of AI that I think may be about to take off in a big way is program synthesis, in particular neural program synthesis. Program synthesis consists of automatically generating simple programs by using a search algorithm (possibly genetic search, as in genetic programming) to explore a large space of possible programs. The search stops when a program is found that matches the required specifications, often provided as a set of input-output pairs. This is highly reminiscent of machine learning: given training data provided as input-output pairs, we find a program that matches inputs to outputs and can generalize to new inputs. The difference is that instead of learning parameter values in a hardcoded program (a neural network), we generate source code via a discrete search process.

I definitely expect this subfield to see a wave of renewed interest in the next few years. In particular, I expect the emergence of a crossover subfield between deep learning and program synthesis, where instead of generating programs in a generalpurpose language, we’ll generate neural networks (geometric data-processing flows) augmented with a rich set of algorithmic primitives, such as for loops and many others (see figure 9.5). This should be far more tractable and useful than directly generating source code, and it will dramatically expand the scope of problems that can be solved with machine learning—the space of programs that we can generate automatically, given appropriate training data. Contemporary RNNs can be seen as a prehistoric ancestor of such hybrid algorithmic-geometric models.

[FIGURE 9.5 OMITTED]

9.3.2 Beyond backpropagation and differentiable layers

If machine-learning models become more like programs, then they will mostly no longer be differentiable—these programs will still use continuous geometric layers as subroutines, which will be differentiable, but the model as a whole won’t be. As a result, using backpropagation to adjust weight values in a fixed, hardcoded network can’t be the method of choice for training models in the future—at least, it can’t be the entire story. We need to figure out how to train non-differentiable systems efficiently. Current approaches include genetic algorithms, evolution strategies, certain reinforcement-learning methods, and alternating direction method of multipliers (ADMM). Naturally, gradient descent isn’t going anywhere; gradient information will always be useful for optimizing differentiable parametric functions. But our models will become increasingly more ambitious than mere differentiable parametric functions, and thus their automatic development (the learning in machine learning) will require more than backpropagation.

In addition, backpropagation is end to end, which is a great thing for learning good chained transformations but is computationally inefficient because it doesn’t fully take advantage of the modularity of deep networks. To make something more efficient, there’s one universal recipe: introduce modularity and hierarchy. So we can make backpropagation more efficient by introducing decoupled training modules with a synchronization mechanism between them, organized in a hierarchical fashion. This strategy is somewhat reflected in DeepMind’s recent work on synthetic gradients. I expect more along these lines in the near future. I can imagine a future where models that are globally non-differentiable (but feature differentiable parts) are trained— grown—using an efficient search process that doesn’t use gradients, whereas the differentiable parts are trained even faster by taking advantage of gradients using a more efficient version of backpropagation.

9.3.3 Automated machine learning

In the future, model architectures will be learned rather than be handcrafted by engineer-artisans. Learning architectures goes hand in hand with the use of richer sets of primitives and program-like machine-learning models.

Currently, most of the job of a deep-learning engineer consists of munging data with Python scripts and then tuning the architecture and hyperparameters of a deep network at length to get a working model—or even to get a state-of-the-art model, if the engineer is that ambitious. Needless to say, that isn’t an optimal setup. But AI can help. Unfortunately, the data-munging part is tough to automate, because it often requires domain knowledge as well as a clear, high-level understanding of what the engineer wants to achieve. Hyperparameter tuning, however, is a simple search procedure; and in that case we know what the engineer wants to achieve: it’s defined by the loss function of the network being tuned. It’s already common practice to set up basic AutoML systems that take care of most model knob tuning. I even set up my own, years ago, to win Kaggle competitions.

At the most basic level, such a system would tune the number of layers in a stack, their order, and the number of units or filters in each layer. This is commonly done with libraries such as Hyperopt, which we discussed in chapter 7. But we can also be far more ambitious and attempt to learn an appropriate architecture from scratch, with as few constraints as possible: for instance, via reinforcement learning or genetic algorithms.

Another important AutoML direction involves learning model architecture jointly with model weights. Because training a new model from scratch every time we try a slightly different architecture is tremendously inefficient, a truly powerful AutoML system would evolve architectures at the same time the features of the model were being tuned via backpropagation on the training data. Such approaches are beginning to emerge as I write these lines.

When this starts to happen, the jobs of machine-learning engineers won’t disappear—rather, engineers will move up the value-creation chain. They will begin to put much more effort into crafting complex loss functions that truly reflect business goals and understanding how their models impact the digital ecosystems in which they’re deployed (for example, the users who consume the model’s predictions and generate the model’s training data)—problems that only the largest companies can afford to consider at present.

9.3.4 Lifelong learning and modular subroutine reuse

If models become more complex and are built on top of richer algorithmic primitives, then this increased complexity will require higher reuse between tasks, rather than training a new model from scratch every time we have a new task or a new dataset. Many datasets don’t contain enough information for us to develop a new, complex model from scratch, and it will be necessary to use information from previously encountered datasets (much as you don’t learn English from scratch every time you open a new book—that would be impossible). Training models from scratch on every new task is also inefficient due to the large overlap between the current tasks and previously encountered tasks.

A remarkable observation has been made repeatedly in recent years: training the same model to do several loosely connected tasks at the same time results in a model that’s better at each task. For instance, training the same neural machine-translation model to perform both English-to-German translation and French-to-Italian translation will result in a model that’s better at each language pair. Similarly, training an image-classification model jointly with an image-segmentation model, sharing the same convolutional base, results in a model that’s better at both tasks. This is fairly intuitive: there’s always some information overlap between seemingly disconnected tasks, and a joint model has access to a greater amount of information about each individual task than a model trained on that specific task only.

Currently, when it comes to model reuse across tasks, we use pretrained weights for models that perform common functions, such as visual feature extraction. You saw this in action in chapter 5. In the future, I expect a generalized version of this to be commonplace: we’ll use not only previously learned features (submodel weights) but also model architectures and training procedures. As models become more like programs, we’ll begin to reuse program subroutines like the functions and classes found in human programming languages.

Think of the process of software development today: once an engineer solves a specific problem (HTTP queries in Python, for instance), they package it as an abstract, reusable library. Engineers who face a similar problem in the future will be able to search for existing libraries, download one, and use it in their own project. In a similar way, in the future, metalearning systems will be able to assemble new programs by sifting through a global library of high-level reusable blocks. When the system finds itself developing similar program subroutines for several different tasks, it can come up with an abstract, reusable version of the subroutine and store it in the global library (see figure 9.6). Such a process will implement abstraction: a necessary component for achieving extreme generalization. A subroutine that’s useful across different tasks and domains can be said to abstract some aspect of problem solving. This definition of abstraction is similar to the notion of abstraction in software engineering. These subroutines can be either geometric (deep-learning modules with pretrained representations) or algorithmic (closer to the libraries that contemporary software engineers manipulate).

[FIGURE 9.6 OMITTED]

9.3.5 The long-term vision

In short, here’s my long-term vision for machine learning:

 Models will be more like programs and will have capabilities that go far beyond the continuous geometric transformations of the input data we currently work with. These programs will arguably be much closer to the abstract mental models that humans maintain about their surroundings and themselves, and they will be capable of stronger generalization due to their rich algorithmic nature.

 In particular, models will blend algorithmic modules providing formal reasoning, search, and abstraction capabilities with geometric modules providing informal intuition and pattern-recognition capabilities. AlphaGo (a system that required a lot of manual software engineering and human-made design decisions) provides an early example of what such a blend of symbolic and geometric AI could look like.

 Such models will be grown automatically rather than hardcoded by human engineers, using modular parts stored in a global library of reusable subroutines—a library evolved by learning high-performing models on thousands of previous tasks and datasets. As frequent problem-solving patterns are identified by the meta-learning system, they will be turned into reusable subroutines—much like functions and classes in software engineering—and added to the global library. This will achieve abstraction.

 This global library and associated model-growing system will be able to achieve some form of human-like extreme generalization: given a new task or situation, the system will be able to assemble a new working model appropriate for the task using very little data, thanks to rich program-like primitives that generalize well, and extensive experience with similar tasks. In the same way, humans can quickly learn to play a complex new video game if they have experience with many previous games, because the models derived from this previous experience are abstract and program-like, rather than a basic mapping between stimuli and action.

 As such, this perpetually learning model-growing system can be interpreted as an artificial general intelligence (AGI). But don’t expect any singularitarian robot apocalypse to ensue: that’s pure fantasy, coming from a long series of profound misunderstandings of both intelligence and technology. Such a critique, however, doesn’t belong in this book.

**US Civil War Defense---1NC**

**No civil war.**

Robert **Reich 23**, "There will be no civil war over Trump. Here's why," Guardian, 6/12/2023, https://www.theguardian.com/commentisfree/2023/jun/12/trump-civil-war-chances-documents-indictment

Violence is possible, but there will be no civil war.

Nations don’t go to war over whether they like or hate specific leaders. They go to war over the ideologies, religions, racism, social classes or economic policies these leaders represent.

But Trump represents nothing other than his own grievance with a system that refused him a second term and is now beginning to hold him accountable for violating the law.

In addition, the guardrails that protected American democracy after the 2020 election – the courts, state election officials, the military, and the justice department – are stronger than before Trump tested them the first time.

Many of those who stormed the Capitol have been tried and convicted. Election-denying candidates were largely defeated in the 2022 midterms. The courts have adamantly backed federal prosecutors.

**Natural Disasters Defense---No Supervolcanos Impact---1NC**

**No supervolcanoes**

Adam **Voiland 11**, Science Writer, 11/15/2011, “Supervolcanoes: Not a Threat For 2012”, NASA, http://www.nasa.gov/topics/earth/features/2012-superVolcano.html

The geological record holds clues that throughout Earth's 4.5-billion-year lifetime massive supervolcanoes, far larger than Mount St. Helens or Mount Pinatubo, have erupted. However, despite the claims of those who fear 2012, there’s no evidence that such a supereruption is imminent.

What exactly is a "supervolcano" or a "supereruption?" Both terms are fairly new and favored by the media more than scientists, but geologists have begun to use them in recent years to refer to explosive volcanic eruptions that eject about ten thousand times the quantity of magma and ash that Mount St. Helens, one of the most explosive eruptions in recent years, expelled.

It’s hard to comprehend an eruption of that scope, but Earth’s surface has preserved distinctive clues of many massive supereruptions. Expansive layers of ash blanket large portions of many continents. And huge hollowed-out calderas – craters that can be as big as 60 miles (100 km) across left when a volcano collapses after emptying its entire magma chamber at once – serve as visceral reminders of past supereruptions in Indonesia, New Zealand, the United States, and Chile.

The eruption of these prehistoric supervolcanoes has affected massive areas. The magma flow of Mount Toba in Sumutra, which erupted some 74,000 years ago in what was likely the largest eruption that has ever occurred, released a staggering 700 cubic miles (2,800 cubic km) of magma and left a thick layer of ash over all of South Asia. For comparison, the quantity of magma erupted from Indonesia’s Mount Krakatau in 1883, one of the largest eruptions in recorded history, was about 3 cubic miles (12 cubic km).

Volcanologists continue to seek answers to many unanswered questions about supervolcanoes. For example, what triggers their eruptions, and why do they fail to erupt until their magma chambers achieve such enormous proportions? How does the composition compare to more familiar eruptions? And how can we predict when the next supervolcano will erupt?

But there’s one thing that all experts agree on: supereruptions, though they occur, are exceedingly rare and the odds that one will occur in the lifetime of anybody reading this article are vanishingly small.

The most recent supereruption occurred in New Zealand about 26,000 years ago. The next most recent: the cataclysmic eruption of Mount Toba happened about 50,000 years earlier. In all, geologists have identified the remnant of about 50 supereruptions, though teams are in the process of evaluating a number of other possibilities.

That may sound like a large number. However, when one group of scientists used the count of all the known supervolcanoes to calculate the approximate frequency of eruptions, they found that only 1.4 supereruptions occur every one million years.

That’s not to say that a supervolcano will occur every million years at regular intervals. Many millions of years could pass without a supereruption or many supervolcanoes could erupt in just a short period. The geological record does suggest supervolcanoes occur in clusters, but the clusters are not regular enough to serve as the basis for predictions of future eruptions.

Scientists have no way of predicting with perfect accuracy whether a supervolcano will occur in a given century, decade, or year – and that includes 2012. But they do keep close tabs on volcanically active areas around the world, and so far there’s absolutely no sign of a supereruption looming anytime soon.