## Offcase

**1NC – DA**

#### The United States federal government should ban the right to strike for workers in the United States.

**Corporate debt burdens are sustainable---unexpected deterioration in credit conditions triggers rapid systemic collapse, especially for chemicals.**

Sarah **Limbach et al. 12/3**, Limbach is Primary Contact at S&P Global Paris; Barbara Castellano is Primary Contact at S&P Global Milan; Roberto H Sifon-arevalo is Primary Contact at S&P Global New York, "Refinancing Risk: What If The Wind Changes?" S&P Global Ratings, 12/03/2025, https://www.spglobal.com/ratings/en/regulatory/article/refinancing-risk-what-if-the-wind-changes-s101660722

Corporates are already adjusting to higher refinancing costs, but unexpected increases could pose challenges for companies at the lower end of the rating scale. Sovereigns appear more resilient to potential significant shocks in financial markets.

How this will shape 2026

Maturities seem manageable amid higher refinancing costs. About $1.35 trillion of nonfinancial corporate debt will mature in 2026, as of Oct. 1, 2025, 10% higher than at the same time in 2025. That said, the weakening dollar during the first half of 2025 increased the value of non-dollar denominated debt, when converted into USD. A significant portion of upcoming maturities were issued in the low-interest rate environment of 2020/2021. Consequently, European and U.S. corporate issuers with fixed-rate 2026 maturities may face higher funding costs, of about 150 basis points across the board, if refinancing at current yields.

Pockets of risk exist among the weakest-rated issuers. Most issuers have been able to roll over their debt in recent years despite higher funding costs, but those with weaker financial or economic fundamentals could face increased pressure in 2026. Recent strong speculative-grade issuance has pushed back maturities, though refinancing risk among issuers rated in the 'CCC' to 'C' categories is evidenced by their 2026 maturities, which are more than double that of 'B-' rated issuers, as of Oct. 1, 2025. What's more, bond prices in the secondary market for bonds rated 'CCC+' to 'C' with upcoming maturities reflect a more bearish view from investors on that category.

Sovereign issuers will maintain access to financing. Even during periods of liquidity stress, such as after the global financial crisis and during/after the pandemic, sovereigns largely maintained access to funding, albeit with varying terms and conditions. Should 2026 prove turbulent, the critical role of sovereign debt as a relatively stable source of capital will once again come to the fore. We expect sovereign entities, often supported by central banks, to continue to be key players in financial markets, particularly if conditions deteriorate.

What we think and why

We anticipate that corporates will continue refinancing maturities, barring a triggering event. Potential catalysts for such an event include escalating geopolitical tensions, a marked deterioration in economic conditions, or disruptions coming from specific sectors that spread through financial markets.

Worsening credit metrics are likely to exacerbate refinancing pressure in some sectors. Excluding the financial sector, the automotive industry has the highest amount of debt maturing in 2026--over $170 billion, with nearly half stemming from European issuers. It is also the sector with the highest negative bias (issuers assigned a negative outlook or placed on CreditWatch negative). The sector's downgrade risk points to a deterioration in funding conditions going forward. Telecommunications and chemicals, packaging, and environmental services carry an elevated risk of future credit deterioration while also holding the highest amount of debt rated in the 'CCC' to 'C' categories that matures in 2026.

Beyond existing maturities, the substantial funding needs associated with AI data centers are expected to add volatility to the debt market in 2026. The scale of funding needed for these projects, coupled with uncertainty surrounding their valuations, is already generating some market volatility.

What could change

Continued geopolitical or economic tensions may lead to a moderate deterioration in financing conditions. If financing costs rise significantly, investors will likely be more selective in the lower end of the rating scale. Industries that are already facing challenges--such as automotive and basic chemicals--would likely be most affected. Conversely, sectors benefiting from AI and data center investments--including high-tech, automation, electrification, and parts of the real estate and construction sectors--could maintain better access to debt, even under less favorable conditions.

A more extreme scenario--driven by the exacerbation of existing tensions or a "black swan" event--is unlikely at this stage but could trigger a market shutdown. The most immediate risk would be a liquidity crunch, disproportionately affecting corporates with weaker credit ratings, imminent refinancing needs, or significant operating losses and cash burn. Investment-grade issuers typically have liquidity buffers and access to bank facilities and private loans. However, access to these funding channels may also be constrained in such a scenario, and a prolonged shutdown would challenge even the most resilient issuers' ability to refinance. Companies in non-essential goods and services sectors--such as leisure, durable goods, and autos--are most exposed to rapid contractions in demand. Business-to-business companies, such as auto suppliers or capital goods manufacturers, would also be indirectly exposed to a decline in end-demand, particularly those with high fixed costs, where a sharp drop in advance payments or a sudden reduction in accounts receivable would add pressure. Some sectors such as telecommunications and utilities have historically proven resilient, but idiosyncratic stresses could arise such as difficulties in reducing large investment programs or direct exposure to the disruptive event.

**The plan crashes corporate bond markets---increased union power in bankruptcy makes restructuring less efficient and more likely to fail.**

Murillo **Campello et al. 18**, Campello Johnson Graduate School of Management Cornell University, Jiaping Qiu DeGroote School of Business McMaster University, Janet Gao Kelley School of Business Indiana University, Yue Zhang Universite Catholique de Louvain, “Bankruptcy and the Cost of Organized Labor: Evidence from Union Elections,” The Review of Financial Studies, Volume 31, Issue 3, March 2018, Pages 980–1013, https://doi.org/10.1093/rfs/hhx117

Despite their declining prominence, labor unions still shape workers’ participation in corporate activity. Over eight million private-sector workers in the U.S. today are represented by unions and of the largest 100 industrial firms, 33 have a unionized work force. Unions are known to use collective bargaining power to protect workers’ interests such as wages, health care, and job security (Freeman (1980) and Lewis (1986)), but less is known about the role they play in bankruptcy. At the time when workers’ investment in firm-specific human capital is most threatened, the U.S. Bankruptcy Code only safeguards wages and benefits for work already performed.1 To protect their members’ long-term interests, unions must become active parties in bankruptcy states (Haggard (1983)).

Unions are able to protect their members’ interests in several ways in bankruptcy and this paper shows that worker unionization bears significant wealth consequences for other stakeholders of the firm. As recognized creditors, for example, unionized workers may be eligible to seats on unsecured creditors’ committees under Chapter 11.2 Those committees are favored by the courts and have broad powers to (1) formulate reorganization plans, (2) request the replacement of managers, (3) block asset sales, and (4) move to convert the case into Chapter 7. Non-unionized workers with separate, small claims are not eligible to seats on creditors’ committees.3

Beyond receiving debtor-like recognition under Chapter 11, unions resort to other tactics to empower workers in bankruptcy. They organize strikes, boycotts, and public denouncements with the goal of forcing managers to acquiesce to their demands, so as to avoid disruptions that invite creditor control (Atanassov and Kim (2009)). When convenient, unions use their leverage in court so that bankruptcy proceedings allow for disruption of absolute priority rules (APR), whereby unsecured creditors’ claims lose seniority (Adler (2010)). Unions can also make bankruptcies last longer, using the courts to force parties into repeated, costly negotiations over workers’ demands. In securing continued employment for their members, unions often favor inefficient reorganizations in lieu of liquidation (Korobin (1996)). This is a key concern since firms that emerge from reorganization often re-enter bankruptcy, as unions resist asset sales and worker layoffs.

We study the impact of worker unionization on corporate creditors by looking at the price reactions of publicly traded bonds to union elections. Bond prices represent a unique value metric with which to gauge the impact of unionization onto financial stakeholders of the firm. Unlike other creditors (e.g., banks and syndicated lenders), it is difficult for investors of diffusely held bonds to renegotiate with borrowers. Bond investors, instead, dispose of their securities in the market in response to innovations to the expected value of their claims. Given the concave structure of bond payoffs (capped at the issue face values in non-bankruptcy states), bond prices are sensitive to expected losses in bankruptcy states. In particular, as their claims are senior, yet unsecured, bondholders’ expected wealth declines sharply in the face of high bankruptcy costs.4 Deviations from an orderly bankruptcy process will increase expected bankruptcy costs and lead to declines in the secondary market price of corporate bonds.

Union elections are conducted through secret ballot voting. Once a union wins over 50% of the workers’ votes, it attains legal recognition. Union rights are protected by the National Labor Relations Act and a successful election significantly increases the bargaining power of workers. Naturally, both the occurrence and the results of union elections are influenced by a number of factors. As such, the average union-win firm might differ from its average union-loss counterpart on several dimensions (both observable and unobservable). To identify our tests, we resort to a regression discontinuity design (RDD) that exploits local variation in the vote share of elections that can lead to discrete shifts in union legal status. In short, our tests contrast bond price reactions to closely won union elections with bond price reactions to closely lost union elections. Workers in close-win elections gain legal representation status while those in close-loss elections do not; yet firm characteristics and workers’ support for unions are ex-ante similar across the two groups. Given the nature of the voting process, it is unlikely for individuals or firms to precisely anticipate or manipulate the outcome of close union elections. Under these regularity conditions (which we verify in the data), relative differences in bond price reactions to close union election results can be plausibly attributed to the effect of unionization.

We conduct our analysis on a sample of 721 bond issuers witnessing worker unionization attempts between 1977 and 2010 using records from the National Labor Relations Bureau (NLRB). In short, our tests show that worker unionization negatively affects the wealth of senior, unsecured creditors. Results from RDD estimations imply that closely won union elections lead to a negative 210 (470)-basis-point average cumulative abnormal return (CAR) over a 3-month (12-month) time window.5 Closely lost elections, in contrast, are associated with economically insignificant CARs.

From a pricing perspective, the decline in bond values that we report could arise from increases in default risk or in bankruptcy costs. We next look for evidence of those effects in our data. DiNardo and Lee (2004) find no relevant impact of worker unionization on firms’ profitability or survival rates, implying negligible changes in firms’ default risk following unionization. Consistent with those authors’ results, we find no evidence that close union winners perform worse, become more likely to enter distress, or are more likely to file for bankruptcy than close union losers for several years after the vote.

We then set out to investigate the effects of unionization on bankruptcy costs. This is a difficult task and our analysis is limited by the fact that we focus on explicit bankruptcy costs. The examination necessitates data from actual bankruptcy events and we first expand our dataset to include information from the UCLA-LoPucki bankruptcy database. In this investigation, we use non-local linear regressions to compare the duration, costs, and outcomes of court proceedings across bankrupt firms with unionized workers and those without. We find that unionized firms experience more prolonged court proceed ings and are also more likely to go through inefficient reorganizations, as evidenced by a higher likelihood of emerging from bankruptcy and refiling for bankruptcy shortly thereafter. Unionized firms are also more likely to reorganize under debtor-in-possession (DIP) financing.6 In addition, firms with labor unions incur significantly higher expenses and fees paid in bankruptcy court. The results we report are consistent with the notion that unionization is associated with higher in-court bankruptcy costs. Admittedly, nonetheless, these tests could allow for a non-causal interpretation.

We thus set out to more granularly identify the welfare costs of labor unions in bankruptcy court by exploiting statutory variation in the number of seats assigned to unions on unsecured creditors’ committees (UCCs). Section 1102(a) of the Bankruptcy Code charges the U.S. Trustee with the duty of organizing a committee composed of the largest unsecured creditors of the bankrupt firm (including both unionized workers and bondholders). Following this guideline, the Trustee shall assign union representatives to seats on UCCs if they represent labor claims whose amount ranks among the largest liabilities of the firm. It is difficult to ascertain and calculate the claims of various corporate creditors, and as a result there is considerable degree of variation regarding the number of UCC seats eventually assigned to unions — seats that come at the expense of other unsecured creditors. We use this source of variation to gauge the marginal effect of unions’ empowerment in bankruptcy court onto bondholders’ wealth in bankruptcy. We collect information on the composition of UCCs of firms filing for bankruptcy between 1988 and 2010 and combine it with Moody’s data on in-court loss given default (LGD) rates. Our tests show that bondholders’ losses monotonically increase with the assignment of seats to unions on unsecured creditors’ committees. Notably, the LGD rates of secured creditors on the same firms are found to be insensitive to the number of UCC seats assigned to unions.

We also exploit firm and union heterogeneity in our RDD framework to help characterize how unionization affects bond values through expected bankruptcy costs. First, we compare subsamples of financially distressed and financially healthy firms, expecting bond price reactions to news of unionization to be particularly pronounced for firms in distress. We consider several measures of financial distress, including Altman’s Z-Score, Ohlson’s O-Score, Merton’s distance to default, as well as Moody’s credit ratings. Consistently across all measures, RDD results show that unionization has a much greater impact on the bonds of distressed firms. We also look at the funding status of firms’ pension plans. Unionized workers’ pensions are entitled to the same (high) priority assigned to their wages in bankruptcy. As such, underfunded plans will aggravate bondholders’ expected bankruptcy costs. We partition our sample based on firms’ pension funding status and find the effect of unionization to be significantly stronger for firms with underfunded plans. Finally, we examine the argument that the value impact of unions is related to their bargaining powers. The adoption of right-to-work (RTW) laws by some state legislatures allows non-union workers to enjoy the benefits of collective bargaining without paying union dues. These laws constrain unions’ financial resources, diminishing their powers (Holmes (1998)). Partitioning our sample according to whether a union election is held in a state with RTW laws, we find that the negative impact of unionization on bond values is much weaker in states with RTW laws in place (where unions are weaker).

There is a growing literature on the interplay between human capital and corporate financing. Papers in this literature often focus on the effect of labor force bargaining power (e.g., union coverage) on firms’ leverage ratios. Studies such as Bronars and Deere (1991) and Matsa (2010) document a positive relation between labor power and leverage (see Dasgupta and Sengupta (1993) and Perotti and Spier (1993) for theoretical models). The underlying theme of this stream of work is that firms increase their leverage as a way to enhance shareholders’ bargaining power over the labor force.7 Other studies propose a different argument: firms may reduce leverage to preserve workers’ human capital. Berk et al. (2010) propose a theory in which firms’ leverage is influenced by the higher wages workers demand in exchange for exposure to job loss in default states. Along this view, Simintzi et al. (2015) show that firms in countries with higher union coverage have lower leverage (see also Ellul and Pagano (2017)).

Our analysis relates to the existing literature in that our results speak to conflicts between labor and suppliers of financial capital to the firm, creditors in particular. As unionization empowers workers by preserving their human capital in default states, “displaced creditors” (unsecured bondholders) observe a change in the value of their claims. Our paper on union voting and bond price dynamics differs from existing studies in important ways, nonetheless. While most previous studies build on contrasts between unionized and non-unionized firms (regardless of a vote occurring or its outcome), our contrasts focus on firms in which workers attempted to unionize. By the nature of its test design, our study may not rule in or rule out existing views on the relation between labor and leverage ratios, as the bankruptcy dynamics that we consider do not apply to the entire schedule of debt contracts in firms’ balance sheets. We can only speak to the pricing of bonds, the claims held by creditors that are displaced by unions under the U.S. Bankruptcy Code.

**Spiking yields set off a corporate debt bomb in 2026---causes systemic crisis, bank failures, and 60+% economic contraction.**

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Corporate Debt Wall and Impact on Margins

Over $2.5 trillion of U.S. corporate debt matures before the end of 2027. Seven hundred billion is due in 2025. More than $1 trillion is due in 2026. Global corporate debt maturities peak at $2.78 trillion in 2026, according to S&P Global.

The coupon shock is similar to Treasuries but more severe for lower-rated issuers. The median coupon for BBB-rated bonds maturing in 2025 was 3.8 percent. Refinancing will require yields of 5 to 6 percent. This is a 120-180 basis point spread increase on the coupon. For a company borrowing $1 billion, this translates to $12-18 million in annual incremental interest cost.

For S&P 500 companies, the result will be slightly tighter margins and probably a valuation reset. It is the smaller, unprofitable companies that are in big trouble, in my opinion.

U.S. high-yield debt trades with credit spreads at 315 basis points. Historically, this is a warning sign of credit stress during slowdowns. The recipe is set: higher refinancing costs, lower revenues, compressed margins, and rising defaults on new loans made at higher rates.

Profit margins already face headwinds. Consumers are squeezed. Delinquencies on auto loans are at 5.1 percent, the highest outside the Financial Crisis and COVID. When consumers default, they spend less. When they spend less, companies sell less. When companies sell less, margins compress even before the debt refinancing cost hits them.

Small companies without a strong private lending relationship face a massive problem refinancing in the next few years, in my opinion, again, unless there is enough QE fast enough. With the run-up in the Russell 2000 recently, it pays to be very careful of company-specific risk. And I say that as a very regular small-cap investor for the past 25 years.

I think IWM is heading towards lower support levels, perhaps all the way to the solid red line in the next year or three.

Can IWM break higher towards $300? Certainly, markets can be irrational for long fits of time. That is why I maintain some catalyst driven stock positions, but would not touch IWM with a ten-foot wallet.

Corporate debt trends are a harbinger of stock market volatility looming if history is a guide.

Tariffs Are Weird

Tariffs have not had the inflationary impact that many supposed. The idea about tariffs raising prices is not theoretically wrong; however, inventory and front-running offset potential price increases. As supply chains move, the inflationary impact would dissipate anyway, most likely.

Think "long and variable time lags." Atlanta Fed President Raphael Bostic said American firms reported that 40 percent of their unit cost growth in 2025 and 2026 comes from tariffs. How does that play out?

Where tariffs could cause a real problem, though, is if supply chains do not build fast enough and we instead see an economic slowdown for any number of reasons already discussed and other potential reasons.

Recessions are deflationary, and we are seeing a large part of the non-AI related economy suffering right now. I do not think we should dismiss the volatility in prices that could be coming, in both directions, sequentially and differently depending on sector, service and product. I think we are likely to have a very mixed bag the next several years.

Beyond tariffs, the Trump Administration has floated a number of policy ideas, edicts, and executive orders that are too many to cover today. But, I would simply say that certain ideas, while sounding good in populist messaging, might not have the intended impacts.

Japan Matters

I think the international macro to watch most is Japan. They are the 4th largest economy in the world, and they are facing fiscal and monetary issues similar to what the U.S. has coming as Boomers retire, but they start from a low resource position and growing competition for their manufacturing. If you think American issues are severe, Japan seems worse to me.

Japan's government budget for fiscal 2026 is expected to exceed 120 trillion yen, surpassing the current record of 115.2 trillion yen from fiscal 2025. Debt-servicing costs are expected to hit a fresh record, surpassing 28.2 trillion yen for the current fiscal year.

Half of the new spending will be funded by new bond issuance. Japan's deficit-to-GDP ratio will worsen to 3.2 percent in 2026 and 3.7 percent in 2027, according to forecasts. They are trying to do that without being the global reserve currency.

The Bank of Japan is reducing its monthly purchases of government bonds. Beginning next quarter, purchases will fall from 3.705 trillion yen to 3.3 trillion yen. This is the central bank scaling back its support of the government bond market, QT, aka, Quantitative Tightening, precisely when the government is issuing more debt. Think about 2022 in the U.S., then add a multiplier.

CGTN reported that Japan's debt-servicing costs for interest payments have risen to 28.2 trillion yen annually, further widening fiscal imbalances and amplifying financial risks. With outstanding government debt exceeding 1,300 trillion yen, every one-percentage-point rise in interest rates raises annual interest payments by more than one trillion yen. Again, they are doing this without being the global reserve currency.

Worsening inflation from yen depreciation. Higher prices are reducing household purchasing power. The government was forced to issue even more debt to support households. Rising rates are crushing household finances with mortgage payments and forcing further rate hikes from the Bank of Japan to stabilize the yen.

It's a potentially devastating cycle that could have a global impact due to all the securities tied to Japan and Japanese-influenced financing.

The parallel to the U.S. is obvious. The U.S. is on a similar trajectory. The only advantage the U.S. has is reserve currency status. That advantage erodes if fiscal discipline is abandoned into the Boomer retirement, which comes with major societal expenses.

Japan teaches us how this ends: trapped in deflation, not inflation, with structurally unsustainable debt ratios.

Interestingly, I do think there is a specific fix for the United States that involves a "lockbox." I'll discuss that another time.

International Investors Will Impact Stocks Too

U.S. stocks have seen a massive surge of investment from international investors since Covid. Money printing, aka QE, has clearly been a catalyst for stock buying. I have posted Apollo Global data about that a few times.

The chart below, I think, looks nice on first glance, but I would suggest looking at the image I put below it.

I would suggest that international investors have a level of sophistication at least similar to U.S. accredited investors. And, we should remember, a lot of that money is institutional.

In an era where budgets and pensions (which a lot of the rest of the world still has) are facing crunches, a sell-off, or at least a flattening of international demand for U.S. assets, I think, is likely.

Again, I point to the midterms. You can rebel against the idea that there are political motivations for international investors to sell, but I think that is naive.

I think that international investors can be thought of as marginal pricing power in the stock market. Remember your lessons on economics. Marginal pricing pressure is the last dollars in or out. What if international demand for U.S. stocks flattens or falls? The answer is obvious in my mind.

Stock Market Scenarios

I'm going to cover my 3 potential scenarios for the stock market this year. And it really applies to the next few years since I think we have entered an overvalued period full of "unknown unknowns."

Valuations are high on the S&P 500 (VOO). By now everyone should know that.

Sure, there's an argument that corporate profits are high and valuations should be higher. But consider this: if debt has a problem, then corporate profits have a problem. There's a massive correlation between debt, corporate profits, and stock prices.

Understand that chart. As public debt increased, it flowed to corporations. Is that really in all of our best interests at those extremes?

That means there is a risk that the S&P 500 (SPY) could fall dramatically or have an extended period of low returns. I'm in both camps, though there are multiple ways things can play out, and nobody can tell you which ahead of time with any precision. The best we can do is be prepared to respond in real time and maintain the risk levels appropriate for our own finances.

In my scenarios to follow, I break each piece—bullish, base, and bearish—into 20% pie slices. The one I plan for is the one that is most likely, which I put at 60%, like a good poker player does. The others I try to be ready for and mitigate my exposure accordingly.

The Bullish Blowoff Top Scenario

If policy works well and liquidity does not fall, then GDP growth above 3% could happen. If it does, then I would expect bullish animal spirits to surge again.

In this scenario, credit conditions ease. Liquidity expands. Defaults remain contained. The S&P 500 rallies to $7,500 to $8,500 by year-end. Valuations expand further. This requires not just economic acceleration but deliberate policy choice to prioritize asset inflation over currency stability.

This scenario works if AI adoption is as transformative as expected and is quick about it. If the productivity gains are real and material. If management teams deploy capital efficiently. It is possible. But it requires execution and a benign policy environment. History shows both are rare.

I put the bullish blowoff top scenario at 20%.

The Base Scenario Bear Market Scenario

Economic growth meanders at 1.5 to 2.0 percent as AI slows and the rest of the economy is flattish.

In this scenario, the Fed delivers one or two 25-basis point rate cuts for a total of 50 basis points in H1 before the change in Federal Reserve Chairman. This is insufficient to materially ease financial conditions given the debt wall. It thwarts the effectiveness of the U.S. Treasury rolling debt in any attempt to meaningfully save interest expenses.

In this case, the Treasury maturity wall pressures long-term yields higher as foreign buyers remain flat to diminished. Corporate hiring slows due to uncertainty around tariffs and geopolitical risk. The stock market corrects 20 to 30 percent, testing the October 2023 lows near 4,500 to 5,500 on the S&P 500.

This is a base case because it fits historical precedent. Late-stage bull markets correct 20 to 30 percent when valuations are extreme and liquidity inflects. The correction flushes momentum speculators and resets valuations closer to historical norms of 18-20x earnings.

As I believe "all roads lead to QE" there is a rebound at some point. Unless the next scenario is playing out, I expect to be a heavy buyer of quality S&P 500 stocks in a "run-of-the-mill" 20-30% bear market.

I assign a 60% probability here.

The Bearish Scenario Financial Crisis

The convergence of Treasury refinancing pressure, CRE defaults, Fed leadership transition, and foreign capital exodus creates a credit event severe enough to break market confidence.

A major regional bank fails, or possibly even one of the large national banks if we see a full-blown crisis. I am on record as saying I do not trust Citibank's (C) underwriting. In this scenario we see REIT defaults as the CRE crisis accelerates.

The Fed cannot mount a credible rescue without announcing massive QE, which signals loss of independence and commitment to the currency. However, the administration, committed to fiscal responsibility, attempts regulatory forbearance rather than decisive intervention. A quasi-form of austerity with deferred debt emerges. Credit markets freeze, and we get a deflationary event.

The S&P 500 collapses 40 to 60 percent, falling to $3,000 to $4,000.

This scenario reflects genuine tail risk if policy errors accumulate faster than the Fed can respond. It happened in 2008. It almost happened in March 2020 before they overreacted. Either can happen again.

I have the odds of this at 20%. That is high for me. Usually, this scenario gets "almost zero chance." I have not seen the potential for this scenario so high since 2007.

**Crash causes global nuclear war.**

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NEW YORK – As we enter the second quarter of the twenty-first century, slow economic growth will remain the world’s most persistent challenge, transcending national borders and affecting developed and developing countries alike.

The economies of the United States, the European Union, and Japan are all projected to grow by less than 3% per year for the foreseeable future – the threshold needed to double per capita income within a generation (25 years). At the same time, large emerging economies like Brazil, Argentina, and South Africa are also expected to experience sluggish growth over the next decade.

While total global GDP has increased to $110 trillion, progress remains unevenly distributed, threatening to erode living standards. Worse, the world economy faces powerful headwinds that could stifle growth, innovation, and investment, triggering political and social instability.

Governments and business leaders must adjust their models and assumptions accordingly. In the face of significant policy shifts, investors will need to rethink their investment and allocation strategies to navigate an era defined by uncertainty and uneven growth.

Looking ahead, eight risks to global GDP growth stand out: geopolitical fissures; divisive domestic politics; technological disruption and the rise of artificial intelligence; demographic trends; rising inequality between and within countries; natural-resource scarcities; government debt and loose fiscal policies; and deglobalization. Taken together, these headwinds will be a persistent impediment to economic growth in the coming years.

No World Order

The first drag on global growth is the escalation in geopolitical tensions – particularly among the US, China, and Russia – compounded by additional threats from Iran and North Korea. As the rift between developed and developing economies widens, developing countries are increasingly joining economic alliances like the BRICS bloc, which expanded from five members at the start of 2024 to nine by the end of the year. In the near term, there is a growing risk that this geopolitical tug-of-war could escalate into an all-out military conflict.

Over the past 50 years, the world economy has gone from being a positive-sum game to a negative-sum game. The positive-sum era, driven by economic and global cooperation, reached its zenith during the Washington Consensus period, which was highlighted by the fall of the Berlin Wall in 1989 and China’s accession to the World Trade Organization in 2001. But following the 2008 financial crisis, the world entered a negative-sum period, marked by declining growth, intensifying competition, and rising international tensions, further heightened by the COVID-19 pandemic, Russia’s invasion of Ukraine, and the Gaza War.

Widening geopolitical fissures have laid bare deep vulnerabilities. China, for example, is one of America’s largest foreign creditors, holding more than $770 billion in US Treasuries. This gives it significant leverage over the US, whose policymakers increasingly regard it as a political and ideological rival. Against this backdrop, the intensifying race between China and the West for technological dominance in AI, quantum computing, and semiconductors has fractured the digital economy, giving rise to a balkanized “splinternet.”

As decades of multilateral cooperation give way to economic fragmentation, new cross-country alliances have weakened the US-led international order and the Bretton Woods institutions, such as the World Bank and the International Monetary Fund. The expanded BRICS bloc – led by Brazil, Russia, India, China, and South Africa – is the most significant of these alliances, representing more than 40% of the world’s population and 36% of global GDP.

Meanwhile, so-called “swing states” like Turkey, Saudi Arabia, and other Gulf Cooperation Council countries are reshaping global trade routes, reconfiguring supply chains, and redirecting investment flows, altering the distribution and pricing of key commodities such as foodstuffs and critical minerals.

Beyond stifling global GDP growth, these geopolitical rifts are hindering collective efforts to tackle climate risks, as developed and developing economies remain deeply divided over the urgency, scope, and aggressiveness of the regulatory and policy reforms required to combat climate change and advance the clean-energy transition.

Populism and Domestic Politics

Many advanced economies are also grappling with deepening political polarization at home. US President-elect Donald Trump’s return to the White House – much like Brexit and Trump’s first election victory in 2016 – heralds a period of widespread uncertainty and major political transformations.

Amid these populist gales, developed economies’ budgets are increasingly strained by expanded welfare programs. In 2022, for example, the EU spent €3.1 trillion ($3.3 trillion) – 19.5% of its GDP and nearly 40% of its total expenditures – on social protection.

As demands on government budgets grow, worsening fiscal positions will make it increasingly difficult for many countries to provide essential public goods like health care, education, and infrastructure. The resulting fiscal pressures will likely deepen polarization and lead to more policy volatility.

**Refinancing key to chemical sustainability---extinction!**

Fabiola **Schneider 24**, University College Dublin (UCD), Dublin, Ireland; Platform on Sustainable Finance, Brussels, Belgium, "A catalyst for change? How sustainable finance can support the transition of the chemical industry," Journal of Business Chemistry, February 2024, https://www.businesschemistry.org/article/a-catalyst-for-change-how-sustainable-finance-can-support-the-transition-of-the-chemical-industry-2/

Introduction

Chemistry is the study of matter – it is the study of everything. The periodic table contains the ingredients for making just about anything. This is also reflected in our economy: More than 95% of manufactured products rely on chemicals (European Commission, 2017). The European Union recognises the sector as an enabling industry which may play a “pivotal role” (European Commission, 2023a).

Yet at the same time, the chemical sector is the single biggest industrial energy consumer (IEA, 2023). The emissions stemming from the sector’s use of heat, steam, and power for compression and cooling account for roughly half of its total fossil fuel related emissions. The other half is linked to using fossil fuels as input to chemical reactions, for products such as plastic or fertilizer. Overall, the chemical sector takes third place in the ranking of industry subsectors when it comes to direct carbon dioxide emissions.

Given the urgent need to reach net zero and commitments such as the 2015 Paris Agreement and the EU Green Deal, the pressure for the chemical industry to decarbonise is mounting. In business terms, this means that so called transition risk, one form of climate risk, is building up. To demonstrate its materiality, looking at cost originating from the European Union Emission Trading System (EU ETS) is telling: Forecasts see costs quadrupling by 2030 (ICIS, 2021). Here, very obviously, reducing emissions is not only doing good for the planet, but also has direct financial benefits. Still, some chemical companies choose to further deepen their ties with fossil fuels by buying petrochemicals business from energy majors who are selling the assets as part of their transition efforts (Bousso, 2020; BBC, 2017) and continue to invest in them (Reuters, 2022; Ineos, 2018).The International Energy Agency’s (IEA) Fatih Birol has called the petrochemicals business a “key blind spot” while examining their future (IEA, 2018). The IEA sees the sector not on track, stating that carbon dioxide intensity has been stable over recent years for primary chemicals, yet the et Zero Emission by 2050 Scenario requires an 18% absolute emission reduction compared to 2022 by 2030, despite increasing production (IEA, 2023). This means decoupling emissions from production is urgently needed.

Sustainability and the chemical sector

“Chemistry is, well technically, chemistry is the study of matter. But I prefer to see it as the study of change” (IMDB, 2008)

And indeed, the chemical industry could be a key driver for transforming the real economy. In the TV show “Breaking Bad” Walter White goes one step further than portraying chemistry as the study of everything, by adding a forward-looking perspective to it. Given that chemical products are the basis for nearly all manufactured products, they need to be accounted for under so-called Scope 3 emissions for the respective manufacturers. The Greenhouse Gas Protocol, the most common emission classification system for corporate emission reporting, distinguish three scopes: Direct emissions (Scope 1), indirect emissions from purchased energy (Scope 2) and lastly emissions outside of a companies own boundaries, related to its value chain (Scope 3).

Up until today, most efforts and pledges revolve around Scope 1 and 2, often dubbed core emissions. Yet there is increasing attention shifting towards Scope 3[1] – not the least because they make up the majority share of all emissions and in fact the vast majority for most sectors (Hoepner & Schneider, 2022a). Indeed, Deloitte specifically lists sustainability as their number 1 trend and specifically mentions the carbon footprint of supply chains as their top 3 for the chemical sector (Deloitte, 2022). The chemical industry is in a unique position to drive major supply chain decarbonisation and thereby support Scope 3 emission reductions globally. Moreover, the transition involves a range of opportunities for chemistry, including batteries but also ammonia for shipping.

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Thus, it is little surprising that firms in the sector signal their sustainability ambitions via bold claims in their corporate reporting and public statements. Table 1 gives an overview of different sustainability statements made by senior executives of firms from the sector. It becomes obvious, that statements vary in their level of ambition but also scope and time perspective. It is important to recognise differences in forward-looking (plans and pledges) and backward-looking (actually achieved performance, that can be evidenced) claims. Some firms may choose to highlight their standing relative to their peers, others make absolute claims. The distinction between relative emission targets, in the form of intensities (ie emission reduction per revenue or unit of output) and absolute ones is likewise crucial.

Yet any claim needs to translate into tangible actions, otherwise firms run risk of engaging in greenwashing. The table above is part of the GreenWatch[2] database, which compares corporate claims across sectors with actual emission performance. For alignment with the Paris Agreement and the 1.5°C target absolute emissions must be reduced 7% year on year. Anyone making bold sustainability claims should at least meet this basic metric. At GreenWatch, Artificial Intelligence (AI) is used to classify sustainability claims in terms of their boldness and then compared to absolute core emission reductions. A differentiation between no claim, a moderate claim and a bold claim and between an emission reduction in line with the Paris Agreement, a weak emission reduction and an emission increase is made. Importantly, carbon offsets are not factored in[3]. Should a company make a strong sustainability claim while in fact increasing their absolute emissions, a high likelihood of greenwashing is assigned.

Today many forms of greenwashing have developed. Given the obvious commercial incentive to be perceived as green, sophisticated strategies to mislead customers and investors have evolved. PlanetTracker portrays greenwashing as a beast with many heads in their Hydra report. The analysis outlines six distinct types of greenwashing (PlanetTracker, 2023, p.3-8):

“Greencrowding is built on the belief that you can hide in a crowd to avoid discovery; it relies on safety in numbers. If sustainability policies are being developed, it is likely that the group will move at the speed of the slowest.

Greenlighting occurs when company communications (including advertisements) spotlight a particularly green feature of its operations or products, however small, in order to draw attention away from environmentally damaging activities being conducted elsewhere.

Greenshifting is when companies imply that the consumer is at fault and shift the blame on to them.

Greenlabelling is a practice where marketers call something green or sustainable, but a closer examination reveals that their words are misleading.

Greenrinsing refers to when a company regularly changes its ESG targets before they are achieved.

Greenhushing refers to the act of corporate management teams under-reporting or hiding their sustainability credentials in order to evade investor scrutiny.”

A lot of the greenwashing that is happening in the market is not explicitly illegal and hard to proof. But climate litigation is growing in momentum and posing a real risk to climate offenders. And these lawsuits have very material financial risk for the respective companies: Sato et al. (2023) find that climate litigation filings or unfavourable court decisions on average lead to reduction in firm value by -0.41%. These lawsuits can also result in transparency and climate action obligations (Weller and Tran, 2022).

While climate litigation for the moment focuses on energy firms and the carbon majors, the chemical industry is also subject to substantial pressure due to environmental concerns. Pollution prevention is an additional key environmental objective as recognised by the European Commission (European Commission, 2023b). Around 40 laws regulate chemicals in the EU, which reflects ongoing concern among EU Citizens: 90% of Europeans worry about the impact of chemicals in everyday products on the environment and 84% about its impact on their health (European Commission, 2023c).

One class of chemicals has recently received considerable amounts of attention[4]: Per- and polyfluoroalkyl substances (PFAS), commonly referred to as “Forever Chemicals” which are used when manufacturing fluoropolymer coatings and products that resist heat, oil, stains, grease, or water. The EU is taking actions to phase out their use where it is not essential (European Commission, 2023d). American multinational 3M announced the end of their PFAs production for 2025, which will incur initial cost of up to $1 billion and more later on. Yet longer-term legal liabilities are estimated to be over $30 billion This compares to the roughly $1.3 billion in annual sales generated from PFAs at 3M (Kary & Beene, 2022). Needless to say, PFAS litigation is not limited to 3M. DuPont and Chemours settled to pay $670 million in a lawsuit filed by thousands of people in Ohio (Maher & McWhirter, 2017) and $1.18 billion following complaints from drinking water providers (Flesher, 2023). In total, DuPont has been named in over 6000 PFAS related lawsuits (ChemSec, 2022). Other cases involve Tyco Fire Products LP and Chemguard Inc (SEC, 2020).

Following the idea of a carbon footprint, NGO ChemSec published chemical footprint for the 54 biggest chemical firms. In 2022, only four of them published a strategy to phase out hazardous chemicals from their product portfolios (ChemSec, 2022).

This risk is not going unnoticed by investors. In November 2022, 47 asset managers with a combined $8 trillion assets under management issued a call to phase-out PFAS. Besides the financial and litigation risk, the call cites the danger it poses to future generations (ChemSec, 2022).

Given that the most recent update on planetary boundaries established that the safe boundary for chemical pollution, “novel entities”, has been crossed (Richardson, et al., 2023), the pressure can only be expected to increase going forward.

Defining a path to sustainability

While there are many challenges to be overcome, most solutions don’t require major breakthroughs. For example, it is already feasible to produce plastic bottles with emissions-free chemicals at a price increase of those bottles by 1% (Energy Transition Commission, 2020). Overall, Deloitte postulates that 15 technologies can abate 90% of industry emissions (Deloitte, 2022).

Still, developing solutions at the scale and speed we need require significant investments. While there is growing investor appetite, it creates the need to be able to distinguish credible transition plans from greenwashing to avoid capital misallocation.

The first step is defining what green or sustainable really means. That is exactly what the EU Taxonomy for Sustainable Activities sets out to do (European Commission, 2020). The EU Taxonomy focuses on environmental sustainability, covering six objectives: Climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, and protection and restoration of biodiversity and ecosystems. By design, all environmental objectives are equally important. The EU Green Taxonomy is designed to act as a market transparency tool and transition enabler. It is rooted in EU law as part of the EU sustainable finance framework; the Taxonomy Regulation went into force in July 2020.

Technically, the EU Taxonomy allows to assess the sustainability of economic activities, which means that entities can be assessed as a sum of their often numerous activities. It is important to note, that Taxonomy reporting will be mandatory for a large number of firms, but that does not mean that companies must comply with the criteria nor that investors must invest in a specific manner. Taxonomy reporting is carried out in terms of revenue, operating expenses (opex,) and capital expenditure (capex). If an economic activity meets all the criteria set out in the regulation, it is considered “aligned”. A company may for example report that it generates X% of its revenue from taxonomy-aligned activities or that it spends Y% of its capex on taxonomy-aligned activities.

The first step to alignment is checking whether an activity is included in the Taxonomy regulation, termed “eligibility”. If an activity is not (yet) included in the EU Taxonomy, there are no criteria to compare against and an activity cannot be aligned. Activities not covered remain out of scope for now. Once eligibility is established for an activity, three levels must be passed in order to achieve alignment. First, substantial contribution to at least one of the six environmental criteria must be proven by complying with activity specific criteria. Next, “Do No Significant Harm” (DNSH) criteria must be passed for all the other environmental objectives of the EU Taxonomy. This is to ensure that while the activity may support progress in one area it does not jeopardize achieving the other. Lastly, even though the EU Taxonomy focuses on the environment, minimum social safeguards must be met. In total, the process therefore encompasses four stages that an activity must pass to demonstrate EU Taxonomy alignment: Eligibility, substantial contribution to at least one objective, no significant harm to the other objectives and meeting minimum social safeguards. It is noteworthy that “not aligned” does not mean harmful, it simply equals not meeting the criteria to be considered substantially contributing to environmental objectives.

The European Commission offers the EU Taxonomy Compass tool for easy access and navigation of criteria. For the chemical sector, a range of activities is eligible. Figure 1 shows the substantial contribution criteria for climate change mitigation from the EU Navigator for the manufacture of organic basic chemicals. Other examples include the manufacture of plastics in primary form, the manufacture of soda ash, chlorine, aluminium, or ammonia.

In advance of the pollution prevention delegated act for the EU Taxonomy being published in 2023, the Investor Initiative on Hazardous Chemicals (IIHC), representing some of the biggest institutional investors, published an open letter addressed to the European Commission calling for robust chemical criteria (IIHC, 2023). Lobbying to weaken policy is found across sectors. For example, in the UK, lobbying efforts have been noted on fracking and exempting the chemicals sector from climate taxes (ClientEarth, 2023). InfluenceMap compiles a lobbying scorecard by analysing engagement from corporations and industry associations on climate policy. Of the 25 assessed corporations none got the highest score A, only one firm was scored B (InfluenceMap, 2023). Naturally, the EU is not alone in creating a classification system for sustainability in this regard. Indeed, in 2022 around 20 countries were at different stages of developing their version of a taxonomy. These vary widely in scope, design, and level of ambition. A noteworthy exception among the 20 countries is the US. Other large players such as China, Russia, Brazil, Canada, and Australia as well as smaller players such as the Dominican Republic or Mongolia have been more proactive.

Facilitate transition: Sustainable Finance

Corporate net zero pledges for 2050 are becoming popular; globally around 70 chemical firms have set targets (Deloitte, 2022). The UN Race to Zero Data Explorer offers a concise platform to explore the net zero targets of 500 firms globally. The tool allows to view the year when a firm aims to reach net zero and distinguishes between absolute emissions and emission intensities. A net zero emission intensity target takes the form of a “per unit” pledge, for example revenue or product. This approach may lead to a firm’s absolute emissions increasing despite intensities decreasing if the company grows. From a climate science perspective, we need absolute net zero in order to halt global warming.

Besides the pledge, the tool also contains information on whether the firms that pledge do have a transition plan on how to achieve their goals. Additionally, it gives an indication of progress on proceeding with the plan by showing emission reduction trends for Scope 1 and Scope 2 emission, and how many Scope 3 emission subcategories are disclosed. Alignment numbers for revenue, capex and opex are available as well.

While transition plans are needed to understand how a company envisions to be part of the future net zero economy, forward looking plans are no guarantee. Greenrinsing (PlanetTracker, 2023), where a firm silently drops a target which it previously published, is unfortunately emerging as a greenwashing practice. Only relying at backwards- looking measures such as past emission reductions likewise is not optimal for gauging future performance.

A big concern for both, companies with robust transition plans is therefore how to credibly communicate these. On the flipside of the coin, investors looking to invest in firms that will be profitable in a net zero economy need a way to ensure investee firms indeed transition.

This is where sustainable finance can offer remedy. Different innovative financial instruments have evolved in the green and sustainable finance space. The general idea is instead of just publishing words and plans, to “put your money where your mouth is” and link financing to sustainability.

A more established instrument are green bonds, which are supposed to directly finance green activities. Academic research finds that these are considered a credible instrument to communicate commitment to the environment (Flammer, 2021). Flammer (2021) finds benefits both on the environmental side – lower emissions and higher environmental ratings – as well as on the financial side, in the form of a diversification of the investor base and more long-term ownership.

One particularly suitable instrument for transitioning is sustainability-linked debt. First it is noteworthy that the debt market has a key role to play in supporting the transition as primary market transactions occur periodically, according to refinancing cycles. This is not the case for equity, where the majority of transactions occur between investors on the secondary market. In this case, the corporate cash flow is not directly affected (Hoepner & Schneider, 2022b).

Sustainability-linked bonds (SLBs) are one type of sustainability-linked debt, which the International Finance Corporate (IFC, World Bank Group) recently called “one of the fastest-growing corners of finance” (IFC, 2023). Their unique feature is that future sustainability targets are directly linked to cost of capital through coupon step up (or down) payments. Effectively that means that a borrower commits to certain sustainability targets in the future and incurs a financial penalty when missing them. For the investor on the other hand, it means that in case the issuer does not follow through on their promise they get financially compensated. Table 2 shows an example of a sustainability-linked bond from the chemical industry.

SLBs are general purpose financial instruments and differ conceptually from green bonds, which are use-of-proceeds type of instruments. The difference in design allows sustainability-linked bonds to be applied more generally and to finance the transition of not yet green activities (forward looking Key Performance Indicators for sustainability performance). On the other hand, the proceeds of a green bond must be allocated to activities which are already green (backwards looking). This likewise means that while a SLB can be used for refinancing of any maturing security, a green bond can only refinance green activities. Overall, the hypothetical amount of issuance for SLBs is unlimited – any bond issued could be sustainability-linked – while the amount feasible to be issued as green bonds is limited to the volume of existing green activities. Other important differences include how the greenness is priced: While the Greenium for green bonds is determined in the market, SLBs have step up (or down) or penalty payments as legally enforceable covenants. Covenants are by no means a new concept in finance, predating their use in SLBs, and therefore easily applicable.

Still, in the nascent markets greenwashing concerns are not negligible. Unambitious or irrelevant targets may delay real progress. For climate change, especially in energy related sectors, all three emission scopes should be addressed. Absolute emission reductions should be prioritized over emission intensity improvements. In Signalling Theory (Spence, 1973), a signal must be costly to be credible.

Thus, imposing substantial penalties for missing targets are key. Here the devil may be in the detail: Do payments occur throughout the duration of the bond and accumulate when targets continue to be unmet or is there only a once off payment close to maturity? Ul Haq and Doumbia (2023) point out structural challenges while Erlandsson et al. (2022) offer a risk-neutral present value scenario approach for the pricing of step-down structures.

There are some support resources available to foster SLB uptake and ensure their integrity, though so far these are voluntary. For example, the International Capital Market Association (ICMA) has published Sustainability-Linked Bond Principles including an illustrative KPIs registry (ICMA, 2023). It is notable that the language around penalties for missing targets is soft and indicates optionality, despite being recognised as a key feature:

“The cornerstone of an SLB is that the bond’s financial and/or structural characteristics can vary depending on whether the selected KPI(s) reach (or not) the predefined [Sustainability Performance Target(s)], i.e. the SLB will need to include a financial and/or structural impact involving trigger event(s).“ The Climate Bonds Initiative (CBI) also issues guidance for sustainability-linked bonds as transition finance instruments (CBI, 2022a). These specifically stress the importance of strong structures around call dates and KPI observation dates.

Increased scrutiny can be observed as the sustainable debt market is maturing. This is for example evident in increasing amount of green bonds being rejected by CBI because of quality concerns (CBI, 2022b): 1 in 4 US Dollars did not meet their standards. The majority of the excluded bonds originated from China.

Yet the bond market is not the only place where sustainability metrics get linked to cost of capital. Sustainability- linked loans (SLLs) are similarly becoming popular. In 2019, specialty chemical firm Kemira agreed on three sustainability KPIs for its five year 400 mio EUR revolving credit: emission efficiency, generating half its revenue from products enhancing customers’ resource-efficiency and maintaining the highest rating from external rater EcoVadis (Kemira, 2019). Other examples of industrial firms taking SLLs include DSM, Indorama Ventures, Solvay, and Stora Enso.

The flexible design of linking capital cost to sustainability indicators naturally allows to factor in different facets of sustainability, beyond climate change mitigation. For the chemical industry, indicators revolving around recycling and pollution prevention seem sensible – a conceivable KPI could be the phase out of PFAS. The example of Lanxess’ 1 bn EUR revolving credit facility demonstrates that also social goals are feasible: Interest rates are not only linked to the successful reduction of its CO2e emissions (Scope 1) but also raising the share of women on the top three management levels (Lanxess, 2021). This case also highlights that multiple targets can easily be featured in the same sustainable debt instrument.

Even if a company does not participate in the sustainable finance market, the traditional corporate financing of a firm will also be affected by sustainability. “ESG” – the acronym for environmental, social, and governance factors – is considered by rating agencies when assessing credit worthiness (see for example Moody’s scorecard (Moody’s, 2022).

Conclusion

Overall, the chemical industry could play a key enabler role in the sustainable transition of our economy. While there are many challenges to be resolved, the chemistry underlying supply chains especially in the manufacturing industries could be the engine of innovation.

Greenwashing poses a real threat and must be managed as a risk. The underlying targets for sustainability-linked debt must be ambitious and relevant, and penalties for missing targets substantial. While the sector in the past had been “a blind spot” (Hawker, 2021) for investors, the increased interest will also bring more scrutiny. Additionally, changing regulation is adding to pressure in transition risk.

To unlock the power of the sector, significant investment is needed. Innovative sustainable finance instruments when applied appropriately could hereby be a catalyst for change. Sustainability-linked debt has successful been obtained by firms in the sector. It could be a key tool to both raise funds for the transition and credibly communicate transition plans to capital providers.

**1NC – CP**

Codetermination CP

**The United States federal government should**

* **enact a tax on financial transactions;**
* **establish mandatory codetermination for large firms, specifically encompassing wages, hours, working conditions, and other terms and conditions of employment.**
* **ban collective bargaining rights for workers in the United States.**

#### modernize its regulatory framework by streamlining interagency processes, establishing clear timelines and accountability, and empowering agencies to expedite approval of biotechnology and infrastructure projects. -establish an independent digital oversight agency empowered to enforce duty-of-care and duty-to-deal principles, apply risk-based regulation, and develop enforceable behavioral standards through a government-supervised standards-setting process. -      outlaw and refuse to engage in bulk collection of Americans’ private records with no connection to criminal or national security threats, publicly report summaries of foreign intelligence surveillance court rulings.

#### Allow employers to waive employment law regulations including antidiscrimination, privacy protection, minimum wages, restrictions on hours.

**Codetermination replicates all the benefits of unions without the political and economic costs.**

Anthony **Carini 24**, J.D. Candidate (2025) at Southwestern Law School, Staff Editor of the Southwestern Journal of International Law, 2023-2024, "Codetermination as a Remedy for American Labor Woes, or How I Learned to Stop Worrying and Love the Bomb," Southwestern Journal of International Law, vol. 31, 2024, p. 256, Lexis

For decades, Germany has utilized codetermination in its corporate governance structure to give workers a voice in ways American workers largely don't have.1 By placing employees on corporate boards, many of the current ills plaguing workers, such as inequality and dissatisfaction, can be remedied.2 Adopting Germany's codetermination scheme presents an excellent opportunity for the U.S. to restore worker power without significantly disrupting corporate culture, law, or politics.

It is no secret that economic inequality in the United States has dramatically increased in the past few decades.3 A report from the Economic Policy Institute in 2015 showed that from 1979 to 2013, middle and low-wage [\*258] workers saw a 6% increase and a 5% decrease in wages, respectively.4 Meanwhile, earners in the ninety-fifth percentile saw a 41% increase during that same time period.5 Since its peak in 1970, the inflation-adjusted minimum wage has decreased by about 40%.6 Additionally, from 1979 to 2024, worker productivity growth outpaced hourly pay growth by fifty-one percent.7 According to a Pew Research Center 2013 survey, less than half of American workers feel "very satisfied" with their pay, opportunities for training and promotion, and benefits.8 The brunt of the dissatisfaction in these categories is, unfortunately yet predictably, borne by lower and middle income workers.9

At the same time, since 1983, union membership has been cut in half and is now among the lowest out of the Organization for Economic Cooperation and Development (OECD) countries.10 This downward trend is partly attributable to the natural effects of a globalized, technologically advanced service economy.11 But it can also be traced to specific policies and court decisions, such as Linden Lumber Div., Summer & Co. v. N.L.R.B., the Taft-Hartley Act, "Right to Work" laws, and broad shifts in attitude surrounding corporations' responsibility to shareholders.12 The decreased [\*259] worker bargaining power that follows from weak union membership strongly correlates with and likely has aided, these bleak labor statistics.13

On the flip side, a recent report from the U.S. Department of the Treasury highlighted the many benefits of unionization.14 For example, union workers on average earn about 20% higher wages than non-union workers, which is referred to as "the union wage premium."15 Union workers are also much more likely to be offered medical benefits, retirement, life insurance, and numerous other fringe benefits and amenities from their employer than non-union workers.16

Unfortunately, however, it is unlikely that union membership will ever recover to its mid-century level due to various structural and cultural barriers that have been erected since the Taft-Hartley Act. This means that the U.S. needs to consider other options available to empower workers in the way unions could when they had significant influence over labor relations.

To achieve labor empowerment and reverse the harmful effects that weakened unions have had on American workers, the U.S. needs to implement a federal codetermination scheme similar to that of Germany. Codetermination is the best option for the U.S. because it can restore workers' voices in a way that complements the modern American legal and political climate, it can produce benefits for workers much like unions can, and it brings the U.S. closer to actually upholding freedom of contract and association.

II. A BACKGROUND ON CODETERMINATION AS APPLIED IN GERMANY

Beginning in 1976 with the Codetermination Act, Germany embedded in its legal system a requirement for equal participation in the company decision-making process between shareholders and employees.17 In 1979, [\*260] the German Federal Constitutional Court held that a challenge by numerous companies to the Codetermination Act was unfounded, and stated that, "[The Codetermination Act] also has the task of mitigating the external control associated with the subordination of employees to external management and organizational power in larger companies through institutional participation in business decisions . . . and of supplementing the economic legitimacy of company management with a social one."18

One of the main ideas behind codetermination is pursuing equality between capital and labor through a democratic decision-making process that rewards employee loyalty with participation rights.19 Although many other European countries have adopted some form of codetermination, Germany has the most well-known and enduring form of it.20 This, along with similarities in their corporate law structure, makes codetermination a great fit to use as a model for the U.S.

First, German codetermination is split into two levels one at the "company" level and one at the "workplace" level.21 German labor law defines a "workplace" as "an employer's facility in which several employees normally work together," while a "company" is comprised of all the workplaces for example where an automotive manufacturer is a "company", its factories are the "workplaces."22

At the company level, the Codetermination Act creates a supervisory board composed of employee representatives and shareholders in companies with more than 2,000 employees.23 The amount of representation on the supervisory board depends on the size of the company but is always divided [\*261] equally between employees and shareholders.24 However, the supervisory board is chaired by a shareholder whose vote is decisive when there is a deadlock.25

This differs from the unique supervisory board scheme for companies in the mining, coal, iron, and steel industries set out by the Coal, Iron, and Steel Codetermination Act.26 Here, the supervisory board applies to all companies with more than 1,000 employees and has a neutral member elected by agreement from both sides to offset the shareholder chairman.27 Companies covered under this act are subject to the unions' right to propose members for supervisory board seats, but union members are not required to hold seats, as they still need to be elected.28 This is in contrast to companies covered under the Codetermination Act, where union member participation on the supervisory board is compulsory.29

For companies with 500 to 2,000 employees though, the One-Third Participation Act applies, which explicitly states that unions do not have a right to propose members for board seats.30 Additionally, as the name suggests, employee representatives are outnumbered by shareholders as they only represent one-third of the board.31

[\*262] The Codetermination Act states that employee representatives in companies with more than 8,000 employees are elected by delegates unless the employees agree to a direct election.32 The act states, in each of the company's operations, "employees shall elect delegates by secret ballot and in accordance with the principles of proportional representation."33 There is "one delegate for every ninety employees entitled to vote" (over the age of eighteen).34 If that calculation results in more than:

1.25 delegates, the number of delegates to be elected is reduced to half; these delegates each receive two votes.

2.0 delegates, the number of delegates to be elected is reduced to a third; these delegates each receive three votes.

3.75 delegates, the number of delegates to be elected is reduced to a quarter; these delegates each receive four votes.

4.100 delegates, the number of delegates to be elected is reduced to a fifth; these delegates each receive five votes.

5.125 delegates, the number of delegates to be elected is reduced to one sixth; these delegates each receive six votes.

6.150 delegates, the number of delegates to be elected is reduced to one seventh; these delegates each receive seven votes.35

Companies with less than 8,000 employees directly elect their representatives, unless the employees decide on an election by delegates.36 The alternative election decision is made after one-twentieth of the employees sign an application to bring it to a vote.37 Then, it takes a majority to flip the election process.38

Typically under German codetermination laws the supervisory board is tasked with overseeing and appointing members of the executive board.39 Since Germany employs a two-tiered system with a separate executive board composed of the CEO and other executives the supervisory board appoints, the employee power here is mainly derived from being able to oversee and disapprove of decisions the executives make.40 Unless the company is covered by the Coal, Iron, and Steel Codetermination Act, the employee [\*263] representatives generally serve three main functions with their minority position on the board: sharing information and worker perspectives with the executives, influencing decisions about working conditions, and using their company level information to support workplace level efforts.41

Aimed to compliment the supervisory board, the workplace level "works councils" were established by the Works Constitution Act of 1952, amended in 1972.42 These are voluntary councils of employees, elected by employees, that exert more direct influence on employers over matters of interest to the average worker in contrast to the broad decision-making influence of the supervisory board.43 The works council can draft "works agreements" that act as enforceable agreements with the employer concerning "wage supplements, working time, professional development, or company pension schemes."44 Additionally, employers cannot create new rules regarding a specific set of worker issues without consulting the works council.45 These include health and safety measures, hours, leave plans, pay systems, and procedures to monitor employee conduct and performance.46 Further, works councils' increase in size commensurate with workplace size, much like supervisory boards do at the company level.47

III. BACKGROUND ON LABOR UNIONS IN THE U.S.

Unions have a complicated history in the United States. After steadily growing throughout most of American history and peaking in the 1940's,48 their membership and influence began to steadily decline in the 1960's.49 Beginning with the Taft-Hartley Act in 1947, employers were able to undermine unions' efforts to inform and recruit workers.50 A string of [\*264] subsequent Supreme Court decisions then bolstered employers' ability to delay and disrupt union organizing efforts.51 These, coupled with employers finding creative ways to circumvent the protections of the NLRA,52 created a union-hostile environment in the United States that persists to this day.

From as far back as the early colonial days of the seventeenth and eighteenth century, organizations resembling modern unions influenced American law and politics.53 By the turn of the nineteenth century, numerous strikes and negotiations to improve working conditions by printers, cabinet makers, carpenters, and more were organized by unions.54 As industrialization ramped up around the time of the Civil War, workers began to notice the immense power and wealth their employers were accumulating and recognized the need to join their organizing efforts.55 The National Trades' Union and the National Labor Union were the first short-lived attempts at this but were both casualties of recessions.56 In 1881, delegates from a variety of trades came together in Pittsburgh to form the Federation of Organized Trades and Labor Unions, which adopted a formal constitution and focused significant energy on legislation.57 A few years later, this group evolved into the American Federation of Labor and expanded its membership to include women.58

The next few decades were plagued with intense struggles between titans of industry and the loosely organized, but still relatively weakened unions.59 By 1904, the American Federation of Labor had a membership of 1.7 million workers and was eventually able to urge Congress to create the U.S. Department of Labor tasked with protecting the rights of wage earners.60 In 1914, the Clayton Act was adopted; it enumerated that "the labor of a human being is not a commodity or article of commerce," and reinforced the [\*265] right to strike and boycott while limiting the use of injunctions in labor disputes.61

Against a backdrop of a floundering economy during the Great Depression, President Roosevelt urged Congress to pass the National Recovery Act (NRA), which cemented the rights of unions to negotiate with employers in statute for the first time.62 Although it had no real enforcement power and was eventually held unconstitutional by the Supreme Court, in 1935, the Wagner Act (NLRA) was passed which mandated workers to have freedom of association to organize into unions.63 It also established that companies were obligated to enter into bargaining agreements with government-certified unions.64 In contrast to the NRA, it actually had an enforcement mechanism in the National Labor Relations Board (NLRB).

Despite all this, beginning in the 1960s union membership in the U.S. steadily decreased as workers faced more difficulty getting past each successive step in the process of forming one.65 To form a union workers must procure 30% interest and ask for a government election, win the government election by a majority vote, and negotiate their first contract with their employer.66 This added difficulty can be traced to a few major policy and legal decisions.

Initially, The NLRB required employers to remain neutral on the issue of unions, but the 1947 Taft-Hartley Act allowed employers to freely express their views on unions so long as there was no offer of benefit or threat of reprisal involved.67 Additionally, there was a provision that allowed "employers to file petitions to determine whether their employees actually wanted union representation," a process that was previously only available when multiple unions were competing.68 Subsequently, the NLRB under President Nixon began allowing employers to tell workers that forming a union could be "fatal" or cause "turmoil" because they would risk losing everything they had by starting from the beginning with bargaining.69 They [\*266] could also predict they would have to close down due to finances if workers unionized.70

In Linden Lumber, the Supreme Court ruled that employers could refuse to recognize unions based on majority support and insist on an NLRB election so that they could engage in anti-union campaigns during the delays NLRB involvement would create.71 Further, a 1956 Supreme Court decision in NLRB v. Babcock & Wilcox, held that employers didn't have to give union organizers access to parking lots to talk with employees unless they had no other means of reaching employees.72 This exacerbated the already unequal balance in the ability to communicate with employees between the employer and unions.

Attacks on labor laws intensified when, in the 1970s, employers learned through experience that labor violations never carried any significant penalty.73 Workers do not have a right to sue employers under the NLRA, and the NLRB does not award any monetary damages.74 So even though charges for unfair labor practices increased sevenfold between 1950 and 1980, employers had little incentive to stop engaging in threats, mandatory anti-union meetings, and illegal firings.75

Lastly, Taft-Hartley also allowed states to ban "union security" agreements which ensured all represented employees would share union costs through dues.76 This led to states implementing Right to Work laws that allowed employees to reap the benefits of union representation without sharing in the cost.77 This free-rider problem where employees who do not pay union membership dues still reap union membership benefits severely [\*267] undermined union membership and the impacts of these laws can still be felt today.78

In sum, the methodical erosion of labor laws in the era following the Taft-Hartley Act has left the U.S. in a position where rebuilding the legal framework surrounding unions would take a herculean effort. This has left a major hole in American labor relations, as workers cannot rely on a strong union system to advocate on their behalf, and their employers have nearly free reign to set whatever standards they please.

IV. CODETERMINATION RESTORES WORKER'S VOICES IN A WAY THAT COMPLIMENTS AMERICAN LAW AND POLITICS

German codetermination has the potential to fill the void left by weakened unions because it doesn't require strong union participation, it can be adapted to fit the U.S. statutory labor law scheme, and German corporations have key similarities to American ones. Notably, an additional key detail is that the U.S. adheres to a "shareholder primacy" scheme of corporate governance which has the sole purpose of maximizing shareholder benefit.79 This philosophy goes back to the Berle-Dodd Debate in the 1930s where Berle espoused the idea that corporate law should function like trust law, in that corporate managers owed a fiduciary duty to manage the corporation in the interest of shareholder-beneficiaries.80 Dodd, on the other hand, argued that corporate managers "should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders."81 In Dodd's view, corporations have "a social service as well as a profit-making function."82 As we now know, Berle's argument won the [\*268] day, because shareholders are deemed as the owners of the corporation with their interest defined in property rights.83

Milton Friedman said, "an entity's greatest responsibility lies in the satisfaction of the shareholders."84 This norm has now permeated much of corporate culture in the U.S., as well as the world, and has led to companies making hasty decisions in order to reach short-term goals for the sake of shareholder benefit.85 Often this has the effect of corporate managers neglecting the long-term effects of their decisions on consumers, the environment, and workers.86

The shareholder primacy corporate culture, combined with a neutered union framework, has created a landscape that effectively silences worker voices. One of the few remaining places workers can turn to have their interests protected are labor specific statutes. Statutory schemes such as the Fair Labor Standards Act, the Occupational Safety and Health Act, and the Employee Retirement Income Security Act provide certain protections to workers but are contingent on a legislature that values the interest of labor.87

Although this reality may appear bleak, it presents a unique opportunity for the U.S. to take advantage of its statute-heavy, bargaining devoid, labor relations scheme and legislate a federal codetermination law. Even though Germany has a thriving union culture in comparison to the U.S., its codetermination scheme can operate entirely independently of it.88 The Codetermination Act only specifically calls for union participation in Section 7 "Composition of the Supervisory Board," and states:

The employee members of the supervisory board must include:

1.In a supervisory board composed of six employee supervisory board members, four employees of the company and two representatives of trade unions;

2. [\*269]

In a supervisory board composed of eight employee supervisory board members, six employees of the company and two representatives of trade unions; and

3.In a supervisory board composed of ten employee supervisory board members, seven employees of the company and three representatives of trade unions.89

At no other point in the act are unions mandated to be a part of any of the functioning of supervisory boards; their members sitting on the board are merely granted rights that are commensurate with the rights of non-union board members.90

Furthermore, the Works Constitution Act similarly allows for cooperation with and participation of trade unions in works councils but lacks any language mandating them to be a part of them.91 The act states, "the employer and the works council work together in a spirit of mutual trust having regard to the applicable collective agreements and in co-operation with the trade unions and employers' associations represented in the establishment for the good of the employees and of the establishment."92

Thus, the works councils have even less of a required tie to the unions than the supervisory boards do. They are simply provided for in the statutory language to assure that since they do exist, the council will respect their agenda as it goes about its work.

This framework, where the supervisory board and works council are encouraged to work with the unions but only required to in one section of the Codetermination Act, lends itself nicely for application in the United States. Since American unions have relatively little influence, a codetermination scheme that does not rely on them to function fits snuggly into U.S. labor law. The U.S. would only need to erase the language that mandates that a share of supervisory board seats go to union members, and simply indicate that half of the seats are occupied by shareholders and half by employees. If a union exists and wants to collaborate with the board or council, they have the right to, but it is not required.

Also, the election process outlined in the Codetermination Act translates smoothly into U.S. companies as well.93 The same principle of unions [\*270] providing input on delegates or candidates if they exist can apply here because the election process is capable of being run entirely independently of unions. The first set of board elections would be organized by management, and from there on out the representatives could run the employee elections as they internally deem fit. As for the shareholder representatives, U.S. corporations already have internal processes for electing their board, so that side will not need to be dictated at all by codetermination law.94

If the U.S. follows the German approach, perhaps it should not make a distinction between companies with less than 2,000 employees only having one-third representation, and companies with more than 2,000 employees having near parity.95 Germany, and other European codetermination countries, can get away with this distinction because their various collective bargaining schemes ideally make up for the power that minority board representation lacks. The U.S. does not have strong collective bargaining to fall back on, so it needs to implement the most effective form of codetermination in order to restore workers' voices. A Finnish representative said this about the dynamic between workers and shareholders with a minority rule: "We have the same powers and responsibilities, but of course I know where the power lies. Of course, if we come to a vote, then we lose but the [shareholder representatives] always seek consensus . . . . Very frequently, they ask us, they challenge us, and so they want our opinion."96 There are undoubtedly benefits merely from the dialogue fostered with minority worker representation, but the U.S. needs to maximize worker power, which is what parity codetermination potentially offers.97

Another aspect of German codetermination that can be especially useful for the U.S. is its two-level structure.98 The supervisory board operates separately from the executive board, as essentially an auditor of its decisions, so corporations can retain their current hierarchy that has been built out of the shareholder primacy norm.99 The executive board still makes the high-level operating decisions for the entire company and can continue operating to maximize shareholder benefit, but workers will have the backstop of the [\*271] supervisory board it reports to, to hold it accountable for any erroneous or harmful decisions it makes.100

Further, at the company ground level at all the various branches, plants, and stores, the works council can have its finger on the pulse of the day-to-day decisions of management.101 This can fill in the gaps of where unions are lacking influence over the issues most tangible to the average worker. In Germany, employers cannot make changes to the issues covered by works agreements without first consulting the works council.102 This, combined with the Nordic style "single channel" workplace representation,103 is perfectly applicable to achieve the bargaining power the U.S. lacks in the absence of unions. The issues works councils negotiate with employers on include safety measures, hours, benefits, and pay systems, which are the kinds of things unions would have covered before they were gutted.104 The U.S. can adopt this exact system and include wage negotiation to create a system where workers' voices are mandated to be heard at all levels of employer decision-making.

The U.S. clearly has made a concerted effort over the years to pass legislation on tangible issues in workers' everyday lives. Regulations regarding working conditions, minimum wages, benefits, and many other topics can be found in statutes the U.S. Department of Labor enforces.105 So if the U.S. wants to maintain this dedication to protecting workers by statute, it makes sense for a federal statute introducing codetermination to be added to the Department of Labor's toolbox. It would be consistent with the nation's trend of holding employers accountable by statute, while also creating an added dimension of direct worker influence on how these companies make decisions.

In addition, the U.S. and Germany share some key corporate law and structure norms that may prove to streamline the adoption of codetermination. First, German corporations like their American [\*272] counterparts drifted away from considering all stakeholders in their decision-making in the second half of the twentieth century.106 In 1965, the German Stock Corporation Act was revised to eliminate previously enumerated duties to the welfare of the corporation, employees, the people, and the state.107 The rationale for the elimination was that these duties were implied in every corporation, but as can be observed from American corporate culture, eliminating these express duties has the tendency to allow profit-seeking corporations to act in more myopic ways.108 Today, many corporate directors in Germany mainly consider the interests of the large banks that own most corporate stock to the detriment of other small shareholders and stakeholders.109

Second, state corporate laws usually permit U.S. corporations to adopt a two-level structure similar to Germany's supervisory board and executive board.110 The board of directors in U.S. corporations typically outsources their day-to-day operational decision-making duty to a group of executives that report to the board, like how the executive board is subject to supervisory board disproval in German companies.111 The main difference between the [\*273] two is that American boards are more acutely scrutinized by individual shareholders who can remove the board with or without cause; in Germany, boards can only be removed for cause with a lower standard of proof than in the U.S.112

One key difference to note is that German law holds corporate managers to the standard of a "diligent and conscientious manager."113 U.S. law, on the other hand, only holds managers to the standard of care of an "ordinarily prudent person in a like position."114 Although this standard difference can potentially lead to incongruent outcomes in lawsuits, when accountability is handled internally, these two approaches should be easily reconciled. Each company will be different in how its supervisory board and executives interact, so the state's law on the official standard of care they are beholden to will not make a difference since the U.S. has a lower standard than Germany to begin with. German courts also give managers less discretion than American courts, more often deciding they have taken unreasonable risks.115 Since U.S. courts are less likely to question companies' business judgment, codetermination can serve as a useful backstop to internally stop nearsighted decisions from being made that German courts would hold companies accountable for.

Moreover, in Stop the Beach Renourishment, Inc. v. Florida. Dep't of Env't Prot., a Florida statute allowing local governments to get permits to restore coastlines where private citizens owned property rights was not a constitutional taking.116 The owners had the right to access the water from their property and receive accretions (gradual additions of sand and other materials) to their property and claimed that the government restoration would create a new boundary line so that new accretions would be on public land rather than theirs.117 The Supreme Court reasoned that these rights to [\*274] future exposed land and contact with the water were inferior to the State's right to restore its coastal land.118

This is significant for the constitutionality of codetermination legislation because the statute allowed for a public determination that the outer edges of the owner's property rights should yield restoration for the public good.119 This same logic may be applied to potential takings clause challenges to codetermination, as employee representation can be analogized to public restoration to the outer edges of privately held companies. With the precedent set by Stop the Beach Renourishment Inc., codetermination is more likely to survive constitutional challenges like it did in Germany at its inception.120

Finally, passing codetermination legislation seems to be becoming more politically feasible. In 2018, Senator Elizabeth Warren proposed the Accountable Capitalism Act which provided, among other corporate governance changes, that "the boards of United States corporations must include substantial employee participation: Borrowing from the successful approach in Germany and other developed economies, a United States corporation must ensure that no fewer than 40% of its directors are selected by the corporation's employees."121

Additionally, that same year, Senators Tammy Baldwin, Brian Schatz, and Elizabeth Warren sponsored the Reward Work Act, which would require every publicly traded company to allow employees to elect one-third of its board of directors.122 Although neither of these bills rises to the level of German codetermination, they prove that there is interest in the concept at one of the highest levels of the U.S. government. A 2018 study by Data for Progress found that 52% of likely 2018 voters supported codetermination and only 23% opposed it.123 Not only does German codetermination fit well into American labor law, but it is also on the verge of having legitimate political viability.

[\*275]

V. CODETERMINATION PRODUCES BENEFITS FOR WORKERS SIMILAR TO UNIONS

The benefits workers see from strong union representation are well documented.124 Therefore, for codetermination to legitimately make up for where union representation in the U.S. lacks, it needs to create similar benefits. Luckily, Germany, and many other European countries, have experience with their systems in place to study the impacts.125

First off, it has been found that companies governed by codetermination invest more domestically than U.S. companies do.126 This has led to more capital-intensive production that serves overseas markets better, evidenced by Northern European countries' relatively smaller trade deficits with China compared to the U.S.127 This has also benefitted the workforce by increasing the share of skilled workers in high-wage jobs in a codetermination country's labor forces.128 As companies governed by codetermination consider the needs of all stakeholders, including workers and their communities, more fulfilling jobs will be created domestically rather than outsourced.

Another example of codetermination considering the needs of all stakeholders can be found in a 2019 study on the relationship between codetermination and a company's corporate social responsibility (CSR) policies.129 The results were that codetermination has a positive relationship with substantive CSR policies like targets for reduction in emissions, CSR reporting, and employment security.130 This study made clear that when employees have their voices heard at the highest level of management, companies respond with more sustainable decision-making.

[\*276] A 2004 study by Forschungsinstitut zur Zukunft der Arbeit [Institute for the Study of Labor] looked at sixty-five companies' productivity levels before and after the Codetermination Act of 1976.131 The study concluded that these newly codetermined companies increased overall productivity in the years following the Codetermination Act compared to the years preceding it.132 This result is in stark contrast to many of the criticisms leveled at codetermination, which worry that it will negatively impact productivity and profits as the cost for redistributing power to workers.133 When worker perspectives are represented at the highest levels of decision-making, everyone involved in the company wins. Productivity can be increased, resulting in more returns for shareholders, and resulting in better jobs for workers.134

An additional study from Hans-Böckler-Stiftung compared German companies with codetermination to similar European companies without codetermination as they recovered from the Great Recession.135 The study found that between 2006 and 2011, German companies saw a 7.2% increase in earnings per share, while the other European countries saw a 21.1% decrease.136 Additionally, the German companies cut jobs at a lower rate than the other companies during and while recovering from the recession.137 This is likely because they chose to cut pay instead, as their employees were already making more on average than those at the non-codetermination companies.138 Finally, the codetermination companies made significantly more investments in research and development and new plants between 2008 and 2013.139 This is an excellent example of codetermination helping [\*277] companies put long-term investments into action that they might not have if they were only run with short-term shareholder profits in mind.

From a broad, company-wide perspective, codetermination can lead to more sustainable decision-making that creates better jobs for workers and long-term returns for companies. This doesn't necessarily remedy the ills that diminished unions in the U.S. have plagued workers with. There needs to be specific evidence that workers will see substantive change under codetermination.

**Financial transaction tax, or FTT, solves inequality and generates uniqueness for our productivity turns.**

Lenore **Palladino 21**, Assistant Professor of Public Policy and Economics at University of Massachusetts at Amherst, "The Case for the Financial Transaction Tax in 2021," The Appeal, 02/10/2021, https://theappeal.org/the-lab/policy/the-case-for-the-financial-transaction-tax-in-2021/

This type of tax, known as a Financial Transaction Tax (FTT), is designed to discourage economically useless speculation, progressively raise hundreds of billions of dollars for social and economic investments, and help transition to a more equitable tax system in the United States. An FTT would ensure that high-volume stock market transactions would curb, rather than reinforce inequality, and return needed resources to support vulnerable families.

Background

A Financial Transaction Tax is a small tax applied every time a financial asset is sold, the same way that we all pay a small tax when we buy a t-shirt or a haircut. These assets might include stocks, bonds, or derivatives, but the type of asset is only one factor in determining when the tax applies. Today, the FTT targets a practice known as High Frequency Trading (HFT), which relies on complex algorithms to execute a slew of transactions in milliseconds, turning tiny changes in price into huge profits. As Andrew Ross Sorkin pointed out in a recent column, this type of trading makes “a mockery of the idea of actual investing” while giving Wall Street firms unique advantages over retail investors. Rather than channel funds for investment back to American corporations, HFT further enriches the wealthy while creating risks of market volatility.

FTTs are common around the globe and even have a long history in the United States. There was an FTT in place for much of the twentieth century, from 1914 to 1965, during a period of great expansion of capital markets. New York imposed a similar tax as recently as the 1980s. Several of the world’s other advanced capital markets have an FTT, including France, Italy, the UK, and Hong Kong. Even today, the Securities and Exchange Commission (SEC) continues to fund its own operations through a small tax on transactions, thus providing a successful model on which to build.

A few proposals on FTTs have been put forward recently. The Wall Street Tax Act was introduced in the House of Representatives last month by Rep. Peter Defazio, and would place a tax of 0.1 percent on sales of stocks, bonds, and derivatives—the equivalent of ten cents per $100 sold. Other proposals vary the specific rates paid on different financial instruments, though all contemporary proposals would apply the tax across all financial instruments. In the Senate, Bernie Sanders’s Inclusive Prosperity Act would place a 50 basis points tax on securities, 10 basis points on bonds, and five on derivatives (equal to $5 for a $1,000 stock; $1 per $1,000 bond and five cents for derivatives where the underlying value is $1,000). Another proposal by former Treasury Department official Antonio Weiss and Emily Kawano in a Brookings Institute paper calls for a 10 basis point tax on all financial instruments, phased in over time.

A Financial Transaction Tax is progressive

A cornerstone of modern tax policy is the principle of progressive taxation, which is concerned not only with how to raise revenue, but how to raise revenue equitably. A progressive tax structures the burden according to ability to pay. For example, the income tax in the U.S. is progressive because those with higher incomes pay a higher tax rate. Some excise taxes, however, like the tax on cigarettes, are technically regressive because low-income individuals smoke at nearly twice the rate of others and therefore bear more of the cost in proportion to their income. FTTs are progressive for the opposite reason. The overwhelming majority of equities in the U.S. are held by wealthy families.

According to the Federal Reserve Board, the top 10% of households in terms of net worth own over 80% of overall equities, a broad measure that includes the value of pension holdings. By contrast, the bottom 50% own only 7% of overall equities. The distribution is even more lopsided when looking at directly-held stocks, which are more likely to be traded at the volume and frequency that FTTs are designed to address. Any debate around an FTT should begin with this fundamental imbalance in what the stock market means to the vast majority of families.

The most common critique of the FTT is that it would hurt the retirement security of the middle class. But the top 10% of households also own 54% of pension entitlements. If we define “middle-class” as households in the 20 to 60 percentile range by income, they own just 15% of pension entitlements and 4% of corporate equity and mutual funds.

Importantly, the majority of such assets are owned by white households. Only a third of Black households own any stocks at all, whereas the ownership rate for white households is over 60%. This divide compounds the racial gap in nearly every other measure of economic stability—wage income, debt, residential home and business equity, cash accounts, etc.—with Black households largely locked out of the roughly 260% returns over the last decade for S&P 500 funds. In terms of overall value, Black and Latinx households own only 1% and 0.4% in corporate equity, respectively.

For middle-class households holding financial assets for the long-term, the tax would have a negligible effect, as it only applies as trades take place. Given the concentration of financial assets in the hands of the wealthiest households, it is clear that the FTT is progressive in its impact. It would also make up some of the lost revenue from the declining taxation of capital gains.

Useless speculation vs. the real economy

This concentration of assets has implications for how frequently different groups trade their holdings, which matters in terms of who would pay the tax. There are important distinctions between the high-frequency traders (HFTs), who would be most impacted by the FTT, and middle-class investors whose retirement security is held for decades in mutual funds.

HFTs are now estimated to make up half of market trading volumes, executed by algorithms seeking to exploit miniscule differences in prices. Because the FTT would be applied per transaction, it would decrease the frequency of HFT and thus its profitability. However, this may be a desirable result, as excess volatility and speculative activity do not serve the actual function of the financial system, which is to provide support for innovation in the goods and services sectors of the economy.

An FTT could play an important role in restricting the excessive trading that is designed to manipulate the markets instead of benefiting the overall economy. Over the past forty years, the U.S. economy has transitioned towards a financialized economy, meaning that the financial sector has grown, and non-financial corporations have come to rely more on financial activities rather than productive innovation. This has reversed the traditional understanding that the financial sector serves the needs of the goods and services economy, providing credit to businesses and households, facilitating savings and intermediation, and supporting equity issuances for publicly-traded corporations. As the financial sector was deregulated in the 1990s, it grew both as a percentage of GDP and as a locus of increased speculative activity. This transition resulted not only in the 2007 Great Recession, but more deeply in the ongoing focus by large non-financial companies—the major employers in the United States—on maximizing shareholder value and on secondary market trading that seeks to create wealth through speculation rather than through share price increases tied to actual productive improvements in certain companies.

Reducing speculation can redirect the financial markets toward sound investments in the real economy and even the transition to decarbonization. Economists Pollin, Heintz, and Herndon show that the ratio between stock market trading and productive investment by non-financial corporations has increased 18-fold, which strongly suggests that reducing the volume of high-frequency trading on the stock markets would have negligible impact on actual productivity in the goods and services-producing economy.

A Financial Transaction Tax would raise revenue for real priorities

Exactly how much revenue the FTT could raise is a challenge to estimate, because it depends both on the impact of trading volume from the tax (known to economists as the elasticity response), as well as the changing overall transaction costs per trade. Even though an FTT would increase transaction costs, these costs have been falling in recent years, and an FTT would only restore total transaction costs to the level they were a few decades back, when financial market trading was still robust.

Given the uncertainty, economists have proposed a wide range of how an FTT would impact overall market transactions and thus the amount of revenue that the FTT would produce. Recent estimates range from approximately $500 billion over ten years to $2 trillion. According to the Congressional Budget Office, a tax of 0.1% on financial transactions, as proposed by the Wall Street Tax Act, would generate $777 billion in new revenue over the next decade.

Pollin, Heintz, and Herndon analyzed the 2015 version of Sanders’s Inclusive Prosperity Act and “concluded conservatively” that an FTT would raise an additional $220 billion annually, even accounting for a projected 50% decline in trading volume and some tax avoidance. To put that estimate in context, $220 billion annually is enough to effectively end homelessness in the U.S. ($20 billion), wipe out all outstanding medical debt ($81 billion), and create a universal child care program ($70 billion) that would ensure 12 million children receive affordable care—and still have well over $100 billion left over.

Conclusion

The ultimate value of a tax is not only in the revenue it raises, but also in the incentives it creates. The FTT is urgently needed because of this dual impact: it will equitably raise revenue that can be used to support economic recovery and social goods while discouraging financial roulette that rewards speculation rather than jobs and wages.

Our economy needs a well-functioning financial sector. As the Nobel-prize winning economist Joseph Stiglitz has noted, our current financial system has failed at fundamental tasks such as managing risk, efficiently allocating capital, and providing funds for productive investments and job creation. Our tax system is one of many tools that can be used to disincentivize the pursuit of short-term profits over long-term stability and equity, and better align our financial sector to support the public good. Congress should not hesitate to use it.

### 1NC – CP

Antitrust CP

**The United States federal government should clarify and extend Section 2 of the Sherman Antitrust Act to prohibit anticompetitive behavior in the labor market, standardize “labor market” and “labor power” definitions, standardize a list of presumptively anticompetitive behavior excluding refusing collective bargaining rights, significantly increase damages for antitrust law violations, and substantially fund and staff the relevant agencies necessary to enforce the Sherman Antitrust Act.**

**Antitrust solves disproportionate employer power without strengthening CBR.**

Eric **Posner &** Ioana **Marinescu 20**, Posner is Kirkland & Ellis Distinguished Service Professor, University of Chicago Law School; Marinescu is Assistant Professor, School of Social Policy & Practice, University of Pennsylvania, faculty research fellow at the National Bureau of Economic Research, "Why Has Antitrust Law Failed Workers?" Cornell Law Review, vol. 105, 2020

B. Monopsony

Section 2 also needs to be reformed. The problem is not the statutory language but the paucity of cases that provide guidance for employees who are the victims of anticompetitive behavior by monopsonists. To remedy this problem, we suggest that Congress pass a more detailed version of section 2 as applied to labor monopsonists.222 The law should include the following reforms.

Labor market definition. Plaintiffs would be permitted to allege labor markets based on the six-digit SOC and a commut ing zone. If plaintiffs allege such a labor market, the burden would switch to the defendant to show that the labor market definition is inappropriate.

By standardizing the labor market definition, the proposal would make it easier for plaintiffs to survive motions to dismiss and certify class actions. By creating a presumption that is rebuttable, the proposal would enable defendants to prevail when labor markets are idiosyncratic. In rare cases when labor markets are national in scope, for example, the labor market for CEOs of large firms, an employer would be able to refute a labor market definition based on a commuting zone by provid ing evidence that workers send significantly more than 20% of their applications outside the commuting zone. (Research shows that workers who seek jobs on average send 20% of their applications outside the commuting zone.)223 So we would re quire evidence that the job search in this occupation is signifi cantly broader than average.

Labor market power. Plaintiffs would satisfy the market power requirement that is typically imposed in section 2 cases by proving that the employer has a “large” share of the labor market. How large is “large”? On the product market side, courts nearly always accept 90%, usually accept above 70%, and occasionally accept shares around 50% or higher.224 We think that similar figures could be used for the labor market side. Plaintiffs could satisfy these requirements in either of two ways: based on the employer’s percentage of employment or based on the employer’s percentage of job postings. This reform would again simplify and render more predictable labor monopsony cases.

Anticompetitive behavior. Plaintiffs would be able to base their case on any of the following anticompetitive acts: mergers in highly concentrated markets; use of noncompete and related clauses; restrictions on employees’ freedom to disclose wage and benefit information; unfair labor practices under the Na tional Labor Relations Act;225 misclassification of employees as independent contractors; no-poaching, wage-fixing, and re lated agreements that are also presumptively illegal under sec tion 1; and prohibitions on class actions. Of course, current law gives employees the theoretical right to allege these types of anticompetitive behavior, but the cases show a pattern of judi cial skepticism, as noted earlier.226 Codification would help employees by compelling courts to take these claims seriously. Employers would be allowed to rebut a prima facie case of anticompetitive behavior by showing that the act in question would likely lead to an increase in wages.

This reform would strengthen and extend section 2 actions against labor monopsonists by standardizing a list of anticom petitive acts. While not all of these acts are invariably anticom petitive, the employer would be able to defend itself by citing a business justification. For example, a noncompete could be justified because it protects an employer’s investment in train ing. If so, an employer could avoid antitrust liability by show ing that its use of noncompetes benefits workers, who obtain higher wages as a result of their training.227

Statutory damages. To increase incentives to bring labor side antitrust actions, employees would be entitled to the greater of damages of $10,000 per employee or the harm im posed on each employee.

These reforms would strengthen section 2 claims against labor monopsonies but would also preserve the doctrinal structure of section 2. Thus, they would not generate significant legal uncertainty or require a revision in the way that we think about antitrust law.

### 1NC

#### The fifty states and relevant subnational United States actors should informally communicate to regulated parties that their business activities will be thwarted by relevant laws of general applicability unless those parties negotiate private agreements with workers in the United States replicating the requirements of establishing that collective bargaining rights supersede workers' contrary statutory interests. In the event that preemption is relaxed, these actors should impose these requirements formally.

#### The CP conditions favorable non-labor state policy on employee consent to binding contractual agreements that replicate the plan. That solves the case, is federally enforcable, and avoids preemption.

Benjamin I. Sachs 11, Assistant Professor of Law, Harvard Law School, "Despite Preemption: Making Labor Law in Cities and States," Harvard Law Review, 03/21/2011, https://harvardlawreview.org/print/vol-124/despite-preemption-making-labor-law-in-cities-and-states/

II. A LABOR LAW NUTSHELL: MOTIVES FOR REFORM, PREEMPTION, AND PRIVATE ORDERING

A. The Call for State and Local Innovation

In order to ground the discussion that follows, it is useful to understand what motivates certain states and cities — and unions in those states and cities — to seek a redesign of the NLRA rules of organizing and bargaining. For more than three decades now, the labor movement and leading labor law scholars have been withering in their criticism of the NLRA. Writing in 1983, Professor Paul Weiler commented that “[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution.”20 In 1984, the House Subcommittee on Labor-Management Relations released a report on “The Failure of Labor Law,” observing that the NLRA “has ceased to accomplish its purpose.”21 And in 1996, Professor James Brudney argued that “[s]ixty years after the National Labor Relations Act . . . was passed, collective action appears moribund.”22

The primary substantive critique of the NLRA is that the federal rules of organizing and bargaining render employees’ statutory rights to form and join labor organizations, and to bargain collectively with management, ineffectual.23 Scholars have repeatedly noted the central problems. When it comes to the rules of organizing, the regime provides employers with too much latitude to interfere with employees’ efforts at self-organization, while offering unions too few rights to communicate with employees about the merits of unionization.24 The NLRB’s election machinery is dramatically too slow, enabling employers to defeat organizing drives through delay and attrition.25 The NLRB’s remedial regime is also too weak to protect employees against employer retaliation.26 And, with respect to the statute’s goal of facilitating collective bargaining, the regime’s “good faith” bargain- ing obligation is rendered meaningless by the Board’s inability to impose contract terms as a remedy for a party’s failure to negotiate in good faith.27

These pathologies in the NLRA have given rise to repeated calls for reform, both among scholars and in Washington, but none of the proposed reforms have succeeded.28 In 1977, for example, Congress took up legislation that would have, first, minimized the opportunity for employer interference in organizing drives by mandating a shortened schedule for union elections,29 and, second, rebalanced communicational opportunities by providing union organizers “equal access” to the workplace.30 The bill also would have strengthened the collective bargaining obligation by allowing the Board to impose make-whole remedies when employers violated their duty to bargain in good faith.31 Although the House passed its bill by a vote of 257 to 163, the Senate version was blocked by a five-week filibuster and died after six failed cloture votes.32 The most recent federal labor reform bill responded to the same concerns about employer interference in organizing drives and the weakness of the statutory bargaining obligation. Thus, to minimize employer involvement in union organizing efforts, the Employee Free Choice Act33 would have required that the Board certify unions based on a card check, thereby allowing unions to avoid the NLRB’s notoriously slow election process.34 To ensure compliance with the bargaining obligation, the bill also dictated that if the parties are unable to reach agreement on a first contract within four months, an arbitrator would determine the appropriate content of the contract.35 Although the House of Representatives passed the Employee Free Choice Act in 2007, the bill was blocked by a threatened senatorial filibuster.36

Accordingly, it is the conjunction of these pathologies in the federal law and the inability to reform the statute in Congress that explains the motivation for state and local reforms. As Professor Michael Gottesman explains:

The impetus for [a] reexamination of preemption law will be evident to those familiar with the present state of collective bargaining under the NLRA. . . . [T]he NLRA is not working effectively and the institution of collective bargaining is in decline. The defects in the law have been identified with some precision, but Congress has shown itself too politically paralyzed to make repairs.37

B. Prohibiting State and Local Reform: A “Rule of Total Federal Preemption”

Attempts at state and local reform, however, must contend with the doctrine of federal labor preemption. Although there is no express preemption clause in the National Labor Relations Act, the NLRA’s preemption regime is unquestionably and remarkably broad.38 Prompted in part by a series of articles by Professor Archibald Cox in the Harvard Law Review, 39 the Supreme Court has built a preemption doctrine meant to vest exclusive regulatory authority in the federal government and to preclude state and local governments from varying the rules of organizing and bargaining.40 In 1950, Cox first argued for what he called “an integrated public labor policy”41 derived entirely from the National Labor Relations Act, and he warned that “enforcement of . . . state regulation will thwart the development of federal policy.”42 Four years later he argued for a “rule of total federal preemption,”43 in order to ensure “uniformity.”44

Shortly after Cox began writing, the Court set out what would become the conceptual framework for its future labor preemption cases. In 1953, the Court held that:

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.45

Then, in its sweeping 1959 decision San Diego Building Trades Council v. Garmon, 46 the Court ruled that states may not regulate activity that is even “arguably” protected or prohibited by the federal law.47 As such, employee activity protected (or arguably protected) by section 7 of the NLRA — including, for example, employees’ rights to form and join labor unions or to bargain collectively with their employers — is off limits to state or local regulation. So, too, is employer speech about unionization, which enjoys protection under section 8(c) of the statute.48 Similarly, because collective bargaining is both protected by section 7 and policed by section 8’s unfair labor practice clauses, bargaining rules and obligations are also beyond the reach of state and local law.49

Although Garmon preemption is extremely broad,50 in its 1976 decision Lodge 76, International Ass’n of Machinists v. Wisconsin Employment Relations Committee, 51 the Supreme Court extended the reach of federal labor preemption even further. There, the Court took up the permissibility of state regulation of union activity that, while part of the collective bargaining process, was neither protected nor prohibited by the federal law.52 The Court reasoned that Congress’s decision to leave certain activity unregulated by the NLRA implied a congressional intent that these forms of union and employer conduct be left entirely unregulated.53 Thus, according to Machinists, the absence of federal regulation implied that “Congress intended that the conduct involved be . . . left ‘to be controlled by the free play of economic forces’”54 and “not to be regulable by States any more than by the NLRB.”55

Garmon and Machinists form the two primary strands of labor preemption doctrine, but two other cases extend the doctrine further still. The first is Golden State Transit Corp. v. City of Los Angeles, 56 which involved a strike by Teamsters Union employees at a Los Angeles taxi cab company. At the time of the strike, Golden State Transit needed to renew its operating license in order to continue providing taxi service. The renewal required approval by the Los Angeles Board of Transportation Commissioners and, ultimately, by the Los Angeles City Council.57 Although Golden State was “in compliance with all terms and conditions of their franchise[],”58 the city council rejected the renewal request.59 The Supreme Court held that the council’s de- cision was designed to pressure Golden State to settle the Teamsters’ strike and was, for this reason, preempted.60 According to the Court, the Teamsters’ right to strike, and Golden State’s attempt to withstand the strike, were the kinds of economic weapons that Congress had intended to leave free of regulation and up to the “free play of economic forces.”61 By refusing to renew Golden State’s franchise until the company settled the strike, Los Angeles “imposed a positive durational limit on the exercise of economic self-help”62 and thereby impermissibly intruded into a collective bargaining process that Congress intended to be free of such regulatory intervention.63

The second case is the Court’s most recent labor preemption decision, Chamber of Commerce v. Brown, 64 which struck down a California statute that prohibited employers from using state funds to “assist, promote, or deter union organizing.”65 Noting that “California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition,” the Court held that it was “equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.”66 That is, because employers’ right to engage in noncoercive speech about unionization is protected by section 8(c) of the federal law, states may neither directly restrict employer speech rights nor explicitly predicate the receipt of state benefits on an employer’s agreement to refrain from exercising these rights.67

While these cases establish a broad preemption regime, the Court has created one relatively significant exception to the rule: when a state or local government acts as a market participant, it enjoys the same freedom to structure its labor policies as a private party and is immune from preemption scrutiny. As the Court put it in its 1985 Boston Harbor68 decision: “When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation.”69

gulation.”69 Despite the potential breadth of the proprietary exception,70 the Supreme Court and the courts of appeals have established its limits. To start, the basic fact that a state or city acts pursuant to its spending power, rather than through regulation, does not exempt the action from preemption review. Indeed, the Court has dismissed as a “distinction without a difference” the fact that a state acts by spending rather than regulating.71 Instead, the applicability of the market participant exception requires that the state or locality demonstrate that its intervention is “specifically tailored to one particular job,” and that the intervention is directly aimed at advancing the government’s proprietary interest by, for example, “ensur[ing] an efficient project that would be completed as quickly and effectively as possible at the lowest cost.”72

In sum, after surveying the labor preemption field, Professor Cynthia Estlund concluded that the Supreme Court’s preemption cases “virtually banish states and localities from the field of labor relations,”73 and that “[m]odern labor law preemption essentially ousts states and municipalities from tinkering with the machinery of union organizing, collective bargaining, and labor-management conflict.”74 Most recently, Professor Henry Drummonds summarized the current view by writing: “[The] broad federal labor relations preemption doctrines ensnarl all states in a stifling and exclusive . . . federal labor law regime.”75

C. Facilitating Private Reordering

Although the NLRA prohibits state and local governments from intervening in union organizing and bargaining, the law affirmatively facilitates the private reordering of organizing and bargaining rules by unions and employers. As construed by the NLRB, “[n]ational labor policy favors the honoring of voluntary agreements reached between employers and labor organizations,”76 and accordingly the Board “will enforce such agreements, including agreements that explicitly address matters involving union representation.”77 Thus, so long as their agreements do not waive or violate employee rights, unions and employers are free to depart from the NLRA’s rules and to adopt alternative procedures regarding union organizing, recognition, and bargaining procedures.78 For example, although employers are not statutorily obligated to recognize a union on the basis of signed authorization cards,79 an employer may contractually agree with a union to do so.80 Similarly, although the statutory regime affords employers significant opportunities to communicate anti-union messages to employees, employers may agree to waive or limit their own right to speak about unionization during organizing drives.81 Employers also may — and frequently do — agree to allow union organizers access to the workplace, although employers almost never have a statutory obligation to provide for such access rights;82 to provide unions with lists of employees’ names and addresses prior to any legal obligation to do so;83 and to submit first contract disputes to final and binding arbitration, although the NLRA never requires that employers reach agreement in collective negotiations with a union.84

When unions and employers agree to alternative organizing and bargaining rules, moreover, these agreements are “contracts between an employer and a labor organization,” which, by virtue of section 301 of the Labor Management Relations Act,85 are enforceable in federal district court.86 And, indeed, federal courts have routinely enforced contracts through which unions and employers agree that union recognition will be based on a card check, that employers will remain neutral on the question of unionization (or will significantly restrict their communications on that question), and that union organizers will be entitled to access employer property for the purpose of convincing employees to support the organizing effort.87

The private reordering of organizing and bargaining rules that the NLRA permits often occurs without state or local governmental intervention of any kind — through what we might think of as bipartite labor lawmaking. That is, by facilitating private ordering, labor law enables unions to use multiple sources of leverage to encourage employers to depart from the federal rules and adopt alternative ones; local political power is one source of leverage, but it is not the only one.88 Indeed, the most straightforward way that unions secure such organizing agreements is through the traditional collective bargaining process: where unions already represent some segment of an employer’s workforce, they can incorporate clauses in existing collective bargaining agreements requiring that additional employees of the same employer be organized according to privately negotiated rules like card check and neutrality.89 In other instances, employers enter into private organizing agreements in order to avoid costs that unions could otherwise impose. These costs can come from traditional union actions like strikes and picketing. Or they can be imposed through less traditional tactics including “comprehensive campaigns” in which unions, for example, encourage pension funds to withhold investment capital from targeted firms.90 Thus, the type of political exchange involved in tripartite labor lawmaking can be understood as an example of this broader phenomenon, an example in which unions leverage their state and local political power — rather than their economic power — to se- cure employer agreement on an altered set of organizing and bargaining rules.

Regardless of the source of leverage used to secure these agreements, private organizing agreements erode some of the uniformity that labor law’s preemption regime is committed to securing. In this respect, the NLRA is in tension with itself even in the absence of state and local intervention: while the preemption regime aims to ensure a uniform set of organizing and bargaining rules derived exclusively from federal law, the solicitude for private ordering implies that unions with sufficient bargaining power will be able to secure departures from these national defaults. But unions’ ability to leverage state and local political power to secure private agreements on organizing rules is of particular relevance to the preemption regime. Indeed, the existence of this form of political exchange reveals that state and local governments are an important source of labor law variation and a viable forum for the types of reform that have been impossible to achieve at the federal level — possibilities that preemption is intended and understood to foreclose.91

In sum, the NLRA intends to prohibit state and local government intervention into the rules of organizing and bargaining, while at the same time allowing for private reordering of those rules. As the next Part will describe, although labor law intends to distinguish between reorderings effected by local governments and those effected by private parties, contemporary developments are characterized by the interdependence of these two sources of authority.92

III. TRIPARTITE LAWMAKING

There is no question that labor law’s exceptionally expansive preemption regime precludes state and local governments from attempting directly to achieve at a local level the reforms that have been blocked in Congress. A state law or city ordinance mandating that private sector employers recognize unions based on a card check,93 or grant union organizers access to employer property,94 or remain neutral during organizing drives,95 would be flatly preempted by the NLRA. So too would a local law mandating that collective bargaining disputes be submitted to an arbitrator.96 Neither could state and local governments achieve these same labor policy goals simply by substituting public spending restrictions for regulation: requiring employers to recognize unions based on cards, to remain neutral, or to grant access to organizers in order to access state funding streams would also run afoul of the preemption regime.97 But understanding the way preemption operates in practice requires that we look beyond preemption doctrine itself.

To this end, this Part will describe in some detail the ways in which organizing and bargaining rules are being redesigned in states and cities today through political exchanges involving the public acts of local governments and the private agreements of unions and employers. The Part begins by providing four examples of tripartite labor lawmaking. It then clarifies the government’s role in these examples, and it concludes with a discussion of partial analogues to tripartite lawmaking by drawing on both international and domestic sources.

A. State and Local Labor Law

This section describes four instances of tripartite labor lawmaking in U.S. states and cities and briefly notes where other examples, not developed here, may lie. Although tripartite lawmaking has several variants, each involves a political exchange. The arrangement is predicated on an employer, or group of employers, seeking state or local government action on an issue unrelated to labor relations and union organizing. The union party to the tripartite arrangement desires to replace the NLRA’s rules with procedures that better facilitate unionization and collective bargaining. Tripartite lawmaking involves the exchange of the governmental actions sought by the employer for private contractual agreements through which the employer binds itself to the new rules of organizing and bargaining that the union seeks. In some examples, the state or local government is an explicit partner in tripartite negotiations: the government agrees to act in the way the employer desires if and only if the employer agrees to new organizing and bargaining rules. In other cases, the state or local government does not participate in three-way negotiations, but rather enacts the employer’s desired reforms in response to the union’s political influence — influence brought to bear because of the employer’s agreement on organizing and bargaining rules. In all cases, the end result is a set of organizing and bargaining rules that differs dramatically from the NLRA’s and that, as discussed above, is fully enforceable as a matter of federal labor law.

#### The combo of ossified federal law with the CP's experimental tripartite bargaining drives unions into the local lawmaking process---that revitalizes participative local democracy.

Andrew Elmore 21, Associate Professor, University of Miami School of Law, "Labor's New Localism," Southern California Law Review, vol. 95, 12/01/2021, pp. 253

A rejuvenated labor localism also has important effects on labor and employment law. It permits the reawakening of mass protests, including those that might otherwise be unprotected or unlawful under the NLRA. Connecting strikes and other protests by local labor-community coalitions to translocal labor policy experimentation expands protections against employer retaliation and remedies for violations. Participation by unions and worker centers in the direct democracy mechanisms of local government to bargain for and enforce workplace standards can provide a form of worker representation to unions and worker centers outside the NLRA while also improving workplace regulation that relies on' worker participation. Centering matters of local economic inequality enables subordinated groups, especially poor people, women, immigrants, and people of color, to exercise power in dynamic, inclusive protests and forms of bargaining that can advance democratic values in labor and local law.24

This Article's account of how labor-community coalitions have broadly advanced workplace standards and facilitated unionization and collective bargaining through local law builds on labor law scholarship that examines local law strategies by unions and worker centers,25 [FOOTNOTE 25 BEGINS] 25. See, e.g., Catherine L. Fisk & Michael M. Oswalt, Preemption and Civic Democracy in the Battle over Wal-Mart, 92 MINN. L. REV. 1502 (2008). It builds especially from the work of Scott Cummings, who has comprehensively examined local labor lawmaking in Los Angeles. See SCOTT L. CUMMINGS, BLUE AND GREEN: THE DRIVE FOR JUSTICE AT AMERICA'S PORT 17-25 (2018) [hereinafter BLUE AND GREEN]; SCOTT L. CUMMINGS, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LoS ANGELES 4-8 (2021) [hereinafter EQUAL PLACE]; Scott L. Cummings & Steven A. Boutcher, Mobilizing Local Government Law for Low-Wage Workers, 2009 U. CHI. LEGAL F. 187, 221-45. Benjamin Sachs has discussed the role of local governments in facilitating private-sector collective bargaining with government actions unrelated to labor law, driving local law into opaque areas to promote collective bargaining despite National Labor Relations Act preemption. Benjamin I. Sachs, Despite Preemption: Making Labor Law in Cities and States, 124 HARV. L. REV. 1153, 1164-69 (2011). While local lawmaking can lack accountability, I draw attention to recent, transparent forms of local labor lawmaking and collective bargaining as a new form of localism. [FOOTNOTE 25 ENDS] and the democratic value of public sector unions.26 While scholarship about subfederal workplace regulation has focused on federal law preemption, 27 few labor scholars have considered state preemption, 2 8 and this Article is the first to assess the recent calls for home rule reform to protect local labor lawmaking. 2 9 This Article also contributes to scholarship about the social movement transformation of law.30 Its thick description of local legislative campaigns by translocal, federated networks of unions and worker centers offers an important example of the organizational strategies and structures developed by the labor movement to build and sustain workplace and political power.3 1

While recent local law scholarship seeks to engage with adjacent areas,32 labor law is a muted area of concern among local law scholars. 33 This is surprising given that labor law and local law raise similar questions about democracy 34 and the allocation of power to prevent domination. 35 This Article contributes to the recent debate about home rule reform by offering localism as vital to advance the democratic values underlying labor and local law. Public participation in local government is also a form of local accountability that can be more effective than state supervision, 36 which can strengthen and lift workplace standards. 37 These benefits suggest durable roles for localism in reforming labor law and safeguarding democratic norms, despite the inarguably broader coverage and preemptive power of federal and state government.

This Article proceeds as follows. Part I explains the current weaknesses of labor and employment law in the United States as attributable to the lack of political influence of the nonaffluent in federal and state government. It will introduce the shift of labor-community coalitions to local government to advance labor lawmaking as a form of decentralized, direct democracy. Part II first explores the effects of labor-community coalitions channeling social movement energy into local protest and lawmaking. This has pushed labor-community coalitions to become broader and more inclusive, and to advance local lawmaking translocally, or across local jurisdictions. It then considers the rise of state preemption as a threat to local labor lawmaking. It finds that labor-community coalitions have often managed this threat by engaging in state-level lawmaking and pivoting to adjacent areas. It assesses the current debate about home rule reform, concluding that labor localism advances democratic values and can improve local accountability, and requires only modest home rule reform to improve its stability and reach. Part III demonstrates how labor localism can counteract longstanding weaknesses in labor law and advance democratic values in labor and local law, without harming the institutional strength of unions or encouraging capital flight. Part IV assesses the value of a decentralized approach to labor and employment law given the primacy and broader reach of federal and state standards. It concludes that by building and channeling social movement energy into policy experimentation across cities, labor localism can revitalize federal labor law and advance the democratic values of labor and local law.

I. LABOR LOCALISM AND THE DEMOCRATIC DEFICIT IN FEDERAL AND STATE GOVERNMENT

Nearly half of workers report that they lack voice in the workplace and would join a union if they could.38 But unions represent only about ten percent of the United States workforce and a vanishingly small number of low-wage workers in many sectors.39 This is because the NLRA excludes millions of low-wage workers40 and makes it exceedingly difficult for other workers to join unions and collectively bargain with employers without fear of reprisal. Private-sector employers often can hire permanent replacements for strikers,4 1 lock out employees to press a bargaining position,42 and ignore union demands to bargain for "non-mandatory" issues, such as employer decisions to close part of a business. 43 Even if an employer egregiously violates labor law, the typical remedy is the widely criticized make-whole remedy of reinstatement and damages,44 which is unavailable to employees who lack authorization to work.45 The duty to mitigate in backpay awards and administrative delays in reinstating employees fired for union support often render even these remedies futile. 46

In contrast to the deference federal labor law affords employers, the NLRA tightly constricts a union's right to protest "secondary" employers 4 7 and imposes far more onerous administrative duties on unions than those imposed on other entities. 48 As Catherine Fisk and Diana Reddy explain, these union restrictions can channel unions "into weaker and less disruptive activities, . . . blunting union activism." 49 States have further weakened labor law by codifying a "right to work," or the right to refrain from paying unions for the costs of representation. 50 The Supreme Court constitutionalized the right to refrain as a First Amendment right in publicsector workplaces in Janus v. American Federation of State, County, and Municipal Employees, Council 31.51

For decades, labor law scholars have called for and the labor movement has sought federal law reform to address the weaknesses and gaps of the NLRA.52 But labor law reform ultimately depends on political influence to enact it. Unions have traditionally formed the primary national interest group in the United States seeking to lift and strengthen workplace standards. 53 The political economy of the United States, however, is primarily responsive to the priorities of the affluent, 54 a trend that has accelerated with the decline of the labor movement to counterbalance the representational gap in national and state politics."

This Part will first explain the lack of labor rights in the United States as driven by a democratic deficit for workers. It will then describe the growth of local labor lawmaking as a response to this absence of "equality of voice,"56 through labor-community coalitions that seek to build worker power through cities.

A. THE DEMOCRATIC DEFICIT AT THE HEART OF WEAK WORKPLACE RIGHTS

For democratic theorists, a democratic polity requires political systems that encourage the broad participation of society in decision-making over matters of everyday life. 57 Democratic reformers beginning in the Progressive Era have understood the importance of civic participation in democratic institutions, with unions as potential training grounds for democracy. 58 As K. Sabeel Rahman cautions, Progressive Era reformers did not attend, however, to the "the challenges of activating and empowering voices that might normally be marginalized." 59 Political scientists have consistently found that the affluent have disproportionate influence in politics. 60 The political inequality favoring the affluent is reflected in interest organizations lobbying the federal government.6 1 With its dwindling membership and waning resources, labor unions cannot match the influence of the business lobby, particularly in securing economic rights such as labor law reform.62

And while there is little evidence that interest groups can advance major federal legislation, 63 they can block federal policies they oppose.64 This entrenches a pro-business tilt and status quo bias in federal policymaking in ways that can lack transparency. 65 The weakened state of unions and the dominance of the business lobby help to explain why there has been no significant change to federal labor law in over fifty years and to employment law since the Family and Medical Leave Act of 1993.66 Even the federal minimum wage has remained fixed at $7.25 an hour for over a decade, the longest period without change since the Fair Labor Standards Act was enacted in 1938.67

While the success of the business lobby at the federal level has primarily been in preventing legislative reform, the pro-business lobby has radically transformed state law over the past decade. Forming an alliance with business groups and conservative donors through the American Legislative Exchange Council (ALEC), movement conservatives have successfully lobbied for uniform, pro-business lawmaking throughout the states, 6 8 enabled by opaque state governments 69 and inexperienced, underfunded legislators. 70 ALEC pioneered a form of "functional entrenchment," 7 1 or the undermining of political opposition by using law other than election lawin this case, labor law. 72 A chief accomplishment of ALEC has been a national campaign for states to enact right-to-work laws in order to disable public sector unions, a key constituent of the Democratic Party. 73 The most high-profile example of these laws was enacted in Wisconsin in 2011, causing state public sector union membership in that state to steeply decline from fifty percent to under twenty percent by 2017.74 Hobbling unions in these states led to a parallel, successful effort in 2018, with Janus, to hollow out public-sector unions.75

In sum, the political economy of labor law reform is shaped by the dominance of the business lobby over federal and state politics, while unions have declined as a political counterweight. This has foreclosed federal reform, while undermining labor unions through state right-to-work laws. While polls consistently show that the median voter supports labor unions, raising the minimum wage, and employer-provided paid family and sick leave,7 6 these 'economic interests are contrary to the interests of the affluent, and the nonaffluent lack the political influence to advance them.

B. LOCALISM AS LABOR'S RESPONSE TO THE DEMOCRATIC DEFICIT

Labor law exclusions and rules permitting aggressive employer responses to union elections have foreclosed unionization for many and have eroded the ability of those workers in unions to engage in effective collective bargaining or political advocacy. As Benjamin Sachs argues, blocking off a meaningful pathway for many workers to join unions and collectively bargain has the hydraulic effect of "forc[ing] open alternative legal channels." 77 One such hydraulic is to push labor unions, often in coalition with worker centers and other community organizations, toward localism. Here, "labor localism" refers to a channeling of social movement activism by unions and worker centers into local government to improve workplace standards, using local law instead of or in addition to federal labor law. 7 8

Democratic reformers since the Progressive Era have viewed localism as a response to the democratic deficit in federal and state politics.79 To counteract barriers to group mobilization that can reinforce the biases that favor the political influence of the affluent, democratic theorist Robert Dahl proposes a decentralized version of pluralism. 80 Decentralized pluralism "provide[s] a high probability that any active and legitimate group will make itself heard effectively at some stage in the process of decision." 81 As Gerald Frug explains, this can advance the community-building value of local government with democratic participation, public policy experimentation, and "the energy derived from democratic forms of organization." 82

#### Relocalizing worker protection enables distributed responses to existential risk.

Peter McColl 25, Former Rector of Edinburgh University, Geography graduate from University of Edinburgh, Former Vice President of Edinburgh University Students Association, "Even when it's a Grand Challenge the solution is often local: Thoughts on solidarity and subsidiarity in the face of radical change," Substack, 03/12/2025, https://substack.com/home/post/p-158921506

And the thinking about Grand Challenges very often, focuses on a range of approaches that involve equally grand thinking. Grand schemes, like a National Care Service – long on ambition but worryingly short on detail. These approaches too often ignore the very personal relationships needed to meet the challenge. While we need to create universal standards for care and sectoral deals for workers on pay and conditions, we also need to think about how we can get citizens involved in creating a response to the challenge.

The best social care systems are very local. All the international experience points to decentralised care working best. Of course, this should be balanced with the need to protect workers and avoid bad care practices.

Tackling the symptom, not the cause

Our current Councils are in a very difficult position here: too large to connect with communities, too small to be genuinely strategic. Part of the answer to the question is to bring government local to people. To have genuinely local government.

In other areas, the government has tried to address this problem using workarounds. Identifying a lack of engagement in local democracy, the Scottish Government has done excellent work to encourage schemes such as encouraging participatory budgeting, which allows citizens to propose and develop projects. The community then gets to choose which of the projects gets resources. These are good things in themselves but fail to address the core problem.

In social care, people have focused on care cooperatives as a workaround for our oversized Councils. These are inspired by the ‘Buurtzorg’ cooperatives that have been successful in the Netherlands. Just as with other workarounds, these have failed to take off in Scotland. Where participatory budgeting has worked it has not expanded beyond the areas where it was introduced, no substantial care cooperatives have developed in Scotland, and the ambition to transform social care with cooperative approaches seems as far away as ever.

How could relocalising help?

The failure to develop these approaches points to the need to do something different. One reason why there is such reluctance to relocalise our Councils is the failures of previous reorganisations. But these were imposed by governments Scotland did not vote for, and the reorganisation that gave us the current 32 Councils was a model of bad practice, based largely on achieving party political outcomes, rather than improving how our Councils work. We should not let the scars of a bad, top-down council reorganisation stop us from demanding better, more local Councils. And, as with the Campaign for a Scottish Parliament, the demands of a campaign from below will naturally better reflect the demands of citizens and communities.

Truly local Councils would be well-placed to deliver the benefits of participatory budgeting, and a solution to the challenge of care, capturing the opportunities of localised care cooperatives. Care commissioned and delivered by distant public authorities misses the ability of local communities to pull together and deliver the high-quality care we really need. By combining roles in local areas we can help to address understaffing, by better understanding the needs of citizens we can better deliver care that meets those needs.

While our Covid response shows we can still roll out a vaccine very effectively, it has become even clearer that we need to adopt new approaches to address problems that are more complex, and more fundamentally social in their character. It often feels like we are trying to treat every challenge like it is rolling out a vaccine – something that can be tackled by experts and professionals alone. That is why we find it so difficult to get citizens involved and engaged in addressing challenges.

If you have a hammer in your hand you will be tempted to see everything as a nail. That has been getting in the way of more effective solutions for problems that have social causes. ‘Call the Midwife’ showed successes in vaccine delivery, but the stories are profoundly social and the reason so many people watched the series was the attractiveness of those stories. We need structures that allow us to deal with those problems.

Avoiding the mistakes of previous reorganisations

There are lots of ideas about how we can avoid the complexity and multiplication of effort that are often cited as concerns when reorganisation is discussed. Dave Watson identifies the ‘single public worker’, with conditions and sectoral bargaining as a way to avoid Unions having to negotiate with many more Councils. Where in the 1990s the reorganisation of local government was scarred by discontinuity from the old Councils to the new, we must learn those lessons. This offers an opportunity as well as an assurance. It would require mapping and understanding of what functions local authorities have, where those are located and how they interact with other public services. If we can be clearer about where different tasks are located it will allow better engagement with citizens.

Applying the learning to other Grand Challenges

There are a range of other grand challenges where we can learn these lessons. Dealing with the climate crisis requires action at all levels – from global to local. And the lack of real local government will hamper our response, especially where we need to adapt to climate change. Anyone who lives close to the coast will know that the increased volatility of weather has had a range of devastating effects on beaches and increased coastal erosion. The response needs to be local, and too often the needs of different areas are being played off against one another. The best answer to the question of who should be the priority for coastal defence is to give that power to communities themselves. Of course coastal defence requires coordinated action, so the planning should be at regional level – it is the delivery that should be relocalised.

While we face more grand challenges, we need to resist the temptation to be drawn into a ‘race to the top’ in the responses to those crises. We have mostly solved the challenges that can be solved with centralisation. We need to develop the structures that might help us to deliver solutions to the challenges we face. Localisation offers us a way to tailor solutions to these more social, more complex challenges. In this way we can balance the needs of democracy, workers and citizens more effectively and in sympathy to people’s lives as they live them.

**1NC – CP**

Countercyclical CP

#### The United States federal government should peg workers' rights contrary to collective bargaining rights to macroeconomic indicators, increasing their susceptibility to being nullified by antitrust during periods of labor market tightness, as determined in good faith by the Federal Open Market Committee (FOMC); publicly and consistently disclose whether or not workers' rights contrary to collective bargaining rights are permitted under current macroeconomic conditions; guarantee a six-month regulatory safe harbor before recurrent FOMC review.

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

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

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

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

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

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

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

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

I. SHAREHOLDER PRIMACY AND MACROECONOMIC CONTEXT

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

A. Shareholder Primacy and Stakeholder Governance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. MACROECONOMIC POLICY

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

A. Policy Responses to Recessions

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

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

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

[\*154] 1. Fiscal Policy

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

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

2. Monetary Policy

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

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

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

3. Automatic Stabilizers

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

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

4. Reforming Legal Rules

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

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

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

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

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

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

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

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

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

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

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

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

C. Corporate Governance as an Independent Macroeconomic Policy Tool

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

1. Revising the Profit Maximization Goal

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

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

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

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

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

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

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

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

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

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

2. Revising Decisions on Risky Investments

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

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

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

3. Setting Corporate Priorities

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

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

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

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

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

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

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

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

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

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

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

III. EARLY RESPONSES TO THE COVID-19 CRISIS

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

A. Proxy Advisory Services and Shareholders

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

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

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

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

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

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

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

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

[\*169] B. Government

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

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

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

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

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

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

C. Businesses

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

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

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

IV. PRIVATE IMPLEMENTATIONS

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

A. Potential Shareholder Advocates

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Potential Approaches

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

1. Consistent Approach

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

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

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

2. Switching Approach

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

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

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

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

C. Installing the Approach

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

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

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

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

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

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

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

D. Adjustments to Corporate and Securities Law

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

1. Consistency with Current Law

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

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

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

2. Removing Uncertainty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Preventing or Rolling Back Contrary Reforms

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

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

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

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

4. Facilitative Reforms

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

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

V. GOVERNMENT IMPLEMENTATIONS

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

A. Changing Regulation of Extraordinary Corporate Events

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

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

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

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

B. Changing Ordinary Corporate Governance

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

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

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

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

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

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

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

C. Government as Shareholder

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

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

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

D. Taxes and Regulations

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

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

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

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

I. CONGRESS: POLITICS, ORGANIZATION, AND INCENTIVES

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

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

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

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

A. Concentrated Costs of Regulatory Legislation

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

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

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

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

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

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

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

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

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

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

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

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

\* \* \*

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

C. Congressional Organization and Procedure

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

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

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

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

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

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

D. Policy Complexity and Congressional Capacity

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

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

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

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

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

E. (Lack of) Substitutable Spending

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

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

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

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

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

F. Postenactment Erosion

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

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

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

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

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

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

\* \* \*

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

II. FUTURE-ORIENTED LAWMAKING

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

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

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

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

A. Automatic-Updating Mechanisms

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

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

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

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

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

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

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

B. Mandating Agency Action

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

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

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

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

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

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

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

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

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

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

C. Empowering Agencies

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

1. Funding and capacity.

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

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

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

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

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

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

2. Information access.

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

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

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

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

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

3. Expansive remedies and rulemaking authority.

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

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

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

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

D. Encouraging Pluralistic Action

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

[\*410]

1. State governments.

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

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

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

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

2. Overlapping agency jurisdiction.

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

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

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

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

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

3. Harnessing private parties.

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

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

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

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

CONCLUSION

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

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

**1NC – T**

T-Trumping Power

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

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

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

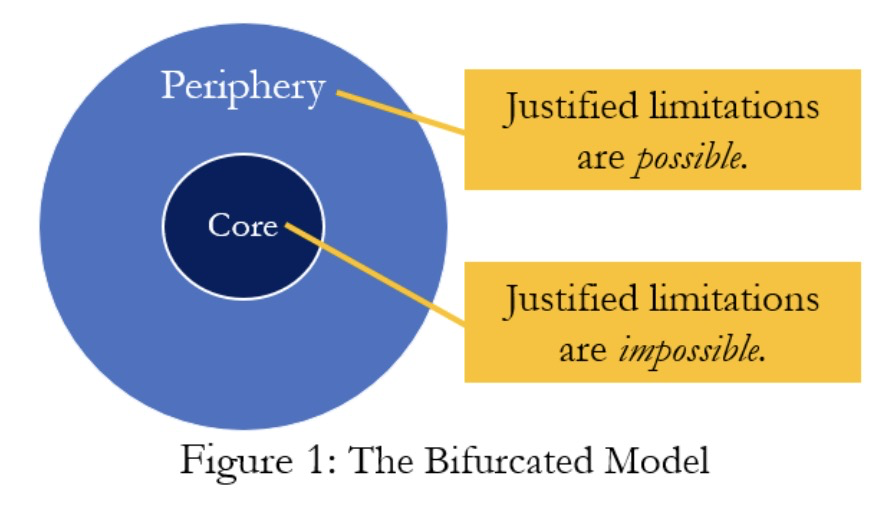
**That means topical affs must make existing labor rights more absolute---expanding the scope of labor rights is not topical.**

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

I. The Bifurcated Model

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Non-Bifurcated Models

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

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

Table 1

Models of Constitutional Rights

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

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

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

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

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

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

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

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

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

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

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

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

III. Identifying the Essence

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Why the Essence is Absolute

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

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

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

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

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

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

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

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

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

V. Conclusion

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

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

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

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

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

**Prefer it:**

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

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

## Unions Advantage

**Top – Solvency – Non-NLRA – 1NC**

**Bargaining rights outside the NLRA is the worst of all worlds. Employers get the carrot of litigation-free bargaining without the stick of NLRB-mandated protections.**

Sam C. **Ehrlich 25**, JD/PhD is an Assistant Professor of Legal Studies (Management) with the Boise State University College of Business of Economics, "The paradox of 'non‐union unions': The risks of extending antitrust immunities without labor law's protections," Wiley Online Library, 4/24/2025, https://onlinelibrary-wiley-com.dartmouth.idm.oclc.org/doi/10.1111/ablj.12258?af=R

3 How Non-Union Unions Decimate the “Carrot-And-Stick” Framework That Defines Labor Law

Of course, if legislation were to pass that would extend union coverage to gig economy workers, college athletes, and other workers stuck between the employee/independent contractor paradigm, it may very well extend the exclusive bargaining privilege to labor groups formed by those workers as well. And while extending these unionization rights without other accompanying employment law may seem to some as a good compromise measure,133 we caution that extending some but not all employment rights to workers who otherwise clearly meet employment classification tests could be devastating to the labor economy. After all, as formal unionization provides, through the statutory and non-statutory labor exemption, both a carrot and a stick that give leverage to employees during the collective bargaining process. A half-measure approach—where workers are allowed to unionize but are not afforded the protections of federal wage-and-hour law and perhaps not even full coverage under the NLRA—would ultimately defeat the purpose of labor law in the first place.

The formal unionization structure is important. The structure, defined by the NLRA and shaped by decades of complementing statutes and judicial interpretations, sets forth a particular set of rules that employees and employers must follow. In exchange—and, at least for now, only in exchange—employers and employees are allowed the benefits of collective bargaining, most primarily the nonstatutory labor exemption which shields whatever agreements are reached through collective bargaining from antitrust scrutiny. This allows employers and employees to work together to craft the structure that best fits their business. But with this ‘carrot’ must also come a ‘stick’: employers are only afforded this important benefit if they recognize and allow the employees' right to collective activity through unionization and agree to come to the table with that union in good faith, fully ceding regulatory authority and oversight over their employer/employee relations to the NLRB.

Employers have several reasons to enter into collective bargaining agreements. Either they are forced to do so through the requirements of federal labor law, or they do so to normalize employment terms across the industry. But without antitrust protection through the statutory and nonstatutory labor exemptions, such a normalization (without freedom for employees to do their own thing at their election) would almost certainly be a clear violation of the Sherman Act. So without the ‘stick’ of federal labor protections and good faith bargaining requirements and the ‘carrot’ of antitrust-free normalized employment terms, the only incentive for employers to enter into an industry-wide agreement with labor would be if the agreement was grossly favorable to the employer at the expense of labor.

**Fissured Economy – 1NC**

**Fissured economy makes worker power impossible.**

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

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

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

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

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

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

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

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

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

### Supply Chains Defense---1NC

#### Supply chains are resilient.

Daniel Drezner 22, International Politics Professor at Tufts University, "Where's My Stuff?" Reason, 01/01/2022, https://reason.com/2021/12/05/wheres-my-stuff/

While demand has been stronger than expected, supply in critical sectors coped better than expected. The predicted pandemic breakdowns in supply chains for food and medical supplies proved to be overstated. Surveys of logistical firms last year revealed that the pandemic had minimal effects on their operational capabilities. Even when it came to medicines and personal protective equipment, there were only minor disruptions after the initial shock in March 2020. Claims that the global supply chain in medical products rendered states vulnerable to weaponized interdependence proved to be wildly exaggerated. The pandemic affected service sectors such as tourism far more severely than any manufacturing sector. Indeed, Slate's Jordan Weissmann pointed out recently that "imports were up 5 percent year-over-year in September, and up 17 percent compared with the same time in 2019." This happened despite the decline in air passenger traffic, which restricted yet another means of shipping goods by air. Supply has increased—it's just that demand has surged even more.

The private sector is responding to market signals by ramping up production and ensuring multiple supply lines. Intel, Samsung, and TSMC are all spending tens of billions of dollars to build new chip foundries in the United States. Skyrocketing shipping prices are incentivizing additional construction of new container ships. The Wall Street Journal reports that in the first five months of 2021, there were nearly twice as many orders for new container ships as there were in all of 2019 and 2020 combined. To ensure holiday inventory, large retailers like Walmart and Home Depot have chartered their own container ships. Container shipping rates have already started to decline from September peaks.

#### No impact, even if shocks occur.

---nearshoring: “practice of transferring a business operation to a nearby country”

---ally shoring: “program of sourcing services, goods, and materials with allies”

Ian Bremmer 22, Ph.D. from Stanford University, B.A. from Tulane University, President of the Eurasia Group, Formerly worked at EastWest Institute, the World Policy Institute, and the Lawrence Livermore National Laboratory, Harold J. Newman Distinguished Fellow in Geopolitics at the Asia Pacific Society, Global Research Professor at New York University, knighted by the government of Italy, "Globalization Isn't Dead," Foreign Affairs, 10/25/2022, https://www.foreignaffairs.com/world/globalization-isnt-dead?utm\_medium=newsletters&utm\_source=fatoday&utm\_campaign=North%20Korea%20Raises%20the%20Nuclear%20Stakes&utm\_content=20221025&utm\_term=FA%20Today%20-%20112017

LEADERLESS WORLD

Although the partial decoupling of Russia and the West and China and the United States does not amount to deglobalization, it does indicate a shift in the nature of globalization. The global economic order is becoming more multipolar and fragmented in the absence of international leadership. This means that geopolitics will increasingly creep into economic calculations. The interdependencies and vulnerabilities exposed by COVID-19 and Russia’s invasion of Ukraine have brought economic security concerns to the fore. Countries and companies will increasingly attempt to make themselves more resilient to external shocks and insulate themselves from geoeconomic pressures through a combination of “ally shoring,” “nearshoring,” diversifying supply sources, and stockpiling. It is even possible that cross-border economic activity will splinter into geopolitical spheres of influence, as countries deepen their integration with friends and reduce their reliance on foes.

These forces point away from the aggressive globalization of recent decades, but not toward autarky. The benefits of scale and specialization are too great, and the costs of reversing globalization are too high. The global value chains that produce most modern goods are so complex and spread out that recreating them at a national level is virtually impossible. Western companies will increasingly pull back from China, no doubt, but for the most part they won’t bring production back home, instead shifting it to friendly, lower-wage nations such as Mexico and Vietnam. With few exceptions, reshoring and insourcing would prove excessively costly—and risky. As the shortage of baby formula in the United States demonstrated earlier this year, resilience is best achieved through diversification and spare capacity—not self-reliance.

These shifts in the patterns of global integration may well result in efficiency losses. Politics and geopolitics, after all, increase transaction costs and impede the optimal allocation of resources. But this is a small price to pay to ensure that globalization and its benefits endure. Striking the right balance between efficiency and security will result in a safer, more sustainable economic order.

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### Shortage Defense---No Resource Wars---Food---1NC

#### No food wars.

Jonas Vestby 18, Doctoral Researcher at the Peace Research Institute Oslo, Ida Rudolfsen, doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO, and Halvard Buhaug, Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography, “Does hunger cause conflict?”, 5/18/18, https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/

It is perhaps surprising, then, that there is little scholarly merit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violent conflict requires people to have both the means and the will. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources of discontent are considerably more complex – linked to political structures, land ownership, corruption, the desire for democratic reforms and general economic problems – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while the international media have a tendency to seek simple resource-related explanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by more complex political relationships.

#### Food insecurity is inevitable.

Martina Igini 24, Journalist & Editor, Earth.Org, "Why Global Food Security Matters in 2024," Earth.Org, 01/11/2024, https://earth.org/global-food-security/

The COVID-19 pandemic has heavily compromised food security globally, increasing hunger levels by an estimated 118 million people worldwide in 2020, the most since 2006. Hunger kills more people than HIV/AIDS, malaria, and tuberculosis combined, the vast majority of which live in developing countries. And it is these countries that are now experiencing the worst consequences of the current food crisis.

In 2012, The Economist first published the Global Food Security Index, an instrument that measures food security in 113 countries. Yearly rankings show this varies greatly around the world. Some regions are more prone to food insecurity due to a lack of fertile land as well as capital to procure sufficient food through the purchasing of imports. However, some external factors such as sudden armed conflicts like the ongoing Ukraine Russia war or global health issues like the recent pandemic compromise food supplies in 'safer' countries as well.

According to the 2022 Index, Finland, Ireland, and Norway share the top rank with the overall GFS score in the range of 80 and 84 points on the index, proving that these countries all have sufficient and affordable food supplies and natural resources to support their population as well as adequate food safety net programmes. The seven worst performing countries in that year were all in Africa with the exception of Syria and Haiti, the lowest and second-lowest in the rank, respectively with scores ranging from 34 to 37 for their low availability and affordability of food supplies as well as very low quality and safety standards.

[Figure omitted]

The world population is growing at a rate of about 1% each ycu, a significant decrease from the 2.2% growth from 50 years ago. Despite this, estimates predict that by 2050, it will increase by another two billion, bringing the total number of people living on Earth to nearly 10 billion. This rapid population growth can have devastating consequences on our planet by putting a strain on its resources, most notably on food supplies. The factors that connect population growth to food security are manifold and range from drastic changes in human diets to the ways in which we produce food. On the one hand, especially in richer countries, people have become wealthier and are eating more. On the other hand, they are opting for more resource-intensive and environmentally impactful food. However, as demand grows, resources decline. To meet the ever-increasing demand, food production had to be scaled up, though this has in turn pushed humanity to the brink of exceeding planetary boundaries. Today's agricultural system is struggling to deliver enough food to meet that need.

Another huge problem with our current global food system is the amount of food waste it generates. Shockingly, even though demand for food is high, we still throw away about one-third of global supplies every year, equivalent to nearly 1.2 billion tonnes of food. Research suggests that if high income countries reduced post-harvest waste by 50%, the number of undernourished people in poor countries could be reduced by up to 63 million. It becomes clear that simply reducing food waste could drastically improve global food security.

But problems related to our food system are just one of the factors impacting global food supplies. Food security and climate change are also deeply connected, with the latter being a threat multiplier for undernourished people and accounting for one of the biggest causes of food insecurity. Drivers of climate change such as biodiversity loss, increased pollution, and extreme weather-related disasters compromise agricultural production, significantly reducing the yields of major crops. Simultaneously, the overexploitation of land and the intensive use of fertilisers and pesticides required to meet the ever-rising food demand are destroying entire ecosystems, impacting species population, and compromising soil fertility, limiting the already restricted amount of food that we can grow. Evidence suggests that in just over 6 decades, over 35% of arable land has been degraded due to human-induced activities.

What Happens When Food Security Is Compromised?

Population growth, improvement in incomes, and diversification of diets have steadily increased the demand for food. If we do not change fast enough, then global food security will be irreversibly compromised. And when this happens, it will lead to catastrophic consequences for societies around the world.

#### Global food supply is resilient.

Indur Goklany 15, PhD from Michigan State, Assistant Director of Programs, Science and Technology Policy at the DOI, represented the United States at the Intergovernmental Panel on Climate Change (IPCC) and during the negotiations that led to the United Nations Framework Convention on Climate Change, “CARBON DIOXIDE: The good news”, The Global Warming Policy Foundation, GWPF Report 18

Crop yields have increased (see Figure 3) and global food production, far from declining, has actually increased in recent decades. Between 1990–92 and 2011–13, although global population increased by 31% to 7.1 billion, available food supplies increased by 44%. Consequently, the population suffering from chronic hunger declined by 173 million despite a population increase of 1.7 billion.112 This occurred despite the diversion of land and crops from production of food to the production of biofuels. According to one estimate, in 2008 such activities helped push 130–155 million people into absolute poverty, exacerbating hunger in this most marginal of populations. This may in turn have led to 190,000 premature deaths worldwide in 2010 alone.113 Thus, ironically, a policy purporting to reduce AGW in order to reduce future poverty and hunger only magnified these problems in the present day.

#### America is insufficient for food security because of export locations.

Anne Weir Schechinger 16, M.S. in Agricultural, Food and Resource Economics at Michigan State University, Senior Economics Analyst at EWG; Craig Cox, M.S., in Agricultural Economics at University of Minnesota, October 2016, “Feeding the World: Think U.S. Agriculture Will End World Hunger? Think Again,” https://static.ewg.org/reports/2016/feeding\_the\_world/EWG\_FeedingTheWorld.pdf, Stras

These same voices often claim that doubling American production is a moral imperative, not simply a market opportunity. They say people will go hungry if U.S. farmers don’t respond (see sidebar). In some cases, they imply or even say outright that the collateral damage to natural resources, the environment, human health and ecosystems that would result from meeting this moral imperative would be regrettable but unavoidable. Finally, they argue that “modern” farming systems that rely heavily on biotechnology, fertilizers and chemicals are the only way U.S. farmers can meet this challenge, and that hewing to more agro-ecological methods of producing agricultural bounty will put countless people at risk of hunger and malnutrition.

Many farmers sincerely believe this. Others use this scenario more cynically to pursue political or business objectives. In either case, the “moral imperative” to feed the world has become an important rationale for maintaining the status quo in U.S. farm policy. It has also been deployed to deflect attention from the damage that “modern” agriculture does to the environment and human health, and to discredit calls for reform.

This self-serving narrative is being challenged, however. José Graziano da Silva, director-general of the Food and Agriculture Organization of the U.N., has argued compellingly that the persistence of hunger in the world, and the growing damage that “modern” agriculture does to soil and biodiversity demonstrate that this model of food production “is no longer acceptable.”4 Graziano and a host of other experts say the true solution to ending world hunger, while protecting environmental resources, is to improve the productivity and income of small farmers in the developing world, while promoting sustainable agriculture and “agro-ecology” everywhere.

EWG dug into agribusiness’ oft-repeated mantra to assess whether it reflects reality. It is true, of course, that many people across the globe do suffer from hunger and malnutrition, and improving their diets while ensuring that millions more don’t suffer the same fate is indeed a moral imperative. It is critical, therefore, that U.S. policies contribute effectively to ending hunger and malnutrition, but right now, these policies verge far from the truth.

Global demand for more diversified diets is expanding as millions of people in developing nations become affluent enough to afford a better, or at least different, diet. This is a welcome development and U.S. farmers have an important opportunity to serve this market through world trade. But meeting this demand—largely for meat, meat products and animal feed—does not carry the same moral imperative as lifting people out of poverty and hunger. The argument that we should accept the collateral damage from doubling U.S. production of grain and meat to satisfy a demand of this type hardly holds water.

As a first step toward improving understanding of America’s role in combating hunger, EWG examined current agricultural export data in detail to determine who gets fed by U.S. agriculture, and with what products. We analyzed agricultural trade and production data from the U.S. Department of Agriculture, the international Organization for Economic Cooperation and Development, and the FAO of the U.N.. Export demand is driven by consumption, so export patterns provide key information about which agricultural products are consumed worldwide.

SPECIFICALLY, WE INVESTIGATED:

The top 25 agricultural products the U.S. exports.

The primary countries that receive U.S. agricultural products.

The amount of U.S. exports that go to countries considered to have high or very high rates of undernourishment.

The share of undernourished countries’ food supply that comes from U.S. exports and food aid.

This report summarizes our findings.

TOP 25 U.S. AGRICULTURAL EXPORTS

In 2015, just 25 products accounted for 73 percent ($97.7 billion) of all U.S. agricultural exports ($133.05 billion), according to the most recent data5 (see Table 1 below). Besides the 26th product, all other agricultural products contributed less than 1 percent each. Over 100 of them contributed less than 0.5 percent each.

Ten years of data, from 2006 through 2015, show similar results, as do the five years of data from 2011 through 2015. However, the second smallest product in 2015’s top 25—walnuts—dropped out of the top 25 over several years, overtaken by soybean oil or bovine hides. Grain sorghum was also more prominent in 2015 than in many of the previous years.

EWG classified the 25 top export products in five categories: (1) animal feed, (2) meat and dairy, (3) food grains, (4) fruits, vegetables and nuts, and (5) other—based on how the products are primarily used. Soybeans, for example, can be used as food for either animals or humans, but were assigned to the animal feed grouping because the vast majority of soybeans are fed to animals. Globally, about 85 percent of soybeans are “crushed” and turned into meal for animal feed and oil for human food.6 The meal-to-oil ratio of soybean exports varies by country, but in the U.S., about 80 percent of crushed soybeans become animal feed.7 Uncrushed soybeans, which comprise a relatively small amount of the total, have food, feed, seed and industrial uses.

Corn is also in the animal feed category. Much more corn is used as animal feed than as human food—about 44 percent is used for feed in the U.S., compared to only 12 percent for food.8 Soybean meal and “other feeds and fodder” are also in the animal feed category.

Although wheat is used as animal feed in the European Union and some other parts of the world, EWG classified it in the food grains category because globally, the majority of the wheat supply is used for food. Other products in the food grains category include rice and “other grain products” such as millet, quinoa and pasta.

Table 1 omitted.

The meat and dairy category includes beef, chicken and pork, and dairy products like cheese and milk. The fruits, vegetables and nuts category is also self-explanatory and includes fruits, vegetables, nuts and “miscellaneous horticulture products” such as spices and vegetable byproducts. The “other” category consists mostly of cotton, beverages, sugar products, waxes and oils.

In 2015, animal feed contributed 40 percent ($39.3 billion) of the total value of the top 25 U.S. agricultural exports; meat and dairy contributed 16 percent ($15.2 billion); “other” 16 percent ($15.6 billion); food grains 14 percent ($13.7 billion); and fruits, vegetables and nuts 14 percent ($14.0 billion) (see Figure 1 below). Throughout the 2006-2015 decade, the breakdown of the top 25 exports was fairly consistent. On average, 41 percent of total value came from animal feed; 15 percent from meat and dairy; 18 percent from “other;” 15 percent from food grains; and 10 percent from fruits, vegetables and nuts.

Figure 1 omitted.

Together, animal feed, meat and dairy products yielded 56 percent ($54.5 billion) of the value of the top 25 U.S. exports in 2015 and a striking 41 percent of the value of all U.S. agricultural exports. In all, over half of the value of the top 25 exports and almost half the value of all agricultural exports was from meat, meat products and animal feed.

EWG used the same five categories to analyze all U.S. agricultural exports—not just the top 25 products—in 2015 to the top 20 importers, and found that animal feed made up 31 percent of their total value. Meat and dairy accounted for 19 percent; fruits, vegetables and nuts 22 percent; food grains 10 percent and “other” made up 18 percent (see Figure 2 below).

Animal feed exports to the top 20 destinations were highly concentrated— just seven products accounted for $35.6 billion of total agricultural export value in 2015. Soybeans and soybean meal alone made up 18 percent ($21.1 billion) of total exports. Other categories were much less concentrated: meat and dairy had 34 products for a combined $21.3 billion value; food grains had 14 products for $11.3 billion; fruits, vegetables and nuts had 57 products for $25.4 billion; and “other” had 48 products for $20.9 billion.

Together, meat, dairy and animal feed accounted for 50 percent ($57 billion) of the value of all exports to the top 20 destinations, meaning that half the total export value was earned by products that help people in wealthier countries eat more meat.

For the 2006-2015 decade as a whole, 33 percent of the value going to the top 20 export destinations came from animal feed; 18 percent from meat and dairy; 11 percent from food grains; 18 percent from fruits, vegetables and nuts; and 20 percent from “other.” The combined export value of meat, dairy and animal feed was very close to the 2015 figure— averaging 51 percent.

DEVELOPED COUNTRIES ARE THE MAIN EXPORT DESTINATIONS

The U.S. only provides a small portion of total world agricultural production. According to the U.N. FAO, in 2013 (the most recent year available) the value of U.S. agricultural production made up only 9.5 percent of the global total.9

The U.N. Development Program uses a system of development indicators to rank each country’s development status as low, medium, high or very high based on measures of life expectancy, income and level of education.10

In 2015, the top 20 importers of U.S. agricultural products—19 individual countries and the European Union—accounted for 86 percent ($114.4 billion) of the total value of U.S. agricultural exports. Only 14 percent went to the other 100-plus destinations. On average, the top 20 importers accounted for 85 percent of all U.S. agricultural exports throughout the 2006-2015 decade. Most of the 20 importers were similar every year, with the exceptions of Russia dropping out in 2014 and 2015, and Guatemala and India being added in 2015. In 2015, most of the top value went to countries with very high or high development scores, and none went to countries with high rates of hunger.

In 2015, 50 percent of the value of America’s agricultural exports to the top destinations went to the European Union and seven countries the U.N. rates very high for development; 39 percent went to six countries rated high; and just 8 percent went to five countries rated medium. Taiwan, which did not have a human development rating due to a lack of data, accounted for 3 percent of the exports’ value (see Table 2 below). (The United States is rated very high for development.)

Between 2014 and 2016, nine of the 20 top importers of U.S. agricultural products enjoyed very low rates of hunger, according to the FAO.11 Nine countries had moderately low rates of hunger and only two had moderately high hunger. FAO ranks a country as suffering a very high hunger rate if 35 percent or more of the population is undernourished; high at 25 to 35 percent undernourished; moderately high at 15 to 25 percent; moderately low at 5 to 15 percent; and very low at less than 5 percent. None of the top 20 importers had high or very high rates of undernourishment, so U.S. agricultural exports mainly went to countries where less than 25 percent of the population is going hungry. (The United States is rated very low for hunger.)

Despite their overall low rates of undernourishment, some countries among the top export destinations do struggle with malnutrition, resulting from a combination of undernourishment and obesity. Millions of people suffer from malnutrition in four countries—China, Indonesia, India and Mexico—that were main U.S. agricultural export destinations in 2015, according to the International Food Policy Research Institute’s 2014-2015 Global Food Policy Report.12 The Institute considers 11 percent (150.8 million) of China’s population, 15 percent (190.7 million) of India’s population and 9 percent (21.6 million) of Indonesia’s population to be undernourished. But in China and Indonesia, the number of overweight or obese people is more than double the number who are undernourished, and 11 percent of India’s population is overweight or obese.

Likewise, being overweight or obese are the main reasons people in Mexico are malnourished. The Institute reports that undernourishment affects a negligible percentage of Mexico’s residents, but 69 percent (82.6 million) are overweight or obese. The Institute cites three main reasons why malnutrition is a problem in these countries despite their impressive rates of economic growth:

growing inequality in wealth and education;

a surge in urbanization, and associated dietary shifts from cereals toward sugary, salty and fatty foods; and

domestic food security programs that do not target the neediest or focus on nutrition.

Table 2 omitted.

U.S. agricultural exports to China, Indonesia and Mexico do nothing to alleviate these problems and may actually contribute to a rise in the overweight and obese populations. In 2015, most of the value of America’s agricultural exports to these three countries came from meat, dairy and animal feed products: 70 percent of the value to China, 65 percent of the value to Indonesia and 60 percent of the value to Mexico. India, at 6 percent, was the only country in which meat, dairy and feed accounted for a low share of import value, mainly because 45 percent of its total imported value was from almonds alone.

A TINY AMOUNT OF U.S. EXPORTS GO TO THE HUNGRIEST COUNTRIES

According to the U.N. FAO, from 2014 to 2016 four countries were experiencing very high undernourishment and 15 had high undernourishment.13 All had low or medium human development scores, which are correlated with undernourishment.

U.S. agricultural exports to these 19 hungry countries were valued at only $719.3 million—a tiny 0.5 percent of total U.S. agricultural exports in 2015. Exports to the top 20 destinations were 158 times greater than those to the 19 undernourished countries (see Figure 3 below). The 10-year average data is not directly comparable because the list of undernourished countries has changed since 2006. However, the value of U.S. agricultural exports to the countries with very high or high undernourishment over the decade averaged only 0.7 percent of the value of total agricultural exports.

Many of these nations have small populations, and having fewer people corresponds to lower agricultural imports. However, some of the top 20 importers have smaller populations than the 19 hungriest countries but still import considerably more agricultural products from the U.S. In 2013, for example, a number of the 19 hungriest countries had larger populations than Hong Kong, but the value of Hong Kong’s agricultural imports in 2015 was much greater.

Among the 19 hungriest countries, Haiti and Yemen together accounted for 63 percent of all U.S. agricultural exports to the group (see Table 3 below). Agricultural exports to the other undernourished countries were small and unevenly distributed.

The breakdown of products in the five export categories was very different for the 19 undernourished countries compared to the top 20 destinations. Hardly any of the agricultural export value going to the 19 hungriest countries was in animal feed in 2015, and over half of the value was in food grains (see Figure 4 below). In the hungriest countries, animal feed made up just 2 percent of the export value ($16.8 million). Food grains were at 59 percent ($426.4 million); fruits, vegetables and nuts were at 9 percent ($67.5 million); meat and dairy were at 22 percent ($156.9 million); and “other” was at 8 percent ($56.5 million).

Figure 3 omitted.

Combined, meat, dairy and animal feed accounted for a much lower percentage of export value to the 19 undernourished countries than to the top 20 export destinations. Those two categories accounted for 50 percent of the top importers’ values but only 24 percent of the hungry countries’ values. Overall, U.S. exports delivered little meat to the hungry countries.

Table 3 omitted.

On average for the 2006-2015 decade, 3 percent of the undernourished countries’ imported values came from animal feed; 18 percent from meat and dairy; 59 percent from food grains; 8 percent from fruits, vegetables and nuts; and 13 percent from “other.” The average value of the meat, dairy and animal feed breakdown for the decade was 21 percent—a little less than in 2015.

U.S. EXPORTS AND AID PROVIDE LITTLE OF HUNGRY COUNTRIES’ FOOD

U.S. food exports and food aid made up a tiny portion of the total food supplies of the 19 hungriest countries. EWG calculated the value of each country’s total food supply by adding net domestic food production and net food import values reported by the U.N. FAO14 to total food aid reported by the OECD, in accordance with FAO methodology.15 The Organization’s food aid data encompassed official development assistance in the form of food aid, food security assistance and emergency food aid.16 Due to the combination of different data sources, the food supply calculations are estimates and may not represent exact values.

Figure 4 omitted.

On average, in 2013 (the most recent year with data), gross food imports from all exporting countries contributed 22.9 percent of the undernourished countries’ food supplies. U.S. food exports made up just 1.2 percent of the total.

Although the U.S. provided almost half of all food aid to the hungriest countries, total food aid made up a diminutive fraction of these countries’ food supplies. In 2013, the share of the total food supply from food aid provided by OECD countries averaged only 2.2 percent. The United States provided 48.9 percent of that food aid, but U.S. aid accounted for only 1.1 percent of the total food supplies in the 19 hungriest countries.

Together, food exports and food aid from the U.S. constituted an inconsequential amount of the 19 undernourished countries’ total food supplies—averaging 2.3 percent. The U.S. contribution to food supplies ranged from a high of 17 percent in Haiti to a low of almost zero in TimorLeste (see Table 4 below). Overall, food aid and gross food imports to the 19 undernourished countries accounted for 25.1 percent of their total food supplies, dwarfing the 2.3 percent U.S. contribution.

## Regulations Adv

**AT: Monopsony – 1NC**

**Employer concentration is low and doesn’t have an impact.**

Geoffrey A. **Manne et al. 25**, Manne is JD, president and founder of the International Center for Law and Economics; Albrecht is PhD, chief economist at the International Center for Law & Economics; Auer is PhD, director of competition policy at the International Center for Law & Economics, "Labor Monopsony and Antitrust Enforcement: A Distorting Mirror," DePaul Law Review, vol. 74, Summer 2025, HeinOnline

For pure concentration measures, this may not matter too much. Berger, Herkenhoff, and Mongey argue that "there is little practical difference in defining a market at the occupation-city level rather than the industry-city level as these two measures are highly correlated."6 2 But at the more granular level of antitrust enforcement, the difference between measures may be significant. In particular, many workers may be able to easily substitute between employers located in different industries. An accountant, for instance, might be just as qualified to work for a bank as for a hotel or a tech company. This cross-industry substitution is obscured by market definition undertaken at the NAICS level. With these caveats about market definition, what does the administrative data show about concentration? Rinz uses the Longitudinal Business Database, covering nearly all private-sector employers, to estimate labor market concentration from 1976 to 2015.63 At the beginning and end of the time period studied, unsurprisingly, Rinz finds rural labor markets to be more concentrated than urban markets. 64 He finds that the average local HHI, defined by commuting zones and four-digit NAICS industries, decreased from 0.16 in 1976 to 0.12 in 2015, indicating a shift toward less-concentrated local markets. Local concentration fell in all population quintiles.65 By contrast, national HHI increased modestly over the same period, driven by large firms entering more local markets.66

Similarly, Lipsius documents falling local concentration from 1976 to 2015, using alternative market definitions based on five-digit NAICS codes and urban areas, rather than commuting zones.67 Despite these definitional differences, the average local HHI remains consistently low, falling from 0.20 to 0.18.68 Berger, Herkenhoff, and Mongey further corroborate these findings with a different way of averaging HHI measures across markets. 69 They estimate an average local HHI of 0.17 for the year 2014, with even lower concentration levels when analyzing individual sectors like manufacturing and services. Handwerker and Dey use microdata from the Occupational Employment and Wage Statistics, mapped to the Quarterly Census of Employment and Wages.7° They find an average HHI that is relatively stable and low.7 1 Recent analysis by Thompson uses the same data but defines markets at the MSA-by-industry-group level data for 2023.72 Thompson finds an average HHI of 0.37 However, when weighted by employment, the average HHI falls to 0.11, consistent with other findings that concentrated markets tend to have smaller workforces. The average local HHI levels documented in these studies are below the 1,800 (or 0.18) threshold associated with highly concentrated markets in the 2023 Merger Guidelines.7 3

Studies using job vacancies rather than employment data tend to find higher market concentration, but this may partly be driven by their omission of job openings that are not published online (or at all). Indeed, the most well-cited papers on labor market concentration use online job postings to measure concentration.7 4 These studies can define labor markets more granularly, but they may not capture all employers and job openings, particularly those that are not advertised online. This focus on vacancies rather than employment may not always reflect the actual options available to workers, as not all job vacancies are advertised (online).

While the 2023 Merger Guidelines suggest that labor markets warrant a lower concentration threshold for competition concerns, they do not provide a clear basis for this assertion or specify what that threshold should be. The indirect evidence from local labor market concentration metrics does not support the notion that labor markets are inherently more problematic than product markets from a concentration perspective. Instead, these low and falling concentration levels suggest that many local labor markets are relatively competitive and do not necessarily require a lower concentration threshold for merger analysis.While the guidelines' recognition of labor markets' unique features is important, this acknowledgment should be coupled with a more precise and empirically grounded approach to defining concentration thresholds.

More fundamentally, regardless of the data source used, marketdefinition issues remain. The variety of concentration estimates stemming from different geographic units and shifting occupational groupings demonstrates the lack of clarity around reasonable market boundaries. Worker mobility also introduces questions about appropriate geographic scope. While some labor markets may be highly concentrated, it does not follow that relevant antitrust labor markets are often relatively narrow. Establishing narrowness, in the antitrust sense, requires specific proof that additional employer options do not provide meaningful competitive discipline against potential wage reductions—something these papers do not do.

The upshot is that antitrust enforcers will need to rely on case-specific evidence, rather than broad claims of high concentration levels and narrow labor markets. Concentration measures have long been considered imperfect indicators of market power in antitrust policy and IO debates.7 5While high concentration may be suggestive of market power, it is not conclusive evidence. Many factors other than concentration can affect wages, such as differences in firm productivity, local labor market conditions (e.g., urban vs. rural), and institutional factors like unionization rates.

Moreover, there is good evidence that employer concentration does not lead to depressed wages.76 For example, Kirov and Traina find that rising markdowns (the gap between worker productivity and wages) are more strongly associated with technology-related factors, such as automation and managerial practices, than with employer concentration.7 7 Moreover, they caution that:

These results suggest that the workhorse assumptions behind some of the labor market power literature might need reevaluation, particularly work that uses cross-sectional variation to infer trends in labor market power. Concentration is likely an inappropriate measure of labor market power in this case. 7 ?

Their critique underscores the limitations of relying heavily on concentration metrics to assess labor market competition, especially when making claims about trends over time. As Berry, Gaynor, and Scott Morton write:

A main difficulty in [the monopsony power literature] is that most of the existing studies of monopsony and wages follow the structureconduct-performance paradigm; that is, they argue that greater concentration of employers can be applied to labor markets and then proceed to estimate regressions of wages on measures of concentration. For the same reasons we discussed above, studies like this may provide some interesting descriptions of concentration and wages but are not ultimately informative about whether monopsony power has grown and is depressing wages. 79

### Biotech Defense---Regulation Fails---1NC

#### Biotech governance fails.

Camino Kavanagh 19, visiting fellow in the Department of War Studies at King’s College London, “New Tech, New Threats, and New Governance Challenges: An Opportunity to Craft Smarter Responses?,” Carnegie, https://carnegieendowment.org/2019/08/28/new-tech-new-threats-and-new-governance-challenges-opportunity-to-craft-smarter-responses-pub-79736

WHAT LIES AHEAD?

The current framework for governing biotech-related ethical and normative challenges and for managing biological risk is fragmented. Responsibilities are dispersed across different intergovernmental agencies and national regulatory and oversight bodies.152 For decades, the WHO has helped shape norms relating to biotechnology, healthcare, and bioethics. The UN and other international and regional bodies have long played a role in shaping principles, standards, and norms in some of these areas with mixed results. For its part, UNESCO has also been involved in bioethics since the 1970s. Its work revolves around the sociocultural, legal, and ethical implications of advances in the life sciences (including biotechnology), and it has established bodies such as the International Bioethics Committee to study such matters.

The UN is also responsible for enforcing the ban enshrined in the BWC (which entered into force in 1975), the first multilateral disarmament treaty banning the development, production, and stockpiling of a specific category of weapons of mass destruction. Through a number of resolutions, the UN Security Council, too, has engaged on certain biotech-related issues, notably in relation to strengthening member states’ capacities to prevent biocrime and bioterrorism. These include UN Security Council Resolution 2325 (2016), which calls on all states to strengthen national antiproliferation regimes in the course of implementing UN Security Council Resolution 1540 (2004), which in turn seeks to keep nonstate actors from acquiring nuclear, biological, and chemical weapons of mass destruction and to submit timely reports on their efforts to do so.

Through its Group on Ethics and Science in New Technologies (EGE), the EU, too, is increasing its attention to biotechnology and its normative implications. After an earlier statement on gene editing, the EGE is preparing an opinion on gene editing, due to be completed in the summer of 2019. The opinion will focus on the “bigger picture of this issue,” which crosses existing ethical divides, as well as “specific aspects of concern” such as “gene editing applied to animals” and “gene editing in the context of biodiversity and ecosystems.”153 International forums like the WEF are also seeking to shape new related governance solutions. For instance, in addition to its work on the Fourth Industrial Revolution, the forum has established a Global Future Council on Biotechnology to consider ethical and safety issues emerging from biotechnology-related discoveries, applications, and policy issues.154

In national terms, rules and practices relating to certain biotech applications (like gene editing) continue to differ widely from country to country. Policymakers around the world are struggling to keep pace with the latest developments and adapt domestic institutions to manage the risks associated with the emergence of future advances and products. Countries have not yet aligned their respective efforts, although some are advocating for more global responses, including consensus on guiding ethical principles, through bodies such as the WHO.155 In this respect, the WHO’s decision to establish an Expert Advisory Committee to “examine the scientific, ethical, social and legal challenges associated with human gene editing” with the aim of advising and producing recommendations on “appropriate governance mechanisms for human gene editing” may be a step in the right direction.156

### Innovation Defense---Alt Causes---1NC

#### R&D and immigration shortages thump innovation.

Karishma Vaswani 20, Asia business correspondent, "Ex-Google boss: US 'dropped the ball' on innovation," BBC News, 09/11/2020, https://www.bbc.com/news/business-54100001

In the battle for tech supremacy between the US and China, America has "dropped the ball" in funding for basic research, according to former Google chief executive Eric Schmidt. And that's one of the key reasons why China has been able to catch up. Dr Schmidt, who is currently the Chairman of the National Security Commission on Artificial Intelligence, said he thinks the US is still ahead of China in tech innovation, for now. But that the gap is narrowing fast. "There's a real focus in China around invention and new AI techniques," he told the BBC's Talking Business Asia programme. "In the race for publishing papers China has now caught up." China displaced the US as the world's top research publisher in science and engineering in 2018, according to data from the World Economic Forum. That's significant because it shows how much China is focusing on research and development in comparison to the US. For example, Chinese telecoms infrastructure giant Huawei spends as much as $20bn (£15.6bn) on research and development - one of the highest budgets in the world. Dr Schmidt blames the narrowing of the innovation gap between the US and China on the lack of funding in the US. "For my whole life, the US has been the unquestioned leader of R&D," the former Google boss said. "Funding was the equivalent of 2% or so of GDP of the country. Recently R&D has fallen to a lower percentage number than was there before Sputnik." According to Information Technology and Innovation Foundation, a US research institute, the US government now invests less in R&D compared to the size of the economy than it has in more than 60 years. This has resulted in "stagnant productivity growth, lagging competitiveness and reduced innovation". Dr Schmidt also said the US's tech supremacy has been built on the back of the international talent that's been allowed to work and study in the US - and warns the US risks falling further behind if this kind of talent isn't allowed into the country. Tech war "This high skills immigration is crucial to American competitiveness, global competitiveness, building these new companies and so forth," he said. "America does not have enough people with those skills." The US has been embroiled in a tech cold war with China and in recent months has stepped up its anti-China rhetoric. This week it revoked the visas of 1,000 Chinese students it claims have military links and accused Chinese tech firms of acting as agents for the Chinese Communist Party - claims Beijing and these companies reject. The Trump administration has also taken steps to block Chinese tech firms like Huawei and Chinese apps including TikTok and WeChat, saying they pose threats to national security. Beijing has said this is "naked bullying", and Dr Schmidt says the bans will mean China will be even more likely to invest in its own domestic manufacturing. Dr Schmidt says the right strategy for a US-China relationship is what is called a 'rivalry partnership' where the US needs to be able to "collaborate with China, while also competing with them". "When we're rivals, we are rough, we are pursuing things. We're competing hard, we're trying to get advantage - real competition - which the US can do well, and which China can do well. But there's also plenty of areas where we need to be partners."

### No Biotech Innovation Impact---1NC

#### Biotech upsides and downsides are overhyped.

Matthew Holmes 22, Centre for Research in the Arts, Social Sciences and Humanities, Alison Richards Building, University of Cambridge, "Houseflies and Fungi: The Promise of an Early Twentieth-Century Biotechnology," The Royal Society Journal of the History of Science, vol. 76, no. 1, 2022

The housefly remained a constant risk, including to members of the British Army billeted in Rouen, Northern France. In 1915, Captain P. J. Marett, of the Royal Army Medical Corps, described how special ‘fly brigades’, consisting of ‘one non-commissioned officer and four men’, carried out inspections of kitchens and latrines to gauge housefly numbers.85 It was only when the flies became unbearable, or threatened to consume supplies, that the fly brigade would attempt to kill the swarms with formaldehyde solution. So far this is a familiar history. Now imagine a counterfactual one: as flies swarm around the Rouen camp, Marett appears onsite with a small flask in his hand. He pours it where the flies are most numerous, the liquid soaking into the ground. Within a matter of days, flies stricken with the E. muscae fungus appear around the camp. Within a week, there is hardly a fly to be seen. Although we can sense that this counterfactual scenario is somewhat fanciful, to Hesse, Bernstein and the readers of popular science magazines, there seemed no reason why such a breakthrough could not be achieved.

Yet despite the ardent support of its early twentieth-century advocates, E. muscae did not live up to the near-utopian hopes placed on it. Part of this disconnection between hope and reality was undoubtedly down to the nature of the organism itself. Polymorphism was hardly the ideal trait for a fly-killing fungus that was supposed to be cultivated on an industrial scale and distributed across the globe. If the fungus changed its shape every time it was cultivated, it was near impossible even to verify that you had the right organism in your test tube. It would also be impossible to know whether the new form of E. muscae would function as planned until it was released. With the benefit of hindsight it seems unlikely that Hesse or his supporters could have reliably cultivated and distributed the fungus. The unreliability of E. muscae had more immediate consequences too, as Hesse’s peers either were unable to replicate his work or were forced to turn to expert taxonomists to find out what they had grown. By the time the BMA met in 1913, Hesse’s programme had already run into serious trouble. The revelation from Buchanan that bacteria once carried by flies could be found in the spores of E. muscae was simply another nail in the coffin.

The dream of harnessing fungus to eliminate houseflies, however, was not idiosyncratic. Rachel Carson noted that, prior to applied entomologists’ obsession with new chemicals, Bacillus thuringiensis bacteria had been recognized as a means of destroying insect pests as early as 1911; it was also used to control the Japanese beetle during the 1930s.86 Microbes were of interest in other areas of agriculture during the early decades of the twentieth century, as American soil bacteriologists sought to revolutionize agriculture by replacing fertilizers with nitrogen-fixing bacteria. Their goal partly failed thanks to the ‘labyrinthine methods’ required to reliably identify and cultivate complex microbial ecosystems.87 Parasites of insect pests were eagerly sought out by the Bureau of Entomology in the USA, although these efforts also wilted as failures mounted and World War I slashed funding and exploration opportunities.88 Chemical insecticides eventually became a more attractive alternative to biological control. The global control of houseflies through a fungal vector was admittedly an ambitious programme, but on a second glance seems no more ambitious than replacing fertilizers with microbes, insecticides with parasites, or traditional crop varieties with Mendelian hybrids. During the early twentieth century, the hope that biology might be manipulated to serve humankind was widely shared.

So how does engaging with a fly-killing fungus aid our understanding of the history of biotechnology? One recurring theme in the story of E. muscae and other contemporary fungal controls is the disjunction between the promise of fungal control and its failure to deliver practical results. Upon this reading, E. muscae is a typical example of what Nik Brown terms ‘bio-hype’, defined as the association of modern biotechnology with ‘stratospherically high expectations of immanent and revolutionary change’. 89 Bio-hype, argues Brown, has exerted a major influence on fields such as recombinant DNA technology and xenotransplantation, leading biologists and the wider public to ‘completely overestimate the practical capabilities of technologies’, including their potential risks.90 Looking back at Hesse, we see how the publicity surrounding his experiments promised the immediate global extermination of the housefly. Although Hesse was personally more restrained in his claims, he did express hope to the English Mechanic that E. muscae might be distributed on an international scale. In a 1913 issue of the Scientific American Supplement, Hesse also stated his desire to see the fungus ‘used by the public in large quantities’. 91 The risks of Hesse’s fungus were later over-exaggerated by Buchanan at the BMA meeting. The promise and fear surrounding E. muscae appears to be characteristic of bio-hype, along with its inability to bridge the gap between perceived potential and practical utility.

The story of Hesse’s fly-killing fungus also fits with James E. McWilliams’ vision of the history of biological control from the mid-nineteenth to the early twentieth century. In his study of the Department of Agriculture in USA, McWilliams argues that efforts at biological control involved ‘a willingness to move biomass across transnational ecosystems’, reflecting ‘the progressive American farmer’s growing interest in scientific experimentation and global perspective.’ 92 The global spread of the locust fungus certainly fits this characterization, as did contemporary hopes for E. muscae. McWilliams also notes that biological control relied upon a process of informal trial-and-error knowledge acquired by farmers, with agricultural information ‘unburdened by the imperatives of expertise.’ 93 Similarly, efforts to harness parasitic fungi were carried forward by those working on the practical level, often outside the realm of professional science. The E. muscae story expands McWilliams’ global take on biological control into the realm of public health: both agriculture and medicine faced problems with insects and both explored similar solutions in the form of fungi. Yet the fly-killing fungus differed from its agricultural counterparts in one key aspect. Given the complexity of nature and the limited utility of biological control, extermination of insect pests was ‘unthinkable’ to farmers and scientists.94 The extermination of the housefly, or at least its complete removal from human habitations, took centre stage in efforts to cultivate E. muscae. We can interpret this ambition as stemming in part from the widespread condemnation of the disease-carrying fly, in part from the hubristic character of bio-hype.

**AT: Misc X-Risks – 1NC**

**Ignore the ‘unpredictable downsides’ catch-all.**

David **Thorstad 23**, Assistant Professor of Philosophy at Vanderbilt University, was a research fellow at the Global Priorities Institute and Kellogg College, Oxford, did a PhD in philosophy at Harvard and BA in philosophy and mathematics at Haverford College, “Exaggerating the risks (Part 8: Carlsmith wrap-up),” Reflective Altruism, 6/3/23, https://reflectivealtruism.com/2023/06/03/exaggerating-the-risks-part-8-carlsmith-wrap-up/

In Part 5, I expressed concern about a regression to the inscrutable, in which effective altruists invest increasing confidence in the least scrutable risks. The challenge is that it is very hard to know what to say about such risks because they are nearly inscrutable.

This suggests that effective altruists will have a difficult time motivating the claim that highly inscrutable phenomena pose high levels of existential risk, since the very inscrutability of these phenomena makes it hard to get a detailed risk argument off the ground. If that is right, then a very good strategy for pushing back against less scrutable risks such as AI risk is to carefully examine the arguments and show that (as we might have expected) the arguments provide little evidence for the risk claims they claim to support.

We saw an illustration of this strategy in Parts 7-8 of this series, where I argued that key elements of Carlsmith’s argument (instrumental convergence; AI timelines; implications of instrumental convergence) are relatively undersupported.

“That’s not fair,” you say! “It is almost always going to be hard to construct a plausible argument that inscrutable phenomena pose high levels of existential risk. Therefore skeptics will nearly always be able to point at gaping holes in arguments for AI risk and other inscrutable risks.”

Exactly. That is why it is so hard for me and many others to believe the arguments made by effective altruists for high levels of AI risk. Arguments for inscrutable risks tend, by construction, to have gaping holes in them.

If we do not, and likely cannot come to possess significant evidence that artificial intelligence poses a high level of existential risk to humanity, then we should not believe that artificial intelligence poses a high level of existential risk to humanity. Speculative arguments may take us a few strides beyond our meager evidence, but there is only so much that can be done without more evidence.

**Polycrisis Defense – 1NC**

**Systemic buffers contain the ‘polycrisis.’**

Noah **Smith 22**, former Bloomberg Opinion columnist, was an assistant professor of finance at Stony Brook University, “Against "polycrisis",” Noahpinion, 11/13/22, https://www.noahpinion.blog/p/against-polycrisis

One term I see used increasingly often in the econ opinion-sphere is “polycrisis”. This term was invented by some French folks in decades past, but it has recently been popularized by Adam Tooze. Tooze, a historian at Columbia and a popular blogger, is also the author of some of my favorite history books, including The Deluge (about WW1), Wages of Destruction (about WW2), and Crashed. The latter is the best history of the early 2010s Euro crisis that I’ve ever read (or am ever likely to read), and it does a great job of explaining how problems in various different countries exacerbated each other.

So perhaps it’s not surprising that Tooze sees the world of the 2020s as a system of even larger interrelated crises. In a recent blog post, he pulls a definition of “polycrisis” from a report by the Cascade Institute:

We define a global polycrisis as any combination of three or more interacting systemic risks with the potential to cause a cascading, runaway failure of Earth’s natural and social systems that irreversibly and catastrophically degrades humanity’s prospects…A global polycrisis, should it occur, will inherit the four core properties of systemic risks—extreme complexity, high nonlinearity, transboundary causality, and deep uncertainty—while also exhibiting causal synchronization among risks.

This basically seems like a way of saying that all the bad things you read about in the news — inflation, climate change, war, political turmoil in the U.S., economic turmoil in China — are all of a piece, with the individual crises reverberating back and forth and causing a general system failure. In an earlier post, Tooze attempted to draw a picture of this system of interrelated crises and risks:

I generally enjoy big-think like this. (If I didn’t, I would be somewhat of a hypocrite, given that my recent post about decoupling was entitled “The end of the system of the world”!) But I’m just not sure if the challenges and risks the world faces today are as mutually reinforcing as Tooze and the other “polycrisis” enthusiasts believe.

The polycrisis illusion

For one thing, it’s always very easy to think that we live in an era uniquely chock-full of risks, disasters, and problems. This is because of something called the availability heuristic — we tend to think the things we read about are typical of the world at large. And both the news media and the social media shouters who crave our eyeballs have long ago realized that “no news is good news” — i.e., negative news is uniquely good at grabbing our attention. So the more we’re engaged with current events, the more we’re likely to see the world as defined by things that alarm us — this is the subject of the song “We Didn’t Start the Fire”, quoted at the top of this post.

This is not to say the world is free of crises and risks; there are plenty out there. Nor is it to say that our current era has less than others; this is very hard to judge. But the idea that these crises are all related may be a case of apophenia — our natural human tendency to perceive connections that don’t actually exist, or are far weaker than we think.

Just because we can draw arrows between news items does not mean that the items are strongly coupled. For example, Tooze’s diagram draws an arrow from China to the Russian gas boycott, but China didn’t join the boycott. He draws an arrow between “Biden administration & GOP risk” and the Lend-Lease bill, but there’s no reason to think Lend-Lease was motivated by U.S. domestic politics, and the support for Ukraine has so far remained bipartisan. He draws an arrow from oil prices to the climate crisis, but — as I’ll talk about in a bit — the former actually helps address the latter.

When crises aren’t really strongly coupled, they can act as low-correlation assets in a diversified financial portfolio — when one problem is getting worse, another problem somewhere else is likely to be getting better.

In fact, though, I think there’s an even more important reason to be skeptical of “polycrisis”: buffer mechanisms. The global economy and political system are full of mechanisms that push back against shocks. Supply-and-demand is a great example — when supply falls, elastic demand cushions the short-term impact on prices (this is a little like Lenz’s Law in physics). Political backlashes are another mechanism — people don’t like it when you try to deny elections or invade your neighbors, and they get mad and push back. Policy responses are a third buffer — when central banks see inflation, they restrain it with higher interest rates. And so on.

The reason this makes a polycrisis less likely is that the buffer mechanisms often push back against problems in addition to the ones they were designed to push back against. There are plenty of historical examples of this. The New Deal didn’t just fight the Depression; it finally implemented a long-needed social insurance system that has served us well to this day. The victory over the Axis in WW2 also prompted decolonization and the creation of a global economic system that has allowed most of the world to flourish in the century since. More recently, the 2008 financial crisis led to needed infrastructure spending, Obamacare, and the intellectual revival of industrial policy.

In other words, sometimes instead of a polycrisis we get a polysolution.

Today, I can see a number of examples where the various crises that newsreaders worry about are leading to responses that will help address the others.

Buffer mechanisms in the global political economy of the 2020s

As I mentioned before, one very simple example of a buffer mechanism is supply and demand. In the past year, China’s economy has slowed dramatically due to a combination of a real estate bust, the Zero Covid policy, and various regulatory crackdowns. Normally, a recession in the world’s biggest trading nation would be a cause for global alarm, but in this one it’s more likely a source of relief. A collapse in Chinese demand is helping to restrain oil prices, keeping them at around the same level as the early 2010s:

That in turn is blunting the impact of the Ukraine war and Russia sanctions on Europe’s economy (and America’s, and Japan’s, etc.).

A combination of China’s economic slowdown and Russia’s military fiasco in Ukraine also seem to have reduced the chance of U.S.-China conflict, at least in the short term. Seeing Russia fail to conquer a smaller country must have given even Xi Jinping pause about launching a similar military adventure to conquer Taiwan, while economic struggles distract policymakers’ attention.

Though it’s too early to tell, the results of last week’s midterm elections in the U.S. — which were a victory for stability and bipartisanship and a loss for election-denialists — might also have been prompted in some minor way by the Ukraine war and the threat of geopolitical competition with China, which should remind Americans that there are enemies in the world more dangerous than other Americans.

Meanwhile, the war in Ukraine will spur the fight against climate change. Disruptions to Russian energy supplies, especially in Europe, create incentives for the rapid deployment of renewable energy. This is from May:

The Commission proposed that 45% of the EU’s energy mix should come from renewables by 2030, an advance on the current 40% target suggested less than a year ago. Officials also want to cut energy consumption by 13% by 2030…

“It is clear we need to put an end to this dependence and a lot faster before we had foreseen before this war,” said Frans Timmermans, the EU official in charge of the green deal.

Just a few days ago, the European Commission followed through with a temporary emergency regulation to speed the adoption of renewables. (The war is leading to minor outbreak of sanity on energy in general; Germany is keeping its nuclear plants open, at least for a while.)

The rapid adoption of renewables will, in turn, drive down their price, through a mechanism known as learning curves — the more you build, the more cost goes down, creating an incentive to build even more. So the increased adoption of renewables in Europe and other Russia-sanctioning countries in response to the Ukraine war will also make renewables more attractive in China, India, and other countries that aren’t joining in the sanctions.

All this will help the fight against climate change. But it will also help address another longstanding economic problem in the rich world: slow growth. Due to massive continuing cost drops, renewable energy increasingly isn’t just green energy — it’s cheap energy. The forecasters who study learning curves believe that technologies like solar, batteries, and hydrogen are much more susceptible to learning effects than fossil fuel technologies or even nuclear. That means that renewables are going to give us cheaper energy than we’ve ever had in our history as a species. And that in turn will help the developed world shake off the creeping stagnation in productivity and wages that it has endured for most of the time since the oil shocks of the 70s. Cheap energy is highly complementary to human labor — armed with cheap energy, we can rebuild much of our world.

This is not to say that there are no cases in the world where one problem is exacerbating another. Higher interest rates, for example, are sure to cause capital flight and currency depreciation in some developing countries, making it harder for them to buy food and energy. But the global free-market system built in the last three decades is looking more resilient than many expected; most developing countries are doing OK.

Dark Brandon vs. polycrisis

In other words, I look out in the world and I don’t see a polycrisis; I see an emerging polysolution. The looming threats of climate change and authoritarian revanchism, combined with the shocks of Covid and inflation, have stirred both policymakers and businesses to action. And many of those actions will end up addressing multiple crises rather than just one. Nor am I alone in my feeling that the narrative of the world suddenly seems to be improving:

I want to venture out on a limb here and say that this is not a coincidence. A lot of the buffer mechanisms I described above are political in nature, and they share the basic description of “human beings coming together in a crisis to address their collective problems”. During good times, human beings tend to seem irresolute and divided as pursue our individual goals and fight over the pie. External shocks can bring the entire system crashing down, but they can also spur humans to get serious and start working together.