# UKRR---Race 1---Aff Doc

## God

### God Source of Ethics---2AC

#### That’s a d-rule. The only paradigm that explains intrinsic human worth is the existence of a transcendent, Christian God.

Evans and Baggett 22 – University Professor of Philosophy and Humanities at Baylor with a Ph.D. from Yale University in Philosophy.

C. Stephen Evans, David Baggett, Professor of philosophy at Liberty University, "Moral Arguments for the Existence of God,” Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/moral-arguments-god/#ArgHumDigWor

5. Arguments from Human Dignity or Worth

Many philosophers find Immanuel Kant’s moral philosophy still offers a fruitful approach to ethics. Of the various forms of the “categorical imperative” that Kant offers, the formula that regards human beings as “ends in themselves” is especially attractive: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end” (Kant 1785 [1964], 96). Many contemporary moral philosophers influenced by Kant, such as Christine Korsgaard (1996), see Kant as offering a “constructivist” metaethical position. Constructivism is supposed to offer a “third way” between moral realism and subjectivist views of morality. Like subjectivists, constructivists want to see morality as a human creation. However, like moral realists constructivists want to see moral questions as having objective answers. Constructivism is an attempt to develop an objective morality that is free of the metaphysical commitments of moral realism.

It is, however, controversial whether Kant himself was a constructivist in this sense. One reason to question whether this is the right way to read Kant follows from the fact that Kant himself did not see morality as free from metaphysical commitments. For example, Kant thought that it would be impossible for someone who believed that mechanistic determinism was the literal truth about himself to believe that he was a moral agent, since morality requires an autonomy that is incompatible with determinism. To see myself as a creature who has the kind of value Kant calls “dignity” I must not see myself merely as a machine-like product of the physical environment. Hence Kant thought that it was crucial for morality that his Critical Philosophy had shown that the deterministic perspective on humans is simply part of the “phenomenal world” that is the object of scientific knowledge, not the “noumenal reality” that it would be if some kind of scientific realism were the true metaphysical view. When we do science we see ourselves as determined, but science tells us only how the world appears, not how it really is. Recognizing this fact suggests that when Kant posits that humans have this intrinsic value he calls dignity, he is not “constructing” the value humans have, but recognizing the value beings of a certain kind must have. Humans can only have this kind of value if they are a particular kind of creature. Whether Kant himself was a moral realist or not, there are certainly elements in his philosophy that push in a realist direction.

If the claim that human persons have a kind of intrinsic dignity or worth is a true objective principle and if it provides a key foundational principle of morality, it is well worth asking what kinds of metaphysical implications the claim might have. This is the question that Mark Linville (2009, 417–446) pursues in the second moral argument he develops. Linville begins by noting that one could hardly hold that “human persons have intrinsic dignity” could be true if human persons do not exist. Clearly, some metaphysical positions do include a denial of the existence of human persons, such as forms of Absolute Monism which hold that only one Absolute Reality exists. However, it also seems to be the case that some forms of Scientific Naturalism are committed to the denial of “persons as substantive selves that essentially possess a first-person point of view” (See Dennett 2006, 107). Daniel Dennett, for example, holds that persons will not be part of the ultimately true scientific account of things. Dennett holds that to think of humans as persons is simply to adopt a certain “stance” toward them that he calls the “intentional stance,” but it is clear that the kind of picture of humans we get when we think of them in this way does not correspond with their intrinsic metaphysical properties. It is not clear how systems towards which we adopt an “intentional stance” could be truly autonomous and thus have the kind of value Kant believes human persons have.

The argument from human dignity could be put into propositional form as follows:

Human persons have a special kind of intrinsic value that we call dignity.

The only (or best) explanation of the fact that humans possess dignity is that they are created by a supremely good God in God’s own image.

Probably there is a supremely good God.

A naturalist may want to challenge premise (2) by finding some other strategy to explain human dignity. Michael Martin (2002), for example, has tried to suggest that moral judgments can be analyzed as the feelings of approval or disapproval of a perfectly impartial and informed observer. Linville (2009) objects that it is not clear how the feelings of such an observer could constitute the intrinsic worth of a person, since one would think that intrinsic properties would be non-relational and mind-independent. In any case, Linville notes that a “Euthyphro” problem lurks for such an ideal observer theory, since one would think that such an observer would judge a person to be intrinsically valuable because the person has intrinsic value.

Another strategy that is pursued by constructivists such as Korsgaard is to link the value ascribed to humans to the capacity for rational reflection. The idea is that insofar as I am committed to rational reflection, I must value myself as having this capacity, and consistently value others who have it as well. A similar strategy is found in Wielenberg’s form of ethical non-naturalism, since Wielenberg argues that it is necessarily true that any being with certain reflective capacities will have moral rights (Wielenberg, 2014, chapter 4). It is far from clear that human rationality provides an adequate ground for moral rights, however. Many people believe that young infants and people suffering from dementia still have this intrinsic dignity, but in both cases there is no capacity for rational reflection.

Some support for this criticism of the attempt to see reason as the basis of the value of humans can be found in Nicholas Wolterstorff’s recent work on justice (2007, especially Ch. 8). Wolterstorff in this work defends the claim that there are natural human rights, and that violating such rights is one way of acting unjustly towards a person. Why do humans have such rights? Wolterstorff says these rights are grounded in the basic worth or dignity that humans possess. When I seek to torture or kill an innocent human I am failing to respect this worth. If one asks why we should think humans possess such worth, Wolterstorff argues that the belief that humans have this quality was not only historically produced by Jewish and Christian conceptions of the human person, but even now cannot be defended apart from such a conception. In particular, he argues that attempts to argue that our worth stems from some excellence we possess such as reason will not explain the worth of infants or those with severe brain injuries or dementia.

Does a theistic worldview fare better in explaining the special value of human dignity? In a theistic universe God is himself seen as the supreme good. Indeed, theistic Platonists usually identify God with the Good. If God is himself a person, then this seems to be a commitment to the idea that personhood itself is something that must be intrinsically good. If human persons are made in God’s image, as both Judaism and Christianity affirm, then it would seem to follow that humans do have a kind of intrinsic value, just by way of being the kind of creatures they are.

### God Solves Everything---2AC

#### God solves, and consequentialism trades off. He’s all knowing.

**Morales 22**– Pastor at Clear Lake United Methodist Church.

Andres Morales;; 11-5-2022; "A Christian case against longtermism"; Effective Altruism for Christians; <https://www.eaforchristians.org/blog/a-christian-case-against-longtermism>; Accessed 3-17-2025]

Christian longtermism can potentially **overcomplicate commands** like loving neighbor and acting justly. The majority of biblicalinstruction is applicable for people in their normal environments and social situations and does not require intelligence or contemplation or calculation, but love (1 Cor. 13:1−3). The New Testament is filled with “one another” commands, instructions about relationships, and exhortations to communal piety (John 13:34–35, Gal. 6:2, James 5:16), which all in practice require present and personal engagement with other people. More than just rule-following, a Christian should most of all cultivate an attitude of love, which is easier in relation to existing people. The theme of justice is also prevalent throughout the Old and New Testaments. Advocacy, justice, and charity for the poor is commanded (Prov. 31:8−9, Matt. 25:31−46, James 2:15−16). This has been called the preferential option for the poor, or can be thought of as a prioritarian ethic. If we assume the trajectory of global living conditions will continue, this ethic would mean our highest priority for charity would be the people that need the most help today.

Jesus’ ministry, and the early church that followed, was primarily concerned with coexisting people (his sacrifice being an exception, affecting past and future believers [Rom. 4, John 3:16]). If Jesus was a longtermist or an effective altruist or even just a utilitarian, he could have introduced countless treatments, technologies, or simple hygiene habits in the first century to **save millions** of lives over the course of history. Instead **he chose to** **heal** the sick **supernaturally**. Throughout the Gospels, Jesus spends his time preaching and helping the disadvantaged in his direct surroundings rather than seeking political power to ensure more permanent long-term security and welfare for his people (Matt. 4:23−24, John 18:36−37). Jesus’ followers, then and now, might not be able to comprehend the true long-term consequences of his ministry, but his life and actions gave the impression that we should prioritize care for the “least of these” today over the future.

Eschatology, existential risk, and responsibility

Longtermism is concerned with mitigating existential risks which could (with some shockingly high probabilities) cause an extinction or curtail humanity’s potential. Protecting life is objectively good. But a Christian can also **reasonably surrender** the **future to God** and **not be anxious** about it; believers are promised earthly suffering not in the form of existential threat outcomes, **but persecution** and tribulation (Matt. 6:25−34, Matt. 24). And we know God has eternally executed his **perfect plan for humanity** and the world, **fully aware of anything** that would appear to genuinely threaten the human race. What we call existential risks to God may simply be never-actualized possibilities, or the means by which he brings about the eschaton. Still, longtermist efforts are useful. I value AI safety and governance, not because I fear a misaligned superintelligence wiping out humanity with nanotechnology, but because of the potential inequality and other side effects of transformative AI. I value biosecurity, not because I fear an engineered pandemic killing all Homo sapiens, but because I witnessed the devastation caused by COVID-19. Preventing a climate catastrophe is an example of stewarding the earth well, helping present people as well as future people.

### God Affirms---2AC

#### Strike 2: God affirms. Encyclical proves.

Pope Benedict XVI 9 – former Pope Emeritus.

“Encyclical asks unions to protect workers beyond their membership,” Catholic Review, July 8, 2009, https://www.archbalt.org/encyclical-asks-unions-to-protect-workers-beyond-their-membership/.

The pope reached out to labor unions in his third encyclical, “Caritas in Veritate” (“Charity in Truth”), released July 7.

“The protection of these workers, partly achieved through appropriate initiatives aimed at their countries of origin, will enable trade unions to demonstrate the authentic ethical and cultural motivations that made it possible for them, in a different social and labor context, to play a decisive role in development,” he said in the encyclical.

Since the church’s traditional teaching makes a valid distinction between the roles of trade unions and politics, it is correct for unions to identify civil society as the proper setting for their activity of defending and promoting labor, especially among exploited and unrepresented workers often overlooked by the general public, the pope said.

In the current global market, some businesses in rich countries have outsourced jobs to poor countries where the work force wages are low, and in the process have exploited workers in that country while driving down prices in their own nations, the pope said.

“These processes have led to a downsizing of social security systems as the price to be paid for seeking greater competitive advantage in the global market, with consequent grave danger for the rights of workers, for fundamental human rights and for the solidarity associated with the traditional forms of the social state,” he said. “Systems of social security can lose the capacity to carry out their task, both in emerging countries and in those that were among the earliest to develop, as well as in poor countries.”

The pope said unions often face obstacles in trying to represent workers, “partly because governments, for reasons of economic utility, often limit the freedom or the negotiating capacity of labor unions.” He said that, even more today than in the past, there was an urgent need for new forms of cooperation at the international and local levels for the promotion of associations that can defend workers’ rights.

### God Real---2AC

#### Fulfilled prophecies prove.

Williams 15 – Computer Systems at the University of Newcastle citing Peter Stoner, Chairman of the Department of Mathematics and Astronomy at Pasadena City College.

David Williams, Danny Chestnut, “Mathematical Probability that Jesus is the Christ,” 2015, https://www.dannychesnut.com/Bible/Prophecy/Mathematical%20Probability%20that%20Jesus%20is%20the%20Christ.htm

The reason why prophecy is an indication of the divine authorship of the Scriptures, and hence a testimony to the trustworthiness of the Message of the Scriptures, is because of the minute probability of fulfillment. Anyone can make predictions. Having those prophecies fulfilled is vastly different. In fact, the more statements made about the future, and the more the detail, then the less likely the precise fulfillment will be. For example, what's the likelihood of a person predicting today the exact city in which the birth of a future leader would take place, well into the 21st century? This is indeed what the prophet Micah did 700 years before the Messiah. Further, what is the likelihood of predicting the precise manner of death that a new, unknown religious leader would experience, a thousand years from now - a manner of death presently unknown, and to remain unknown for hundreds of years? Yet, this is what David did in 1000 B.C. Again, what is the likelihood of predicting the specific date of the appearance of some great future leader, hundreds of years in advance? This is what Daniel did, 530 years before Christ.

If one were to conceive 50 specific prophecies about a person in the future, whom one would never meet, just what's the likelihood that this person will fulfill all 50 of the predictions? How much less would this likelihood be if 25 of these predictions were about what other people would do to him, and were completely beyond his control?

For example, how does someone "arrange" to be born in a specific family?

How does one "arrange" to be born in a specified city, in which their parents don't actually live? How does one "arrange" their own death - and specifically by crucifixion, with two others, and then "arrange" to have their executioners gamble for His clothing (John 16:19; Psalms 22:18)? How does one "arrange" to be betrayed in advance? How does one "arrange" to have the executioners carry out the regular practice of breaking the legs of the two victims on either side, but not their own? Finally, how does one "arrange" to be God? How does one escape from a grave and appear to people after having been killed?

Indeed, it may be possible for someone to fake one or two of the Messianic prophecies, but it would be impossible for any one person to arrange and fulfill all of these prophecies.

John Ankerberg relates the true story of how governments use prearranged identification signs to identify correct agents:

David Greenglass was a World War II traitor. He gave atomic secrets to the Russians and then fled to Mexico after the war. His conspirators arranged to help him by planning a meeting with the secretary of the Russian ambassador in Mexico City. Proper identification for both parties became vital. Greenglass was to identify himself with six prearranged signs. These instructions had been given to both the secretary and Greenglass so there would be no possibility of making a mistake. They were: (1) once in Mexico City, Greenglass was to write a note to the secretary, signing his name as "I. JACKSON"; (2) after three days he was to go to the Plaza de Colon in Mexico City and (3) stand before the statue of Columbus, (4) with his middle finger placed in a guide book. In addition, (5) when he was approached, he was to say it was a magnificent statue and that he was from Oklahoma. (6) The secretary was to then give him a passport.

These six prearranged signs worked. Why? With six identifying characteristics it was impossible for the secretary not to identify Greenglass as the proper contact (John Ankerberg, John Weldon and Walter Kaiser, "The Case for Jesus The Messiah", Melbourne: Pacific College Study Series, 1994, 17-18).

How true, then, it must be that Jesus of Nazareth is the Messiah, if he had 456 identifying characteristics well in advance, and fulfilled them all! In fact, what does the science of probability make of this?

The science of probability attempts to determine the chance that a given event will occur. The value and accuracy of the science of probability has been well established beyond doubt - for example, insurance rates are fixed according to statistical probabilities.

Professor Emeritus of Science at Westmont College, Peter Stoner, has calculated the probability of one man fulfilling the major prophecies made concerning the Messiah. The estimates were worked out by twelve different classes representing some 600 university students. The students carefully weighed all the factors, discussed each prophecy at length, and examined the various circumstances which might indicate that men had conspired together to fulfill a particular prophecy. They made their estimates conservative enough so that there was finally unanimous agreement even among the most skeptical students. However, Professor Stoner then took their estimates, and made them even more conservative. He also encouraged other skeptics or scientists to make their own estimates to see if his conclusions were more than fair. Finally, he submitted his figures for review to a committee of the American Scientific Affiliation. Upon examination, they verified that his calculations were dependable and accurate in regard to the scientific material presented (Peter Stoner, Science Speaks, Chicago: Moody Press, 1969, 4).

For example, concerning Micah 5:2, where it states the Messiah would be born in Bethlehem Ephrathah, Stoner and his students determined the average population of BETHLEHEM from the time of Micah to the present; then they divided it by the average population of the earth during the same period.

They concluded that the chance of one man being born in Bethlehem was one in 300,000, (or one in 2.8 x 10^5 - rounded),

After examining only eight different prophecies (Idem, 106), they conservatively estimated that the chance of one man fulfilling all eight prophecies was one in 10^17.

To illustrate how large the number 10^17 IS (a figure with 17 zeros), Stoner gave this illustration :

If you mark one of ten tickets, and place all the tickets in a hat, and thoroughly stir them, and then ask a blindfolded man to draw one, his chance of getting the right ticket is one in ten. Suppose that we take 10^17 silver dollars and lay them on the face of Texas. They'll cover all of the state two feet deep. Now mark one of these silver dollars and stir the whole mass thoroughly, all over the state. Blindfold a man and tell him that he can travel as far as he wishes, but he must pick up one silver dollar and say that this is the right one. What chance would he have of getting the right one? Just the same chance that the prophets would've had of writing these eight prophecies and having them all come true in any one man, from their day to the present time, providing they wrote them in their own wisdom (Idem, 106-107).

In financial terms, is there anyone who would not invest in a financial venture if the chance of failure were only one in 10^17? This is the kind of sure investment we're offered by god for faith in His Messiah.

From these figures, Professor Stoner, concludes the fulfillment of these eight prophecies alone proves that God inspired the writing of the prophecies (Idem, 107) - the likelihood of mere chance is only one in 10^17!

Another way of saying this is that any person who minimizes or ignores the significance of the biblical identifying signs concerning the Messiah would be foolish.

But, of course, there are many more than eight prophecies. In another calculation, Stoner used 48 prophecies (Idem, 109) (even though he could have used Edersheim's 456), and arrived at the extremely conservative estimate that the probability of 48 prophecies being fulfilled in one person is the incredible number 10^157. In fact, if anybody can find someone, living or dead, other than Jesus, who can fulfill only half of the predictions concerning the Messiah given in the book "Messiah in Both Testaments" by Fred J. Meldau, the Christian Victory Publishing Company is ready to give a ONE thousand dollar reward! As apologist Josh McDowell says, "There are a lot of men in the universities that could use some extra cash!" (Josh McDowell, Evidence that Demands a Verdict, California: Campus Crusade for Christ, 175).

## K

### AT: Ontology---2AC

#### Their theory is wrong.

Smithers 22 – Professor of American History and Eminent Scholar in the College of Humanities and Sciences at Virginia Commonwealth University.

Gregory D. Smithers, “Settler Colonialism and Indigenous Americans,” *Oxford Research Encyclopedia*, 18 July 2022, pp. 2-8, https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-909;jsessionid=BC3B252AD2D665E34C1D8B74156594CE?rskey=cwCpax&result=7.

One historian who has weighed into debate about the utility of settler colonialism in American history is Nancy Shoemaker. In 2015, Shoemaker declared that “settler colonial theory has taken over my field, Native American studies.” Before going on to list twelve forms of colonialism, Shoemaker insisted that “Comparative indigenous histories focused especially on British-descended ‘settler colonies’—Canada, New Zealand, Australia, and the United States—have proliferated. And settler colonial theory is now dogma.”4 Shoemaker’s take on settler colonial studies hints at how a number of leading American historians feel uncomfortable with what they see as the uncritical use of settler colonial theory. This unease stems from a preference for “storytelling” among historians of early colonial America.5 According to Shoemaker and fellow historian Jeffrey Ostler, “history as a field is not theoretically inclined.”6 Moreover, historians of early colonial America question whether a single theoretical model can adequately explain history’s contingencies and messiness. In a separate essay, Ostler writes about the disapproving murmurs that settler colonial frameworks attract among colleagues at conferences and in hallways across the United States. Despite this, Ostler suggests that historians should not casually dismiss settler colonialism, but interrogate it, refine it, and ask questions about it, just as we do with other historical frameworks.7

So, what’s all the fuss about? What is settler colonialism? Settler colonialism is a specific form of colonialism characterized by the “mass transfer” of people to lands they intend to “conquer” and permanently settle.8 Settlement is neither quick nor bloodless; it involves levels of physical violence that can, and do, rise to genocide. If the object of settler colonial violence is to remove the Indigenous people who impede the settler society’s expansion and permanence, then examples of exterminatory violence are not hard to identify in colonial North American history.9 Over time, settlers work to establish “perfect settler sovereignty,” removing any remaining Indigenous challenges to the settler state’s sovereignty and redefining themselves as the “native” inhabitants.10

Admittedly, this is a broad-brushed definition. It nonetheless captures the essence of the metanarrative of settler colonialism. It is a framework that is sometimes reduced to a single phrase: “settlers come to stay.” For historians of the United States, this formulation received its most explicit articulation with the publication of Patrick Wolfe’s 2001 essay, “Land, Labor, and Difference: Elementary Structures of Race.”11 Writing in the American Historical Review, Wolfe, an anthropologist, argued that settler colonialism is “a zero-sum contest over land on which conflicting modes of production could not ultimately coexist.” According to Wolfe, “the primary logic of settler colonialism can be characterized as one of elimination.”12

At the time, Wolfe’s formulation seemed new, neat, and catchy. A generation of scholars, many of them young and still in graduate school when they first read Wolfe’s 2001 essay, latched on to it. But Wolfe had been thinking about settler colonialism for some time. Those labors first came together in his 1999 book Settler Colonialism and the Transformation of Anthropology. In it, Wolfe articulated that now ubiquitous formulation: “settler colonies were (are) premised on the elimination of native societies.”13 Where Wolfe catalyzed the current trajectory of settler colonial studies, Lorenzo Veracini has become one of its most cited theorists. Veracini writes about “transfer” as opposed to Wolfe’s “elimination,” and emphasizes the settler colonial “situation” in contrast to Wolfe’s refences to “structure.”14 But just as Wolfe and Veracini have played leading roles in helping the field of settler colonial studies grow, so too have its critics sharpened their critiques of settler colonialism as an “empirically exhaustive” historical framework.15 Historian Daniel Richter has characterized settler colonialism as a “totalizing” framework that obscures more than it reveals. In the centuries before the American Revolution, Richter sees colonial forms of governance as “incipient,” not hegemonic.16 In the United States, Richter is not alone in suggesting that the diversity of historical experiences in North America since 1492 brings into question the efficacy of settler colonialism as an organizing framework.17

Historicizing North American Colonialism

In his 2019 biography of Walter Ralegh (also spelled Raleigh), historian Alan Gallay reminds us of the historical and theoretical complexity of colonialism in North America. Writing about 16th-and 17th-century English colonialism, Gallay observes the distinction that the English did not talk about settler societies but instead made a distinction between a “plantation” and a “colony.” While both “involved moving groups of people to new lands,” Ralegh and his contemporaries used “plantation” when referring to a settlement that the English Monarch “had a secure claim” to. In contrast, “colonies” existed in places “where sovereignty had yet to be ensured.”18

Gallay’s historical specificity is important. He reminds us of the uncertainties, dynamism, and fluidity that characterized early modern “plantations” and “colonies” in North America— something that distinguishes them from 19th- and 20th-century Anglophone settler colonies. In the 16th and 17th centuries, settlers (a diverse group, often with competing interests) did not automatically look at Indigenous people and think about “eliminating” them. Building on a rich body of thought that went back to the Norman conquest of England, the English in North America might have framed colonization as an opportunity to engage Indigenous communities in a benevolent enterprise, or speak about it as an act of “co-creation” designed to benefit both colonizer and colonized. The English articulated both of these perspectives. The job of the historian is to evaluate the degree to which such rhetoric was genuinely felt or whether it was simply justification for darker motives.19

Positing the need for this type of careful historical analysis is not to say that “eliminationist” forms of physical violence, including genocidal violence, did not occur in early colonial North America.20 It is instead a reminder that the present, much less the future, was anything but certain for English settlers during the 17th century. This is why the written evidence from this formative century in Anglo colonialism includes a seemingly contradictory mix of settler calls for “extermination” and “extirpation” of Indigenous people, missionary efforts to convert Indians to Christianity, intermarriages between English (and after the Act of Union in 1707, British) traders and Indigenous women, and colonial efforts to forge trade and diplomatic alliances with Native polities.21 Violence, disease, diplomacy, and trade could, and did, coexist. The shear diversity of human relations makes the application of a single interpretative framework in early colonial America difficult to sustain.

For instance, consider the complex ways that disease impacted Indigenous people and Anglo-Indian relations. Narratives about “smallpox vials” and disease-infected blankets have punctuated both scholarly and vernacular accounts of settler colonialism from Australia to the United States.22 The historical reality is more nuanced. Historians Alfred Crosby, David Jones, and Paul Kelton, to name just three, have spent decades analyzing disease transfer in early colonial America. A variety of diseases struck down an estimated 70 to 90 percent of the Native North American population—seemingly genocidal levels of death that resulted in cultural and linguistic loss, and in some cases, societal collapse.23 But in assessing such catastrophic figures, historians have reminded us that while colonizers sometimes cheered the loss of Indigenous life—seeing disease-induced mortality as God’s punishment of “savage” people—early modern Europeans did not possess the epidemiological knowledge to engage in germ warfare. In fact, settlers born in the North American colonies were just as likely as Native Americans to sicken and die from European diseases.24 The history of disease in early colonial America is therefore as complex as histories of violence.

Given the variety of competing Indigenous and European interests across North America prior to the American Revolution, historians returning to the subject of violence are advised to do so with care and attention to historical specificity. It’s important to remember that British people came to North America under different circumstances and with an assortment of goals. Some arrived with the Crown’s patronage, others were convicts or indentured servants. Still others sought trading partners and new markets, and growing populations imagined a future in which they stayed. The crosscurrent of colonial origin stories, motivations, and ambitions reveals how the settler societies that emerged during the late 18th and early 19th centuries were not guaranteed. We should therefore avoid the teleology of a previous generation of historians who became trapped in a framework that viewed early colonial America as a means of explaining the emergence of the American Republic.25 There were simply no certainties in early colonial America.

But it is true that prerevolutionary North America was punctuated with intense bursts of prejudice—“savages,” “vermine,” “errors of nature”—and violence that ranged from local skirmishes to genocide.26 The examples are strewn across the historical landscape: the AngloPowhatan Wars in Virginia and the massacre of Native men, women, and children between the 1620s and 1640s; the Mystic Massacre of six hundred to seven hundred Pequot Indians in 1637; the Dutch-inspired attack against Tankitekes (or Siwanoy) and Wappinger people at Pound Ridge in New York in 1644 that saw between to five hundred and seven hundred Indians killed; the massacres of Indigenous people that occurred during Metacom’s War of 1675–1676, also known as King Philip’s War.27 The list of genocidal outbursts goes on and on; they appear to fit the narrative of elimination outlined by settler colonial theorists. However, in the context of early colonial America, we also need to keep in mind that intense violence could coexist with robust treaty negotiations between English colonial officials and Indigenous leaders. In such contexts, historical analysis can reveal the strength of Native diplomats and the strategic weakness of colonial officials as they struggled to cobble together effective governing structures for their respective colonies.28 In such instances, should we interpret settler violence as evidence of anxiety and weakness, not strength? Can we call Anglo-Indian diplomacy an example of settler colonialism? Should we assume that treaty making aimed simply to dispossess and “eliminate” Native Americans? And where does Indigenous agency fit into this history?29

This latter question is one that historians should not lose sight of. Historian Charles Prior has addressed questions of Indigenous agency in the diplomatic history of early colonial North America. Focusing on the Iroquois, Prior identifies “overlapping and contested ‘zones’ of sovereignty” in which no form of colonialism exercised hegemony in North America. Indeed, “Indigenous power” meant that colonizers found themselves bending to the demands of Native kinship structures and economic objectives. This proved true across North America, with frontiers and borderlands, contested zones, “Native grounds,” and “middle grounds,” punctuating the Anglo-Indian political landscape alongside preexisting rivalries among Native polities.30

The diverse geohistorical experiences of Indigenous people and colonizers make the application of a single interpretive model fraught with potential inadequacies. For example, one of the central arguments in Wolfe’s “eliminationist” theory of settler colonialism is the contention that Indigenous labor was superfluous to settlers. This argument almost universally ignores Native American traditions of captivity and kinship and underestimates the entanglements of Indigenous people with enslavement during the 18th and 19th centuries. Indigenous labor, both enslaved and nonenslaved, is a complex part of North America’s colonial history.31 Studies by historians such as James Brooks and Paul Conrad reveal the changing significance of Indigenous captivity and slavery to both Native and colonizer populations throughout the American West between the 17th and 19th centuries. This work sheds light on how enslavement and the coerced transportation of Indian captives caused social dislocation and fractured kinship networks among the Apaches and other Indigenous communities.32 Alternatively, historians Fay Yarbrough and Barbara Krauthamer have taken the lead in studying the racialization of Native slavery in the Southeast and its entanglements with colonial economies.33 Collectively, scholarship that illuminates the intersecting histories of Indigenous-African American people contextualizes the legacies of these fraught histories and their connections to Indigenous sovereignty, land rights, and citizenship in the 21st century. 34

While Veracini builds on Marx and Engels to point to the voracious appetite of settler societies for expanding markets during the 19th century, more work is needed to better understand the relationship between racial slavery and settler colonialism.35 In recognizing changes in global trade during the 19th and 20th centuries, it is also important not to lose sight of how Indigenous people adapted to these changing markets. Indeed, economic histories of settler societies during these latter centuries brings us back to questions of labor and the wide-ranging attitudes that Native Americans displayed toward wage and contract labor, and wealth generation in the centuries after the American Revolution.36

The US Republic and Settler Colonialism

What of the impact of the American Revolution on settler colonialism in North America? In the decades after the American Revolution, the United States exhibited many of the features that theorists associate with settler societies. The unrelenting drive for land, the forced removal of Indigenous polities, and the elimination through warfare and violence of Indigenous communities across the American West during the latter half of the 19th century. 37 These features of United States history seem to conform to what historian Edward Cavanagh describes as settler colonialism’s tendency to remain “relentlessly active in the present.”38 In the context of an expanding United States since the late 18th century, we have to remain open to the possibility that relentlessness may well have been a product of weakness, not power. It is important to remind our students and readers of our work of the persistence of Indigenous political and military power, the strength of Native connections to place, and the innovative traditions of communities throughout Indian Country meant that US common law traditions, political and economic structures, and cultural beliefs continued bending to the arc of Indigenous diplomatic skill and influence well into the 19th century. 39

The risk here is that historians uncritically apply an inverted Turnerarian model of frontier history to their teaching and research. In 1893, historian Frederick Jackson Turner lamented the closing of the frontier in American history. Turner’s “frontier thesis” celebrated the character of American settlers in the context of territorial expansion and conquest.40 Settler colonial studies flips the “frontier thesis” on its head, seeing the qualities that Turner celebrated as evidence of the “eliminationist logic” driving settlers and the societies they built. Used uncritically, both models have the potential to silence Indigenous people—positing them as members of communities who do not make history but are people for whom history acts on. That said, there is room for the judicious application of theory in historical analysis. This can involve the decolonization of settler colonial theory to more clearly hear Native voices, understand Indigenous survivance and sovereignty, or reconsider the limits of liberal and neoliberal forms of settler colonialism.41

Historians can avoid the inverted Turnerarian trap by recognizing adaptive forms of Indigenous kinship and changes in Native political structures. This work will also expose the fits of willed ignorance, historical amnesia, and political imaginings that settler Americans engaged in (and continue engaging in) to justify the sovereignty of the republic and rationalize its expansion. Enlightenment ideas might have convinced the educated few that schemes in “human management” could “assimilate” Native people to the American economy and body politic or persuade the political classes of the humanity of relocating Indians to distant reservations, but the reality was more complex.42 The sovereignty of the United States was far from complete, and by no means “perfect,” in the century after the Revolution. The persistence of Native forms of land ownership and renewed articulations of tribal sovereignty challenged both the violence and the legal foundation for the republic’s existence, in addition to its expansion.43 To quote Prior, “the reality of Indian power should lead us to rethink the ways in which Indigenous polities confronted colonialism.”44

Recognizing the panoply of Indigenous experiences with, and responses to, different forms of colonialism, does not mean that historians should ignore what colonizers thought and did. Nor does it mean that historians should discard settler colonial theory. Jeffrey Ostler makes this point when he observes that the best evidence for understanding the United States as a settler state exists in the centuries after the American Revolution.45

Another area of study that has attracted considerable historical attention is the question of whether the United States became a settler empire during the 19th and 20th centuries. Historians have examined American imperialism and empire building across the Americas from the Monroe Doctrine, in 1823, to the 21st century, producing a rich historiography that is well-suited to college classrooms.46 Historian Norbert Finzsch sets out a framework for understanding the United States in terms of “settler imperialism.” Finzsch defines settler imperialism as the “expansion of settler colonies and settler states, directed against ‘exterior’ indigenous populations, achieved in the context of a democratic and egalitarian society of white, predominantly Protestant Anglo-Saxon settlers organized in farms and family households.”47

Finzsch reapplies the old theory of herrenvolk democracy, a concept popularized in American history by George Fredrickson.48 Like Fredrickson, Finzsch is looking for a historical model that helps explain the development of white supremacy in the United States during the 19th century and beyond. Unlike Fredrickson, Finzsch is specifically interested in exposing the tools of Indigenous “elimination,” be they the erection of fences and Anglo systems of agriculture, or genocidal violence. According to Finzsch, “the long-lasting processes” of settler imperialism may include practices and structures that become less visible (or naturalized) but are “just as deadly as large-scale massacres and genocides.”49 These practices, detailed by historians such as Anne Hyde, were multifaceted and ranged from squatting on Indian lands to using settler laws and economic practices to push Native communities from lands and waterways that formed the basis of their kinship networks.50

The settler imperialism model has interpretive merits in helping historians understand different phases of empire building in American history. However, like settler colonial theory, settler imperialism runs the risk of being applied as a blunt instrument in understanding the complexities of US history. Consider, for example, this line from Chickasaw scholar Jodi Byrd, who argues that Indigenous peoples “serve primarily as signposts and grave markers along the roads of empire.”51 This is a powerful theoretical and political statement, but it is not history. As historical analysis, arguments like this ignore contingency and change over time, and they do a disservice to the diversity of Indigenous experiences in both the past and present. It is also a macabre reapplication of the “dying Indian” and “doomed race thesis” of previous centuries.

Historians J. M. Bacon and Matthew Norton offer a solution to the ahistoricism that is now popular in literary theory and critical studies.52 Their 2019 analysis of US policy takes issue with the absence of Native people in studies of American empire. Bacon and Norton offer a careful critique of US legal and political maneuvers to render Indigenous sovereigns “impaired” and “subordinate.” The United States routinely tries to exert its legal power by setting limits to the sovereign powers of Indigenous nations. The Supreme Court established the precedents for this legal dynamic in the early 19th century, making Native sovereignty a question of federal law. Over time, federal courts divested Indigenous nations of their inherent rights, and in 1903 the US Congress assumed plenary power over Native communities. Indigenous leaders did not let these legal and political developments go unchallenged, any more than they ignore threats to tribal sovereignty in the 21st century. Increasingly, 20th-century Native leaders redeployed treaties— often seen in both popular and professional historical narratives as colonial tools of dispossession—to reassert their sovereignty and pressure the federal government to live up to its trust obligations. As Bacon and Norton make clear, the United States may rely on a number of dubious legal doctrines (such as the Doctrine of Discovery), but the legal skills of Indigenous lawyers and the savvy of their political leaders means the indirect rule that the federal government exercises over Native nations is never as total (or “eliminationist”) as settler colonial studies may make it seem.53

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## Case

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#### That independently causes a second civil war and global catastrophe.

Copley 17 – Dean of the College of Fellows, International Strategic Studies Association; member of the Order of Australia for contributions in the field of strategic analysis

Gregory R. Copley, “What Would A U.S. Civil War Look Like?,” 2017, OilPrice, https://oilprice.com/Geopolitics/North-America/What-Would-A-US-Civil-War-Will-Look-Like.html

And the next US civil war, though it yet may be arrested to a degree by the formal hand of centralized government, will destabilize many other nation-states, including the People’s Republic of China (PRC).

It may, in other words, be short-lived simply because the uprising will probably not be based upon the decisions of constituent states (which, in the US Civil War, created a break-away confederacy), acting within their own perception of a legal process. It is more probable that the 21st Century event would contage as a gradual breakdown of law and order.

The outcome, to a degree dependent on how rapidly orllder is restored, would likely be the end, or constraint, of the present view of democracy in the US. It would see a massive dislocation of the economy and currency. It would, then, become a global-level issue.

Humans mock what they see as an impulse toward species ~~suicide~~ [death] among the beautiful lemming clan of Lemmus lemmus.1 In fact, these tiny creatures have a societal survival pattern which seems more consistent than that of their human detractors. The pattern of human history shows that civilizations usually end through internal ~~illness~~ [problems] rather than at the hand of external powers.

#### Agency decline structurally increases existential risk from numerous pathways.

Schulman 22 – Vice president of research, evaluation and modernizing government, Partnership for Public Service. Formerly served in senior staff roles at the National Security Council and the Department of Defense from 2005-2015, Master in Public Policy, Distinguished Fellow for International Peace and Conflict Studies, University of Minnesota.

Loren DeJonge Schulman, “Schedule F: An Unwelcome Resurgence,” Lawfare, 08-12-2022, https://www.lawfaremedia.org/article/schedule-f-unwelcome-resurgence

Author Michael Lewis describes civil servants’ responsibilities in the “The Fifth Risk,” calling the U.S government the manager of “the biggest portfolio of [catastrophic] risks ever managed by a single institution in the history of the world.” Some are obvious—the threat of nuclear attacks, for example—but most are glacial and opaque, demanding a portfolio of reliable and steady risk managers who can prioritize the nation’s security without fearing for their job security.

Thousands of such “risk managers” who work in policy-adjacent roles would be implicated by a Schedule F policy that removes the civil service protections set out for them in the Civil Service Reform Act of 1978. Civil servants today are protected against possible political retaliation, coercion, or removal by presidents and political appointees. They must be hired on the basis of relative ability, knowledge, and skills, using fair evaluation metrics. And they are protected against reprisal for whistleblowing.

These rules are frequently shorthanded derisively in (false) assumptions that civil servants cannot be fired. To the contrary, there are set guidelines for when federal employees can be lawfully terminated and disciplined based on performance or misconduct. The antiquated federal hiring process faces similar—albeit fairer—criticism, but its slowness is intended to screen for those who have “a high standard of integrity and trust to promote the interests of the public” and for good reason. Overall, these critiques misunderstand that the competitive hiring process and subsequent protections are what make it possible for civil servants to perform exceptionally, particularly in high pressure, complex policy areas where the government is managing extreme risk on behalf of the country, such as national security.

By protecting them from political reprisal, these rules give civil servants in policy roles the foundation to offer advice that may be tough for presidents to hear, to execute policies with high stakes, to report illegal activity and misconduct as a part of their duties, and to trust that they and their peers owe their first fealty to protecting and defending the Constitution. They do all of this with the confidence that their integrity will be rewarded and protected.

At best, shifting policy-aligned roles to Schedule F roles would have a chilling effect on such policy experts whom we rely on for their unique expertise, candor, and integrity, potentially making them more cautious about the advice they give, the portfolios they support, the risks they take in defending the Constitution, and their willingness to call out malfeasance or bad news.

Worst-Case Scenario: Harming National Security

At its worst, Schedule F will make it possible for presidents to remove thousands of experts who make U.S. global leadership possible. By shifting protected civil servants to at-will employees, Schedule F makes it possible to fire them without the due process currently owed to civil servants. In other words, civil servants could be fired for any reason at all—for giving unwelcome advice, for prior jobs, for being the subject of unsubstantiated accusations of any type, for perceptions of partisan affiliation, or simply for being in a role the president wishes to open up for a loyalist.

Some Schedule F advocates make clear that large-scale removals are under consideration and that removal, not oversight, is their ultimate goal for Schedule F. “Fire everyone you’re allowed to fire,” one commented, according to the Axios reporting. “And [then] fire a few people you’re not supposed to, so that they have to sue you and you send the message.”

Because the policy would also allow replacement of current civil servants without a competitive process, replacements for nonpartisan civil servants could be made without regard to qualification and suitability, or based on partisan affiliation, creating a new kind of political appointee.

The potential loss of talent could be wide and extremely damaging. Axios also reported that, according to sources close to Trump, the former president intends to “go after” the national security establishment as a matter of “top priority,” including those in the intelligence community and State Department. Policy roles that could be reclassified as Schedule F could cut across many high-import areas: Russian defense strategy, Iranian nuclear programs, or Chinese regional security capabilities, among hundreds of other categories. The harm to national security of removing and replacing civil servants—whose work, as we have established, requires expertise, relationships, and clear understanding of risk—with individuals with no required qualification except loyalty to a single individual is self-evident.

But, should a future president pursue this action, beyond missing an endless list of risk portfolio managers, the United States will miss something more fundamental to its success and security: its reliability. American alliances are valuable because of the steady undercurrent of the nation’s civil servants who maintain networks, expertise, and consistency regardless of who inhabits the Oval Office. Despite its turmoil, the American political system is a strong model and international interlocutor because its civil servants serve expertly and well across presidential administrations of any political affiliation. Schedule F, by stifling or removing long-serving civil servants, would make the United States a weaker, less reliable, and less trusted partner.

Why Shouldn’t the President Get a Say?

A president’s desire to shape a policy team, and to be sure it is filled with strong performers who are closely aligned with their views, is understandable. After all, presidents are elected to implement their chosen policy agenda, and having a team around them who can work in support is critical. But presidents already can wield enormous influence over both their closest policy advisers and the most far-flung agency overseers: through the 4,000 political appointees who are named, or removed, at the pleasure of the president. The Schedule F proposal would be an enormous and unnecessary expansion of this already poorly utilized system.

Most administrations never come close to seeing all those politically appointed policy roles filled despite the tremendous access and leverage such appointments bring them. And some presidential teams still struggle to make best use of political appointee and career civil servant partnerships. Rather than adding more chaos and instability with a Schedule F policy, administrations could be maximizing the opportunity that comes with leveraging their career and political leaders together. As noted in a recent Partnership for Public Service and Boston Consulting Group report:

Career executives bring program and policy expertise from their long familiarity with their agencies which can help them manage programs better and work more effectively with external stakeholders and inside actors. Politically appointed leaders can bring energy, risk-taking and responsiveness into an agency’s decision-making process which can improve performance. When leaders are matched with missions, agendas and teams that align with their distinct approaches and perspectives, they can find success in creating a government that is more efficient, innovative and responsive to the needs of the public.

The civil service system is not perfect. The pay system has its origins in World War II. The hiring process, though well-intended, is glacial. The permeability of the system in an era that requires close understanding and collaboration across sectors is limited. But the fundamentals are powerful, and they serve as a critical ingredient to the success of the United States’ global leadership and the sustainability of its democracy.

The U.S. government is able to take on high-risk, high-cost ventures—nuclear security, pandemic response, environmental clean-up, food safety, and more—because civil servants are hired based on qualifications, not party affiliation; give advice based on data and integrity, not fear of reprisal; and owe allegiance to the Constitution, not the president. It needs to stay that way.

#### Strong human capital is key to good decision-making throughout the government. It maximizes upsides while checking downsides.

Handler 24 — Thomas C. Grey Fellow and Lecturer in Law, Stanford Law School. Associate Professor of Law. Texas A&M. J.D. Yale Law School Burton H. Brody Prize for Best Essay on Constitutional Privacy. Yale Law and Policy Review (Executive Editor).

Nicholas Handler, “Separation of Powers By Contract: How Collective Bargaining Reshapes Presidential Power,” 99 NYU-L. Rev. 45, https://nyulawreview.org/wp-content/uploads/2024/04/99-NYU-L-Rev-45.pdf

Over the past three decades, the President's power to shape policy through executive action has grown substantially.1 Scholars have responded by spotlighting how the federal civil service, and the millions of bureaucrats who staff it, restrain presidential power.2 Observers agree that Congress and courts are no longer capable of overseeing the full scope of executive activity. The federal bureaucracy, by contrast, has the size, personnel, and expertise to monitor executive action, identify potential abuses, and resist ill-considered or improperly politicized policy. Bureaucrats' independence and their practical and legal ability to challenge presidential policy therefore have become critical modulators of executive power.3

[\*48] To critics, including proponents of the unitary executive theory, the tenured federal bureaucracy constitutes a "deep state," unelected and illegitimate, that has wrested away power constitutionally vested in the President.4 Former President Trump has vowed, if re-elected in 2024, to purge thousands of federal civil servants and replace them with political loyalists, claiming to have a list of fifty thousand civil servants to terminate.5 Even bureaucracy's defenders worry about the civil service's supposed insulation from interbranch supervision and democratic accountability. The mechanisms bureaucrats use to "check" the President are deemed irregular at best, extralegal at worst. They require acts of "disobedience" or "resistance" - such as deliberate noncompliance with or half-hearted implementation of the President's directives.6

At the heart of this debate over the legitimacy of the federal bureaucracy are basic questions of personnel management - to whom do bureaucrats answer? Who structures their incentives? Who can fire, discipline, or reassign them, and for what reasons? Are bureaucrats truly a "ruling class" of "unaccountable `ministers,'" insulated from the control of the coordinate branches and the American public, as critics on the Supreme Court and elsewhere suggest?7 Or do they, as defenders argue, serve a pro-constitutional role by curbing presidential excess [\*49] and promoting separation of powers and rule of law?8 The answers to these questions have important implications for the legal viability of the administrative state itself, as recent judicial decisions make clear.9

But surprisingly, administrative law scholars have ignored a complex system of labor law at the heart of modern personnel administration, which reshapes presidential-bureaucratic relations in profound ways and challenges many of our assumptions about bureaucracy and the administrative state. Federal employees have extensive, statutorily enshrined labor rights. They have the legal right to form labor unions, to negotiate the terms of their employment with presidentially appointed agency heads, and to enter into complex collective bargaining agreements (CBAs) that govern many aspects of their work and shape how the federal government implements public policy.10 These contractual arrangements can amend the relationship between the President and the civil service in important ways, restructuring how agencies work and constraining what agency heads can direct employees to do in service of an agency's mission. Hundreds of these CBAs have been adopted, governing millions of federal employees ranging from immigration judges to scientists to prison guards.11 Their provisions are enforced through thousands of adjudications each year, hundreds of which are appealed to the Federal Labor Relations Authority (FLRA) and dozens to circuit courts.12

Take the field of immigration as an example. Typically, the story goes that the President imposes policies with profound implications for the immigration system, such as prioritizing the arrest and deportation of certain populations or setting targets to grant or deny certain numbers of asylum applications or removal challenges.13 Once those policies are announced, bureaucrats may choose to either sheepishly obey or clandestinely resist their orders. Presidential administration thus produces either an "imperial" presidency or an unaccountable "deep state."

[\*50] But in the overlooked field of labor, bureaucrats may check presidential directives not through subterfuge, but through formal and legal challenges resting on breach of contract or labor violation claims. Immigration and Customs Enforcement (ICE) agents can challenge and defeat policies requiring them to deprioritize the arrest of certain populations - such as minors and those without criminal records - or to provide legal information to detained immigrants on the grounds that those policies improperly alter agents' conditions of employment.14 Border patrol guards can defeat policies altering what types of border searches they may conduct, what types of weapons they may carry, or what disciplinary processes they may face for misconduct.15 Immigration judges can defeat productivity quotas or performance evaluation standards designed to force them to process cases more quickly - a process well known to produce lower win rates for immigrants challenging removals.16 And employees of the United States Customs and Immigration Service (USCIS) may challenge directives pushing them to grant fewer asylum applications.17 In all these instances, important questions of presidential policy may rise and fall not on deep analyses of Article II or the Administrative Procedure Act, but on disputes over contractual interpretation, bargaining obligations, and unfair labor practices. In short, federal labor provides a forum in which civil servants openly and formally, rather than secretly and illicitly, challenge presidential administration in a wide range of important contexts. What emerges from the study of federal sector labor is a picture of presidential power neither imposed from above nor subverted from below. Rather, the President and the civil service bargain over the contours of executive authority and litigate their disputes before arbitrators and courts.

Federal employees' labor rights are likely to become more important in coming years. The Trump Administration accelerated a trend towards federal employees leveraging their labor rights to influence executive branch policies.18 In February 2020, for instance, the union representing ICE employees attempted to negotiate a collective bargaining agreement with Kenneth Cuccinelli, the departing de facto deputy head19 of the Department of Homeland Security, that would [\*51] have significantly expanded their power to challenge immigration enforcement directives as violating agents' rights to certain working conditions.20 An EPA employees' union, emboldened by a victory before the FLRA, likewise sought to negotiate a new CBA enshrining certain protections for scientific expertise and neutrality as employment rights.21 Presidents, however, are not always on the losing end of such contractual arrangements. A 2004 effort by the Bush Administration to insert non-disclosure requirements into a CBA between the Department of Homeland Security and its employees, for instance, resulted in an employment-based ban on leaking from one of the nation's largest and most politically controversial agencies.22 As the norms promoting bureaucratic expertise weaken,23 and as other administrative structures designed to protect civil service independence come under sustained attack,24 such efforts will likely multiply.25 Understanding federal sector labor law is thus an urgent task, as it is an increasingly important battlefield for contesting both the practical control and legal legitimacy of the administrative state. This Article begins that task by making two primary contributions. First, the Article describes and empirically documents how employment-based challenges to top-down management reshape presidential power by reviewing and compiling data on nearly 1,000 FLRA adjudications from the past forty years. It then provides in-depth case studies of agencies in three policy areas - immigration, environmental protection, and tax - to demonstrate how federal labor rights can shape policy outcomes within the executive branch. The Article focuses on these agencies because they have been sites of recurring, high-salience policy changes by presidential directive over the past several decades. And by virtue of the President's focus on these agencies as vehicles for executive policymaking, they have also been at the center of several high-profile disputes over agency policy between tenured staff and [\*52] politically appointed heads.26 These case studies show that, at least in these critical areas of presidential policymaking, contractual rights play an important and underappreciated role in shaping presidential discretion over executive branch policy. Second, this Article illuminates the ideological underpinnings of the modern federal labor regime and its implications for administrative law. It challenges the assumption, prevalent in the academic literature and central to debates about the legitimacy of the administrative state, that executive branch bureaucracy is a top-down hierarchy insulated from political influence. Both bureaucracy's critics and its defenders presume it suffers from a profound democratic deficit. Unitarists believe bureaucracy usurps presidential power, while defenders believe that, despite its salutary role in restraining presidential abuses, bureaucracy sits largely outside the legitimizing force of American law.27 But labor rights complicate these critiques. The federal labor regime is a more mutualistic and legalistic model of presidential-bureaucratic relations than contemporary observers appreciate. While labor rights restrain the President's managerial authority in some respects, they also enhance presidential power and expand executive branch capacity in other ways, thereby complicating the unitarist critique. One surprising insight from the history of federal sector bargaining reveals that neither Congress nor the courts imposed such bargaining on the President.28 Instead, the President urged its adoption for two reasons. First, bargaining allowed the President to recruit skilled workers to join rapidly expanding executive agencies.29 Although the federal government could not compete with the private sector in terms of salary or perquisites, it could offer workers greater workplace autonomy and enable them to serve the public interest free from political interference.30 Second, bargaining tightened the President's control over the federal workforce. Since the late nineteenth [\*53] century, most federal personnel administration had fallen under the control of the Civil Service Commission (CSC), an immensely powerful independent agency that oversaw everything from employee classification and hiring to disciplinary proceedings.31 Collective bargaining allowed the President to bypass the CSC and take a more active role in shaping federal workforce policies through negotiations and contract.32 In short, while worker protections are often cast as improper limits on presidential power, history shows that presidents themselves view labor rights in precisely the opposite terms, as a means of expanding presidential power through strategic concessions. Labor rights also respond to concerns that bureaucratic resistance, however valuable in other ways, subverts democratic governance by permitting an unelected cohort of civil servants to shape executive policymaking.33 Labor rights are susceptible to formal, legal resolution and democratic oversight. Many of the disputes over bureaucratic power and managerial control that might otherwise be fought through inchoate "resistance," or opaque attempts to subvert managerial initiatives, are instead channeled into a highly formalized system of negotiation, contracting, arbitration, and appeal. The power arrangements between the bureaucracy and presidentially appointed agency heads are reduced to writings, and disputes are resolved by contract and statutory law, rather than through the exercise of raw institutional power. This arrangement not only makes bureaucratic power struggles more transparent and legalistic, it also enables each of the coordinate branches to supervise and regulate presidential-bureaucratic relations. By directing negotiations with unions, the President actively shapes workplace policy. Congress can shape civil servants' legal rights through statutory enactments. And courts can supervise the enforcement of these rights, reviewing important questions of statutory interpretation and ensuring that both labor and management bargain in good faith. Nonetheless, civil servant labor rights do present a different set of challenges for the administrative state. While collective bargaining imports some of the legitimizing aspects of American political and legal culture into the federal bureaucracy, it may import some of those cultures' pathologies as well, for instance by providing new avenues to manipulate civil service rights for partisan advantage or to entrench ideological preferences. [\*54] This Article proceeds in four Parts. Part I draws on an array of primary and secondary sources to describe the historical origins and ideological underpinnings of federal sector bargaining. Part II sets forth the legal contours of modern federal sector labor rights and analyzes how they reshape presidential power and permit entry points for the coordinate branches to participate in shaping bureaucratic relations. Part III offers case studies on how bargaining can reshape agency dynamics in specific policy areas; it begins with descriptive data on FLRA adjudications, including how frequently labor and management prevail on their contract claims and how that success varies over time. It then provides descriptive accounts of how bargaining has impacted the operation of immigration, environmental, and tax policy. Finally, Part IV concludes with some reflections on the doctrinal and theoretical implications of bargaining's underappreciated influence on the administrative state. I The History of Federal Sector Bargaining This Part draws on an array of primary sources and legislative history to document the history of federal sector bargaining and the reasons for its emergence. This story, while critical to understanding the modern executive branch, has never been told in the legal scholarship and has been presented only sparingly in other literatures. The proceeding sections argue that bargaining rights emerged as a way to expand the executive branch and to retain the professional integrity of skilled bureaucrats, while rendering bureaucratic relationships more transparent and susceptible to legal supervision. This made the federal bureaucracy more legitimate to an American political culture that by the 1970s was increasingly skeptical of centralized federal power.34 Unions were seen by both the President and Congress as a way of preserving civil servant independence while also rendering the civil service more responsive to democratic forces. Section I.A provides an overview of the Civil Service Reform Act (CSRA) and the structural changes it imposed on the modern federal bureaucracy. Sections I.B and I.C document the reasons for the CSRA's passage, detailing the incentives that both the President and Congress, respectively, had for granting civil servants extensive rights to bargain over the contours of agency management. [\*55] A. The Civil Service Reform Act of 1978 In 1978, President Carter signed the Civil Service Reform Act into law.35 Although now largely forgotten, the law was the most significant civil service reform in nearly a century: the "centerpiece" of President Carter's efforts at government reorganization.36 The Act's goal was to loosen the power of traditional, Progressive Era merit protections, allowing the President to steer executive branch policy over the resistance of "dug-in establishmentarians" within the federal bureaucracy.37 The CSRA "comprehensively overhauled the civil service system" of the New Deal era.38 As relevant here, the CSRA made two key changes to federal personnel management. One was structural. Prior to the enactment of the CSRA, nearly every aspect of the federal civil service was overseen by the Civil Service Commission (CSC), an enormously powerful independent agency. The CSC had been created by the Pendleton Act of 188339 and had grown over successive generations from a mostly advisory body to one tasked with administering a wide variety of things, such as hiring and classifying federal workers, adjudicating employment disputes and appeals, and formulating government-wide management policy.40 The CSRA abolished the CSC and distributed its functions across an array of new agencies. The Merits Systems Protection Board (MSPB) would oversee employee challenges to adverse personnel actions such as suspensions, demotions, and terminations; the Office of Personnel Management (OPM) would formulate management policy; and the Office of Special Counsel (OSC) would investigate certain violations of federal law, such [\*56] as improper political activities in contravention of the Hatch Act.41 While still politically independent, these agencies were smaller and more specialized than the CSC, exerting a less concentrated influence over the bureaucratic organization of the executive branch and leaving more space for the President to influence personnel policy. The second key change was substantive. The CSRA fundamentally altered the array of employment rights available to federal civil servants. Some rights were weakened. For instance, a number of procedural rights that had been developed by the CSC over the middle of the twentieth century and afforded to individual civil servants challenging adverse employment actions were eliminated or significantly curtailed.42 At the same time, however, the CSRA also granted federal workers an array of new labor and contractual rights. For the first time, federal workers were given the legal right to join a union, to collectively bargain over nearly any issue affecting the "conditions" of their employment, and to sue their employing agencies for violations of those contractual provisions.43 These contractual rights were to be enforced by a new independent agency, the Federal Labor Relations Authority (FLRA). The FLRA had a number of component parts, but at its core was a system of semi-private arbitration: In the event of an alleged breach of a CBA, the agency and the union would bring their dispute before a mutually selected, third-party arbitrator. Arbitrations could be appealed, or "except[ed]" in labor parlance, to the FLRA itself, which was composed of three bipartisan members serving fixed, five-year terms.44 The CSRA's establishment of labor rights was a dramatic departure from historical practice. Prior to 1978, federal law provided no formal statutory mechanism for employees to shape the ways in which the federal workplace was managed through contract or union organizing.45 While civil servants did attempt to unionize and bargain, they were afforded no formal legal status and their agreements were unenforceable against the federal government.46 Many commentators [\*57] through the early 1970s believed that public sector unionism was fundamentally incompatible with democratic principles.47 In a widely cited article, then-professor Ralph K. Winter argued that a unionized public sector would "radically alter[]" the political process through the exercise of its extensive bargaining power.48 Indeed, prior to the 1960s, many viewed public sector bargaining as an unconstitutional delegation of executive power to private citizens.49 The CSRA's establishment of muscular federal labor rights thus poses a historical riddle. Why, if greater presidential control of the bureaucracy was the ultimate goal, did the CSRA create for the first time an extensive right for labor to bargain collectively? Why cede so much managerial authority to unions, particularly at a time when private sector labor power was declining precipitously?50 And why restructure bureaucratic relationships - a paradigmatic component of public law - through bargaining and contracts, a form of private ordering that historically had played no role in executive branch management? As described in Sections I.B and I.C, a central claim of this Article is that the private law model of contract and bargaining provided a vehicle for dramatically expanding the scope of public administration from the mid-twentieth century forward, while presenting that expansion as both legally and democratically legitimate. The rise of federal sector collective bargaining can be understood as the product of two concurrent trends. One was internal to the executive branch, driven by the desire of the President to assert greater political control over the terms of federal employment. The other was external, driven by Congress's desire to exert greater control over executive branch operations and management. Both trends responded to a need to expand state capacity while shoring up its legitimacy, reining in both real and perceived abuses of a bureaucracy insulated from democratic control. [\*58] B. Labor Rights as an Enhancement of Presidential Power President Kennedy first established federal sector bargaining by Executive Order in 1962,51 and it was subsequently expanded by presidents of both parties.52 The move reflected two strategic considerations. One responded to changes in the labor market. The President encouraged collective bargaining to entice skilled labor to join the executive branch. By offering workers autonomy and protection from managerial abuses, the federal bureaucracy could compete with the private sector. Politically, contracting also offered the President an opportunity to sidestep the long-standing managerial power of CSC. In both cases, contrary to depictions of unions and bureaucracies as illegitimate drags on presidential power, the executive branch itself initiated bargaining, primarily as a means of politically empowering the President and building state capacity. 1. Labor Market Government from the 1950s to the 1970s was a "growth industry."53 The postwar era saw a major expansion in social service provision and a rapid expansion in the federal government's regulatory and national security remits.54 The growing need for skilled personnel created a recruiting crisis for government. There was a general perception that despite multiplying needs, the quality and efficiency of regulation and federal service provision had declined badly in the decades since the New Deal.55 The executive branch identified several recruiting challenges. One was a general inability to keep pace with private sector wages. In a 1953 report, the House Committee on the Post Office and Civil Service identified a number of "common deterrents in obtaining sufficient applicant supply," including pay "significantly below comparable jobs in industry" and "insecurity of tenure," which had a "marked adverse influence on the attraction of high caliber scientific and professional personnel, as well as key administrative personnel," as it was "generally felt that industry offers a better opportunity than Government for [\*59] advancement in position and salary if an individual merits such advancement."56 The CSC reached similar conclusions about "[t]he problem of attracting highly qualified people - scientists, engineers, [and] administrators" in 1959.57 Low wages were exacerbated by widespread managerial abuses in federal employment. Despite extensive formal protections from major adverse actions such as firing and demotion, civil servants were susceptible to an array of lower-grade abuses that, in practice, gave managers wide range to harass or demoralize them. As a comprehensive study of the civil service concluded in 1975, "[t]he work environment may be made friendly or hostile, open or repressive, tolerable or intolerable by the superior, who is equipped with a finely honed and calibrated set of sanctions to be used against subordinates."58 The CSC, which had a close relationship with the management at many agencies, was often accused of looking the other way when abuses occurred. By the 1970s, this reality had become widely known. As The Washington Post summarized, under the civil service system managers could "dispatch any civil servant" when their "prerogatives" are "attack[ed]."59 The practice was epitomized by the so-called Malek Manual (drafted by Fred Malek, President Nixon's director of personnel), a memorandum that expansively outlined the strategies managers could employ to sideline or harass disfavored workers without running afoul of civil service laws.60 The memo, which became notorious during the Senate's Watergate investigation, was considered to be "to personnel administration what Machiavelli's The Prince is [to] the broader field of political science."61 More generally, there was a growing belief that America, as the world's most powerful democracy, should subject its own government apparatus to "industrial democracy," promoting "consultative management by its own good example."62 The 1949 Hoover Commission on government reorganization observed that employees "were `not [\*60] provided a positive opportunity to participate in the formulation of policies and practices which affect their welfare'" and "that `the President should require the heads of departments and agencies to provide for employee participation in the formulation and improvement of Federal personnel policies and practices.'"63 By the 1950s, many labor organizers and public administrators questioned why robust unionization was permitted in the private sector but forbidden for similar roles in the public sector. The Second Hoover Commission concluded in 1955 that "[t]he Federal Government ha[d] lagged behind other organizations in recognizing the value of providing formal means for employee-management consultation."64 These challenges - the growing need for federal manpower, competition from the private sector, and the executive branch's particular need for skilled knowledge workers - required new models for recruitment and management. In exchange for lower wages than those in the private sector, collective bargaining could offer workers greater autonomy and a sense of professional purpose.65As one expert in public administration testified in 1978, the "increasing professionalization of skills and bodies of knowledge" in social science and technical fields required management strategies for attracting skilled labor and for maximizing its creative output.66 This led to "an increasing reliance on public sector collective bargaining," a "decreasing reliance on authority/control strategies," and "a greater reliance on rational analysis, negotiation, and incentives."67 As early as the 1940s, the CSC and other commissions studying the civil service began insisting that federal employees' labor rights should be in parity with private sector ones.68 Others, including the Hoover Commission and National Civil Service League, similarly encouraged [\*61] dealing.69 Increasingly, major private sector unions began to organize public sector workers.70 The executive branch began responding to these pressures even before any formal legal authorization.71 Informal bargaining with growing unions and trade associations in the executive branch expanded throughout the 1940s and 1950s.72 A 1961 Task Force commissioned by President Kennedy recognized that "[f]ederal employees very much want to participate in the formulation and implementation of personnel policies and have established large and stable organizations for this specific purpose."73 Executive Order 11,491 formalized this understanding, creating a centralized process for civil servants to bargain over employment conditions with agency heads.74 2. Disputes Over Presidential Administration In addition to recruiting and labor pressures, the President also had a concrete political interest in pursuing more expansive bargaining. The CSC, as an independent Progressive Era agency, was highly insulated from presidential influence.75 Bargaining between unions and presidentially appointed agency heads gave the President greater direct control over the contours of bureaucratic power and cut a powerful intermediary out of his relationship with the federal workforce. Moreover, presidents had long been hostile to the CSC. Since the Wilson administration, presidents had sought to exercise greater control over executive branch operations.76 The Brownlow and Hoover commissions on government reorganization had both wanted to bring personnel management under direct presidential control but had failed, even as they had succeeded in restructuring other previously independent branches of the executive branch such as the Budget Bureau.77 The independent CSC proved sticky: It had extensive formal legal power, management expertise, and was adept at building both [\*62] bureaucratic and legislative constituencies.78 It managed everything from hiring and classification of employees, to investigating and adjudicating disciplinary disputes, to generating high-level management policy. Serving "simultaneously both as the protector of employee rights and as the promoter of efficient personnel management policy," it had become "manager, rulemaker, prosecutor and judge" of personnel matters.79 The CSC's extraordinary and very opaque power led to concern that the "federal personnel system" had become "too immune from political directives of any kind," and thus was "isolated, and resistant to carrying out new policy directives."80 This "lack of responsiveness to elected political leaders," in turn, revived longstanding concerns about the democratic legitimacy of the tenured civil service, as it "indicated a general lack of bureaucratic responsiveness to the citizenry."81 Labor agreements offered the President an opportunity to bypass the CSC, and thus the contours of bureaucratic power, and to negotiate terms of employment directly with the federal workforce. Moreover, these arrangements could be reduced to written and legally enforceable contracts, rather than entrusted to the rulemaking and enforcement discretion of the CSC. Bernard Rosen, chair of the CSC, expressed his view in 1975 that the CSC's position as sole arbiter of personnel disputes had become untenable: "With the growing power of Federal employeeunions, and as general government-wide personnel policies have become a matter of increasing concern to them and to other organizations in our society," Rosen wrote, the "complexity of Federal personnel administration" and the "increasingly adversary relations developing betweenunions and agency management" necessitated "a central personnel agency that enjoys the confidence of the Congress, the President, and theunions .…"82 With the neoliberal policy turn of the late 1970s,83 President Carter had the opportunity to codify federal bargaining rights into law. Several factors produced the conditions for bureaucratic reform, including a loss of political support for bureaucracy, an economic slowdown, and [\*63] resulting fiscal constraints. In the 1950s and 1960s, there had been an emphasis on expanding services, with less concern for fiscal discipline. By the 1970s, however, large outlays for bureaucratic programs, and the tenured civil servants that administered them, were increasingly seen as fiscally irresponsible and wasteful of taxpayer dollars.84 Carter had campaigned on the promise to clean up the "horrible bureaucratic mess in Washington" and to institute "tight, businesslike management and planning techniques" in government.85 But beyond cost-cutting, the CSRA also reflected a deeper ideological evolution in public administration. Throughout the 1960s and 1970s, economists and policy consultants had been reframing public policy in terms of economic efficiency, arguing that government programs modeled on private enterprise would be not only more socially productive but also, like private enterprises, more responsive to the demands of the public and the market and thus more legitimate.86 The CSRA extended this logic to the management of the civil service itself. While the bureaucracy of the New Deal legitimized its power through subject matter expertise and insulation from politics, the bureaucracy of the post-New Deal era would legitimize its power by bargaining for it. Contracts would reflect the social and economic value of civil servants by granting them only those labor rights to which the President and his appointees, under electoral pressure to deliver useful services, would agree. C. Labor Rights as a Restraint on Presidential Power The President thus leveraged bargaining rights to recruit talent to the executive branch and to consolidate presidential control over the bureaucracy. Congress, by contrast, viewed those same labor rights as tools for exercising greater supervision over presidential administration. The same attributes that made contract and bargaining effective tools for recruiting and negotiating with labor - their transparency, their enforceability against the President, their capacity to change in response to shifting political and economic conditions, and their ability to cover conditions of employment not captured by civil service laws - also made them effective tools for supervising presidential control of the executive branch. [\*64] In the 1970s, Congress and the judiciary established new checks on presidential power in response to the Watergate and Vietnam crises, as well as the revelation of longstanding abuses by the FBI, CIA, and other executive agencies.87 These checks included statutory reforms and commissions, such as the Freedom of Information Act (FOIA), the Foreign Intelligence Surveillance Act (FISA), and the Church Commission, to limit executive discretion in law enforcement.88 They also included more general limitations on the power of the administrative state to make and enforce regulations, through judicial innovations such as "hard look" review of agency action.89 The CSRA presented a vehicle for extending similar interbranch checks to executive branch personnel management and was supported enthusiastically by congressional Democrats. In a 1977 report, the House Committee on the Post Office and Civil Service emphasized the need for a labor rights "system based on .… statute," rather than executive order, and with meaningful access to judicial review.90 The American Bar Association likewise testified that "[c]onsistent with a fundamental precept of our constitutional law system," statutory labor rights would provide civil service with "a source of authority outside the executive branch and beyond the control of the executive as the primary employer of Federal civil servants," allowing for "access to the judicial branch for redress of grievances with the executive branch" and "meaningful bilateralism in the collective bargaining relationship."91 Like the President, Congress relied on the language of efficiency to justify the enlargement of labor rights. Here, it was the efficiency of management, rather than the bureaucracy, that Congress claimed to be advancing. In a committee report in support of draft labor legislation from 1977, the House Committee on the Post Office and Civil Service opined that "collective bargaining rights for Federal employees," including "[e]ffective labor unions," would "play a positive role in improving productivity in public service."92 [\*65] Federal workers also lobbied for collective bargaining to play a greater role in civil service independence. Labor had historically been suspicious of the CSC and viewed it as hostile to their interests. A comprehensive 1975 study of civil service and the CSC observed that, despite statutory protections against firing and other major adverse actions, civil servants found themselves with "a lack of substantive rights" in a relationship "in which the superior has many opportunities to make discretionary judgments of considerable importance to the subordinate."93 Workers' "exercise of legal rights in such a relationship" was "often difficult and restrained."94 By the 1960s and 1970s, federal workers had come to view the merit system as a "euphemism for favoritism" and saw collective bargaining as an alternative that advanced stricter application of employment rules, based on uniform application of CBAs rather than managerial discretion.95 For labor and its allies in Congress, however, a weakening of the CSC's traditional power over federal personnel (which, however flawed, did restrain at least some managerial abuses by the President and his appointees) had to be accompanied by more robust labor and bargaining rights. As a legislative representative for AFL-CIO, which represented many federal workers, put it, labor's "support for the President's civil service reform plan is not unconditional," but was contingent on a robust "system of labor-management relations" codified "into statutory law."96 Labor's goal was not just to codify specific substantive labor rights, but to establish a statutory framework for collective organizing, bargaining, and adjudication to ensure that those rights were meaningfully enforced in practice. As a chapter president of the National Treasury Employees Union (NTEU) testified, "[i]f this reorganization effort is to improve the efficiency of government, and to protect the public interest in a merit-based civil service system, expanded collective bargaining must be a central factor."97 The CSRA would invest large, well-resourced unions, not individual employees or an independent agency with doubtful allegiances, with the legal power to bargain, litigate, and lobby on behalf of workers, granting labor's "countervailing power" against the President a foothold in law.98 The weaker position of the labor movement in the 1970s helped supporters of the CSRA frame unions as cooperative partners in government, [\*66] rather than an adversarial interest group.99 Historical concerns that federal worker unions would be too powerful to be held democratically accountable - concerns prevalent through the bullish labor markets of the 1960s - had significantly diminished. As enacted, the CSRA formalized and expanded existing bargaining relationships and provided for independent agency enforcement and judicial review of labor disputes. In addition to abolishing the CSC, the CSRA moved many traditional civil service functions into separate, presidentially controlled agencies, shifting the center of bureaucratic power from statutory to contractual protections.100 In doing so, the Act adopted the rationales of efficiency and amicable labor relations deployed by both labor and the President. As articulated in its statutory purpose, the Act's goal was to protect "the right of employees to organize" and "bargain collectively," which would "safeguard[] the public interest," by promoting "the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government."101 II How Bargaining Rights Shape Bureaucratic Power The goal of the CSRA was to provide a framework that could mediate employment disputes, empowering both labor and the President to reshape bureaucratic relationships, while at the same time allowing for legal and democratic supervision by the coordinate branches. This Part provides a typology of the methods by which unionized labor reshapes presidential administration in contemporary practice.

Descriptively, this Part aims to show how labor rights, while largely unnoticed and unstudied, reshape executive branch relations in profound ways. Across a wide variety of policy areas - from federal prisons to the adjudication of asylum applications - collective bargaining changes how agencies (and the millions of bureaucrats who staff them) carry out their missions. What enforcement guidelines border patrol agents follow, how claims processors assess benefits applications, how guards staff prisons - all of these decisions are shaped by labor agreements, with profound consequences for federal policy.

[\*67] Normatively, this Part aims to upend a core assumption about bureaucratic power in the contemporary executive branch. There are many tools that the President uses to structure the incentives and behavior of civil servants, and thereby to influence how they implement federal policy: the power to discipline employees for disobedience; the power to allocate an agency's budget and resources, thereby setting the agency's enforcement priorities; the power to set performance standards and productivity quotas, determining what types of bureaucratic decisions merit reward or punishment; and many more. Most scholarship on administrative law and presidential power presume these tools to operate in a top-down manner: The President implements new management directives, and bureaucrats either obediently follow or illicitly resist them.102 But, as set forth below, this model of top-down implementation and bottom-up resistance is critically incomplete. More often, the President and the unionized civil service bargain over questions of management, rather than fight out their differences through the exercise of raw institutional power. Indeed, in a sharp deviation from the Progressive Era model of a politically insulated civil service, the CSRA explicitly empowered unions to act in a political capacity, including by lobbying Congress, litigating management disputes before Article III courts, endorsing political candidates, and speaking out publicly on questions of executive branch management and policy. Unions thus engage directly in democratic politics and serve as a key mechanism for bringing other democratic stakeholders, such as Congress and the judiciary, into disputes over the President's managerial power. In short, modern bureaucratic management is far more mutualistic, legalistic, and democratically engaged than administrative law scholarship generally presumes. Section II.A below examines the substantive rights that labor law confers on civil servants, and the ways in which those rights can reshape presidential administration. Section II.B discusses unionization rights, including the boundaries and limitations of civil servant unionization and the role that federal sector unions play in promoting democratic oversight of the executive branch. A. How Substantive Rights Mediate Bureaucratic Relations Substantive labor rights, particularly those memorialized in collective bargaining agreements, are at the heart of how labor rebalances executive branch power. The CSRA grants extensive rights to labor. With certain important exceptions, particularly for salary and [\*68] benefits which cannot be altered by contract,103 unions are permitted to bargain over nearly any issue affecting "conditions of employment."104 The main limitation on civil servant bargaining, and thus the primary battleground in litigation between agencies and labor, are certain statutorily defined "management rights," which are enumerated in sub-provisions of 5 U.S.C. §7106.105 Through contractual provisions, the President and the civil service can agree to modify any number of key management tools, from employee discipline to performance evaluation metrics to merit pay. For the purpose of analyzing their impact on presidential power, contractual rights can be sorted into three categories. First are rights that act as a check on structural deregulation, or the use of abusive working conditions to demoralize or sideline bureaucrats in order to undermine an agency's substantive policy mission. Second, labor rights can act as indirect constraints on policy by shaping management tools, such as performance reviews and productivity requirements, that are well known to nudge civil servants' decisionmaking in certain ways. Finally, in certain circumstances labor can act as a direct constraint on policy by seriously limiting the types of enforcement directives management can issue to employees. 1. Check on Structural Deregulation A major method of undermining regulatory effectiveness is to defund agencies, undermine the morale of agency personnel, and obstruct agency operations. Jody Freeman and Sharon Jacobs have identified many of the strategies that the President may use to cripple agencies while evading civil service protections, including imposing burdensome working conditions, reassigning staff to undesirable roles, [\*69] "demoralizing" staff through denigration and abuse, and cutting funding, resources, and pay.106 These are not direct attacks on an agency's legal authority, but a "structural" attack on an agency's ability to function.107 President Trump's unusually aggressive posture towards administrative agencies has put structural deregulation back in public focus, but it has long been a feature of presidential management, as the controversy surrounding the Malek memo in the 1970s illustrates.108 Here, many of the seemingly prosaic aspects of federal labor law are important. The terms and conditions of employment that govern the quotidian existence of civil servants are precisely the sorts of areas that structural deregulation targets. Changes to remote work policies, scheduling, and other routine workplace concerns can be used to demoralize or undermine an agency's staff.109 Unions routinely leverage contract rights to prevent deterioration in working conditions, litigating issues such as increases in workloads,110 compensation for travel and other overtime expenses,111 backpay for wrongful personnel actions,112 and how and when to award bonuses or special compensation required by contract or statute.113 Agencies can also be required to bargain over reductions in staffing levels or reorganization of duties.114 There are numerous examples in which fights over working conditions reflect larger political struggles over the ability of an agency to properly carry out its statutory mission. The infamous nationwide [\*70] strike in 1981 by the Professional Air Traffic Controllers Organization (PATCO), representing federal air traffic controllers, is a useful example. The PATCO strike flouted the federal prohibition on civil servant strikes, in a bid by the union for higher pay and improved working conditions.115 Instead of negotiating, President Reagan broke the strike by calling up military service members and retired controllers to manage the nation's air traffic and firing the strikers (who made up nearly seventy-five percent of federal controllers).116 While PATCO is remembered today for its catastrophic collapse, the union's founding in the 1960s was driven by a decline in conditions of employment that related directly to the substantive mission of the Federal Aviation Administration: Flight speeds for jet planes reduced the margin of error for air traffic controllers, while understaffing and aging equipment made working conditions for controllers increasingly difficult and airport conditions less safe, leading to crashes. It was the FAA's failure to respond to these worker complaints, and its attempt to cover up safety risks, that first inspired the formation of the PATCO union.117 Contemporary examples abound as well. During the Trump Administration, the Department of Education was a frequent target of structural deregulation. In 2018, the agency purported to impose a new labor contract on employees without bargaining that, among other things, removed protections regarding pay raises, altered performance evaluations, and reduced rights regarding overtime, childcare, and work schedules.118 The FLRA subsequently ruled the unilateral contract illegal, forcing the agency to enter into an extensive settlement covering disputed labor issues.119 Federal prisons were another key site of disputes over labor rights. The Trump Administration sought to cut budgets, weaken unions, and worsen conditions at federal facilities at the Bureau of Prisons (BOP), as a prelude to privatization of many key functions. The agency would, for instance, cut shifts for guards [\*71] and replace them with untrained, non-custody employees to guard prisons.120 These policies were enacted despite Congress allocating money for staffing, which the Administration refused to spend.121 At the same time, federal facilities experienced a significant influx of prisoners, including very large numbers of immigrants detained by ICE.122 BOP saw a major decline in prison conditions, leading to increases in assaults, health risks,123 overcrowding,124 and declining staff morale.125 The primary means for resisting these deregulatory policies was labor litigation. Many of these labor disputes concerned the precise tactics - shifting schedules, using untrained and unauthorized workers to staff dangerous prisons, understaffing, overcrowding, removing posts from union positions - that the Administration was deploying to defy Congress and pave the way for privatization.126 Workplace disputes thus dovetailed closely with a broader agenda of weakening prison standards and asserting greater political control over prisons. 2. Indirect Constraints on Policy Labor can also serve to constrain substantive executive branch policy in many indirect but significant ways. It has long been recognized that certain presidential management techniques, while they putatively concern the internal business of overseeing executive branch resources and personnel, can impact substantive enforcement outcomes. As Jerry [\*72] Mashaw canonically articulated, the administration of many large-scale federal welfare and regulatory programs requires a species of "bureaucratic justice," where fairness and efficiency are achieved through quality assurance, performance metrics, productivity quotas and other general, organization-wide management tools.127 Labor can reshape how many of these tools are used, in turn reshaping agency outcomes. One important example is productivity requirements. Determining how much work employees are required to perform, and how they are to perform it, is a well-recognized management tool. These management tools have particularly important impacts on adjudicatory bodies and other discretionary decision-makers: Rules governing decisionmaking processes limit adjudicators' flexibility, while increased productivity requirements reduce the amount of time and effort adjudicators can spend on any one case, making it difficult to rule in favor of poorly represented or under-resourced parties.128 The FLRA routinely enforces contractual limitations on the types of productivity quotas agency management imposes, intervening for instance in disputes over quotas for claims processing for veterans' benefits,129 screening of passport applications by the Department of State,130 and caseload requirements for Taxpayer Advocates employed by the IRS.131 The Trump Administration engaged in particularly hard-fought disputes over productivity and process rules. The Social Security Administration (SSA) extensively litigated proposed productivity requirements for its unionized administrative law judges (ALJs), which would have sped up case timelines, potentially impacting the quality of decisionmaking and the amount of benefits awarded. An arbitrator repeatedly found that the agency's requirements violated the parties' CBA. A two-member majority on the FLRA, appointed by President Trump, however, consistently reversed these rulings,132 over the dissent of Member DuBester, the sole Democratic appointee, who found the policy to be a "straightforward" violation of the parties' agreement.133 Immigration law judges (IJs), likewise, have used bargaining and [\*73] litigation to resist increased efficiency requirements during the Trump Administration, which would have limited IJs' ability to assist asylum seekers during removal hearings.134 Similarly, the United States Customs and Immigration Service (USCIS), under de facto head Ken Cuccinelli,135 pressured asylum officers to reduce grants of asylum, citing statistics showing high grant rates, urging officers to use tools to combat "frivolous claims" and make only "positive credible fear determinations."136 The union resisted these initiatives, which it characterized as pressure to "misapply laws" and "politicize" the asylum process.137 The USCIS union likewise challenged administration guidance to exclude large categories of migrants from asylum consideration and to divert considerable numbers to Honduras and Guatemala, calling the policies "unlawful" and even filing an amicus brief in support of a lawsuit challenging them.138 Negotiated provisions governing selection and promotion likewise can yield "significant" divergences from management's preferences.139 Federally unionized technicians with the Ohio National Guard, for instance, negotiated extensive contractual requirements for promotions, including criteria used to evaluate candidates and differences in merit promotion procedures.140 Agencies can be required to honor promotions dictated by contract.141 The FLRA has required the SSA to bargain over promotion plans for adjudicatory employees.142 Union contracts can also [\*74] prevent discrimination. Unions included clauses in contracts protecting gay employees in the 1990s, well before federal antidiscrimination protections for LGBTQ+ people existed.143 Labor can also substantially reshape employment-based discipline and the hierarchies and incentives that disciplinary power creates. While agencies are subject to formal disciplinary procedures under civil service statutes, they often discipline workers through negotiated grievance procedures, resulting in sanctions that can differ substantially from those that might otherwise apply.144 A prominent example of this phenomenon involved a group of CBP officers who were discovered to have exchanged racist and threatening messages through a private Facebook group in 2019. Even though the incident aroused public outrage and the CBP Discipline Review Board recommended harsh punishments - including termination for eighteen agents - following a negotiated grievance process, some of the officers received substantially lighter punishments, including letters of reprimand, paid suspensions, and only two terminations.145 Indeed, according to data recently released by the Office of Personnel Management, arbitrators who hear cases under labor grievance reinstate three-fifths of all dismissed employees, as compared with only one quarter of all MSPB appeals.146 These obstacles to firing and other forms of discipline are some of labor's most powerful tools, and are also among its most controversial: Many critics accuse union-backed limits on employee discipline of rendering government service less efficient, though the evidence on this question is hotly contested.147 [\*75] Finally, labor rights condition the ability of civil servants to leak, criticize, or otherwise speak out publicly about agency policy. David Pozen and Jennifer Nou, among others, have described how unauthorized disclosures of critical information by civil servants can check agency abuses, inform policy debates, and shape agencies' agendas by shifting public opinion.148 Labor rights are a key guarantor of civil servants' ability to speak publicly about agency policy through testimony, statements to the press, and other means. The CSRA protects the right of employees, when speaking in their capacity as union representatives, to present the "views of the labor organization" to "appropriate authorities," which the FLRA interprets, in many circumstances, to include the press.149 Union officials can thus speak publicly about agency policy and management, even when line employees cannot. Union officials have leveraged their protected status to criticize executive branch policy in environmental regulation, education, immigration, and labor, among other policy areas.150 Unions also advocate for the right of other employees to speak out through litigation and labor agreements. Immigration judges, for example, have historically been protected by labor agreements in their right to critique removal policies, even if they are not union officials.151 3. Direct Constraints on Policy Labor provisions may also directly constrain policy choices. Theoretically, many such provisions are limited by management rights.152 But labor has been pushing for such contractual provisions more aggressively in recent years, sometimes with the encouragement of sympathetic presidents looking to lock in policy preferences. By way of disputes over conditions of employment, labor can resist substantive policy directives to which line employees are opposed for professional, ideological, or other reasons. As discussed in greater detail in Part III, law enforcement functions, particularly in the immigration context, are perhaps the most prominent example. Unions representing [\*76] CBP and ICE agents have successfully used labor rights to challenge many substantive management policies touching core questions of immigration enforcement tactics and priorities, often over the objection that such challenges infringe on protected management rights. These include what weapons agents are issued,153 what types of searches they must perform and how,154 and what information officers must provide to detained immigrants, including identifying information about officers and information about potential legal remedies,155 among many other issues. Complaints about conditions of employment have been used, among other things, to delay the implementation of agency policies directing agents to prioritize detentions of violent criminals and to deprioritize arrests of minors and other nonviolent immigrants.156 Under President Trump, both CBP and ICE negotiated, with the encouragement of the administration, for even more expansive rights to challenge any enforcement guidance affecting the conditions of their employment and to delay the implementation of those policies until any labor disputes have been resolved, a process potentially lasting years.157 Under the Biden Administration, unionized employees at the EPA are now attempting to bargain for similar protections that would preclude the agency from adopting any policies that violate certain principles of "scientific integrity."158 These developments demonstrate the capacity for labor to become not only an influence on policy but, through the deliberate use of conditions of employment as a restraint on managerial discretion, a primary driver of it. B. How Unionization Rights Mediate Bureaucratic Relations This Section sets forth the special rights that unions enjoy under the CSRA, and the ways in which union rights advance the separation-of-powers goals of the CSRA. Unions are the bedrock of legalized resistance to presidential management. The CSRA did not individualize labor rights, but instead provided for collective organization in [\*77] institutions that are capable of bargaining, litigating, and lobbying.159 Battles between the civil service and the President over the scope of unionization rights, the proper bargaining units to be represented by unions, and the resources and legal rights available to unions reflect the growing centrality of collective bargaining to disputes over bureaucracy and the importance of unions in determining the balance of power between the President and the tenured workforce. The following sections set forth: (1) the value of unions to the civil service and the internal separation of powers, (2) the ways in which the President and the civil servants contest the scope of union power, and (3) the ways in which unions serve to further democratic and interbranch supervision of the President. 1. The Value of Unions The civil service's move toward unionization reflects a broader recognition of the value of organized groups in protecting rights and pursuing key political objectives.160 Unions accumulate resources and expertise, allowing civil servants to mount sophisticated and well-financed defenses in labor disputes and to lobby effectively on key issues.161 Unions, for instance, are more effective at litigating employment disputes, a key tool in resisting the disciplinary efforts of management. 162 [Footnote 162] See infra note 209 and accompanying text (noting that civil servants represented by unions win disputes with agencies at significantly higher rates than employees without union representation before the MSPB). [End FN] They achieve higher win rates than unrepresented employees before arbitrators, a key strategic consideration for unionside counsel, as well as a key source of criticism from opponents of unionization rights.163 Unions also bolster the ability of civil servants to successfully litigate employment disputes against agencies in other ways. Through FLRA litigation, unions have secured civil servants Weingarten rights: the right to have a union representative present during a disciplinary investigation. 164 Unions have likewise fought, with mixed success, to bargain for specific substantive rights for civil servants during interviews by agency inspectors general.1 65 Unions also provide extensive financial and logistical support to individual employees. The National Border Patrol Council, for instance, has established legal defense funds for CBP officers who are under investigation for their involvement in "critical incidents," such as the use of force.166 Even when unions do not litigate labor disputes directly, the threat of litigation-the possibility of losing, the need to delay policy implementation, the drain on budgets, and the attendant uncertainty-incentivizes agencies to cooperate with unions, and to take their preferences into account when staffing political positions and formulating policy. For instance, powerful unions, including those representing ICE and the EPA, can and do express their opposition to certain agency heads, dissuading the President from appointing them for fear of souring labor relations and inciting costly litigation battles.167 Perhaps the best example of labor's deterrent power is President Clinton's National Performance Review (NPR) program, launched in 1993. NPR's goal was to "reinvent[]" government by streamlining agency operations, reducing the size of the federal workforce, and reducing labor-management litigation.168 In exchange for union support for a variety of cost- and personnel-cutting measures, President Clinton granted unions substantial new powers.169 The National Partnership Council, which shaped agency reorganization policy, was given four union representatives (one from AFL-CIO, and one each from the [\*79] largest federal unions - NTEU, AFGE, and NFFE).170 Further, in exchange for union cooperation, President Clinton issued Executive Order 12,871 requiring agencies to bargain over formerly optional subjects, effectively waiving a broad range of management rights and significantly expanding union bargaining power.171 Unions also took a substantial role in shaping the federal government's downsizing to ensure union positions received protection during workforce reduction.172 In addition to litigation, unions also have extensive statutory power to lobby Congress, often acting as one of the only sophisticated, proregulation advocacy groups in a competition of political influence dominated by private interests and well-funded nonprofit groups. The CSRA created unions that are, in effect, federally subsidized by dues, "official time" (time during which union officials are paid to engage in organizing and bargaining work), and protections against unfair labor practices.173 To facilitate union lobbying, Congress also created numerous exceptions to rules governing political engagement by civil servants, including the right to lobby on behalf of a labor organization and Hatch Act exemptions to participate in politics.174 Unionized federal employees have been politically engaged since the enactment of the CSRA, lobbying on a range of budgetary and regulatory reform issues.175 Unions lobby on issues ranging from regulatory enforcement policy, to the selection of agency leadership, to questions of funding - and their efforts have had substantial influence in Congress.176 Unions representing the employees of the NLRB, Department of Education, and IRS have all, for instance, lobbied for increases in appropriations for regulatory efforts that have been regular targets of under-funding.177 Labor also endorses political candidates, [\*80] testifies routinely before Congress, and speaks to the press on high-visibility policy issues, often expressing views contrary to the views of agency leadership.178 2. Recognition Disputes: The Boundaries of Union Rights One of the strongest indicators of union influence is the effort that both presidents and labor invest in litigating the question of which employees are entitled to unionize, and which unions are entitled to represent them. Given the potential for labor rights to reorder management relationships, these disputes often focus on personnel in key policy areas or personnel who exercise discretionary judgment in impactful ways. Some areas of federal policy are deemed too sensitive to allow unionization at all, in the interest of remaining apolitical. The CSRA specifically exempts certain agencies from coverage, including the CIA, NSA, FBI, Secret Service, and the Tennessee Valley Authority.179 The Act also does not extend labor rights to anyone employed in "intelligence, counterintelligence, investigative, or security work which directly affects national security,"180 and permits the President to designate such agencies by executive order.181 In the wake of the September 11, 2001 terrorist attacks, President George W. Bush took a particularly aggressive approach toward security-related employees, designating five units of DOJ ineligible to bargain and seeking vast new statutory exemptions from Congress that would have precluded, among others, any DHS or DOD civilian employee from unionizing.182 Likewise, the CSRA exempts "management" personnel from unionization rights, except in certain specified circumstances.183 This carveout allows agencies to contest union rights for personnel that make key policy-related decisions, such as lawyers, ALJs, scientists, and technicians, and thus has become a particularly heated area of labor litigation. Presidents and labor have frequently clashed over union recognition, particularly when the employees are in politically sensitive posts or exercise considerable discretion. Agencies have challenged [\*81] the unionization of, among others, certain scientists at the EPA184 and attorneys at the Department of Energy.185 As discussed below, President Trump engaged in a bitter fight to decertify the union representing federal immigration judges.186 Decertification attempts can also be less targeted, and more bluntly anti-labor. Recently, for instance, House Republicans have attempted to ban or harshly penalize federal unions, including by stripping benefits and pensions from any civil servants who serve as shop stewards and by strictly limiting the availability of official time.187 In a recent opinion, the Supreme Court upheld the applicability of CSRA unionization rights to technicians employed by state national guards against a challenge by Ohio, which was joined by eleven other states188 as amici.189 The states contended, among other things, that permitting the FLRA to supervise labor-management relations within state guard units contravenes the Constitution's Militia Clause,190 and would "erod[e] the constitutional design for checking and balancing national military power."191 Federal labor rights, enforced through third-party arbitration, provide substantially more protection for national guardsmen than state command structures would prefer, both because of the extensive right to bargain and because of the likelihood of prevailing in subsequent labor disputes.192 The states, and their amici, argued that for precisely those reasons, extending the CSRA's coverage to national guard employees unduly interferes with state management prerogatives.193 The dispute arose against the backdrop of states' [\*82] increasingly politicized use of national guard deployments, including to enforce state-level immigration policies that diverge from federal priorities and to manage politically charged civil unrest.194 Perhaps the most interesting aspect of the Court's opinion is how uninteresting it appears on first reading. Justice Thomas, writing for a seven-justice majority, resolved the dispute through a straightforward reading of the CSRA and the Technicians Act of 1968, holding that national guard technicians are employees of the Department of Defense and that the FLRA therefore has jurisdiction over their labor disputes.195 While the Court has made dramatic changes to both administrative and labor law in recent years, it showed no apparent interest in disrupting federal sector labor relations - even in dicta, the majority, which included four conservative justices, paid little heed to the anti-labor theories advanced by eleven states, their amici, or the dissent authored by Justice Alito and joined by Justice Gorsuch.196 At least for now, the holding reflects the remarkable durability of federal bargaining relative to other contested areas of administrative law. 3. Unions as Democratic Actors As powerful interest groups representing tenured bureaucrats, public sector unions are often criticized as the least democratic participants in the labor regime. But while civil servants undoubtedly have their own unique interests - and as will be seen in Part III, their own ideologies - their power as political actors is a feature, not a bug, of modern executive branch organization. Both the President and Congress understood when they enacted civil service reform that they were empowering federal workers to reshape the executive branch. But in at least two critical ways, the political branches understood unions to further, rather than to subvert, democratic oversight of the federal bureaucracy. First, the federal labor regime is designed to make bureaucracy more sensitive to political realities and public opinion. In contrast to the political insulation of the Progressive-era civil service, the CSRA incentivizes open political engagement by bureaucrats: Federal workers can organize, make political donations, lobby, and speak publicly on [\*83] political questions touching on an agency's mission without fear of retaliation.197 Labor also relies, far more than the traditional civil service, on support from the political branches for its power. Many of the most valuable contractual protections, such as those concerning quotas or performance evaluations, are permissive subjects of bargaining.198 The President may, but need not, agree to terms controlling those issues.199 And even for mandatory subjects, the President can choose how intransigent to be at the negotiating table.200 Contract protections are binding once finalized, but whether to consent to them is a political calculation. The President's negotiating posture depends in part on public opinion and potential retaliation by Congress. Presidents Biden and Clinton, for instance, were eager to court labor's support.201 President Reagan was hostile to labor but was compelled to rein in his attacks after pushback from a hostile Congress.202 As a result, labor understands that broad-based political support is key to securing strong, protective collective bargaining agreements. Indeed, one of the primary lessons of the PATCO collapse was the risk of taking an aggressive bargaining position without first shoring up broad support from the public and other unions, both of which had opposed the air traffic controllers' strike.203 Today, prominent federal unions maintain extensive lobbying and communications operations for the purpose of mobilizing democratic support for their agenda as a means of influencing executive bargaining posture.204 [\*84] Second, unions are key to activating other constitutional stakeholders in labor disputes. Where unions cannot achieve a key element of their agenda, such as an increase in agency enforcement budgets, they often, consistent with the extensive political rights granted by the CSRA, lobby Congress. Likewise, when the President interferes with the operation of the civil service in ways that arguably subvert the will of Congress, litigation by unions allows courts to intervene. Unions thus serve as a more formalized vehicle for what have been called "civil servant alarms," or methods by which line workers with specialized knowledge of government operations surface issues that might otherwise escape the notice of the political branches, thereby facilitating intervention and democratic churn.205 III Bargaining as Bureaucratic Power in Contemporary Practice Part II provided a typology of federal labor rights and examined how different rights can constrain presidential power. This Part provides data and real-world examples from three policy areas - immigration, tax, and environmental regulation - to show how these different forces can work in tandem to shape bureaucratic culture and affect policy outcomes throughout very different areas of federal law. These case studies are critical to understanding the true power of labor rights to reshape the executive branch. In isolation, the different contractual rights outlined above can hinder or redirect certain managerial initiatives. But when many of these contractual rights are deployed simultaneously, over years and decades, by sophisticated and well-organized unions, they can profoundly change an organization's culture, its institutional practices, and its mission. These rights have been used differently in the different policy areas surveyed below. In immigration, labor rights have been increasingly weaponized by bureaucrats and their political allies to pursue certain ideological objectives. In the tax and environmental areas, they have been used more defensively, as a shield against structural deregulation. But each study demonstrates the role that labor can play in pushing back against presidential administration. This Part consists of four subparts. Section III.A examines a novel dataset of 986 FLRA cases involving immigration, tax, and [\*85] environmental regulation over the past 40 years. A central claim of this Article is that labor rights exert an important influence on the executive branch. The data confirms that hypothesis: Labor often prevails in contract disputes with agency management, including under hostile presidential administrations and hostile FLRA majorities. Many of these cases carry important implications for presidential control of specific agencies. The data also demonstrate that as labor is increasingly weaponized to contend with more aggressive versions of presidential administration, it is becoming more controversial. As measured by the number of dissents filed in FLRA cases and the rate of reversals of putatively neutral arbitration awards, labor litigation has become more divisive and harder fought over the last decade. Sections III.B, III.C, and III.D then provide case studies of how labor rights have reshaped bureaucratic-presidential relations and policy outcomes in immigration, tax, and environmental regulation. A. Data This Section presents an analysis of 986 FLRA adjudications spanning more than forty years, from 1979 to 2022, across seven agencies in three policy areas. Despite the importance of bargaining to modern bureaucracy, there exists very little empirical research on its implementation, including on fundamental questions such as how frequently labor and management prevail in labor disputes, how frequently litigations implicate particularly contested questions of managerial control, and how frequently disputes generate controversy. This Section seeks to fill that gap by providing a broad overview of how labor disputes play out over time across the immigration, tax, and environmental policy spaces. It first examines how frequently labor and management prevail in disputes to determine whether the CSRA serves its original purpose of promoting a relatively stable balance of power between the President and the bureaucracy. It then seeks to determine the degree to which labor disputes have generated controversy or become sites of legal or political contestation. A caveat is necessary at the outset. The three-person FLRA is, in most instances, an appellate body. Most contractual disputes are resolved in the first instance by internal grievance processes or third-party arbitrators. Disputes over unfair labor practices are generally adjudicated first by administrative law judges.206 Disputes over bargaining unit recognition are heard first by FLRA Regional Directors; and negotiating impasses are typically resolved by the [\*86] Federal Service Impasses Panel (FSIP).207 But the FLRA plays a formative role in setting federal labor policy, issuing authoritative constructions of the CSRA, and determining appeals from the hardest fought labor disputes. I therefore treat it as a reasonable proxy for which party the labor regime favors, and the controversy attending its decisions. 1. Wins and Losses Key to understanding the effect of labor rights on bureaucratic relations is understanding which parties benefit from its provisions. Federal sector labor rights were designed to secure industrial peace within the executive branch. As described above, federal sector labor rights were the product of compromise between a presidency seeking greater freedom to structure the executive branch and a labor movement, supported by congressional Democrats, seeking more robust protections for federal employees. If they are serving that purpose, one would expect both labor and the President to prevail a meaningful percentage of the time. Guarantees of moderating power would be useless if one side gains a decisive or permanent advantage. The data indicates that both labor and management do win a meaningful percentage of the time.208 As shown in Figures 1 and 2, this is true across presidential administrations, from 1979 to the present. It is true in periods of labor turmoil, such as the Reagan Administration, as well as times of relative rapprochement, such as the Clinton era. [\*87] Figure 1. Agency and Labor Wins Over Time, By Percentage Figure 2. Agency and Labor Wins Over Time, Absolute Numbers As shown in Figures 3 and 4, while labor wins slightly more frequently when the FLRA has a Democratic majority (51.7% versus 48.0% during Republican majorities), the difference is relatively modest. Indeed, win rates for labor are much higher than for equivalent disputes before the MSPB, where surveys have consistently shown that [\*88] agencies win over 75%, and perhaps as much as 90%, of the time.209 This data supports labor and Congress's assumption that unionized representation could serve as a more effective check on managerial authority than traditional civil service protections. Figure 3. Prevailing Party, Democratic Majority Figure 4. Prevailing Party, Republican Majority [\*89] One other aspect of this data is worth noting. The total number of cases declined dramatically from the 1980s to 2020s. This is not a quirk of the specific agencies studied here. The total number of FLRA decisions has declined over the past four decades. From January 1, 1979 to December 31, 1989 the FLRA issued 4,196 opinions; from January 1, 1990 to December 31, 2000, it issued 3,147; from January 1, 2001 to December 31, 2010, it issued 1,514; and from January 1, 2011 to December 31, 2020, it issued 1,176.210 The decline of the total number of FLRA cases does not mean that the federal labor regime has declined in importance. First, many disputes that were litigated in the CSRA's first decade are now settled informally through grievance procedures and labor-management programs such as those established under President Clinton's NPR program.211 These efforts reflect the bargaining power of federal workers. FLRA litigation is costly and disruptive. While there is no clear data on management council outcomes, anecdotes suggest that labor has a meaningful role in shaping management policy, and the councils are responsive to unions' concerns.212 Likewise, many disputes that might otherwise be litigated are instead now resolved through negotiated grievance procedures. Here again, anecdotal evidence suggest that these procedures can be more favorable to labor than the alternative.213 2. Controversy The data also appear to show relative stability through the Trump Administration. This is significant, given President Trump's overt hostility to labor and the many ways in which his administration departed from traditional norms of labor relations.214 Observers have presumed that the FLRA majority appointed by President Trump was more hostile to labor than previous boards, including those with Republican-appointed [\*90] majorities.215 Indeed, these accusations were so frequent that the FLRA's Chairman was questioned by the House Oversight and Reform Government Operations Subcommittee over her alleged "`anti-union' modus operandi."216 In terms of raw numbers on wins and losses, there is no clear indication of a strong anti-union bias. However, I reviewed additional metrics to examine whether there was any empirical support for the claim that the Trump-appointed FLRA was uniquely hostile to labor. Consistent with observations of labor hostility, and consistent with the general trend toward greater politicization of democratic institutions,217 these data do provide some indication that labor has become more politically divisive in the past decade. First, I examined the number of dissenting opinions generated by FLRA decisions over time. More dissents would suggest greater controversy over outcomes. Here, the results are quite striking, and show a dramatic uptick in controversy. During the Carter and Reagan administrations, dissents were exceedingly rare, typically appearing in less than two percent of decisions, even as the FLRA handled many more cases per year. Beginning in the Obama Administration, dissents increased substantially, appearing in almost fifteen percent of all decisions between 2008 and 2016. By the Trump and Biden Administrations, in most years a majority of cases produced dissents, totaling sixty-five percent between the start of 2017 and the end of 2021. And these dissents could be dramatic in highlighting the political differences of board members. Member DuBester, the sole Democratic appointee, denounced majority opinions as "ill-conceived" and "fundamentally flawed,"218 "impulsive,"219 and "sophistry,"220 among other strong descriptors. [\*91] Figure 5. Dissents Over Time Second, I also examined the rate at which decisions by arbitrators are reversed. Disputes over contract construction are heard, in the first instance, by third-party arbitrators selected mutually by the parties. As described above, the availability of neutral arbitration was a key demand of labor in exchange for supporting the CSRA, and a recent study indicates that labor arbitrators rule for labor far more frequently than do ALJs within the MSPB in adjudications concerning civil service protections.221 Recent doctrinal changes by the Trump-era FLRA have made arbitration decisions easier to reverse, and practitioners have suggested that the FLRA has been unusually willing to overturn arbitrations, especially those favoring labor.222 If true, a trend toward more aggressively reversing arbitration would represent a deviation from one of the CSRA's core goals of preserving industrial peace by ensuring relatively equitable outcomes in labor disputes. Here, too, the data suggest a significant break with past FLRA practice. As shown in Figure 6, between 1979 and 2017, the FLRA reversed only twenty-two percent of decisions by arbitrators, but between 2018 and 2021, it reversed fifty-four percent. [\*92] Figure 6. Arbitration Appeal Outcomes Over Time The trend is starker when broken down based on appellant. As seen in Figure 7 below, when agencies appeal labor-friendly arbitrations, the rate of reversal, in whole or in part, has increased from eighteen percent from 1979 to 2017 to sixty-two percent from 2018 to 2021, suggesting a strong recent tilt toward management under the majority appointed by President Trump. By contrast, as shown in Figure 8, where labor was the appellant, the rate of reversal was four percent from 1979 to 2017. However, between 2017and 2021 labor did not successfully secure a single reversal on appeal. One study suggests similar disparities in outcomes under the FLRA since 2018.223 [\*93] Figure 7. Arbitration Appeals - Agency Appellant Figure 8. Arbitration Appeals - Union Appellant In short, the data confirms that the CSRA has historically empowered labor to reshape bureaucratic relations through the successful litigation of labor disputes. But the data also confirm anecdotal observations that, in recent years, FLRA litigation has become increasingly polarized, in line with developments in other democratic institutions. [\*94] B. Immigration Labor dynamics in immigration policy have evolved along two separate dimensions: enforcement, primarily through Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), and adjudication through the Executive Office of Immigration Review (EOIR) and U.S. Customs and Immigration Services (USCIS). Civil servants in each of these agencies have different political preferences, and labor disputes raise different questions in different areas. But across each, labor has been a significant force in shaping bureaucratic power and driving policy outcomes. 1. Enforcement Immigration enforcement is one area where conditions of employment, and limits on them, directly impact immigration policy. ICE and CBP, which are housed within the Department of Homeland Security, together perform most of the key enforcement functions in federal immigration policy.224 Unusually for federal agencies, employee unions at both are strongly Republican. Indeed, both the National ICE Council, representing ICE agents, and the National Border Patrol Council, the union representing CBP agents, supported Donald J. Trump in his 2016 run for the presidency, and the NBPC has since supported other Republican candidates for public office.225 Immigration enforcement was originally housed in the Immigration and Naturalization Service (INS), under the Department of Justice. In immigration enforcement, managerial initiatives frequently intersected with broader policy objectives. A political desire to avoid detaining and deporting large numbers of women and children, for instance, was expressed as a series of managerial directives to border agents about how and where to focus their daily enforcement activity.226 These enforcement directives could generate resentment among agents. As one INS field manager commented in response to a Clinton-era enforcement policy that instructed agents to prioritize arrests of "criminal" migrants, and to [\*95] deprioritize inspections and arrests at work sites, "[t]here is resistance .… because, basically, if you get through the border, you're home free .… We're extremely frustrated. Morale is low."227 Since the enactment of the CSRA, labor rights have placed immigration enforcement agents in conflict with agency management. Unions representing immigration and border patrol agents have resisted rules and guidance governing issues that impacted enforcement policy, including use-of-force policies,228 the staffing of specialized units,229 the identification of officers to detainees, and policies governing internal affairs investigations.230 Labor's ability to frustrate enforcement guidance became a subject of controversy after the September 11, 2001 terrorist attacks. The George W. Bush Administration undertook a dramatic reorganization of immigration, customs, and antiterrorism enforcement.231 The traditional immigration functions of the INS, along with an array of new anti-terrorism and law enforcement initiatives, were consolidated into CBP, ICE, and USCIS under the newly formed Department of Homeland Security (DHS). One of the primary objectives of the proposed reforms was to allow the President to exercise greater direct control over personnel, including by exempting DHS employees from labor and civil service protections.232 As Dan Blair, the head of the Office of Personnel Management (OPM) testified before a House Appropriations committee in support of the proposed bill, union rights improperly skewed "the balance between workplace rights for public employees and the government's basic responsibility to protect its citizens from threats and harms."233 Indeed, the Bush Administration planned to subsequently expand the personnel reform to the Department of [\*96] Defense, the most heavily unionized agency in the federal government, followed eventually by the entire civil service.234 Labor, however, mobilized to successfully defeat the anti-union and anti-civil service provisions of the bill.235 Despite the strong conservative political leanings of both the ICE and CBP unions,236 it was the Republican Bush Administration that sought to strip enforcement agents of their considerable bargaining power. By contrast, it was congressional Democrats, who were both more protective of labor rights and more wary of the potentially vast expansion of presidential power entailed by the DHS bill, that united with the unions to strip out the strongest anti-labor provisions.237 The movement also relied on the support of the broader unionized federal workforce, led by the Democratic-leaning AFGE and NTEU.238 Similar configurations emerged in response to other attempts by the Bush Administration to leverage employment relationships in order to assert greater political control over DHS personnel. For instance, in 2004 DHS issued a memorandum requiring employees to sign nondisclosure agreements prohibiting them from releasing "sensitive," but not classified, information - as the unions put it, a "virtually unlimited universe of information that is relevant to important matters of public concern"239 - effectively instituting a department-wide prohibition on leaking as a condition of employment. Employee unions, along with allies in Congress and civil liberties groups, opposed disclosure limits, [\*97] threatened litigation, and successfully lobbied to have the requirement repealed the following year.240 By the 2010s, labor became an increasingly powerful weapon in the struggle between the President and the bureaucracy for control of the agency's immigration agenda. As the rank and file of CBP and ICE became more politically active, they began to aggressively push their own policy objectives within DHS, including stricter enforcement of immigration laws. Initially these efforts took the form of lobbying, advocacy, and impact litigation. The most prominent and instructive example of this new turn was the ICE Council's opposition to President Obama's Deferred Action for Childhood Arrival (DACA) program.241 Under that program, DHS Secretary Janet Napolitano and ICE Director John Morton issued memoranda directing DHS personnel, including ICE agents, to exercise their "prosecutorial discretion" when detaining and deporting undocumented immigrants to focus on those with criminal records, and to deprioritize, among others, those who had arrived in the country as minors.242 The union, led by president Chris Crane, lobbied intensively against the DREAM Act, which would have codified DACA's objectives into law. In congressional testimony, Crane argued that the Obama Administration was "asking law enforcement officers to basically ignore their law books .… For officers out in the field, we can't function like that. We have to have laws that are very clear, that aren't ambiguous, that we can confidently go out into the street and enforce." When DHS announced the DACA initiative, the National ICE Council prominently (and, ultimately, unsuccessfully) challenged the program as unlawful in federal court, asserting a novel theory of standing that claimed ICE agents were injured by being required to enforce a presidential mandate in violation of a federal statute, thus risking "adverse employment action."243 In most accounts, the dismissal of plaintiffs' complaint for lack of Article III standing in Crane v. Napolitano ends there.244 But while the union failed in its direct challenge to DACA, the National ICE Council adopted the same logic - that the program was [\*98] unlawful, and that the agency was imposing improper conditions of employment on agents by requiring them to enforce it - and applied it, more successfully, in labor advocacy. The union repeatedly delayed implementation of DACA by insisting on the right to bargain about its impact on conditions of employment, including the impact of required enforcement trainings.245 In congressional testimony, union leadership continued criticizing the program by framing it as an infringement on labor rights. Crane testified, for instance, that the union had repeatedly tried to participate in discussions leading to the adoption of this policy but had been excluded from internal deliberations, and accused Napolitano and Morton of negotiating in bad faith, and of waging "the most anti-union and anti-federal law enforcement campaign we have witnessed."246 Subsequent studies suggested that ICE's deportation decisions remained largely unchanged by the Napolitano and Morton memos.247 Rather, following a vote of no confidence by the National ICE Council and attacks by conservative senators, it was Morton who was forced to resign.248 Resistance to DACA was not an anomaly. Since the Obama presidency, both ICE and CBP agents have used labor rights with increasing assertiveness to challenge managerial directives over a wide range of enforcement policies. CBP employees aggressively negotiated over, among other topics, agents rights during Inspector General investigations,249 policies governing the conduct of vehicle [\*99] searches at the border,250 and disciplinary procedures for agents.251 ICE employees likewise negotiated over issues such as the agency's required distribution of detainer forms,252 which were revised during the Obama Administration to more effectively apprise detainees of their due process rights.253 The negotiated grievance process also contributed to more limited discipline for agents, including the light punishments imposed in response to CBP's 2019racism scandal.254 The president of the Border Patrol Council, Brandon Judd, had been an outspoken supporter of the agents, actively resisting the recommendations of the agency's inspector general.255 These aggressive challenges to certain managerial initiatives are also worth considering in light of other challenges apparently not made. For instance, during racial justice protests in summer 2020, CBP and other DHS personnel were deployed to Portland, Oregon and other cities to quell unrest, occasionally in unmarked vehicles and non-standard uniforms.256 Despite the dramatic deviations from CBP's usual mission and operating procedures, the union does not appear to have mounted any serious challenge to its deployment, illustrating how labor rights can allow unions to selectively disincentivize certain changes to policy while tacitly accepting others. The Trump Administration saw the full reversal of labor's position from insurgent outsider to privileged insider in immigration policymaking, and of labor law from a stumbling block of enforcement policy to a primary driver of it. As a candidate, Donald Trump had actively sought the support of immigration enforcement unions, which took the unprecedented step of endorsing him.257 Brandon Judd became a prominent advisor of the Trump campaign, and later of the transition team, and Trump actively campaigned to earn the support of rank-and-file agents, for instance by appearing on a Border Patrol Council [\*100] podcast sponsored by Breitbart News.258 With his election, President Trump granted the unions extensive access to the White House and allowed them to exert considerable influence on agency management. The administration took a number of policy cues from the unions on key issues, for example, by deciding to oppose so-called "catch-and-release" policies directing CBP agents to release many detained immigrants without criminal records.259 President Trump also appeared to defer to them in regards to CBP leadership, replacing Mark Morgan, an agency outsider who had been criticized by the unions, with an insider favored by labor.260 The ICE Council likewise successfully pressured the Trump Administration to withdraw his nominee for ICE Director, Ron Vitiello, in favor of a "tougher" candidate.261 Most dramatically, the Trump Administration sought to entrench the political power of unions with expansive new contracts. When CBP negotiated a new contract in 2019, Brandon Judd negotiated the agreement directly with President Trump, bypassing the CBP Director.262 The contract granted the union extensive new rights, including expansive rights to challenge and negotiate changes to staffing and enforcement policy.263 It also expanded the union's power through an extraordinarily generous grant of official time.264 While most federal unions lost considerable official time under President Trump's Executive Order 13,837, the National Border Patrol Council received a three-fold increase to 150,000 hours, far exceeding the 18,000 hours to which it would have been entitled under the Administration's standard formula.265 [\*101] The contract awarded to the ICE Council in 2020 follows a similar pattern but reflects an even more explicit attempt by the President to entrench the power of loyal unions. The agreement authorized over 85,000 hours of official time, nearly twice what is granted to the union representing USCIS, despite ICE having half the staff.266 The contract also paid per diems for union-related travel expenses, despite such concessions being prohibited by Trump's own EO 13,837. More unusual still, under the agreement, ICE expressly waived its management rights to alter employees' working conditions at will when necessary for agency operations; instead, the new contract required ICE to bargain with the union before implementing any change to working conditions, effectively giving the union a veto over any meaningful changes in enforcement policy.267 The extraordinary nature of the contract is reflected in the chaotic process by which it was signed. The agreement was signed by Ken Cuccinelli, then serving as the de facto deputy head of DHS on January 19, 2021, the day before President Biden's inauguration.268 Cuccinelli signed in lieu of Jonathan Fahey, the former Director of ICE, who resigned after "being pressured" to sign the agreement and refusing.269 After the agreement was leaked by an agency whistleblower, President Biden rescinded it within the thirty day window for disapproval authorized by the CSRA.270 But the contract, which would otherwise have taken effect, provides an example of the extremes to which labor rights can be stretched to influence and constrain agency policy when the parties are sufficiently motivated. 2. Adjudication Immigration adjudication, like enforcement, presents a story of a strong union that exerts influence on policy outcomes. But the trajectory of adjudication-related labor disputes under the Trump administration is radically different, and sheds light on the way that labor can pull in different directions, exerting a significant overall effect on policy. The enforcement story is one of labor first resisting abolition, then [\*102] transitioning into policy resistance under Obama, before sliding into something resembling cooperation or mutual support under Trump. By contrast, adjudication presents a longstanding model of labor resistance to executive power, which accelerated dramatically under the Trump Administration. Immigration law judges (IJs), under the Executive Office of Immigration Review (EOIR) within the Department of Justice, adjudicate immigration removal proceedings. A key political dispute in immigration adjudication, and the one which frames many subsidiary labor-management disputes, is whether IJs should serve a role similar to that of judges or administrators. Presidents view them as administrators whose role is to implement presidential policy on asylum and immigration.271 The union, by contrast, has historically advocated for greater due process in removal proceedings, including by supporting the separation of IJs from the supervision of EOIR, which also oversees the agency's prosecutorial functions.272 IJs have explicitly defined themselves as a check on political influence on removal hearings.273 As the then-president of the National Association of Immigration Judges (NAIJ), the union for IJs, summarized in 2020: Imagine going to a court where you've been charged by a prosecutor, and when you come to court you find out that the judge is hired by the prosecutor and can be fired by the prosecutor and then ultimately the prosecutor can come in and overrule the judge if he is not satisfied by the process.274 Labor rights play a key role in IJs' pursuit of administrative independence. For instance, IJs can use proceedings to pursue independent lines of questioning with asylum seekers, giving unrepresented parties an opportunity to present their case more fully.275 By increasing caseloads without increasing personnel, management can limit this role by restricting the amount of time IJs can spend on [\*103] a given case. Management can further hamstring active IJ engagement in cases by imposing productivity quotas, penalizing IJs for delays, and scheduling alterations.276 Likewise, performance evaluations can tie advancement and compensation to the "efficiency" of IJs, and have even sought to require IJs to meet certain target quotas for asylum denials or other case outcomes.277 Finally, demanding productivity requirements and other poor working conditions can erode IJs' ability to work on cases effectively, and has contributed to attrition within the EOIR, further weakening protections for asylum-seekers.278 Historically, NAIJ has leveraged bargaining rights to resist the aggressive use of management tools to affect case outcomes. For instance, quotas and performance metrics are governed by Article 22 of the union's CBA, which contains a number of provisions that restrict how the agency can evaluate judges. For example, a judge's partisan affiliation or perceived ideology cannot be factored in, and measures of a judge's performance and efficiency must account for, among other things, the "availability of resources" and "other factors not in the control of the [Judge]," effectively preventing the agency from punishing judges by imposing unmanageable caseloads.279 The union has successfully litigated contractual limitations on EOIR's ability to enforce performance appraisals,280 to discipline employees,281 and to impose burdensome changes in working conditions.282 NAIJ's outspoken positions on removal policy, and its open hostility to DOJ supervision, have led to historical tensions with [\*104] presidents of both parties. The Clinton Administration moved to decertify the union on the grounds that the IJs were managers because of their highly discretionary implementation of policy and were thus ineligible for labor protections.283 The FLRA rejected that position, holding that immigration judges are employees rather than managers because they do not hire, fire, or supervise, despite their discretionary role.284 The Trump Administration took a particularly hostile approach to immigration adjudication, ushering in what the union characterized as a "new and dark era" of labor relations.285 Occasionally, labor tensions were overt, as when Justice Department officials distributed a newsletter citing white nationalist critiques of prominent immigration judges throughout EOIR, sparking union grievances.286 More often, however, these tensions manifested as changes in management and labor policy. Management sought to control or demoralize recalcitrant judges through the imposition of heavy case quotas287 and aggressive performance reviews.288 Attorney General Sessions imposed harsh quotas of 700 cases per year, tied to performance reviews; 378 of 380 judges failed to meet either certain targets or other deadlines.289 Dockets were further burdened by the Trump Administration's increases in immigration detentions and its stricter prosecution policy.290 From 2016 to 2020, EOIR's backlog of cases doubled to 1.1 million, a combination of rapidly rising arrests and cuts in funding.291 By 2019, the DOJ had eliminated judges' option to administratively suspend cases, and had reopened 300,000 pending cases, flooding IJs' dockets.292 EOIR also sought to limit IJs' public statements about removal proceedings, sparking a labor dispute that continues to generate extensive litigation. NAIJ has historically protected IJs' ability to discuss and criticize the president's removal policies. Judges' right to speak publicly [\*105] was guaranteed in a memorandum of understanding between NAIJ and EOIR.293 However, the DOJ issued updated ethics manuals in 2017 and 2020 that made it much more onerous for IJs to receive approval to speak publicly about their work. The 2020 update, which was implemented without bargaining in the form of a memorandum of understanding, banned most speaking engagements by IJs and spawned extensive litigation before both the FLRA and the Fourth Circuit challenging the order on both employment and First Amendment grounds.294 These escalating tensions culminated in 2018, when the Trump Administration attempted to decertify NAIJ, reviving the Clinton Administration's rejected argument that IJs are managers and thus ineligible to unionize under 5 U.S.C. §7112. EOIR argued that because IJs' decisions were given more deference by the Board of Immigration Appeals than they had been twenty years ago, they were now functionally "management officials."295 The FLRA's Washington D.C. Regional Director rejected EOIR's argument, but in a split opinion the two Trump-appointed members of the FLRA accepted it, in an opinion characterized by dissenting Member DuBester as "sophistry."296 Highlighting the fraught politics of the IJs' unionization, the FLRA's opinion did not end the matter. In an act of apparent "defiance" that the FLRA called "troubling," the Regional Director refused to finalize the decertification despite a second FLRA order.297 Under the Biden Administration, NAIJ has again sought re-certification.298 While President Biden has signaled a desire to recognize and bargain with NAIJ, because certification can only be granted by the FLRA, NAIJ cannot resume bargaining unless the Authority reverses its own recent precedent.299 The continuing struggle over NAIJ's certification thus illustrates both the ways in which changes in presidential administrations can lead to dramatic shifts in attitudes toward labor, and also the role that the independent FLRA can play in resisting or moderating those changes.300 [\*106] C. Tax Immigration-related labor disputes reflect the rapid expansion of executive power. In the immigration field, labor plays a central role in an area where executive branch officials are exercising their policymaking power in increasingly aggressive ways. Tax presents a different narrative. Since the 1980s, the IRS has been the target of political attacks from policymakers who view taxation, and the redistributive politics it facilitates, as an impediment to economic growth.301 Congress has for decades degraded the IRS's enforcement capacity through budget cuts and other restrictions on personnel.302 As a result, labor rights play a primarily defensive role. In the tax field, labor does not guide the expansion of administrative power, but rather acts as a backstop against efforts at structural deregulation. Labor has played an important role in the institutional politics of the IRS. Labor provides numerous routes to resist presidential efforts at weakening tax enforcement or structurally destabilizing the agency. The IRS has a very large unionized workforce, constituting half of the NTEU's membership.303 With an agency so large, and where so much of policy depends on questions of how thoroughly and aggressively to enforce existing law, questions over how to allocate personnel, how to staff them, and how to evaluate their performance can have important policy impacts. Early labor disputes within the IRS in the 1980s generated significant FLRA precedents regarding how extensively labor could bargain over the agency's management tools. These early cases favored labor, granting unions broad power to bargain over tools [\*107] governing, among other things, performance evaluation systems,304 hiring and promotion,305 pay structures,306 and the scope of mid-term bargaining.307 Union contracts also restricted the IRS's ability to conduct large-scale reorganizations of the agency. Contracts limited, for instance, changes in the assignment of auditors and other enforcement workers in the 1980s, impacting the conduct of important audits.308 The union also negotiated to curb the impact of reductions in force (RIFs), limiting how and when the agency could lay off personnel, leading to tension and extended litigation with management.309 Unionization of IRS employees, including most tax attorneys, continued throughout the 1990s in response to fears of continuing cutbacks.310 Presidents and legislators have recognized the potential for labor to check control of the agency and have sought to limit it. President Clinton reduced labor litigation through the aggressive implementation of his NPR program at the IRS.311 Since the Reagan Administration, Republican presidents and legislators have made more aggressive efforts to curb tax enforcement by underfunding the IRS and restricting tax enforcement policies. Here, Congress intervened not to curb the President but primarily to restrict the power of labor, enacting specific laws or budget riders for the purpose of limiting personnel discretion to enforce tax laws. In a series of structural reforms in the 1990s, Congress revised IRS personnel performance ratings to be based upon "customer service," as measured by taxpayer satisfaction, rather than enforcement metrics; created citizen oversight boards to monitor the IRS for excessive enforcement; reduced IRS staffing levels, and outsourced agency functions to private contractors.312 In 2014, a Republican-controlled Congress enacted limits on IRS compensation, requiring that employees not be found to have violated any personnel [\*108] rules or committed other offenses to be eligible for bonuses.313 Indeed, in recent years Congress has gone so far as to seek the abolition of IRS labor rights in an effort to weaken the enforcement efforts of line staff. Republican members of Senate Finance Committee wrote in 2015 that it was "virtually impossible for the IRS to maintain the reality, much less the appearance, of neutrality and fairness to all taxpayers, when a substantial number of IRS employees are members of the highly partisan and left-leaning National Treasury Employees Union."314 The union has resisted attempts at structural deregulation. Through lobbying, the NTEU "fiercely" resisted a large-scale reduction in staff and budget and a reorientation away from aggressive enforcement during the Clinton Administration, leveraging the threat of litigation and its position on the agency's labor-management council to scale back reform.315 Its contractually imposed limitations on RIFs were one tool in slowing privatization, requiring extensive accommodations for employees replaced with outside contractors during a government-wide shift toward privatization under the George W. Bush Administration.316 Union contracts have likewise required accommodations for increased workloads as a result of understaffing.317 The union has also pushed back on specific personnel rules designed to shift enforcement incentives, for example by negotiating for specific performance evaluation rules that replace customer-facing assessments of employees with more nuanced metrics.318 Compensation rules have been another means of resisting structural attacks. For instance, the CSRA provides for cash bonuses in addition to regular salary in order to incentivize "high-performing" employees, one of the many ways in which the Act seeks to replicate the incentive structure of the private market.319 But the CBA negotiated by the IRS union provides additional employee protections, making [\*109] it more difficult for managers to withhold scheduled bonuses. These protections have proved critical as a means of supplementing IRS salaries, which have failed to keep pace with inflation or the private sector and have often been delayed during furloughs and government shutdowns. For instance, in 2013 the IRS agreed to pay $70 million in technically discretionary bonuses after a threat of labor litigation, despite being directed to withhold the pay by the Office of Management and Budget.320 However, similar strategies have been less successful under more conservative FLRA majorities. For example, an attempt to pay bonuses to enforcement staff specifically barred from incentive pay by Congress was upheld by an arbitrator, but ultimately struck down by the FLRA in 2020.321 In addition to litigating, labor has also lobbied in response to structural attacks. Congress's overarching method for degrading IRS enforcement is congressional budget cuts. While unions can slow or offset certain effects of underfunding through contracts, unions cannot allocate consistent, long-term funding for the agency absent an appropriation by Congress. But the IRS union, relying on official time, dues, and other organizing rights conferred by federal law, has aggressively lobbied Congress against cuts to enforcement, with some success.322 The union has been especially vocal in emphasizing the effects that repeated budget cuts have had on agency attrition, and the attendant risk of a fall in both enforcement and government revenue to finance other programs.323 Indeed, because congressional budget cuts and other legislation have been the primary means of incapacitating the IRS, tax is perhaps the most prominent example of unions leveraging the unique political rights granted by the CSRA to serve a public-facing "alarm" role, lobbying for a tax enforcement program from which the [\*110] public benefits, but which has a limited base of political support beyond federal personnel. D. Environment The story of labor rights inside the EPA mirrors aspects of both the immigration and tax stories. Like the IRS, the EPA has long been a target of political attacks and structural deregulation, to which labor has historically been a counterbalancing force.324 EPA staff first unionized in response to the deregulatory efforts of the Reagan Administration. President Reagan's first EPA director, Ann Gorsuch, dramatically reduced enforcement actions and actively lobbied Congress to reduce the agency's budget.325 In an echo of the Nixon Administration's "Malek memo" tactics, senior agency management developed "hit lists" of effective enforcement staff whom they reassigned to marginal positions.326 In response, an "oppositional culture bloomed among career staff, who gathered in bars to plot strategies of resistance and unionized themselves to promote job security and scientific integrity."327 Staff coordinated with Congress and leaked information about agency operations to the press, leading to investigations of key agency appointees. As the administration sought to discipline, reassign, or demoralize untrusted staff, the union represented employees in disputes over discipline, pay, and working conditions.328 President George H.W. Bush was likewise hostile to career EPA staffers, though he learned from Reagan's failures and took a less direct assault on staff, instead bypassing career staff on key policy and enforcement decisions.329 President Trump pursued similarly aggressive deregulatory policies toward the EPA, including attempts to limit enforcement actions, limit the use of scientific research in decisionmaking, and to increase work [\*111] burdens on staff and encourage resignations.330 As a central component of this policy, the administration took a hardline view on employees' labor rights.331 The agency sought to impose a new contract consistent with the administration's 2018 executive orders,332 replacing the parties' 2007 CBA. When the parties failed to agree on key provisions, the FSIP imposed largely management-friendly terms, including sharply reduced official time, hobbling union organizing efforts;333 restrictions as to what matters could be the subject of grievance proceedings; and provisions granting management more extensive discretion on employee performance evaluations.334 The agency also made more subtle attacks on staff, such as tightening telework allowances. The availability of telework is often a key tool for recruiting and retaining staff in areas of the country with long commutes or remote offices, allowing the agency to operate and conduct environmental enforcement nationwide.335 An EPA employee, characterizing management's posture, summarized: "We're going to make it difficult for you to carry out your mission of using science and the law to protect the environment .… And now we're also going to make it difficult for you to spend time with your families."336 As in the IRS, the EPA's union has been a focal point of resistance to structural deregulation. James Sherk, President Trump's senior labor and civil service reform adviser, later claimed that the "vast majority of career staff" at the EPA "appeared hostile to Trump Administration policies," and "treated political appointees not as the representatives of the will of the people but as an occupying army to be resisted."337 [\*112] Employees organized leaks, public protests, and lobbying, among other tactics.338 The union also successfully appealed management's FSIP-imposed limit on official time to the FLRA, receiving nearly double what the administration had offered.339 Beyond specific employment disputes, the union leveraged its employment rights to challenge the Trump Administration's policies more broadly. Union officials exercised their rights under 5 U.S.C. §7102(1) to speak publicly about internal agency operations, criticizing, for instance, Trump Administration policies that discouraged environmental enforcement actions.340 The union also lobbied against deep agency budget cuts and publicly protested the appointment of Scott Pruitt as EPA administrator, though with less success than similar protests by ICE and CBP.341 Since the end of the Trump Administration, the union has sought to leverage labor rights for more permanent bureaucratic independence by negotiating a new contract with the Biden Administration, which has rescinded the agreement imposed during the Trump Administration. This development could signal a new era in EPA labor relations, similar to the one that has emerged in the immigration context, in which the union and friendly presidents leverage labor rights to further specific policy goals. The union is, for instance, seeking a "guarantee that scientists will have a say in the drafting of any EPA position or decision" in order to ensure that scientists' "words have not been taken out of context," as they allegedly had during the Trump Administration.342 Such provisions have been criticized by Sherk, who warned that their "goal does indeed appear to be to lock in career employees' preferred policies no matter who the American people elect president."343 The union's proposed contract also includes protections against harassment and bad faith discipline, including negotiated standards governing promotions, safety [\*113] and health, and diversity initiatives,344 as well as changes to pay scales to address attrition among the EPA workforce. In its most recent round of negotiations, the union has openly acknowledged that its approach to labor rights is informed by the use of managerial techniques to undermine the agency's performance. A union representative explained that "[a] contract with robust language on promotions, health and safety, and other items on the union's wish list would mean a hostile administration wouldn't be able to violate those terms without risking a lawsuit."345 As the union's Executive Vice President summarized, "I actually think we have to be more cynical in putting in safeguards."346 IV Theoretical Implications of Collective Bargaining The preceding sections have shown that collective bargaining imports many aspects of traditional American democratic politics into the bureaucratic management of the executive branch. The democracy enabled by collective bargaining is not direct democracy, however. There is no vehicle for mass popular input into core questions of bureaucratic management. Rather, bargaining provides a means of indirect democratic control, which has several key features. First, bureaucratic management of the executive branch is overseen by other democratic institutions, including Congress and the courts. Second, and relatedly, the balance of power between the President and the bureaucracy becomes transparent and legalistic. Bureaucratic relationships are reduced to formal, written agreements and subject to highly formalized bargaining and dispute resolution processes. These relationships are far less opaque and siloed off from traditional politics than is generally assumed. Finally, while bargaining does not necessarily promote direct democratic supervision, it does allow for extensive public participation in bureaucratic politics via interest groups. In particular, unions act as links between the insular world of executive branch management and the wider world of democratic participation. Through lobbying, litigation, leaks, political endorsements, and direct publicity campaigns, unions connect the internal political struggles of executive branch organization to the broader partisan struggles of American political culture. [\*114] These democratic characteristics of collective bargaining, largely overlooked by previous scholarship,347 offer a number of new perspectives on the modern administrative state. I focus here on two such perspectives. First, the structure and history of bargaining rights complicate longstanding critiques of the administrative state as democratically unresponsive and therefore illegitimate. The modern federal bureaucracy is far more responsive to both democratic pressure and interbranch supervision than these critiques assume; indeed, as history demonstrates, its democratic responsiveness is by design. Second, this democratic responsiveness raises troubling questions of its own. While collective bargaining imports some of the legitimizing aspects of American democracy and constitutionalism, it may also import some of its pathologies as well. For instance, making bureaucratic power dependent on the continual support of the political branches may make bureaucracy susceptible to manipulation or corruption by those same institutions. Likewise, federal sector labor law allows - even encourages - the creation of sophisticated, well-funded interest groups within the federal bureaucracy in the form of unions. While these unions can advocate for public values that the administrative process might otherwise overlook, they can also import many of the fraught cultural and political divisions that have destabilized American politics in recent years. In short, collective bargaining may in some respects gain democratic legitimacy while diminishing the values of impartiality, political insulation, and technocratic expertise that earlier generations of public administrators saw as core to the survival of the bureaucratic state. A. The Legitimizing Role of Collective Bargaining Collective bargaining changes the structure of federal bureaucracy in ways that challenge both unitarist critiques of the administrative state, as well as critiques which see bureaucracy as valuable but insufficiently democratic. 1. Implications for Presidential Power The practice of bargaining and contracting suggests a more complex and mutualistic model of presidential-bureaucratic relations than the unitary theory implies. Many unitary critiques of bureaucracy center on the federal bureaucracy’s supposed undemocratic character and its insulation from direct presidential control. These accounts assume that bureaucratic protections subvert the President’s “sole authority to execute the law”348—or the requirement that “lesser officers must remain accountable to the President, whose authority they wield.”349 This critique is increasingly leveled at federal unions.350 But the history and practice of labor suggest a more complicated story. Bargaining arose at the initiative of President Kennedy and was expanded by Presidents Johnson and Nixon. Part of their goal was to tame an existing civil service system that was substantially more insulated from presidential control. Even President Nixon, initially hostile to labor, came to support labor as a means of combatting the CSC and agency management.351

Even absent political competition with Progressive Era administrators, the President saw value in enhancing labor protections for civil servants. Labor autonomy was a way of attracting talent from the private sector when the federal government could not compete on salary or other benefits due to fiscal constraints. As studies by the CSC and the President’s own commissions make clear, it was also a means of improving decisionmaking and outcomes within the executive branch by its “rational analysis, negotiation, and incentives” rather than hierarchical control.352 As core state functions turned increasingly on complex technical, scientific, and administrative questions, traditional methods of top-down management were seen as less effective. Labor autonomy was useful not only in recruiting skilled labor, but in allowing labor to shape the workplace so as to foster productive intellectual work. Thus, labor protections, even if they limited managerial control in certain ways, also enhanced state capacity, expanding, among other things, the President’s ability to project power internationally and to compete with Congress and courts on policymaking.353 The empowered presidency often celebrated by unitarists was made possible, in part, by the success of this recruitment drive.

#### That’s key to homeostatic regulation. Otherwise, polycrisis is existential.

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Henry Farrell, “When the polycrisis hits the omnishambles, what comes next?” Programmable Mutter, 02-21-2025, https://www.programmablemutter.com/p/when-the-polycrisis-hits-the-omnishambles

The point of Paul’s post, taken from Marvin Hyman Minsky,\* is that one of the key roles of government is to mitigate the tendencies toward irrationality in financial markets. Risks and higher profits tend to go together, encouraging the participants in financial markets to do ever chancier things with their and their clients’ money. To the extent that these risks are correlated, or actively reinforce each other, there is an ever increasing likelihood that people take too much risk and market goes kaput. Government regulators create rules that dampen this “irrational exuberance” to the immediate annoyance of financial people (who want to make as much money as they can) but to the long term benefit of society, making markets more stable, and crises less common. So what happens when the crypto folks (whose entire business model is irrational exuberance and ‘number go up’) get their hands on the levers of government? Nothing good.

My and Abe’s argument also talks a lot about the consequences of crypto - but for economic statecraft. We say that the two-decades-old system of economic coercion, under which specialized technocrats set the pace of economic statecraft - is over. We’ve suggested elsewhere that this system had its own tendencies toward irrational exuberance, underestimating the risks that their actions could have unexpected consequences. But those risks are likely to be much greater in Trump’s second administration, which combines a much bigger appetite for pushing other countries around, with a revealed preference to let Elon Musk and the crypto bros start smashing the government structures that actually allow the U.S. to do this.

That is partly down to Trump’s own peevish unpredictability. Thin skin and thick skull are an unfortunate combination in a leader. It is also down to the various factions in government, which seem united only in their enthusiasm to dismantle the administrative state. In our words, “we may be looking at the beginning of a world in which countries disentangle themselves from U.S. dependence at the same time that our machinery of power begins rusting from within.”

These are loosely similar insights - but they concern different aspects of the U.S. state. So is there some way of bringing them together?

A couple of years ago, on my now deleted Twitter account, I had a brief joking dialogue with Adam Tooze, about the concept of polycrisis, which he didn’t invent but has popularized. Adam explains the polycrisis as a concatenation of big problems - e.g. climate change; the crisis of democracy; global migration - that not only hit simultaneously but plausibly make each other worse. I pointed to another neologism, the “omnishambles” (from Arnaldo Ianucci’s dark comedy, The Thick of It - Wikipedia definition), describing governmental situations in which no-one has any idea what is going on or what to do, and policy-making is utterly shambolic and fucked up. By construction, I suggested, there must be such things as the polyshambles and omnicrisis.

It wasn’t a very good joke, but I think that there is a useful intuition behind it, which is worth turning into an entirely unfunny diagnosis. We are in a world where our problems are getting bigger, and are feeding on each other. Those of us who live in the U.S. are at the beginning of a sudden and dramatic worsening of the quality of government policy making. In other words, we are about to see a collision between the polycrisis and the omnishambles. So how do we think about this collision usefully?

From this perspective, both Paul’s post, and our op-ed map specific pieces of a larger and more complex problem. And when I use the term ‘complex,’ I use it advisedly. The polycrisis is a simplified way of talking about the world as a complex system. In Scott Page’s description, a “complex system consists of diverse entities that interact in a network or contact structure.” In less academic language, it is a larger system composed of smaller sub-systems that interact with each other. Even when these sub-systems are relatively simple, the whole may be complex and unpredictable. And when they are themselves complex …

This way of thinking about the world helps clarify what the polycrisis involves. Complex interactions may give rise to positive feedback loops, in which different parts of the system reinforce each other so as to induce instability. To apply this to the polycrisis, think crudely of how climate change may increase the likelihood of large scale migration across borders, leading to crises of democracy and government legitimacy, which in turn makes governments less capable of regulating the economic activities that make climate change worse. But complex systems may also give rise to homeostasis, in which some parts of the system become adaptive, perhaps dampening down positive feedback loops and responding dynamically to unexpected changes in the environment.

One of Paul’s early books builds on these ideas (although he later became skeptical, since they are notably better at describing the phenomenon than predicting how it will unfold, let alone providing precise guidance on what to do about it). Indeed, the Minsky cycle is exactly an example of how government may act to limit the likelihood of positive feedback loops getting out of hand. Without regulation, irrational exuberance feeds upon itself and the behaviors it induces. The role of the Federal Reserve, famously, is to order “the punch bowl removed just when the party [is] really warming up.”

Behind Paul’s post - and our piece - lies a possible understanding of the larger situation we face. In good times, we have an environment in which the problems are not too big, or can be dealt with one by one, or, ideally, both things are true at once. We have a government that is capable of dealing with them, acting as a kind of homeostatic regulator, which dampens down the possible chaos without, and perhaps even takes advantage of the unexpected possibilities it provides (while avoiding eviscerating the dynamical aspects of the economy - one can absolutely have too much government).

We are not in those good times. Instead, we are in an increasingly unpredictable environment with multiple major problems reinforcing each other in complex ways (the polycrisis). At much the same time, the most significant government in the world is absolutely not acting as a homeostatic regulator. Instead, of dampening down the chaos, it is accelerating it, while ripping out large swathes of the administrative apparatus that potentially allow it to understand the environment and influence it.

Trump’s second term is going to be the apotheosis of the omnishambles. And it is potentially even grimmer than that. In an ideal world, there is at least a second order feedback loop such that bigger problems leads to better government and the expansion of capacity for government to deal with these problems in conjunction with other modes of problem solving (markets; democracy). In the world we are in right now, there seems to be just the opposite set of feedbacks. Bigger problems are not leading to better government in the U.S. and elsewhere, but to worse.

As noted already, complexity theory is much better at describing problems like this than at predicting how they will turn out, let alone solving them. But it at least provides a framework for seeing how the different sub-systems might interact together.

The crises we are likely to face in Trump’s second term are not simply going to be crises of financial regulation, or of tariffs, or of withdrawn security guarantees, or breakdowns of scientific knowledge, or loss of capacity to respond to emergencies. They are likely, instead to involve the interactions of two or more of these factors with each other, and with the pre-existing problems of the polycrisis. Mapping out - even crudely - the relationships between these different sub-systems will help us be better prepared for what happens, even if we cannot fully anticipate it.

It provides a better framework for understanding the true weirdness of the ideas animating the agenda of DOGE and many of the Silicon Valley connected people who are backing Trump. Behind Marc Andreessen’s celebration of ‘effective accelerationism’ with its ‘technocapital singularity’ lies the delirious counter-cybernetics of the neo-reactionary thinker Nick Land, who depicts positive feedback loops as a Lovecraftian dark god to be worshipped and celebrated:

The story goes like this: Earth is captured by a technocapital singularity as renaissance rationalization and oceanic navigation lock into commoditization take-off. Logistically accelerating techno-economic interactivity crumbles social order in auto sophisticating machine runaway. As markets learn to manufacture intelligence, politics modernizes, upgrades paranoia, and tries to get a grip. The body count climbs through a series of globewars. Emergent Planetary Commercium trashes the Holy Roman Empire, the Napoleonic Continental System, the Second and Third Reich, and the Soviet International, cranking-up world disorder through compressing phases. Deregulation and the state arms-race each other into cyberspace. By the time soft-engineering slithers out of its box into yours, human security is lurching into crisis. Cloning, lateral genodata transfer, transversal replication, and cyberotics, flood in amongst a relapse onto bacterial sex. Neo-China arrives from the future. Hypersynthetic drugs click into digital voodoo. Retro-disease. Nanospasm.

Finally, it provides a framework for thinking about what we need to do. In a world of proliferating, intersecting crises that feed upon each other and themselves, building state capacity is crucial. This might, or might not mean more state depending - the more crucial and urgent tasks are twofold. First, to remake the state so that it is more flexible and responsive. Second, to create different feedback loops between the state and democracy than the one we are trapped in right now, in which the bigger the crises get, the more that they empower the people who want to ignore them, rip out the control systems, or, in the extreme, actively welcome the crises in. I’ve written before about the beginnings of alternatives that are at least better aware of the challenges we face, but they’re only the beginnings, and we need a whole lot more.